




# NON-PARENT VISITATION



## HISTORY

- **COMMON LAW – GRANDPARENTS/NON-PARENTS RECEIVE VISITATION**

- Solomon v. Solomon, 319 Ill.App. 618, 49 N.E.2d 807 (Ill.App., 1943) – when drafted into the military, Father's parents were able to have visitation with child – trial court granted and upheld at Appellate Court.
  - Lucchesi v. Lucchesi, 330 Ill.App. 506, 71 N.E.2d 920 (Ill.App., 1947) – Grandparents received visitation with child after their son (child's father) died – trial court denied and the Appellate Court reversed.
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## HISTORY CONT.

- COMMON LAW – NON-PARENTS DIFFICULT TO RECEIVE WHAT WAS THEN KNOWN AS CUSTODY
  - Kulan v. Anderson, 300 Ill.App. 267, 20 N.E.2d 987 (Ill.App. 1939)
  - Mom died, Aunt sought custody alleging Dad was a bad person, but the Court said he may not be a good Dad, but he is the Dad so he receives the child.
  - Superior Rights Doctrine prevails.
  - The rule that a parent has the right to the custody of his child against all the world, unless he has forfeited that right, was born of natural desire of mankind to create and maintain a home; and as has been often said, the home is the foundation of society and civilization. Deprive worthy parents of their natural right to the custody of their children, where they have not forfeited that right, and you undermine the home.

## DIVORCE ACT OF 1975

- “[U]nder the common law that existed prior to the statute, the court had subject matter jurisdiction to award grandparents visitation with their grandchildren when special circumstances were shown.” Bush v. Squellati, 522 N.E.2d 1225, 122 Ill.2d 153, 119 Ill.Dec. 366 (1988).
- CASE BY CASE BASIS – SPECIAL CIRCUMSTANCES
- Despite Mother denying visitation with Father and his family, Grandparents did not prevail in obtaining visitation because they failed to allege any special circumstances. Denial of visitation itself is not sufficient to grant non-parent visitation. Chodzko v. Chodzko, 360 N.E.2d 60, 66 Ill.2d 28, 4 Ill.Dec. 313 (Ill.1976).

## 1981 GRANDPARENT VISITATION STATUTE

- 750 ILCS 5/607
- Amended Divorce Act of 1975 to include Grandparent Visitation
- CONTINUING EVOLUTION OF LEGAL THEME: Courts frequently referenced that the dynamic of the “typical American Household” was rapidly changing. More frequent single parent households were leading to closer and more substantial relationships between grandchildren and grandparents as they were called upon to assist in raising the children. See *Lulay v. Lulay*, 193 Ill.2d 455, 465, 739 N.E.2d 521, 527 (2000).

## BUT...TROXEL V. GRANVILLE

- 530 U.S. 57 (2000)
- Grandparent visitation statute of the State of Washington held UNCONSTITUTIONAL
- Washington’s law was broader than Illinois’

## WHY UNCONSTITUTIONAL ???

- No allegation as to the fitness of the Mother in Troxel and the Court stated that “so long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the state to inject itself into the private realm of the family.”
- The trial judge presumed that the grandparent visitation should be granted unless the children would be adversely affected. This presumption “contravened the traditional presumption that a fit parent will act in the best interests of his or her child.”
- No presumption under the law that a parent’s decision was valid, nor did it require a Judge to weigh the “best interests” of the minor child.

## TROXEL CONT.

- Didn’t protect parents NATURAL RIGHTS, didn’t comply with Superior Rights Doctrine.
- U.S. Supreme Court recognized that a fit parent has a fundamental right to the care, custody and control of his/her children, including the right to make decisions regarding grandparent visitation.

## ILLINOIS STATUTE UNCONSTITUTIONAL???

- At first, only unconstitutional IF BOTH parents objected to Grandparent visitation. *Lulay v. Lulay*, 739 N.E.2d 521, 193 Ill.2d 455, 250 Ill.Dec. 758 (Ill. 2000).
- *Lulay*: Parents divorced with joint custody. Grandparents heavily involved with children before divorce. Parents stop letting Grandparents see children (Mom's Mom). Case had ended and Maternal Grandmother filed Petition for Visitation – allowed in 1981 statute.

## LULAY

- The Court analyzed multiple state's statutes and *Troxel* and determined that the Illinois Statute as applied to this SPECIFIC CIRCUMSTANCE was unconstitutional because BOTH parents objected to Maternal Grandmother having visitation when NEITHER parent was declared unfit.
- The Court declined to determine if the statute as a whole was unconstitutional.
- Justice Rathje wrote a concurring opinion stating that the entire statute was unconstitutional. BUT people don't listen...

