

## ELDER LAW

BY DANIEL G. FISH

*Grandparent Visitation Statute Survives N.Y. Challenge*

In 2000, the U.S. Supreme Court rejected a suit by a Washington state couple who sought visitation rights with their granddaughters. It found the state statute unconstitutional, *Troxel v. Granville*, 530 US 57.

The New York Court of Appeals has just upheld a suit by a grandmother who sought visitation rights with her grandson. It rejected a constitutional challenge to New York's grandparent visitation statute, *E.S. v. P.D.*, 2007 N.Y. Lexis 118.

The contradictory outcomes can be explained by the difference in the language between Washington and New York statutes and the markedly different fact patterns in the two cases.



to the right of a fit parent to decide with whom her child would associate. The statute allowed a fit parent's decision regarding visitation to be overridden by anyone showing that the child might benefit. The fit parent then assumed the burden of showing that the visitation would be harmful to the child. The sole test was the best interest of the child: "Section 26.10.160(3) contains no requirement that a court accord the parent's decision any presumption of validity or any weight whatsoever." Under the Washington formulation, visitation would be granted unless the parent could show that it would be harmful to the child.

In reviewing the fact of this particular case, the Supreme Court gave weight to the fact that the mother in *Troxel* did not prohibit visitation by the grandparents completely, she simply objected to the duration of the visits. The court drew a distinction between a parent's decision to forbid all visitation and a parent's decision to allow visitation but restrict the terms. The level of intrusion by the state was deemed to be higher if the parent agreed to some visitation.

**U.S. Supreme Court: 'Troxel v. Granville'**

Ms. Tommie Granville and Mr. Brad Troxel lived together in the state of Washington. They never married, had two daughters and then separated. After the separation, Mr. Troxel moved back into the home of his parents. His two daughters spent weekends with him and they had a great deal of contact with his parents. Two years later he committed suicide. After the suicide, Ms. Granville limited the paternal grandparents' visitation to one short visit each month.

The grandparents immediately filed suit under a Washington statute that permitted any person at any time to petition for visitation. The statute did not require any finding that the parent was unfit. Visitation could be granted if the court found it to be in the best interest of the child. The grandparents sought two weekends of visitation each month and two weeks during each summer. The trial court awarded visitation of one weekend per month and one week during the summer and four hours on the birthday of each of the grandparents. The Washington Court of Appeals reversed the trial court. The Washington Supreme Court held that the statute was facially unconstitutional in that it interfered with Ms. Tommie Granville's right to rear her children free from state interference.

The case was appealed to the U.S. Supreme Court which held that the Washington state statute was unconstitutional as applied. However, it took six separate opinions to reach that conclusion. The plurality decision of the Court, by Justice Sandra Day O'Connor was joined by Chief Justice William Rehnquist and Justices Ruth Bader Ginsburg and Stephen Breyer. Justices David Souter and Clarence Thomas wrote separate concurring opinions and Justices John Paul Stevens, Antonin Scalia and Anthony Kennedy wrote dissenting opinions.

The U.S. Supreme Court characterized the Washington law as "breathtakingly broad." The statute permitted any third party to petition for visitation. It was not limited to suits brought by grandparents. The statute also allowed a petition to be filed at any time. It was not limited to the circumstance where one or both of the parents were deceased.

The statute started from a faulty presumption and misallocated the burden of proof. It gave no deference

**N.Y. State Court of Appeals: 'E.S. v. P.D.'**

Ironically, this case began with great harmony, as a family responded to a tragic medical condition. In 1997, a couple (A.D., the wife, and P.D., the husband) with a small son learned that the wife had cancer. The wife's mother (E.S.) was asked, and agreed, to move in with the couple to assist her ailing daughter and four-year-old grandson. After the wife's death in 1998, the wife's mother remained in the house for three and a half years at the husband's request. The opinion goes to great length to describe the very specific help she provided.

Grandmother cleaned the house, shopped, cooked household meals and looked after the child when A.D.'s illness prevented her from doing so.

During that time, grandmother comforted, supported and cared for the motherless child. She got him ready for school, put him to bed, read with him, helped him with his homework, cooked his meals, laundered his clothes and drove him to school and to doctor's appointments and various activities, including gym class, karate class, bowling, soccer, Little League baseball and swimming class. She arranged and transported him to away-from-home or supervised at-home play dates; she took him to the public library and introduced him to the game of chess.

Ultimately, the relationship between the grandmother and father broke down and the father ordered the grandmother out of the home. The 78-year-old grandmother brought an action for visitation under New York State's grandparent visitation statute, Domestic Relations Law §72(1).

Domestic Relations Law §72(1) does not suffer the same "breathtakingly broad" scope as the Washington statute. While the Washington statute permitted anyone to petition for visitation, the New York statute only permits a grandparent to make application for visitation.

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Continued on page 6

### *Grandparent Visitation Statute Survives N.Y. Challenge*

#### **Continued from page 3**

While the Washington statute permits a petition to be filed at any time, the New York statute only permits a petition to be filed when one or both of the parents is deceased, or where "equity would see fit to intervene." However, the New York statute does not contain any language that requires the court to give great weight or deference to the decision of a fit parent regarding visitation by a grandparent.

After a nonjury trial, the New York Supreme Court awarded visitation rights. The Appellate Division affirmed but significantly modified the Supreme Court order to accommodate the father's specific wishes. It deleted a provision of the order that required the father to send his son to the grandmother on Passover, Rosh Hashanah, or Hanukkah if the father was not celebrating those holidays himself. It added a provision to the order excluding the presence of an uncle of the child, when the child visited the grandmother. It added a provision prohibiting the grandmother from taking the child outside of New York State without the father's permission.

The New York State Court of Appeals did not have the difficulty of the divided U.S. Supreme Court and issued a unanimous decision, holding that New York's grandparent visitation statute was constitutional. It rejected the father's argument that DRL §72(1) was facially unconstitutional holding that the statute was

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interpreted to accord special weight and deference to a parent's decision. The modification of the trial court order regarding religious holidays, exclusion of the uncle during visits and restriction of visits to New York State was considered proof of that "special weight."

In addition, the argument that DRL §72(1) was unconstitutional as applied was similarly rejected. The trial court was found to have started from a presumption that the fit father's wishes were in the child's best interest and that this presumption created a high

hurdle. It assumed that the burden of proof was on the grandmother.

However, on the particular facts in this case, the grandmother was found to have surmounted that high hurdle. The court characterized the grandmother as follows: "...from the time the child was almost four until he was seven, grandmother was his surrogate, live-in mother."

#### **Conclusion**

Under common law a grandparent had no standing to assert a claim for visitation with a grandchild. Now, all 50 states have some form of grandparent visitation statute. In addition, the federal Visitation Enforcement Rights Act of 1998 requires an order granting grandparent visitation in one state to be accorded full faith and credit in all states.

When a parent dies and leaves minor children, the visitation rights that his or her parents (the grandparents) enjoyed can be dramatically altered by the surviving spouse. Elder law attorneys are accustomed to cases where an older person is cared for by their child. They are not accustomed to cases where a grandparent brings suit for the right to visitation. The New York State Office for Aging estimated that in 2000 there were 143,000 grandparents in New York State who had responsibility for their grandchildren. Elder law attorneys should pay attention to these cases because the demographics strongly suggest that actions involving grandparents will increase.