

Comment,  
GRANDPARENT VISITATION STATUTES IN  
THE AFTERMATH OF *TROXEL V.*  
*GRANVILLE*

## I. Introduction

Relationships between grandparents and their children can become distant for a variety of reasons. As a result, the grandparents may have their relationships with their grandchildren severed. Today, more and more grandparents are petitioning courts for the right to visit their grandchildren. Many times the parents are divorced and as the court is awarding visitation rights to each parent, the grandparents chime in.<sup>1</sup> If a parent is deceased, some grandparents want to make sure they can still visit their grandchildren, even if the other parent remarries and the new spouse adopts the children.<sup>2</sup> Then, the tension-ridden situations occur when the parents simply deny grandparents the right to visit grandchildren for various reasons.<sup>3</sup>

At common law, no right to grandparent visitation existed if the parents of the child objected to the visitation.<sup>4</sup> Today, all fifty states have some form of third-party visitation rights.<sup>5</sup> State legislatures ranged widely in their leniency toward grandparent visitation rights. Some specifically included grandparents in their statutory language.<sup>6</sup> Some states even recognized that people to-

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<sup>1</sup> See, e.g., 23 PA. CONS. STAT. §§ 5311-5313 (2000).

<sup>2</sup> *Id.* at § 5311.

<sup>3</sup> Parents may feel that grandparents are interfering or intruding and grandparents may become alienated from their grandchildren. Many times the stress of divorce may lead the parent to deny the grandparent visitation privileges. See Linda A. Drew & Peter K. Smith, *The Impact of Parental Separation/Divorce on Grandparent-Grandchild Relationships*, 43 INT'L J. AGING AND HUMAN DEVELOPMENT, 195 (1999).

<sup>4</sup> Most jurisdictions allow only a statutory, not a constitutional, right to grandparent visitation with their grandchildren. See, e.g., *Matter of D.S.*, 806 P.2d 1143 (Okla. Ct. App. 1991)(holding that while grandparents do not have a constitutional right to visitation with their grandchildren, they do have such a statutory rights.)

<sup>5</sup> Third party is defined as anyone not a parent or legal guardian to the child.

<sup>6</sup> See e.g., NEB. REV. STAT. § 43-1802 (2000).

day are living longer, and included great-grandparents in the statutory language.<sup>7</sup> Still others, such as Washington, were written so broadly that they allowed any third party to petition for visitation rights in the “best interests” of the child.<sup>8</sup> This type of statute was broad enough to include anyone, not just grandparents. It was a testing ground to determine how to define “family” and “how far the state will be permitted to intrude into family life.”<sup>9</sup>

This Comment focuses on changes in grandparent visitation statutes after *Troxel*. Then the Comment will address each state grandparent visitation statute separately. The law is still in flux, but grandparents have a great deal at stake concerning their rights to see their grandchildren.<sup>10</sup> The two fundamental issues in granting third party visitation center around a showing of harm prior to permitting visitation and whether this requirement of a demonstration of harm should be altered when no traditional nuclear family exists.<sup>11</sup>

### ***Troxel v. Granville***

The United States Supreme Court decision, *Troxel v. Granville*,<sup>12</sup> interpreted a Washington statute<sup>13</sup> and brought the issue of grandparent visitation rights to the nation’s attention.<sup>14</sup> The statute permitted “any person” to petition for visitation rights “at

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<sup>7</sup> See e.g., ARIZ. REV. STAT. ANN. § 25-409 (West 2000), ARK. CODE ANN. § 9-13-103 (Michie 2000), IOWA CODE § 598.35 (2001), OKLA. STAT. tit. 10, § 5 (2000), MINN. STAT. § 257.022 (2000), NEV. REV. STAT. § 125C.050 (2000), N.D. CENT. CODE § 14-09-05.1 (2000), 23 PA. CONS. STAT. § 5313 (2000), WIS. STAT. § 767.245(2000).

<sup>8</sup> WASH. REV. CODE § 26.10.163(3)(1999).

<sup>9</sup> *The U.S. Supreme Court Reviews Scope of Grandparent Visitation Law* 17 MATRIM. STATETEGIST 1, (Jan. 2000).

<sup>10</sup> Grandparents have become an increasing well-represented political group in their state legislatures. Growing number of grandparents’ rights groups are pushing for the right to visitation with their grandchildren and great-grandchildren. Jeanne M. Hilton & Daniel P. Marcari, *Child Custody: Legal Decisions and Family Outcomes*, 28 J. DIVORCE AND REMARRIAGE, 219 (1997).

<sup>11</sup> Elizabeth Wiess, *Nonparent Visitation Rights v. Family Autonomy: An Abridgement of Parents’ Constitutional Rights?*, 10 SETON HALL CONST. L.J. 1085, 1087 (2000).

<sup>12</sup> 120 S.Ct. 2054 (2000)

<sup>13</sup> WASH. REV. CODE § 26.20.160(3)(2001).

<sup>14</sup> 120 S.Ct. 2054

any time” and authorized state superior courts to grant these rights when visitation is in the child’s best interest.<sup>15</sup> The Troxels’ son, Brad, committed suicide in 1993, and the grandparents, Gary and Jenifer Troxel kept up visits with their two granddaughters. Later, the girls’ mother, Tommie Wynn married and her new husband adopted the girls.<sup>16</sup> Wynn offered the Troxels limited regular visits once a month, but the Troxels wanted at least one weekend a month and sued under state law.<sup>17</sup>

In an opinion by Day O’Connor, joined by Justices Ginsberg, and Stephen Breyer and Chief Justice Rehnquist, the Court held that the law violated the “fundamental right” of parents to make decisions about their children.<sup>18</sup> Six opinions in all were written by nine justices, but the Court indicated that more limited laws aimed at preserving grandparents’ rights might be valid.<sup>19</sup> The Court in the plurality opinion wrote:

We do not consider the primary constitutional question passed by the Washington Supreme Court [to be] whether the due process clause requires all non-parent visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation. We do not, and need not, define today the precise scope of the parental due process right in the visitation context.<sup>20</sup>

The court reaffirmed the parents’ freedom to provide for the custody and care of their children under the Due Process Clause of the Fourteenth Amendment. Even though the Court did not strike down all third party visitation statutes as unconstitutional *per se*, family lawyers say the opinion places a higher burden of proof on third parties seeking visitation, but it does not strike down third party visitation statutes entirely.<sup>21</sup>

#### A. Summary of the State Legislative Changes after Troxel

Ohio and South Dakota have amended their respective grandparent visitation right statutes and many states have evalu-

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<sup>15</sup> WASH. REV. CODE § 26.20.160(3)(2001).

<sup>16</sup> *Troxel*, 120 S.Ct. at 2058.

<sup>17</sup> *Id.* at 2057.

<sup>18</sup> *Id.*

<sup>19</sup> *Troxel*, 120 S.Ct. at 2060.

<sup>20</sup> 120 S.Ct. at 2054.

<sup>21</sup> Rebecca Porter, *Supreme Court Delivers Narrow Ruling on Grandparents’ Visitation Rights*, 36 Trial 84, 84 (August 2000).

ated the constitutionality of their grandparent visitation statute after *Troxel* was decided June 5, 2000.

Ohio allows any person to petition for visitation with a child.<sup>22</sup> Effective January 1, 2002, the parents' wishes and concerns must be considered when determining whether to grant companionship or visitation rights to a person other than a parent along with the "convenience factors" such as the residence of the parties and the amount of time available and other factors.<sup>23</sup>

South Dakota's statute allows the court to grant reasonable grandparent visitation rights with or without a petition based on the best interests of the child.<sup>24</sup> Therefore, the legislature has introduced Senate Bill 202. The court may grant grandparent visitation if the parent has denied or prevented a grandparent reasonable opportunity to visit the grandchild, but the court will only grant visitation rights if it would not significantly interfere with the parent-child relationship. The Senate also added a presumption that visitation is in the best interests of the child if the parent of the child who is the child of the grandparent has died.<sup>25</sup>

One of the first states to re-evaluate its statute in light of *Troxel* was Kansas. The statute states that a grandparent may petition for visitation if it is in the best interests of the child and a substantial relationship has been established between the child and grandparent.<sup>26</sup> Courts in Kansas reviewed a case in which the grandparents could not prove a substantial relationship, but the trial court implied an exception because the parents had prevented the relationship.<sup>27</sup> The Supreme Court of Kansas held that the court should not imply an exception and that the grandparents carry the burden of proving a substantial relationship.<sup>28</sup>

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<sup>22</sup> OHIO REV. CODE ANN. § 3109.11 (West 2000).

<sup>23</sup> *Id.*

<sup>24</sup> S.D. CODIFIED LAWS § 25-4-52 (Michie 2000).

<sup>25</sup> *Id.*

<sup>26</sup> KAN. STAT. ANN. § 38-129 (1999).

<sup>27</sup> *State Dept. of Social & Rehabilitative Services v. Paillet*, 16 P.3d 962 (Kan. 2001).

<sup>28</sup> *Id.*

**B. Individual State Grandparent Visitation Statutes-2001****Alabama**<sup>29</sup>

Alabama follows the traditional approach of awarding grandparent visitation based on the best interests of the child upon the death or divorce of the child's parents.<sup>30</sup> Alabama also adds factors for awarding visitation, such as when the parent has abandoned the child or when the child is born out of wedlock.<sup>31</sup> The court also awards visitation if parents unreasonably deny it. When the child is living with both biological parents who are still married to each other and have used their parental authority to prohibit a relationship with the child and grandchild, the court will look to "whether or not there is a broken relationship between either or both of the parents and the grandparent."<sup>32</sup> In *J.S. v D.W.*<sup>33</sup> the Alabama Court of Civil Appeals held that these factors were insufficient to protect fit parents' rights and declared the statute unconstitutional as applied.

