Children's Legal Rights Journal

Volume 40 | Issue 2 Article 2

2020

Grandparent and Third-Party Visitation Rights: A 50 State Survey

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I. INTRODUCTION

In the United States, fit parents have the fundamental right to decide what is in the best interests of their children.[2] The Supreme Court has held that the Fourteenth Amendment guarantee that no person will be deprived of her liberty without due process of law applies to the fundamental interest parents have to direct the care, custody, and control of their children.[3]

This fundamental right to make parenting choices is not without qualification. State and federal laws dictate when and how parents must educate their children, care for their medical needs, and define the extent to which parents may physically discipline their children. All fifty states have laws that determine when and how parties other than parents can have legal visitation rights with children, even over the objections of the parents.[4] In many states, these rights are restricted to grandparents.

There are several legal theories that explain how grandparents may have a superior right over all other third parties to visit with their grandchildren. Some states use the "derivative rights" theory, which only allows consideration of visitation privileges when there is the legal absence of the parent whose parent is petitioning for visitation.[5] The right of the grandparent thus derives from the right of the related parent.[6]

Other states appear to operate under the presumption that continuing a close relationship between a grandparent and grandchild tends to be in the best interests of the child. Grandparents in these states can obtain visitation in part by showing the existence of a close pre-existing relationship with their grandchildren and that severing this relationship would not be in the best interests of the children.[7] This can also apply to other third parties who wish to visit children with whom they have developed a close relationship.[8] For example, a former stepparent or partner of a parent who has participated in the raising of a child for many years may wish to obtain legal visitation after his or her relationship with the parent has dissolved.

Some states do not appear to follow a clearly articulated legal theory when awarding grandparents visitation with their grandchildren. In South Carolina for instance, the family court

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[2] Parham v. J.R., 442 U.S. 584, 602 (1979).

[3] Troxel v. Granville, 530 U.S. 57, 66 (2000).

[4] *See* cases cited *infra* Part III.

[5] *See, e.g.,* Suster v. Ark. Dep't of Human Servs., 858 S.W.2d 122, 123-24 (Ark. 1993) (finding that a grandparent had no standing to seek visitation with her grandchild after her daughter's parental rights were terminated).

[6] *See* IND. CODE ANN. § 31-17-5-1 (West, Westlaw through 2020 2d. Sess.); *see also* 15 R.I. GEN. LAWS ANN. § 15-5-24.1 (West, Westlaw through Chapter 79 of 2020 2d. Sess.); *see also* TEX. FAM. CODE ANN. § 153.433 (West, Westlaw through 2019 Sess.).

[7] ALA. CODE § 30-3-4.2(c)(2) (2020); CONN. GEN. STAT. ANN. § 46b-59 (West, Westlaw through 2020 Sess.); MICH. COMP. LAWS ANN. § 722.27b(6) (West, Westlaw through P.A. 2020, No. 164); NEB. REV. STAT. ANN. § 43-1802(2) (West, Westlaw through Oct. 1, 2020); OR. REV. STAT. ANN. § 109.119(3)(b) (West, Westlaw through 2020 Sess.).

[8] *See e.g.*, CAL FAM CODE § 3101 (West, Westlaw through Ch. 372 of 2020 Sess.).

has jurisdiction to order parents to allow grandparents to visit with their grandchildren under certain circumstances.[9] To obtain visitation in South Carolina, a grandparent must show that: their grandchild's parents are either deceased, divorced, or living apart from one another; the parents of the child have been "unreasonably depriving" the grandparent visitation with the child for over ninety days; awarding visitation will not interfere with the parent-child relationship; and the parents are unfit or there are other compelling circumstances which overcome the presumption that the parental decision is in the child's best interests.[10]

Because grandparent or third-party visitation statutes vary widely throughout the country, the same facts can lead to different results depending on the state in which the action is brought. A grandparent in South Carolina who has never met her grandchild can petition for visitation whereas in Arkansas, that same grandparent would be out of luck.[11]

Fit parents can suffer a significant burden if forced to fight a petition for visitation by grandparents or another third party. This can lead to particularly inequitable results, pitting parents with legitimate reasons for denying visitation against grandparents who have more financial resources and time, regardless of a grandparents' prior relationship with their grandchild. This article will analyze the general history and rise of grandparents and third-party visitation statutes, analyze each state's statute, and finally conclude with an analysis of the overall effect of *Troxel* and some policy suggestions.

II. OVERVIEW OF THE HISTORY OF GRANDPARENT AND THIRD-PARTY VISITATION LAW

*A. Grandparents' Rights Pre-*Troxel

As early as 1894, grandparents who attempted to compel visitation with their grandchildren were rejected by the courts.[12] In *Succession of Reiss*, a maternal grandmother appealed to the Louisiana Supreme Court because the widowed father of her grandchildren refused to send his children to visit her, and instead insisted on visitation at his home.[13] The court rebuffed this attempt and stated that "[t]he law gives no right of action to the grandparents" and that the father owed no one any explanation for his motives in denying visitation.[14] The *Reiss* court recognized that an obligation to visit grandparents is a moral obligation, not a legal one, and that the courts had no place interfering in these particular family matters.[15]