## 2 YEARS LATER...

- The Illinois Supreme Court finally held that the law was unconstitutionally broad
  - Consolidated 2 pending cases
  - Wickham v. Byrne, 769 N.E.2d 1, 199 Ill.2d 309, 263 Ill.Dec. 799 (Ill., 2002) WITH Langman v. Langman

## AND SO, 750 ILCS 5/607(a-5(4))

- Legislature used the specific concerns from Troxel to create a statute that would pass constitutional muster.

## WHY UNCONSTITUTIONAL ???

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- The trial judge presumed that the grandparent visitation should be granted unless the children would be adversely affected. This presumption “contravened the traditional presumption that a fit parent will act in the best interests of his or her child.”
- No presumption under the law that a parent’s decision was valid, nor did it require a Judge to weigh the “best interests” of the minor child.

## 750 ILCS 5/607(A-5(4)) FACTORS

- (A) the preference of the child if the child is determined to be of sufficient maturity to express a preference;
- (B) the mental and physical health of the child;
- (C) the mental and physical health of the grandparent, great-grandparent, or sibling;
- (D) the length and quality of the prior relationship between the child and the grandparent, great-grandparent, or sibling;
- (E) the good faith of the party filing the petition;

## 750 ILCS 5/607(A-5(4)) FACTORS CONT.

- (F) the good faith of the person denying visitation;
- (G) the quantity of the visitation time requested and the potential adverse impact that visitation would have on the child's customary activities;
- (H) whether the child resided with the petitioner for at least 6 consecutive months with or without the current custodian present;

## 750 ILCS 5/607(A-5(4)) FACTORS CONT.

- (I) whether the petitioner had frequent or regular contact or visitation with the child for at least 12 consecutive months;
- (J) any other fact that establishes that the loss of the relationship between the petitioner and the child is likely to harm the child's mental, physical, or emotional health; and
- (K) whether the grandparent, great-grandparent, or sibling was a primary caretaker of the child for a period of not less than 6 consecutive months.



## 750 ILCS 5/601.2 - JURISDICTION

- (b) A proceeding for allocation of parental responsibilities with respect to a child is commenced in the court:
- (3) by a person other than a parent, by filing a petition for allocation of parental responsibilities in the county in which the child is permanently residing or found, but only if he or she is not in the physical custody of one of his or her parents;

## 750 ILCS 5/601.2 CONT. – STEP-PARENT

- (4) by a step-parent, by filing a petition, if all of the following circumstances are met:
- (A) the parent having the majority of parenting time is deceased or is disabled and cannot perform the duties of parent to the child;
- (B) the step-parent provided for the care, control, and welfare of the child prior to the initiation of proceedings for allocation of parental responsibilities;
- (C) the child wishes to live with the step-parent; and,
- (D) it is alleged to be in the best interests and welfare of the child to live with the step-parent as provided in Section 602.5 of this Act;

## 750 ILCS 5/601.2 – CONT.

- (5) when one of the parents is deceased, by a grandparent who is a parent or step-parent of the deceased parent, by filing a petition if one or more of the following existed at the time of the parent's death:
- (A) the surviving parent had been absent for the marital abode for more than one month without the spouse knowing his or her whereabouts;
- (B) the surviving parent was in State or Federal custody; or

## 750 ILCS 5/601.2(B)(5)(C)

- (C) the surviving parent had: (i) received supervision for or been convicted of any violation of Section 11-1.20, 11-1.30, 11-1.40, 11-1.60, 11-1.70, 12C-5, 12C-10, 12C-40, 12C-45, 18-6, 19-6 or Article 12 of the Criminal Code of 1961 or the Criminal Code of 2012 directed towards the deceased parent or the child; or (ii) received supervision or been convicted of violating an order of protection entered under Section 217, 218, or 219 of the Illinois Domestic Violence Act of 1986 for the protection of the deceased parent or the child.