**Alaska**<sup>34</sup>

In Alaska, a child's grandparent may petition the superior court for an order establishing reasonable rights of visitation between the grandparent and child if the grandparent has established or attempted to establish ongoing personal contact with the child, and the visitation is in the child's best interest.<sup>35</sup> Alaska provides a clause at the end of the statute that places special emphasis on situations of abuse in the child's home. "When determining whether to grant rights of visitation between a grandparent and grandchild under this section the court shall consider whether there is a history of child abuse or domestic violence attributable to the grandparent's son or daughter who is a parent of the grandchild."<sup>36</sup> The court will allow grandparents who did not petition the court during a final order relating to

<sup>29</sup> ALA. CODE § 30-3-4.1 (2000).

<sup>30</sup> *Id.* at § 20-3-4.1(3).

<sup>31</sup> *Id.* at § 20-3-4.1(4-5)

<sup>32</sup> *Id.* at § 20-3-4.1(6) (2000).

<sup>33</sup> No. 2990431 (Ala. Civ. App. May 4, 2001) See also. RSC. V J.B.C. No. 2990943, 2001 WC 996065 (Ala. Civ. App. Aug. 31, 2001).

<sup>34</sup> ALASKA STAT. ANN. § 25.20.065 (Michie 2000).

<sup>35</sup> *Id.* at §§ 25.20.065 (a)(1-2).

<sup>36</sup> *Id.* at § 25.20.065 (a)(3).

child custody to subsequently raise their right for visitation only if “the grandparent did not request the court to grant visitation rights during the pendency of proceedings” or “there has been a change in circumstances relating to the custodial parent or the minor child that justifies reconsideration of the grandparent’s visitation rights.”<sup>37</sup>

### **Arizona**<sup>38</sup>

Arizona allows grandparents and great-grandparents to petition for visitation. Grandparents or great-grandparents may be awarded reasonable visitation rights to a child in his minority if it “would be in the best interests” of the child and the marriage of the parents has been dissolved for at least three months, the parent has been deceased or missing<sup>39</sup> for at least three months, or if the child was born out of wedlock.<sup>40</sup>

The factors the court will consider when deciding the child’s best interest include the motivation of both sides, the quality of time and relationship between the grandparent and child, and, if one of the child’s parents are dead, the benefit in maintaining an extended family relationship.<sup>41</sup> The court is sensitive to the situation when a grandparent may want visitation when the child is with the non-grandparent’s child. This could cause an awkward situation and “if all logistically possible and appropriate the court shall order visitation by a grandparent or great-grandparent to occur when the child is residing or spending time with the parent through whom the grandparent or great-grandparent claims a right of access to the child. If a parent is unable to have the child reside or spend time with that parent, the court shall order visitation by a grandparent or great-grandparent to occur when that parent would have had that opportunity.”<sup>42</sup>

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<sup>37</sup> *Id.* at § 25.20.065 (b).

<sup>38</sup> ARIZ. REV. STAT. ANN. § 25-409 (West 2000).

<sup>39</sup> A parent is considered missing if the parent’s location has not been determined and the parent has been reported missing to a law enforcement agency. *Id.* at § 25-409 (A)(2).

<sup>40</sup> *Id.* at § 25-409 (A-B).

<sup>41</sup> *Id.* at § 25-409 (C).

<sup>42</sup> *Id.* at § 25-409 (D). For example, if A and B are parents of child C and C married D and has a child, E. If C and D divorce, the court may order visitation of child E when E is visiting C.

An Arizona court recently upheld the constitutionality of its grandparent visitation statute in *Jackson v. Tangreen*.<sup>43</sup> Tangreen, a grandmother, was awarded visitation of her son's children when the children's mother regained primary custody. Subsequently, the mother remarried and her new husband adopted the children.<sup>44</sup> The mother and new father filed a petition to terminate the grandmother's visitation, which was denied. On appeal, the court affirmed the grandparent visitation statute as constitutional, holding that the grandmother has a right to continue visitation with her grandchildren after the adoption.<sup>45</sup> It further held that this did not impermissibly distinguish between a two-parent and stepparent adoption because the grandparent visitation statute superceded the statute giving an adopting parent the rights of a natural parent.<sup>46</sup> Therefore, the maternal grandmother may still have visitation rights because she was granted them subsequent to the adoption.

#### **Arkansas**<sup>47</sup>

Arkansas may award visitation rights to grandparents and great-grandparents if it would be in the best interest and welfare of the minor<sup>48</sup> and the parents' relationship has been severed by death, divorce, or legal separation.<sup>49</sup> The court may also grant visitation if the child is in custody of someone other than his natural parent or the child is illegitimate and the person is the maternal grandparent or the paternal grandparent where paternity has been established by a court.<sup>50</sup>

#### **California**<sup>51</sup>

California's statute is very detailed and covers everything from costs of expenses related to visitation to presumptions in court.<sup>52</sup> The court may grant reasonable visitation rights to the

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<sup>43</sup> 18 P.3d. 100 (Ariz. Ct. App. 2000).

<sup>44</sup> *Id.* at 102.

<sup>45</sup> *Id.* at 106.

<sup>46</sup> *Id.* at 108.

<sup>47</sup> ARK. CODE ANN. § 9-13-103 (Michie 2000).

<sup>48</sup> *Id.* at § 9-13-103(a)(2)(2000).

<sup>49</sup> *Id.* at § 9-13-103 (a)(1).

<sup>50</sup> *Id.* at § 9-13-103(a)(1)(2000).

<sup>51</sup> CAL. FAM. CODE ANN. § 3104 (West 2001).

<sup>52</sup> *Id.*

grandparent if there is a preexisting relationship between the grandparent and the grandchild that has engendered a bond such that visitation is in the best interest of the child.<sup>53</sup> The court will balance the interest of the child in having visitation with the grandparent against the right of the parents to exercise their parental authority.<sup>54</sup>

If the parents are married, the court will not grant visitation absent one of these exceptions:

- (1) The parents are currently living separately and apart on a permanent or indefinite basis.
- (2) One of the parents has been absent for more than one month without the other spouse knowing the whereabouts of the absent spouse.
- (3) One of the parents joins in the petition with the grandparents.
- (4) The child is not residing with either parent.<sup>55</sup>

California has a rebuttable presumption that the visitation of a grandparent is not in the best interest of a minor child if the natural or adoptive parents had agreed that the grandparent should not be granted visitation rights.<sup>56</sup> The court may require the grandparents to “pay to the other, an amount for the support of the child or grandchild, which includes transportation and basic expenses such as day care.”<sup>57</sup>

The California court recently held in *Kyle O. v. Donald R.*,<sup>58</sup> that the grandparent visitation statute violates the parental right under the Due Process Clause of the constitution. The grandparents were awarded visitation when their daughter died during the pendency of a dissolution proceeding and the father was awarded custody of the child.<sup>59</sup> The court found that the father was a fit parent, who did not cut off visitation with the grandparents completely, and no substantial evidence was presented to rebut the presumption in favor of a fit parent’s decision.<sup>60</sup> Therefore, the awarding of visitation violated his constitutional rights to the care, custody and control of his daughter.<sup>61</sup>

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<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at § 3104 (a).

<sup>55</sup> *Id.* at § 3104 (b).

<sup>56</sup> *Id.* at § 3104 (e-f).

<sup>57</sup> *Id.* at § 3104 (i)(A-B).

<sup>58</sup> 85 Cal. App. 4<sup>th</sup> 848 (Cal. Ct. App. 2000).

<sup>59</sup> *Id.* at 850.

<sup>60</sup> *Id.* at 863.

<sup>61</sup> *Id.* at 862.



In a more recent case, *Punsly v. Ho*,<sup>62</sup> the California court found that although California law provides more protection than the statute at issue in *Troxel*, the court may not substitute a best interest standard in place of a competent custodial parent. The paternal grandparents sought visitation after their son's death with their minor granddaughter. The court held that a court order awarding visitation over the decision of a competent custodial parent absent a showing of unfitness, unconstitutionally infringes on the mother's fundamental rights.<sup>63</sup>

### Colorado<sup>64</sup>

Colorado allows grandparents to petition for visitation rights no "more than once every two years absent a showing of good cause"<sup>65</sup> when it is in the best interests of the child and there has been a "case concerning the allocation of parental responsibilities with respect to a child."<sup>66</sup> This covers "any of the following, whether or not child custody was or parental responsibilities were specifically an issue":

- (a) That the marriage of the child's parents has been declared invalid or has been dissolved by a court or that a court has entered a decree of legal separation with regard to such marriage;
- (b) That legal custody of or parental responsibilities with respect to the child have been given or allocated to a party other than the child's parent or that the child has been placed outside of and does not reside in the home of the child's parent, excluding any child who has been placed for adoption or whose adoption has been legally finalized; or
- (c) That the child's parent, who is the child of the grandparent, has died.<sup>67</sup>

If the court modifies or terminates parenting time, this does not affect the grandparents.<sup>68</sup> But, the court will not restrict the

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<sup>62</sup> No. DO36025, 2001 WL 259238, (Cal. Ct. App. March 16, 2001).

<sup>63</sup> *Id.* at \*2. *See also*, *Butler v Harris*, No D036144, 2001 WL 1113062 (Cal. Ct. App. Sept. 24, 2001)(finding statute unconstitutional as applied and requiring that in order for statute to pass constitutional muster it must be constructed to require grandparents to show by clear and convincing evidence that the parent's decision to oppose visitation would be detrimental to the children.)

<sup>64</sup> COLO. REV. STAT. § 19-1-117 (2000).

<sup>65</sup> *Id.* at § 19-1-117(3).

<sup>66</sup> *Id.* at § 19-1-117(1).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at § 19-1-117(5).

movement of the child to allow the grandparents to exercise their visitation rights.<sup>69</sup>

### **Connecticut**<sup>70</sup>

Connecticut has one of the most liberal visitation statutes; it allows visitation to any person. The legislature leaves it to the “court’s best judgment upon the facts of the case and subject to such conditions and limitations as it deems equitable, provided the grant of such visitation rights shall not be contingent upon any order of financial support by the court.”<sup>71</sup> The court will consider the best interests of the child and the “wishes of such child if he is of sufficient age and capable of forming an intelligent opinion, yet the statute does not set out a specific age. These rights do not prevent the court from later terminating the visitation rights if a subsequent order concerns “custody of such child, the parental rights with respect to such child or the adoption of such child.”<sup>72</sup>

This statute’s constitutionality was recently questioned after the *Troxel*<sup>73</sup> decision in *Carbo v. Kalosky*.<sup>74</sup> The court recognized that the Connecticut statute is nearly identical to the statute in *Troxel*.<sup>75</sup> The court struck down the decision to grant visitation to the maternal uncles of a minor child when the child’s mother had died because the court gave no weight to the parent decision to deny visitation.<sup>76</sup> The burden of proof should be on the applicant, not the parents, to prove the best interest of the child.<sup>77</sup>

### **Delaware**<sup>78</sup>

Delaware’s statute will grant grandparents reasonable visitation rights based on the best interests of the child, “regardless of

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<sup>69</sup> *Id.* at § 19-1-117(3).

<sup>70</sup> CONN. GEN. STAT. § 46b-59 (1999).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *See* note 1, *infra*.

<sup>74</sup> No. FA0092057S, 2001 WL 206134, at \*1 (Conn. Super Ct. Feb. 15, 2001).

<sup>75</sup> *Id.* at \*2.

<sup>76</sup> *Id.* at \*3.

<sup>77</sup> *Id.*

<sup>78</sup> DEL. CODE. ANN. tit. 10, § 1031 (7)(2000).

marital status of the parents of the child or the relationship of the grandparents to the person having custody of the child.”<sup>79</sup> However if the parents of the child are cohabiting as husband and wife, grandparental visitation may not be granted over both parents’ objection.<sup>80</sup> For practical purposes, the court “shall provide the respective maternal or paternal visitation rights” when the child is placed with or has visitation with the mother or father, unless agreed otherwise by all the parties.<sup>81</sup>

### Florida<sup>82</sup>

Florida, the state with perhaps the most grandparents as residents, will grant grandparent visitation rights if: the marriage of the parents of the child has been dissolved, a parent of the child has deserted the child, or the minor child was born out of wedlock.<sup>83</sup> When determining the best interest of the minor child, the court shall consider:

- (a) The willingness of the grandparent or grandparents to encourage a close relationship between the child and the parent or parents.
- (b) The length and quality of the prior relationship between the child and the grandparent or grandparents.
- (c) The preference of the child if the child is determined to be of sufficient maturity to express a preference.
- (d) The mental and physical health of the child.
- (e) The mental and physical health of the grandparent or grandparents.
- (f) Such other factors as are necessary in the particular circumstances.<sup>84</sup>

The Florida Supreme Court has declared different provisions of the grandparent visitation statute unconstitutional including: visitation where the minor child is born out of wedlock,<sup>85</sup> visitation when one or both of the parents are deceased<sup>86</sup> or when the minor child is living with both natural parents.<sup>87</sup> The

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<sup>79</sup> *Id.* The trier of fact shall determine what the best interests of the child are.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at § 1031 (7)(b).

<sup>82</sup> FLA. STAT. ANN. § 752.01 (West 2000).

<sup>83</sup> *Id.* at 752.01 (1)(a-c).

<sup>84</sup> *Id.* at § 752.01 (2).

<sup>85</sup> *Saul v. Brunetti*, 753 So.2d 26 (Fla. 2000).

<sup>86</sup> *Eiff v. Azicri*, 720 So.2d 510 (Fla. 1998).

<sup>87</sup> *Beagle v. Beagle*, 678 So.2d 1271 (Fla. 1996).

Florida court recently held that the State Constitution's guarantee of right of privacy was violated by granting statutory visitation rights to grandparent when the marriage of the child's parents had been dissolved.<sup>88</sup> The Florida Supreme Court has done all but revoked the grandparent visitation statute and imposes a very heavy burden on the grandparent seeking visitation.

### **Georgia**<sup>89</sup>

Georgia allows grandparents<sup>90</sup> to petition for visitation. However, if the parents of a minor child are not separated and the child is living with both parents, the grandparents may not file an original action for visitation.<sup>91</sup> The court will award visitation "if the court finds the health or welfare of the child would be harmed unless such visitation is granted, and if the best interests of the child would be served by such visitation."<sup>92</sup> No presumption exists in favor of visitation and a grandparent may not file more than once during any two-year period.<sup>93</sup> The courts may also "assign the issue of visitation rights of a grandparent for mediation" at the grandparent's expense.<sup>94</sup>

In *Clark v. Wade*<sup>95</sup> the Georgia Supreme Court consolidated two child custody cases in which custody was awarded to the non-custodial fathers and the maternal grandparents in each case filed an appeal. The court held that a third party must show that the parental custody would harm the child in order to rebut the statutory presumption in favor of the parent.<sup>96</sup> The state may interfere with a parent's right to raise his or her child only when the state acts to protect the child's health or welfare and when the parent's decision would result in harm to the child.<sup>97</sup> This strong

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<sup>88</sup> *Bellair v. Drew*, 776 So.2d 1105 (Fla. Dist. Ct. App. 2001).

<sup>89</sup> GA. CODE ANN. § 19-7-3 (2000).

<sup>90</sup> Grandparent is defined as the parent of a parent of a minor child, the parent of a minor child's parent who has died, and the parent of a minor child's parent whose parental rights have been terminated. *Id.*

<sup>91</sup> *Id.* at § 19-7-3 (b).

<sup>92</sup> *Id.* at § 19-7-3 (c).

<sup>93</sup> *Id.* at § 19-7-3 (d)(2).

<sup>94</sup> *Id.* at § 19-7-3 (d).

<sup>95</sup> Nos. SOOA1610, SOOA2014, 2001 WL 135672, at \*1 (Ga. Feb. 16, 2001).

<sup>96</sup> *Id.* at \*3.

<sup>97</sup> *Id.* at \*5.

presumption would arguably carry over to the grandparent visitation statute making the grandparent overcome a strong burden in favor of the parent's decision to deny visitation.

### **Hawaii**<sup>98</sup>

Hawaii courts may award reasonable visitation rights based on the best interests of the child, provided that "this State is the home state of the child at the time of the commencement of the proceeding" and "reasonable visitation rights are in the best interests of the child."<sup>99</sup> Hawaii's statute is broad and allows for visitation rights when the parents are living or deceased and it makes no mention of divorce or child custody orders.

### **Idaho**<sup>100</sup>

Perhaps the briefest of all, the Idaho statute states that "the district court may grant reasonable visitation rights to grandparents or great-grandparents upon a proper showing that the visitation would be in the best interests of the child."<sup>101</sup> In a recent Idaho case,<sup>102</sup> a grandmother petitioned to intervene in a Child Protection Act (CPA) proceeding. The court held that the CPA does not confer on related persons seeking placement of the child in their home a conditional right to intervene in CPA proceedings even if grandmother alleged standing as the child's de facto parent. The CPA recognizes only parents, guardian or other legal custodians, and a child's guardian ad litem as parties to the proceeding.<sup>103</sup>

### **Illinois**<sup>104</sup>

Under Illinois' visitation statute, the court may grant reasonable visitation privileges to a grandparent, great-grandparent, or sibling of any minor child if the court determines that it is in the best interests and welfare of the child.<sup>105</sup> A petition for visitation

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<sup>98</sup> HAW. REV. STAT. § 571-46.3 (2000).

<sup>99</sup> *Id.* at § 571.46.3 (1-2).

<sup>100</sup> IDAHO CODE § 32-719 (2000).

<sup>101</sup> *Id.*

<sup>102</sup> *Roe v State, Dept of Health and Welfare*. 9 P. 3d 1226, 1229 (11). (2000)

<sup>103</sup> *Id.* at 1228.

<sup>104</sup> 750 ILL. COMP. STAT. § 5/607 (2000).

<sup>105</sup> *Id.* at § 5/607(b)(1).

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may be filed if the parents are not living together or one parent has been absent for more than one month.<sup>106</sup> Parents of a putative father must establish paternity before they may petition for visitation.<sup>107</sup> Grandparents may also petition for visitation if one of the parents is deceased or joins in the petition.<sup>108</sup> If a court has entered an order prohibiting the non-custodial parent from any contact with the child, and the grandparent or great-grandparent is found to have used his or her visitation privileges to facilitate contact between the child and the non-custodial parent or parents in a manner that violates the terms of the order restricting the non-custodial parent's contact with the child, then the court can modify or deny visitation rights of the grandparent.<sup>109</sup>

In a recent Illinois case, *Lulay v. Lulay*<sup>110</sup> a grandmother petitioned the court for visitation with her three grandchildren whose parents were divorced. Neither parent was deemed unfit and they both shared equal custody of the children.<sup>111</sup> The parents moved to dismiss the petition claiming that they objected to the visitation and that the Due Process Clauses included a heightened protection against government interference with certain fundamental rights and liberty interests. The court held that in light of *Troxel*, the plain language of the statute allowed visitation, but even so, when applied to the present case did not serve compelling state interest and therefore unconstitutionally infringed on the parents' fundamental liberty interest in raising their children.<sup>112</sup>

**Indiana**<sup>113</sup>

Indiana provides grandparents the right to seek visitation rights when the child's parent is deceased, the marriage of the child's parents has been dissolved in Indiana, or the child was born out of wedlock.<sup>114</sup> The court will allow visitation rights to a

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<sup>106</sup> *Id.* at A-B.

<sup>107</sup> *Id.* at § 5/607(b)(2)(A).

<sup>108</sup> *Id.* at C-D.

<sup>109</sup> *Id.* at § 5/607(b)(2)(A)(3)(d)(1)(i-ii).