## 750 ILCS 5/602.9 – VISITATION BY CERTAIN NON-PARENTS

- (a) As used in this Section:
- (1) “electronic communication” means time that a grandparent, great-grandparent, sibling, or step-parent spends with a child during which the child is not in the person’s actual physical custody, but which is facilitated by the use of communication tools such as the telephone, electronic mail, instant messaging, video conferencing or other wired or wireless technologies via the Internet, or another medium of communication;

## 750 ILCS 5/602.9 – VISITATION BY CERTAIN NON-PARENTS

- (a)(2) “sibling” means a brother or sister either of the whole blood or the half blood, stepbrother, or stepsister of the minor child;
- (3) “step-parent” means a person married to a child’s parent, including a person married to the child’s parent immediately prior to the parent’s death; and

## 750 ILCS 5/602.9 – VISITATION BY CERTAIN NON-PARENTS

- (a)(4) “visitation” means in person time spent between a child and the child’s grandparent, great-grandparent, sibling, step-parent, or any person designated under subsection (d) of Section 602.7. In appropriate circumstances, visitation may include electronic communication under conditions and at times determined by the court.

## 750 ILCS 5/602.9 – VISITATION BY CERTAIN NON-PARENTS

- (b) General Provisions.
- (1) An appropriate persons, as identified in subsection (c) of this Section, may bring an action in circuit court by petition, or by filing a petition in a pending dissolution proceeding or any other proceeding that involves parental responsibilities or visitation issues regarding the child, requesting visitation with the child pursuant to the Section. If there is not a pending proceeding involving parental responsibilities or visitation with the child, the petition for visitation with the child must be filed in the county in which the child resides. Notice of the petition shall be given as provided in subsection (c) of Section 601.2 of this Act.

## 750 ILCS 5/602.9 – VISITATION BY CERTAIN NON-PARENTS

- (b)(2) This Section does not apply to a child:
- (A) in whose interests a petition is pending under Section 2-13 of the Juvenile Court Act of 1987; or
- (B) in whose interests a petition to adopt by an unrelated person is pending under the Adoption Act; or
- (C) who has been voluntarily surrendered by the parent or parents, except for a surrender to the Department of Children and Family Services or a foster care facility; or

## 750 ILCS 5/602.9 – VISITATION BY CERTAIN NON-PARENTS

- (b)(2) This Section does not apply to a child:
- (D) who has been previously adopted by an individual or individuals who are not related to the biological parents of the child or who is the subject of a pending adoption petition by an individual or individuals who are not related to the biological parents of the child; or
- (E) who has been relinquished pursuant to the Abandoned Newborn Infant Protection Act.

## 750 ILCS 5/602.9 – VISITATION BY CERTAIN NON-PARENTS

- (3) A petition for visitation may be filed under this Section only if there has been an unreasonable denial of visitation by a parent and the denial has caused the child undue mental, physical, or emotional harm.

## 750 ILCS 5/602.9 – VISITATION BY CERTAIN NON-PARENTS

- (4) There is a rebuttable presumption that a fit parent's actions and decisions regarding grandparent, great-grandparent, sibling, or step-parent visitation are not harmful to the child's mental, physical, or emotional health. The burden is on the party filing a petition under this Section to prove that the parent's actions and decisions regarding visitation will cause undue harm to the child's mental, physical, or emotional health.

## 750 ILCS 5/602.9 – VISITATION BY CERTAIN NON-PARENTS

- (5) In determining whether to grant visitation, the court shall consider the following:
- (A) the wishes of the child, taking into account the child's maturity and ability to express reasoned and independent preferences as to visitation;
- (B) the mental and physical health of the child;
- (C) the mental and physical health of the grandparent, great-grandparent, sibling, or step-parent;

## 750 ILCS 5/602.9 – VISITATION BY CERTAIN NON-PARENTS

- (5) In determining whether to grant visitation, the court shall consider the following:
- (D) the length and quality of the prior relationship between the child and the grandparent, great-grandparent, sibling, or step-parent;
- (E) the good faith of the party in filing the petition;
- (F) the good faith of the person denying visitation;

## 750 ILCS 5/602.9 – VISITATION BY CERTAIN NON-PARENTS

- (5) In determining whether to grant visitation, the court shall consider the following:
- (G) the quantity of the visitation time requested and the potential adverse impact that visitation would have on the child's customary activities;
- (H) any other fact that establishes that the loss of the relationship between the petitioner and the child is likely to unduly harm the child's mental, physical, or emotional health; and
- (I) whether visitation can be structured in a way to minimize the child's exposure to conflicts between the adults.

## 750 ILCS 5/602.9 – VISITATION BY CERTAIN NON-PARENTS

- (6) Any visitation rights granted under this Section before the filing of a petition for adoption of the child shall automatically terminate by operation of law upon the entry of an order terminating parental rights or granting the adoption of the child, whichever is earlier. If the person or persons who adopted the child are related to the child, as defined by Section 1 of the Adoption Act, any person who was related to the child as grandparent, great-grandparent, or sibling prior to the adoption shall have standing to bring an action under this Section requesting visitation with the child.