<sup>110</sup> *Lulay v. Lulay*, 739 N.E.2d 521 (Ill. 2000).

<sup>111</sup> *Id.* at 522.

<sup>112</sup> *Id.* at 535.

<sup>113</sup> IND. CODE. § 31-17-5-1 (2000).

<sup>114</sup> *Id.* at § 31-17-5-1 (a)(1-3).

paternal grandparent of a child who is born out of wedlock if paternity has been established.<sup>115</sup> Indiana declared a constitutional preference in favor of a parent having custody of his or her children in *Froelich v. Clark*.<sup>116</sup> The Indiana court recently declared a presumption exists in all custody disputes between a natural parent and a third party that the natural parent should have custody of his or her child.<sup>117</sup> The maternal grandmother had custody of her two grandchildren while the parents were being treated for substance and alcohol abuse. The parents, after completing the program, petitioned for termination of guardianship of the grandmother.<sup>118</sup> The court found that a presumption in favor of the parents may only be overcome by clear and cogent evidence and then the best interest of the child analysis applies.<sup>119</sup>

#### **Iowa**<sup>120</sup>

Under Iowa law, grandparent or great-grandparent visitation rights will be granted if it is in the best interests of the child and the grandparent or great-grandparent had established a substantial relationship with the child.<sup>121</sup> The grandparent or great-grandparent of a child may petition for visitation rights when the parents of the child are divorced, have filed a petition for dissolution of marriage, or the grandparent's child has died.<sup>122</sup> They may also petition if the child is in a foster home, the child has been adopted by a step-parent, the child is born out of wedlock and paternity is established, or unreasonably refuses to allow visitation or restricts visitation.<sup>123</sup> In *Santi v Santi*<sup>124</sup> the Iowa Supreme Court found the statute to be facially unconstitutional

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<sup>115</sup> *Id.* at § 31-17-5-1 (a)(b).

<sup>116</sup> *Floelich v. Clark*, No. 40A01-008-CV-253, 2001 WL 168171 (Ind. Ct. App. Feb. 21, 2001).

<sup>117</sup> *Id.* at \*5.

<sup>118</sup> *Id.* at \*3.

<sup>119</sup> *Id.* at \*8. See also *Crafton v Gibson*, No. 40 A 04-0011-CV-490 (Ind. Ct. App. July 11, 2001) (upholding the statute.)

<sup>120</sup> IOWA CODE § 598.35 (2001).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at § 598.25 (1-3).

<sup>123</sup> *Id.* at § 598.25 (4-7).

<sup>124</sup> 2001 WL 103593L (Iowa Sept. 6, 2001).

because it permits a court to order grandparent over the objection of married parents in an intact nuclear family.<sup>125</sup>

**Kansas**<sup>126</sup>

Kansas law dictates that the court will “grant the grandparents of an unmarried minor child reasonable visitation rights” if it is in the child’s best interests and when a substantial relationship between the child and the grandparent has been established.<sup>127</sup> If the child’s parent is deceased, the court may “enforce visitation rights previously granted . . . , even if the surviving parent has remarried and the surviving parent’s spouse has adopted the child.”<sup>128</sup> The Kansas court recently reevaluated the statute after *Troxel*.<sup>129</sup> The Kansas Supreme Court found that there must, in fact, be a substantial relationship between the child and grandchild to obtain visitation rights<sup>130</sup> Even if the parent has prevented a relationship, the grandparents still have the burden of proving a substantial relationship. The court may not imply an exception to the statutory substantial relationship.<sup>131</sup>

**Kentucky**<sup>132</sup>

Kentucky courts will grant “reasonable visitation rights to either the paternal or maternal grandparents of a child” and issue any necessary orders to enforce the decree based on the best interests of the child.<sup>133</sup> Once a grandparent has been granted visitation rights, if the child’s father or mother has his or her rights terminated, it will not affect the grandparents unless the court determines that it is in the best interest of the child to do so.<sup>134</sup> If the grandparent’s son or daughter is dead and the grandparent “has assumed the financial obligation of child support owed by

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<sup>125</sup> *Id.* at \*8.

<sup>126</sup> KAN. STAT. ANN. § 38-129 (1999).

<sup>127</sup> *Id.* at § 38-129 (a).

<sup>128</sup> *Id.* at § 38-129 (b).

<sup>129</sup> State Dept. of Social & Rehabilitative Services v. Paillet, 16 P.3d 962 (Kan. 2001).

<sup>130</sup> *Id.* at \*15.

<sup>131</sup> *Id.* at \*27.

<sup>132</sup> KY. REV. STAT. ANN. § 405.021 (Banks-Baldwin 2000).

<sup>133</sup> *Id.* at § 405.021(1).

<sup>134</sup> *Id.*



the deceased parent,” the court may grant the grandparent non-custodial parental visitation rights.<sup>135</sup>

### **Louisiana**<sup>136</sup>

In Louisiana, the court will grant grandparent visitation based on the best interests of the child if the parents are married and one of the parents dies, “is interdicted, or incarcerated.”<sup>137</sup> If the parents “of a minor child or children live in concubinage and one of the parents dies, or is incarcerated,” the grandparents may also have visitation rights.<sup>138</sup> If the parents are “legally separated or living apart for a period of six months,” the grandparents or siblings may also be granted visitation rights.<sup>139</sup>

In a recent Louisiana decision, *Mills v. Wilkerson*,<sup>140</sup> the child’s father and child’s grandparents shared joint custody of the child after the death of the child’s biological mother. The court allowed the grandparents to introduce evidence that the child wanted to live with the grandparents as he had done the past three years since his mother’s death. The court reversed a trial court’s grant of sole custody of a biological child to his biological father in favor of joint custody with the father and grandparents.<sup>141</sup>

In another recent case, *Galjour v. Harris*,<sup>142</sup> the maternal aunt and uncle were granted visitation of their niece after the death of the maternal mother. The father sought to have the visitation terminated years later and the grandparents intervened in the petition and sought grandparent visitation. The court affirmed that the grant of visitation rests within the trial court’s discretion and when the non-custodial parent is either dead, interdicted or incarcerated, the grandparent is relieved of the burden of showing extraordinary circumstances, but must still prove the visitation is in the best interest of the child.<sup>143</sup> Therefore, the

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<sup>135</sup> *Id.* at 504.021(3).

<sup>136</sup> LA. REV. STAT. ANN. § 9:344 (West 2000).

<sup>137</sup> *Id.* at 9:344(A).

<sup>138</sup> *Id.* at 9:344(B).

<sup>139</sup> *Id.* at 9:344(D).

<sup>140</sup> No. 24,694-CA, 2001 WL 286869 (La. Ct. App. March 26, 2001).

<sup>141</sup> *Id.* (no publication pages are available for this document).

<sup>142</sup> No. 2000 CU 2696, 2001 WL 293689 (La. Ct. App. March 28, 2001)

<sup>143</sup> *Id.*

grandparents were granted visitation while the visitation with the maternal aunt and uncle was terminated.

### **Maine**<sup>144</sup>

Maine courts allow a grandparent to petition for visitation if one of the child's parents or legal guardians has died and either a sufficient relationship exists with the child or sufficient effort to establish one has been made.<sup>145</sup> The court may grant a grandparent reasonable rights of visitation or access to a minor child upon finding that rights of visitation or access are in the best interests of the child and would not significantly interfere with any parent-child relationship or with the parent's rightful authority over the child. The court will consider many factors including the age of the child and his or her preference, the relationship with the grandparents, and the duration, adequacy and stability of the child's living arrangements.<sup>146</sup> The court will also consider the parties' motivation, capacity to cooperate, methods of resolving disputes, the child's adjustment to home, school and community and any other factor that has a bearing on the well-being of the child.<sup>147</sup>

In a recent case<sup>148</sup> in Maine, the court found that as a matter of first impression, the grandparent visitation statute as applied to the facts of the case, was constitutional. The grandparents had acted as the children's parents for significant periods of time and the children had even lived with them.<sup>149</sup> The statute requires a sufficient existing relationship between the grandparents and children to have standing to petition for visitation.<sup>150</sup> The court found that this serves the states compelling state interest and the statute is narrowly tailored to serve that compelling interest.<sup>151</sup> Therefore, it could be applied without violating the constitutional rights of the parents.<sup>152</sup>

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<sup>144</sup> ME. REV. STAT. ANN. tit. 19A, § 1803 (West 2000).

<sup>145</sup> *Id.* at § 1803 (1).

<sup>146</sup> *Id.* at § 1803 (3)(A-E).

<sup>147</sup> *Id.* at § 1803 (3)(F-J).

<sup>148</sup> *Rideout v. Riendeau*, 761 A.2d 291 (Me. 2000).

<sup>149</sup> *Id.* at 294.

<sup>150</sup> *See* note 137, *infra*.

<sup>151</sup> *Id.* at 299.

<sup>152</sup> *Id.* at 302.

**Maryland**<sup>153</sup>

Maryland's statute is very brief. In Maryland, the statute states that "an equity court may consider a petition for reasonable visitation of a grandchild by a grandparent; and if the court finds it to be in the best interests of the child, grant visitation rights to the grandparent."<sup>154</sup> Grandparents may petition for visitation even if the marriage is intact, and the determination is within the discretion of the trial court.<sup>155</sup> In a case strikingly similar to *Troxel*, Maryland's highest court held the statute unconstitutional as appealed.<sup>156</sup>

**Massachusetts**<sup>157</sup>

Massachusetts does not allow grandparents to petition for visitation when the marital family is intact. Grandparents may petition for visitation based on the best interests of the child if the parents are divorced, married but living apart, separated, one parent is deceased, or the child is born out of wedlock where paternity has been established and the parents do not reside together.<sup>158</sup>

In a recent case,<sup>159</sup> the father of a child petitioned to remove as guardians of his child the child's grandparents. The father and mother were separated and the child went to live with the mother. The mother lost custody due to neglect and the child moved to Florida with her grandparents. The Appeals Court found that the inquiry necessarily begins with the premise that parents have a natural right to the custody of their children.<sup>160</sup> It furthermore stated that the mere fact that the father showed an occasional lack of interest in the child's life does not rise to the level of disinterest. Therefore, the father was to be the sole legal guardian and the court remanded to determine what visitation rights should be afforded the grandparents.<sup>161</sup>

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<sup>153</sup> MD. CODE ANN. FAM. LAW § 9-102 (2000).

<sup>154</sup> *Id.*

<sup>155</sup> *See Beckman v. Boggs*, 665 A.2d 901 (Md. 1995).

<sup>156</sup> *Brice v Brice*, 754 A. 2d 1132 (Md. Ct. Spec. App. 2000).

<sup>157</sup> MASS. GEN. LAWS CH. 199, § 38D (2000).

<sup>158</sup> *Id.*

<sup>159</sup> *In re Guardianship of Yushiko*, 735 N.E.2d 1260 (Mass. App. Ct. 2000).

<sup>160</sup> *Id.* at 1262.

<sup>161</sup> *Id.* at 1263.

**Michigan**<sup>162</sup>

Grandparents in Michigan may petition for “grandparenting time” if a child custody dispute occurs. This includes divorce, legal separation, legal custody being given to someone other than a parent, or the child is placed outside of the home.<sup>163</sup> Additionally, grandparents may also seek grandparenting time when the child who is the natural parent of an unmarried child is deceased.<sup>164</sup> The court will award visitation or grandparenting time based on the best interests of the child and grandparents have some restrictions of their petition, such as, they may not file more than once every two years absent a showing of good cause.<sup>165</sup> The court may not restrict the movement of the grandchild solely for the purpose of allowing the grandparent to exercise the rights conferred in a grandparenting time order.<sup>166</sup>

*Jones v. Slick*<sup>167</sup>, the court affirmed the grandparents right to petition for grandparenting time. The child’s mother had been killed and the child had been adopted by a step-parent.<sup>168</sup> The maternal grandparents petitioned for visitation and the court held that it was legislature’s intent not to allow the adoption of a child to terminate grandparenting time.<sup>169</sup>

**Minnesota**<sup>170</sup>

Minnesota allows for grandparents and great-grandparents to petition for visitation rights. The legislature has developed two different schemes of grandparent rights. If the parent of the child is deceased, then the parents and grandparents of the deceased party may be granted visitation rights based on the best interests of the child. The court must consider the amount of personal contact between the parents or grandparents of the deceased parent and the child prior to the application.<sup>171</sup> If there has been a proceeding for dissolution, custody, legal separation,

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<sup>162</sup> MICH. COMP. LAWS ANN. § 25.312 (7b) (West 2000).

<sup>163</sup> *Id.* at § 25.312 (7b)(2).

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at § 25.312 (7b)(4).

<sup>166</sup> *Id.* at 25.312 (7b)(5).

<sup>167</sup> 619 N.W.2d 733 (Mich. Ct. App. 2000).

<sup>168</sup> *Id.* at 734.

<sup>169</sup> *Id.*

<sup>170</sup> MINN. STAT. § 257.022 (2000).

<sup>171</sup> *Id.* at § 257.022(1).

annulment, or parentage, the court may grant grandparent visitation rights if the visitation rights would be in the best interests of the child and would not interfere with the parent-child relationship.<sup>172</sup> The court will consider the “amount of personal contact between the parents or grandparents of the party and the child prior to application.”<sup>173</sup> In the circumstance where the child has resided with the grandparents for twelve months, the court will grant visitation if it is in the best interests of the child and would not interfere with the parent’s relationship with the child.<sup>174</sup>

### Mississippi<sup>175</sup>

Grandparents in Mississippi may petition for visitation rights in a few situations. Grandparents of a parent of a minor child who was not awarded custody, whose parental rights were terminated, or who has died, may petition the court for visitation rights.<sup>176</sup> The court must find that the “grandparent of the child had established a viable relationship with the child,” visitation was “unreasonably denied”<sup>177</sup> and visitation rights would be in the best interests of the child.<sup>178</sup> To establish a viable relationship, the grandparents must have voluntarily and in good faith supported the child financially in whole or in part for at least six months or the grandparents must have had frequent visitation for one year including having the child overnight.<sup>179</sup> The Supreme Court of Mississippi upheld this statute finding that previous case law<sup>180</sup> requiring the court to consider certain factors before awarding visitation adequately protected the parent’s constitutional rights.<sup>181</sup>

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<sup>172</sup> *Id.* at 257.022(2).

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at § 258.022(2a).

<sup>175</sup> MISS. CODE. ANN. § 93-16-3 (2000).

<sup>176</sup> *Id.* at § 93-16-3 (1).

<sup>177</sup> *Id.* at § 93-16-3 (2).

<sup>178</sup> *Id.* at § 93-16-3 (3).

<sup>179</sup> *Id.*

<sup>180</sup> *Zemah v Stanfors*, 789 So. 2d 798 (Miss. 2001)

<sup>181</sup> *Martin v Coop*, 693 So. 2d 912 (Miss. 1997)

**Missouri**<sup>182</sup>

Grandparents in Missouri may petition for reasonable visitation rights when the parents of the child have filed for dissolution.<sup>183</sup> They may also petition if one parent of the child is deceased and the surviving parent denies reasonable visitation rights; a grandparent is unreasonably denied visitation with the child for a period exceeding ninety days; or the child is adopted by a stepparent, another grandparent or other blood relative.<sup>184</sup> The court will consider the best interests of the child and whether the denial of visitation would “endanger the child’s physical health or impair the child’s emotional development.”<sup>185</sup>

In 1993, Missouri reviewed the constitutionality of its statute in *Herndon v. Tuhey*.<sup>186</sup> The court found that the statute was reasonable because it contemplates only minimal intrusion on the family and it was narrowly tailored to protect the interests of the parents and the child.<sup>187</sup> Recently in *Cabral v. Cabral*,<sup>188</sup> the court held that it was not within the power of the Court of Appeals to impose strict scrutiny for cases involving grandparent visitation and that application of the statute was constitutional. The court awarded the grandparent two hours of supervised visitation with the grandchildren every three months. This was found to be not excessive and to fall within the minimal standard of the statute.<sup>189</sup>

**Montana**<sup>190</sup>

Montana’s statute provides for grandparent visitation after a hearing and a finding by a court that the contact would be in the best interests of the child.<sup>191</sup> Additionally, a grandparent may only petition every two years unless a significant change occurs in

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<sup>182</sup> MO. REV. STAT. § 452.402 (1999).

<sup>183</sup> *Id.* at § 452.402(1)(1999).

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at § 452.402(2).

<sup>186</sup> 857 S.W.2d 203 (Mo. 1993).

<sup>187</sup> *Id.*

<sup>188</sup> 28 S.W.3d 357 (Mo. Ct. App. 2000).

<sup>189</sup> *Id.* at 365.

<sup>190</sup> MONT. CODE ANN. § 40-9-102 (2000).

<sup>191</sup> *Id.* at § 40-9-102 (2).

the circumstances of the child, the child's parent, guardian, or custodian, or the grandparent.<sup>192</sup>

### Nebraska<sup>193</sup>

Under Nebraska's statute, a grandparent may petition for visitation if the child's parent is deceased, the parents are divorced or a petition for the dissolution has been filed and is still pending, or if the parents were never married, but paternity was legally established.<sup>194</sup> The court may grant visitation between a grandparent and child if "a significant beneficial relationship exists, or has existed in the past," and "it would be in the best interests of the child to allow such relationship to continue" and "visitation will not adversely interfere with the parent-child relationship."<sup>195</sup>

### Nevada<sup>196</sup>

Nevada has developed more than one scheme for grandparent visitation rights. Guided by the best interests of the child, the court may grant grandparent and great-grandparent visitation rights if the parent of a child is deceased, divorced or separated, has lost or given up parental rights, or has never been married to the other parent, but is now living apart from the other parent.<sup>197</sup>

Nevada also provides visitation rights to all third parties if the child has resided with a person and has "established a meaningful relationship."<sup>198</sup> The court will grant visitation "regardless of whether the person is related to the child, if the court finds that the visits would be in the best interests of the child."<sup>199</sup> The court lays out factors it shall consider, including the emotional ties between the grandparent and child and the capacity of the grandparent to provide love and cooperate in providing material needs or health care to the child during visitation.<sup>200</sup> The court will look at the "moral fitness" and the "mental and physical

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<sup>192</sup> *Id.* at § 40-9-102 (3).

<sup>193</sup> NEB. REV. STAT. § 43-1802 (2000).

<sup>194</sup> *Id.* at § 43-1802(1).

<sup>195</sup> *Id.* at § 43-1802 (2).

<sup>196</sup> NEV. REV. STAT. § 125C.050 (2000).

<sup>197</sup> *Id.* at § 125C.050(1).

<sup>198</sup> *Id.* at § 125C.050(2).

<sup>199</sup> *Id.* at § 125C.050(2).

<sup>200</sup> *Id.* at § 125C.050(3)(a-b).

health” of the grandparent.<sup>201</sup> The court will look at the prior relationship of the child and grandparent and will take into consideration “whether the child was included in holidays or family gatherings” with the grandparent.<sup>202</sup> Other factors include the willingness of the grandparent to encourage a “close and continuing relationship” between the child and parent, the medical needs of the child and whether the grandparent had provided financial support to the child.<sup>203</sup>

#### **New Hampshire**<sup>204</sup>

New Hampshire courts may grant grandparent visitation rights in the event of divorce, legal separation, death of a parent, step-parent adoption, or unwed parents.<sup>205</sup> The court will consider along with the best interests of the child, if the visitation would interfere with any parent-child relationship or with a parent’s authority over the child, along with the nature of the relationship of the grandparent and child.<sup>206</sup> If the child has lived with the grandparent, the court will consider the length of time of such residence.<sup>207</sup> Other factors include friction between the parent and grandparents and the circumstances that resulted in the “absence of a nuclear family, whether divorce, death, relinquishment or termination of parental rights, or other cause.”<sup>208</sup> The child may express a preference. The statute also allows the court to consider any other factors.<sup>209</sup>

#### **New Jersey**<sup>210</sup>

New Jersey requires grandparents to prove by a “preponderance of evidence that granting the visitation is in the best interests of the child.”<sup>211</sup> It is prima facie evidence of the best interests of the child if the grandparent has, in the past, been “ a

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<sup>201</sup> *Id.* at § 125C.050(3)(d-e).