## 750 ILCS 5/602.9 – VISITATION BY CERTAIN NON-PARENTS

- (7) The court may order visitation rights for the grandparent, great-grandparent, sibling, or step-parent that include reasonable access without requiring overnight or possessory visitation.

## 750 ILCS 5/602.9 – VISITATION BY CERTAIN NON-PARENTS

- (c) Visitation by grandparents, great-grandparents, step-parents, and siblings.
- (1) Grandparents, great-grandparents, step-parents, and siblings of a minor child who is one year old or older may bring a petition for visitation and electronic communication under this Section if there is an unreasonable denial of visitation by a parent that causes undue mental, physical, or emotional harm to the child and if at least one of the following conditions exists:

## 750 ILCS 5/602.9 – VISITATION BY CERTAIN NON-PARENTS

- (A) the child's other parent is deceased or has been missing for at least 90 days. For the purposes of this subsection a parent is considered to be missing if the parent's location has not been determined and the parent has been reported as missing to a law enforcement agency; or
- (B) a parent of the child is incompetent as a matter of law; or
- (C) a parent has been incarcerated in jail or prison for a period in excess of 90 days immediately prior to the filing of the petition; or

## 750 ILCS 5/602.9 – VISITATION BY CERTAIN NON-PARENTS

- (D) the child's parents have been granted a dissolution of marriage or have been legally separated from each other or there is pending a dissolution proceeding involving a parent of the child or another court proceeding involving parental responsibilities or visitation of the child (other than an adoption proceeding of an unrelated child, a proceeding under Article II of the Juvenile Court Act of 1987, or an action for an order of protection under the Illinois Domestic Violence Act of 1986 or Article 112A of the Code of Criminal Procedure of 1963) and at least one parent does not object to the grandparent, great-grandparent, step-parent, or sibling having visitation with the child. The visitation of the grandparent, great-grandparent, step-parent, or sibling must not diminish the parenting time of the parent who is not related to the grandparent, great-grandparent, step-parent, or sibling seeking visitation; or
- (E) the child is born to parents who are not married to each other, the parents are not living together, and the petitioner is a grandparent, great-grandparent, step-parent, or sibling of the child, and parentage has been established by a court of competent jurisdiction.

## 750 ILCS 5/602.9 – VISITATION BY CERTAIN NON-PARENTS

- (2) In addition to the factors set forth in subdivision (b)(5) of this Section, the court should consider:
  - (A) whether the child resided with the petitioner for at least 6 consecutive months with or without a parent present;
  - (B) whether the child had frequent and regular contact or visitation with the petitioner for at least 12 consecutive months; and
  - (C) whether the grandparent, great-grandparent, sibling, or step-parent was a primary caretaker of the child for a period of not less than 6 consecutive months within the 24-month period immediately preceding the commencement of the proceeding;

## 750 ILCS 5/602.9 – VISITATION BY CERTAIN NON-PARENTS

- (3) An order granting visitation privileges under this Section is subject to subsections (c) and (d) of Section 603.10.
- (4) A petition for visitation privileges may not be filed pursuant to this subsection (c) by the parents or grandparents of a parent of the child if parentage between the child and the related parent has not been legally established.

## 750 ILCS 5/602.9 – VISITATION BY CERTAIN NON-PARENTS

- (d) Modification of visitation orders.
- (1) Unless by stipulation of the parties, no motion to modify a grandparent, great-grandparent, sibling, or step-parent visitation order may be made earlier than 2 years after the date the order was filed, unless the court permits it to be made on the basis of affidavits that there is reason to believe the child's present environment may endanger seriously the child's mental, physical, or emotional health.
- (2) The court shall not modify an order that grants visitation to a grandparent, great-grandparent, sibling, or step-parent unless it finds by clear and convincing evidence, upon the basis of facts that have arisen since the prior visitation order or that were unknown to the court at the time of entry of the prior visitation order, that a change has occurred in the circumstances of the child or his or her parent, and that the modification is necessary to protect the mental, physical, or emotional health of the child. The court shall state in its decision specific findings of fact in support of its modification or termination of the grandparent, great-grandparent, sibling, or step-parent visitation. A child's parent may always petition to modify visitation upon changed circumstances when necessary to promote the child's best interests.
- (3) Notice of a motion requesting modification of a visitation order shall be provided as set forth in subsection (c) of Section 601.2 of this Act.
- (4) Attorney's fees and costs shall be assessed against a party seeking modification of the visitation order if the court finds that the modification action is vexatious and constitutes harassment.