<sup>202</sup> *Id.* at §§ 125C.050(3)(f), 125C.050(3)(c).

<sup>203</sup> *Id.* at § 125C.050(3)(g-j).

<sup>204</sup> N.H. REV. STAT. ANN. § 458:17-d (2000).

<sup>205</sup> *Id.* at § 458:17-d (III).

<sup>206</sup> *Id.* at § 458:17-d (II).

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> N.J. STAT. ANN. § 9-2-7.1 (West 2001).

<sup>211</sup> *Id.* at § 9-2-7.1(a).



full-time caretaker for the child.”<sup>212</sup> Considerations of the court include the relationships between the parent and grandparent and the grandparent and child, and amount of time since the grandparent had contact with the child, and the effect that visitation will have on the child’s relationship with the parents.<sup>213</sup> If the parents are divorced or separated, the court will consider the time sharing arrangement between the parent and child.<sup>214</sup> The grandparent must file in good faith and the court will consider any past history of physical, emotional or sexual abuse by the grandparent and any other factor relevant to the best interests of the child.<sup>215</sup> In *Wilde v Wilde*<sup>216</sup> the Superior Court held that the statute was unconstitutional as applied because the very filing of a grandparents visitation suit is a burden on a parent’s substantive due process rights and must be carefully circumscribed.

#### **New Mexico**<sup>217</sup>

New Mexico courts may grant grandparent visitation rights in the event of a dissolution of marriage, legal separation or the “the existence of the parent and child relationship pursuant to the provisions of the Uniform Parentage Act.”<sup>218</sup> Additionally, the visitation should not “conflict with the child’s education or prior established visitation or time-sharing privileges.”<sup>219</sup> New Mexico has adopted a separate scheme if the child has resided with a grandparent for at least three months if the child is under six years of age and at least six months if the child is over six years of age.<sup>220</sup>

New Mexico also provides that the biological grandparents may attempt to establish visitation privileges even if the child is adopted or the parental rights are terminated.<sup>221</sup> The court will consider the best interests of the child, the interaction and relationship between the grandparent and child, any prior visitation

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<sup>212</sup> *Id.* at § 9-2-7.1(c).

<sup>213</sup> *Id.* at § 9-2-7.1(b)(1-4).

<sup>214</sup> *Id.* at § 9-2-7.1(b)(5).

<sup>215</sup> *Id.* at § 9-2-7.1(b)(6-8).

<sup>216</sup> No. A-618-00T5 (NJ. Super Ct. App. D.V. June 22, 2001)

<sup>217</sup> N.M. STAT. ANN. § 40-9-2 (Michie 2000).

<sup>218</sup> *Id.* at § 40-9-2 (A).

<sup>219</sup> *Id.*

<sup>220</sup> *Id.* at § 40-9-2 (C), § 40-9-2 (D).

<sup>221</sup> *Id.* at § 40-9-2 (F).

orders, the effect on the child, the grandparent's prior convictions, and whether the grandparent had previously been a full-time caretaker of the child. New Mexico will recognize an order or act regarding grandparent visitation privileges issued by any state, district, Indian tribe or territory of the United States of America.<sup>222</sup>

### **New York**<sup>223</sup>

New York allows grandparent to apply for a writ of *habeas corpus* for visitation when a parent is deceased or even "where circumstances show that conditions exist which equity would see fit to intervene."<sup>224</sup> The issue orders directions that require grandparent visitation if it is in the best interests of the child.<sup>225</sup> New York allows standing to grandparents under this statute even if the nuclear family is intact.<sup>226</sup>

In October of 2000, a New York court invalidated the statute, holding it unconstitutional in *Hertz v. Hertz*.<sup>227</sup> The court held that the grandparent visitation statute did not accord any deference to the parent's decision and permitted the court to impose its own best interest standard.<sup>228</sup> This violated the parents' substantive due process rights.<sup>229</sup> However, in November of 2000, and the New York, family court affirmed that parents have a fundamental right to make decisions regarding the care, custody and control of their children, the two part scheme established by statute does not violate their rights.<sup>230</sup> The court found visitation can only be granted if the grandparent has standing. There must be sufficient equitable circumstances to be present if one of the parents of the child is deceased and the court must then determine if the best interests of the child mandate that visitation would be appropriate.<sup>231</sup>

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<sup>222</sup> N.M. STAT. ANN. § 40-9-4 (Michie 2000).

<sup>223</sup> N.Y. DOM. REL. LAW § 72 (McKinney 2001).

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> *See Emanuel S. v. Joseph E.*, 78 N.Y.2d 178 (N.Y. 1991).

<sup>227</sup> 717 N.Y.S.2d 497 (N.Y. Sup. Ct. 2000).

<sup>228</sup> *Id.* at 498.

<sup>229</sup> *Id.*

<sup>230</sup> *Fitzpatrick v. Youngs*, 717 N.Y.S.2d 503 (N.Y. Sup. Ct. 2000).

<sup>231</sup> *Id.* at 505.

**North Carolina**<sup>232</sup>

In a custody order, a North Carolina court may provide for grandparent visitation rights as it “deems appropriate.”<sup>233</sup> Grandparent includes biological grandparents of a child adopted by a stepparent or a relative of the child where “a substantial relationship exists between the grandparent and the child.”<sup>234</sup> The statute makes it clear that this does not include a biological grandparent of a child adopted by adoptive parents.<sup>235</sup> Additionally, the burden of proof is on the grandparents to show the visitation would be in the best interests of the child.<sup>236</sup>

**North Dakota**<sup>237</sup>

The North Dakota statute says that a court must provide visitation rights to grandparents and great-grandparents unless the court finds that visitation is not in the best interests of the child.<sup>238</sup> The statute goes on to state that “[v]isitation rights of grandparents to an unmarried minor are presumed to be in the best interest of the minor.”<sup>239</sup> The court shall consider the amount of contact between the grandparents and the child and the child’s parents. North Dakota also allows grandparents to petition in a divorce or custody hearing, or a proceeding to enforce grandparental rights may be brought against the custodial parent as a civil action.<sup>240</sup>

A presumption in favor of grandparent visitation rights is arguably unconstitutional after *Troxel* because there is a presumption that fit parents act in their child’s best interests.<sup>241</sup> The court in *Troxel* when discussing a presumption in favor of grandparent visitation rights stated, “the problem here is not that Washington Superior Court intervened, but that when it did so, it

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<sup>232</sup> N. C. GEN. STAT. § 50-13.2 (2000).

<sup>233</sup> N. C. GEN. STAT. § 50-13.2 (b1)(2000).

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> *See Kerns v. Southern*, 397 S.E.2d 651 (1990).

<sup>237</sup> N.D. CENT. CODE § 14-09-05.1 (2000).

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> *Troxel* at 2060.

gave no special weight at all to Granville's determination of her daughter's best interest."<sup>242</sup>

### **Ohio**<sup>243</sup>

Ohio allows for grandparents and "any person related to the child by consanguinity or affinity,"<sup>244</sup> and any other person to petition for visitation or companion rights in a divorce, legal separation, annulment, or child support proceeding or if one of the parents is deceased.<sup>245</sup> The court may grant reasonable rights if the court determines the person has an interest in the welfare of the child and that granting the rights is in the best interest of the child.<sup>246</sup> The court will consider many factors when deciding these issues, including: the prior relationship between the petitioner and the child, the geographical location of the residence of the parties, the child and parents' available time, the age of the child and his or her adjustment to home, school, and community, the child's wishes, the amount of time available, the mental and physical health of all parties, the willingness of the petitioner to reschedule missed visitation and any prior criminal convictions of the petitioner, the location of the residence if the parent is to move out of state and any other factor that relates to the best interests of the child.<sup>247</sup> The Ohio statute is very broad since it allows any person to petition for visitation. After *Troxel*, the legislature amended the statute. Effective January 1, 2002, the parents' wishes and concerns must be considered when determining whether to grant companionship or visitation to a person other than the parent.

In February 2001, the court in *Esch v. Esch*<sup>248</sup> concluded that a grandparent could not be awarded visitation of a biological mother based on the best interest of the child standard. The court must first find that the parent is unfit or unsuitable before it can grant custody to a nonparent.<sup>249</sup>

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<sup>242</sup> *Id.*

<sup>243</sup> OHIO REV. CODE ANN. § 3109.051 (West 2000).

<sup>244</sup> *Id.* at § 3109.051(B)(1).

<sup>245</sup> OHIO REV. CODE ANN. § 3109.11 (West 2000).

<sup>246</sup> *Id.* at § 3109.051(B)(1)(c).

<sup>247</sup> *Id.* at § 3109.051(D).

<sup>248</sup> No. 18489, 2001 WL 173198, (Ohio Ct. App. Feb. 23, 2001).

<sup>249</sup> *Id.* at 3.

**Oklahoma**<sup>250</sup>

Oklahoma allows grandparents and great-grandparents<sup>251</sup> to “seek and be granted reasonable visitation rights” in a divorce, separate maintenance or annulment of the parents, or when the grandchild’s parent who is a child of the grandparent is deceased, if it is in the best interests of the child.<sup>252</sup> The court may also grant visitation rights whether a custody order exists or not. There must also be a “strong, continuous grandparental relationship between the grandparent and the child” or the child’s parents have never married and are not residing in the same household. Even if the parental rights have been terminated, the grandparent may obtain visitation rights if the court determines there is a “strong continuous relationship” between the child and grandparent.<sup>253</sup> Oklahoma’s statute is broad and it also allows grandparents to seek visitation at any other time and for any reason the court deems it to be in the best interests of the child.<sup>254</sup>

In determining the best interests of the minor child, the court shall consider the willingness of the grandparents to encourage a close relationship between the parent and child and the length and quality of the prior grandparent/child relationship.<sup>255</sup> The court may also ask the child for his or her preference, and examine the child and grandparent’s mental and physical health and such other factors as are necessary in the particular circumstances.<sup>256</sup>

The Supreme Court of Oklahoma in *Neal v. Nesvold*,<sup>257</sup> found that grandparent visitation can only be imposed if there is a showing of harm or potential harm to the child without the visitation. The court may not reach the best interests of the child standard when determining grandparent visitation without overcoming this hurdle first or it would be violating the mother and father’s federal and state constitutional right to make decisions concerning the care, custody, and control of their children.<sup>258</sup> In

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<sup>250</sup> OKLA. STAT., tit. 10, § 5 (2000).

<sup>251</sup> *Id.* at § 5 (4)(E)(I).

<sup>252</sup> *Id.* at § 5 (A)(1)(a-c).

<sup>253</sup> *Id.* at § 5 (A)(1)(e, g-h).

<sup>254</sup> *Id.* at § 5 (A)(1)(i).

<sup>255</sup> *Id.* at § 5 (D)(1-2).

<sup>256</sup> *Id.* at § 5 (D)(3-6).

<sup>257</sup> 14 P.3d 547 (Okla. 2000).

<sup>258</sup> *Id.* at 550.

a recent case, *Scott v. Scott*,<sup>259</sup> the court reviewed a case in where the parents were divorced and the step-father adopted the child after the paternal grandparents had been awarded visitation. The mother sought to terminate the visitation rights, and was denied. She appealed and the Supreme Court remanded holding that the district must first hold a hearing regarding the best interest of the child in a termination hearing before they can rule on the issue.

### **Oregon**<sup>260</sup>

A grandparent<sup>261</sup> may petition for visitation rights in Oregon if the grandparent has “established or has attempted to establish ongoing personal contact with the child and the “custodian of the child” has denied the grandparent reasonable opportunity to visit the child.”<sup>262</sup> Grandparents may petition the court after the commencement of a domestic relations suit and before a final decree dissolving the marriage of the parties.<sup>263</sup> After a divorce decree is entered, grandparents may petition the court only if they did not file a petition during the pendency of the divorce proceedings or a change of circumstances has occurred.<sup>264</sup>

In a recent case, *Gatliff v. Sisson*,<sup>265</sup> the court reviewed the grandparent visitation statute and concluded that grandparents must show that the child would benefit from the visitation. The child’s father had abused the child and the paternal grandparents were seeking visitation. The court found that the visitation would cause trauma to the child and that the grandparents did not show that the child would benefit.<sup>266</sup>

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<sup>259</sup> No. 93371, 2001 WL 69457 (Okla. Feb. 7, 2001).

<sup>260</sup> ORE. REV. STAT. § 109.121 (2000).

<sup>261</sup> This does not include step-grandparents. *Id.* at § 109.121(7)(a)(2000).

<sup>262</sup> *Id.* at § 109.121 (1)(a)(A-B).

<sup>263</sup> *Id.* at § 109.121 (1)(b).

<sup>264</sup> *Id.* at § 109.121 (1)(c)(A-B).

<sup>265</sup> 13 P.3d 152 (Or. Ct. App. 2000). See also *Harrington v Daum*, 18 P.3d 456 (Or. Ct. App. 2001 (finding statute unconstitutional as applied to mother’s former boyfriend who sought visitation after mother died).

<sup>266</sup> *Gatliff v Sisson*, 13 P.3d 152, 157 (Or. Ct. App. 2000).

**Pennsylvania**<sup>267</sup>

Grandparents in Pennsylvania may petition for visitation rights in a proceeding for dissolution, when the parent have been separated for six months or more,<sup>268</sup> or when a parent is deceased.<sup>269</sup> The court may grant visitation if it would be in the best interest of the child and would not interfere with the parent-child relationship.<sup>270</sup> The court must consider the amount of personal contact between the grandparents and the child prior to the application.<sup>271</sup> The grandparents or great-grandparents may petition for partial custody and/or visitation rights if the child has resided with them for twelve months or more and is subsequently removed from the home of his parents.<sup>272</sup> The grandparent must have “a genuine care and concern for the child” and for “12 months has assumed the role and responsibilities of the child’s parent.”<sup>273</sup> This only applies if the relationship with the child began with the consent of a parent of the child or pursuant to a court order.<sup>274</sup>

**Rhode Island**<sup>275</sup>

Rhode Island allows grandparents to petition for visitation rights in a divorce proceeding<sup>276</sup> or when the parent who is the child of the grandparent is deceased.<sup>277</sup> In all other instances grandparents may be granted visitation rights based on the best interests of the grandchild if the grandparent is fit and proper and has repeatedly attempted to visit the grandchild during the ninety days prior to the petition.<sup>278</sup> There must also be no other way for the grandparent to visit the child and the grandparents

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<sup>267</sup> 23 PA. CONS. STAT. §§5311-5313 (2000).

<sup>268</sup> *Id.* at § 5312.

<sup>269</sup> *Id.* at § 5311.

<sup>270</sup> *Id.* at § 5311-12.

<sup>271</sup> *Id.*

<sup>272</sup> *Id.* at § 5313 (A).

<sup>273</sup> *Id.* at § 5313 (B)(3).

<sup>274</sup> *Id.* at s 5313 (B)(2).

<sup>275</sup> R.I. GEN. LAWS §§ 15-5-24.1 to 15-5-24.3 (2001).

<sup>276</sup> *Id.* at § 15-5-24.2.

<sup>277</sup> *Id.* at § 15-5-24.1.

<sup>278</sup> *Id.* at § 15-5-24.3.

must rebut the presumption that the parent's decision to deny visitation is reasonable.<sup>279</sup>

### **South Carolina**<sup>280</sup>

South Carolina's grandparent visitation statute is embedded in a general family court jurisdiction statute. Periods of visitation may be ordered when the parents are divorced, are living separate and apart in different habitats regardless of a court order, or when one of the parents are deceased.<sup>281</sup> The court will consider the nature of the grandparent/child relationship and will grant visitation if it is in the best interests of the child and would not interfere with the parent/child relationship.<sup>282</sup>

### **South Dakota**<sup>283</sup>

South Dakota will grant grandparents reasonable visitation rights with their grandchild with or without a petition if it is in the best interests of the grandchild.<sup>284</sup> The statute, while brief, opens the door to questions after *Troxel*. Therefore, the South Dakota legislature has introduced Senate Bill 202, which amends the statute. The bill allows grandparents to petition for visitation when the parents have denied or prevented the grandparent a reasonable opportunity to visit the grandchild, it is in the child's best interest, and the visitation "would not significantly interfere with the parent-child relationship."<sup>285</sup> The bill also provides "a presumption that visitation with the grandparents is in the best interests of the grandchild if a parent of that grandchild, who is also a child of that grandparent, has died."<sup>286</sup>

### **Tennessee**<sup>287</sup>

Tennessee will allow grandparents to petition for visitation if a parent is deceased, the parents are divorced or legally separated, or the child's parent has been missing for not less than six

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<sup>279</sup> *Id.* at § 15-5-24.3.

<sup>280</sup> S.C. CODE ANN. § 20-7-420 (Law Co-op. 2000).

<sup>281</sup> *Id.* at § 20-7-420 (33).

<sup>282</sup> *Id.*

<sup>283</sup> S.D. CODIFIED LAWS § 25-4-52 (Michie 2000).

<sup>284</sup> *Id.*

<sup>285</sup> H.R. 202, 76<sup>th</sup> Leg., Reg. Sess., (S.D. 2001).

<sup>286</sup> *Id.*

<sup>287</sup> TENN. CODE ANN. § 36-6-306 (2000).



months.<sup>288</sup> First, the court must determine the presence of a danger or substantial harm to the child if the grandparent is not allowed visitation.<sup>289</sup> Proof may be offered that the child “had a significant relationship with the grandparent and that loss of the relationship is likely to occasion severe emotional harm to the child” or that “the grandparent functioned as a primary caregiver such that cessation of the relationship could interrupt provision of the daily needs of the child and thus occasion physical or emotional harm.”<sup>290</sup> Additionally, proof can be offered that “the child had a significant existing relationship with the grandparent and loss of the relationship presents the danger of other direct and substantial harm to the child.”<sup>291</sup>

After this initial finding, the court must determine that visitation is in the best interests of the child.<sup>292</sup> Best interests are defined by statute to include the length of time of prior relationships, the emotional ties to the grandparent, the child’s preference, the hostility between the grandparent and parents, the grandparent’s good-faith in filing the petition, any time-sharing arrangements between the parents, and if a parent is deceased or missing, the fact that the grandparents requesting visitation are the parents of that absent parent.<sup>293</sup>

A grandparent is deemed to have a significant relationship if prior to the filing of the petition the grandchild lived with the grandparent for at least six consecutive months during the last two years, the grandparent was a full-time caretaker for not less than six months or the grandparent had frequent visitation with the child for not less than one year.<sup>294</sup>

### Texas<sup>295</sup>

Texas will allow grandparent visitation if it is the best interests of the child and at least one biological or adoptive parent has not had his or her parental rights terminated.<sup>296</sup> Additionally,

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<sup>288</sup> *Id.* at § 36-6-306 (a)(1-3).

<sup>289</sup> *Id.* at § 36-6-306 (b)(1).

<sup>290</sup> *Id.* at § 36-6-306 (b)(1)(A-B).

<sup>291</sup> *Id.* at § 36-6-306 (b)(1)(C).