## 750 ILCS 5/602.9 – VISITATION BY CERTAIN NON-PARENTS

- (e) No child's grandparent, great-grandparent, sibling, or step-parent, or any person to whom the court is considering granting visitation privileges pursuant to subsection (d) of Section 602.7, who was convicted of any offense involving an illegal sex act perpetrated upon a victim less than 18 years of age including, but not limited to, offenses for violations of Section 11-1.20, 11-1.30, 11-1.40, 11-1.50, 11-1.60, 11-1.70, or Article 12 of the Criminal Code of 1961 or the Criminal Code of 2012, is entitled to visitation while incarcerated or while on parole, probation, conditional discharge, periodic imprisonment, or mandatory supervised release for that offense, and upon discharge from incarceration for a misdemeanor offense or upon discharge from parole, probation, conditional discharge, periodic imprisonment, or mandatory supervised release for a felony offense. Visitation shall be denied until the person successfully completes a treatment program approved by the court. Upon completion of treatment, the court may deny visitation based on the factors listed in subdivision (b)(5) of this Section.

## 750 ILCS 5/602.9 – VISITATION BY CERTAIN NON-PARENTS

- (f) No child's grandparent, great-grandparent, sibling, or step-parent, or any person to whom the court is considering granting visitation privileges pursuant to subsection (d) of Section 602.7, may be granted visitation if he or she has been convicted of first degree murder of a parent, grandparent, great-grandparent, or sibling of the child who is the subject of the visitation request. Pursuant to a motion to modify visitation, the court shall revoke visitation rights previously granted to any person who would otherwise be entitled to petition for visitation rights under this Section or granted visitation under subsection (d) of Section 602.7, if the person has been convicted of first degree murder of a parent, grandparent, great-grandparent, or sibling of the child who is the subject of the visitation order. Until an order is entered pursuant to this subsection, no person may visit, with the child present, a person who has been convicted of first degree murder of the parent, grandparent, great-grandparent, or sibling of the child without the consent of the child's parent, other than a parent convicted of first degree murder as set forth herein, or legal guardian.

## WHO MAY FILE???

- grandparents
- great-grandparents
- step-parents
- or
- siblings (including half- and step-siblings) of a minor child

## WHEN MAY NON-PARENT FILE???

- the child is at least one year old (750 ILCS 5/602.9(c)(1)),
- there has been an unreasonable denial of visitation by a parent, (750 ILCS 5/602.9(b)(3)), and
- the denial has caused undue mental, physical, or emotional harm to the child (750 ILCS 5/602.9(b)(3));
- AND

## WHEN NON-PARENT MAY FILE CONT.

- AND ONE OF THE FOLLOWING . . .
- the parents never married, are not living together, and parentage has been established;
- the parents are divorcing or divorced and one parent does not object to the 3rd party visitation (but the 3rd party visitation may not disrupt the objecting parent's parenting time);
- OR
- a parent has been incarcerated for more than 90 days;
- a parent is adjudicated incompetent;
- The child's other parent is deceased or has been missing for at least 90 days.

## IF THE NON-BIOLOGICAL PARENT MEETS THE CRITERIA TO FILE,

- the Court is presented with SOME OF the best interests factors in 750 ILCS 602.9(b)(5):
  - (A) the wishes of the child, taking into account the child's maturity and ability to express reasoned and independent preferences as to visitation;
  - (B) the mental and physical health of the child;
  - (C) the mental and physical health of the grandparent, great grand-grandparent, sibling, or step-parent;

## IF THE NON-BIOLOGICAL PARENT MEETS THE CRITERIA TO FILE,

- the Court is presented with SOME OF the best interests factors in 750 ILCS 602.9(b)(5):
  - (D) the length and quality of the prior relationship between the child and the grandparent, great-grandparent, sibling, or step-parent;
  - (E) the good faith of the party in filing the petition;
  - (F) the good faith of the person denying visitation;

## IF THE NON-BIOLOGICAL PARENT MEETS THE CRITERIA TO FILE,

- the Court is presented with SOME OF the best interests factors in 750 ILCS 602.9(b)(5):
- (G) the quality of the visitation time requested and the potential adverse impact that visitation would have on the child's customary activities;
- (H) any other fact that establishes that the loss of the relationship between the petitioner and the child is likely to unduly harm the child's mental, physical, or emotional health; and
- (I) whether visitation can be structured in a way to minimize the child's exposure to conflicts between the adults.

# QUESTIONS?