<sup>292</sup> *Id.* at § 36-6-306 (c).

<sup>293</sup> *Id.* at § 36-6-307.

<sup>294</sup> *Id.* at § 36-6-306 (b)(2).

<sup>295</sup> TEX. FAM. CODE ANN. § 153.433 (West 2000).

<sup>296</sup> *Id.* at § 153.433 (1).

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the court must find at least one of the following facts to be present to grant visitation:

- 1) the grandparent is a parent of a child that is incompetent or dead or the child has been incarcerated for three months prior to the petition,
- 2) the parents are divorced or living apart for three months prior to the petition,
- 3) the child has been abused or neglected by a parent,
- 4) the child has been adjudicated to a child in need of supervision or a delinquent child,
- 5) the grandparent requesting access to the child whose parental rights have been terminated,
- 6) the child has resided with the grandparent for at least six months in the two-year period preceding the petition.<sup>297</sup>

Texas is the only state to allow grandparent's visitation rights to their grandchild if the parent is incarcerated.

Texas recently held in *In the Interest of R.D.Y.*,<sup>298</sup> that there is a strong presumption that the best interest of the child is served if a natural parent is awarded custody and that presumption imposes a heavy burden on the non-parent seeking conservatorship. The mother appealed the removal of sole custody of the child from her and the award of three-way custody between a child born out of wedlock to the mother, father and maternal grandmother.<sup>299</sup> The evidence showed numerous reports of neglect and abuse when the child was in the sole care of the mother and that the joint conservatorship did not violate the mothers liberty interest in the care, custody and control of her child.<sup>300</sup>

### Utah<sup>301</sup>

Utah provides for grandparent visitation based on the best interests of the child if the grandparent's child has died or has become a non-custodial parent through divorce or legal separation.<sup>302</sup> In all other cases, Utah requires a number of factors to be met and imposes a presumption that the parent's decision

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<sup>297</sup> *Id.* at § 152.433 (2).

<sup>298</sup> *In the Interest of R.D.Y.*, No. 01-99-01073-CV, 2001 WL 83995 (Tex. App. Feb. 1, 2001).

<sup>299</sup> *Id.* at \*3.

<sup>300</sup> *Id.* at \*6. See also, *Lilley v Lilley*, 43 S. W. 3d 703 (Tex. App. 2001)(upholding a paternal grandparents' visitation order over the objection of the child's mother).

<sup>301</sup> UTAH CODE ANN. § 30-5-2 (2000).

<sup>302</sup> *Id.* at § 30-5-2 (2).

with regard to grandparent visitation is reasonable.<sup>303</sup> In these situations the visitation must not only be in the best interest of the child, but the court must find that the grandparent is a fit and proper person and has repeatedly attempted to visit the grandchild and that the parents have not allowed these visits.<sup>304</sup> There must also be no other way for the grandparent to visit the child and the grandparent must rebut the presumption that the parent's decision to deny visitation is reasonable.<sup>305</sup>

### **Vermont**<sup>306</sup>

Vermont allows grandparents to petition for visitation rights if there is a prior proceeding in a superior, juvenile or probate court regarding custody or visitation<sup>307</sup> or if a parent of the child is deceased or mentally incapable, or has abandoned the child.<sup>308</sup> The court will grant visitation based on the best interests of the child.<sup>309</sup> The court will consider the "love, affection and other emotional ties" and the nature of the relationship between the grandchild and grandparent.<sup>310</sup> The court will also consider at the capacity, moral fitness, mental and physical health of the parties, preference of the child, willingness of the grandparents to "facilitate and encourage a close and continuing relationship between the child and other parties" and any other factor the court deems relevant.<sup>311</sup>

### **Virginia**<sup>312</sup>

Virginia's statute does not even mention grandparents, yet allows the court to award custody or visitation to "any other person with a legitimate interest" upon a showing by clear and convincing evidence that the "best interests of the child would be served."<sup>313</sup> The court must find actual harm to the child's health

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<sup>303</sup> *Id.* at § 30-5-2 (3).

<sup>304</sup> *Id.* at § 30-5-2 (3)(a-c).

<sup>305</sup> *Id.* at § 30-4-2 (3)(d-e).

<sup>306</sup> VT. STAT. ANN. tit. 15, §§ 1101-1113 (2001).

<sup>307</sup> *Id.* at § 1011.

<sup>308</sup> *Id.* at § 1012.

<sup>309</sup> *Id.* at § 1013 (a).

<sup>310</sup> *Id.* at § 1013(b)(3).

<sup>311</sup> *Id.* at § 1013(b)(2-8).

<sup>312</sup> VA. CODE. ANN. § 20-124.2 (Michie 2000).

<sup>313</sup> *Id.* at § 20-124.2 (B).

or welfare without such visitation and must give due regard to the parent-child relationship.<sup>314</sup>

### **Washington**<sup>315</sup>

Washington will now allow grandparents, or any person other than a parent, to petition for visitation rights, in the situation of a pending dissolution, legal separation, or modification of a parenting plan.<sup>316</sup> Grandparents must first demonstrate by clear and convincing evidence that a significant relationship exists between the grandparent and the child.<sup>317</sup> Visitation is presumed to be in the best interests of the child if a significant relationship is shown to exist, but that presumption can be rebutted by a preponderance of the evidence showing that visitation would endanger the “child’s physical, mental or emotional health.”<sup>318</sup>

The Washington statute that was in dispute in *Troxel* allowed “any person to petition the court for visitation rights at any time including, but not limited to custody proceedings.”<sup>319</sup> It further permitted “visitation based on the best interests of the child whether or not there was a change in circumstances.”<sup>320</sup> The Supreme Court held the trial court’s order for grandparent visitation based on the statute was unconstitutional as applied to the facts.<sup>321</sup>

### **West Virginia**<sup>322</sup>

West Virginia’s legislature has enacted a statute that states that the provisions for grandparent visitation set forth in the grandparent visitation article are exclusive.<sup>323</sup> Grandparents may petition for visitation in any proceeding for divorce, custody,

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<sup>314</sup> See *Dotson v. Hylton*, 513 S.E.2d 901 (Va. Ct. App. 1999), *Williams v. Williams* 485 S.E.2d 651 (Va. Ct. App. 1997).

<sup>315</sup> WASH. REV. CODE § 26.09.240 (2001).

<sup>316</sup> *Id.* at § 26.09.240(1).

<sup>317</sup> *Id.* at § 26.09.240(3).

<sup>318</sup> *Id.* at § 26.09.240(5)(a).

<sup>319</sup> WASH. REV. CODE § 26.10.160 (2001).

<sup>320</sup> *Id.*

<sup>321</sup> 120 S.Ct. 2054.

<sup>322</sup> W.VA. CODE §§ 48-2B-1 to 48-2B-7 (2000).

<sup>323</sup> *Id.* at § 48-2B-1.

legal separation, annulment or establishment of paternity.<sup>324</sup> They may also file a separate motion when the marriage is intact or the previous factors are not met.<sup>325</sup> The court will base its decision on the best interests of the child and must find that the visitation would not “substantially interfere with the parent-child relationship.”<sup>326</sup> The court can consider the age of the child, the relationship between the child and grandparent and the child’s parent, the time since the last contact with the grandparent, the good faith of the grandparents in filing a motion, the time available to the child, any history of abuse, whether the child has ever lived with the grandparent or if the grandparent has been a significant caretaker, the preference of the parents, and if the parents are divorced or separated, any custody or visitation arrangements.<sup>327</sup> The West Virginia Supreme Court upheld the constitutionality of this statute noting that required consideration of the numerous factors distinguished it from the statute in *Troxel*.<sup>328</sup>

### Wisconsin<sup>329</sup>

Grandparents and great-grandparents may petition for visitation rights when they have maintained a relationship similar to a parent-child relationship with the child and the court determines visitation is in the best interests of the child.<sup>330</sup> The court may also grant visitation rights to a grandparent when the child’s parents have not been married and paternity is established, and the child has not been adopted.<sup>331</sup> The grandparents must have maintained a relationship with the child or attempted to maintain a relationship and not likely to act in a manner that is contrary to the decisions that are made by a parent who has legal custody of the child.<sup>332</sup> Grandparents may also petition for visitation when

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<sup>324</sup> *Id.* at § 48-2B-4 (a).

<sup>325</sup> *Id.* at § 48-2B-4 (b).

<sup>326</sup> *Id.* at § 48-2B-5 (a).

<sup>327</sup> *Id.* at § 48-2B-5 (b)(1-13).

<sup>328</sup> *Brandon v. Moats*, No 29288 (W. Va. July 6, 2001).

<sup>329</sup> WIS. STAT. §§ 767.245, 880.155.

<sup>330</sup> *Id.* at § 767.245(1).

<sup>331</sup> *Id.* at § 767.245(a-c).

<sup>332</sup> *Id.* at § 767.245 (d-e).

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one or both of the parents are deceased.<sup>333</sup> The court may grant reasonable visitation based on the best interests of the child.<sup>334</sup>

### **Wyoming**<sup>335</sup>

Wyoming allows grandparents to bring an original action for visitation rights against any person having custody of the grandparent's minor child. The court will grant visitation based on the best interests of the child as long as "the rights of the child's parents are not substantially impaired."

## **II. Conclusion**

While all states provide for grandparents to petition the court for visitation rights with their grandchildren, only a few have changed their statutes since *Troxel*. In many other states the courts have been called upon to assess the validity of the statutes. Because the Supreme Court failed to give sufficient guidance to legislatures concerning the exact nature of third party rights, it is likely that courts rather than legislatures will continue to be the arbitrators of these difficult issues.

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<sup>333</sup> *Id.* at § 880.155(2).

<sup>334</sup> *Id.*

<sup>335</sup> WYO. STAT. ANN. § 20-7-101 (Michie 2000).

† The author would like to dedicate this Comment to her great-grandmother, Ruby Baker.