Courts are more likely to approve non-statutory visitation requests by grandparents in situations where there has been a break in the nuclear family. For example, in an early case in Georgia, a court granted a mother custody of her children after a divorce but required her to allow visitation with both the child's father and paternal grandparents.[16] Generally, courts used the "best interests of the child" standard to reason that these visits were allowed in circumstances where families were legally fractured.[17]

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[9] S.C. CODE ANN. § 63-3-530(A)(33) (2020).
[10] *Id.* § 63-3-530(A)(33).
[11] *See* discussion *infra* regarding Arkansas and South Carolina.
[12] *See* Succession of Reiss, 15 So. 151, 151-52 (La. 1894).
[13] *Id.* at 151-52.
[14] *Id.* at 152.
[15] *Id.*
[16] Scott v. Scott, 115 S.E. 2, 2 (Ga. 1922).
[17] *See, e.g.,* Boyles v. Boyles, 302 N.E.2d 199, 201 (Ill. App. Ct. 1973).

Many states have enacted statutes that create a cause of action for visitation with children when a grandparent's child has died, and use the "best interests of the child" standard as their metric.[18] Over time, and along with the rise of no-fault divorce and divorce rates, state statutes relaxed and allowed petitions for visitation in more circumstances than the death of a parent. However, regardless of how the grandparents established standing, these statutes did not respect a parent's inherent right to determine the custody, care, and control of the child.

B. Troxel v. Granville *and Beyond*

Enter Tommie Granville. Tommie Granville was the unmarried mother of two daughters, Isabelle and Natalie.[19] Isabelle and Natalie's father died by suicide, and at first, Tommie allowed the girls' paternal grandparents, Mr. and Mrs. Troxel, liberal visitation with the children.[20] However, when she remarried, Tommie decided that visits with the Troxels interfered too much with the girls' family life and told the Troxels that the visits would be limited.[21] Mr. and Mrs. Troxel eventually sued under Washington's grandparents' rights law for visitation, demanding two weekends a month with overnight stays and two full weeks of visitation in the summer.[22] The trial court granted visitation and Tommie appealed.[23] Then the Washington Court of Appeals reversed the trial court's decision and the grandparents appealed.[24] The Washington Supreme Court affirmed and then the grandparents appealed the case to the United States Supreme Court.[25]

The Supreme Court issued its plurality opinion on the matter on June 5, 2000.[26] Justice Sandra Day O'Connor, joined by Chief Justice Roberts, Justice Ginsburg, and Justice Breyer, concluded that Washington's statute was unconstitutional as applied to the facts of the case because Tommie was a fit parent and had a fundamental constitutional right to decide the custody, care, and control of her daughters, including whether or not they could visit with their grandparents.[27] Justice O'Connor reasoned that because there is a presumption that a fit parent acts in a child's best interests,"there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children."[28] Justice O'Connor also recognized the need for finality in the case and that litigation on the issue alone is a burden on Tommie's rights.[29]

The effects of *Troxel* on state law have been varied. The fact that the decision in *Troxel* was a plurality means that states have no strong guidance on what legal theory they must follow when crafting their statutes, other than requiring that the application of these statutes conform with the holding of *Troxel.* Some states have amended their statutes to acknowledge the ruling in *Troxel,* while still others have simply applied *Troxel* to their existing statutes. *Troxel* did not address constitutional issues regarding the fairness of statutes which delineate between intact (meaning the

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[18] *See, e.g.,* CAL. CIV. CODE § 197.5 (repealed 1994); *see also* FLA. STAT. § 63.151 (repealed 1973).
[19] Troxel v. Granville, 530 U.S. 57, 60 (2000).
[20] *Id.*
[21] *Id.* at 60-61.
[22] *Id.* at 61.
[23] *Id.*
[24] *Id.* at 62.
[25] *Id.*
[26] *Id.* at 57.
[27] *Id.* at 67-70, 73.
[28] *Id.* at 68-69.
[29] *Id.* at 75.

parents are married and living together) and non-intact families, nor did it discuss what could overcome the presumption that a fit parent has her child's best interests in mind. States have grappled with these issues individually and their responses have varied widely. The following section contains an analysis of each state's approach.

III. GRANDPARENT AND THIRD-PARTY VISITATION BY STATE

A. Alabama

In Alabama, a grandparent can initiate an action for visitation with her grandchild if: (1) there is an action for divorce or legal separation of the married parents of the child, (2) one of the married parents of the child has died, (3) the child was born out of wedlock, or (4) an action for termination of the parental rights of a parent has been filed.[30] The grandparent must also show that the grandparent "has established a significant and viable relationship with the child" and that visitation is in the best interest of the child.[31]

Interestingly, the Alabama statute includes a declaration regarding the purpose of the grandparent's rights statute:

> As a matter of public policy, this section recognizes the importance of family and the fundamental rights of parents and children. In the context of grandparent visitation under this section, a fit parent's decision regarding whether to permit grandparent visitation is entitled to special weight due to a parent's fundamental right to make decisions concerning the rearing of his or her child. Nonetheless, a parent's interest in a child must be balanced against the long-recognized interests of the state as *parens patriae*. Thus, as applied to grandparent visitation under this section, this section balances the constitutional rights of parents and children by imposing an enhanced standard of review and consideration of the harm to a child caused by the parent's limitation or termination of a *prior relationship* of a child to his or her grandparent.[32]

The Alabama legislature based its statute on that of Arkansas, but increased the standard of proof required to prove harm to the grandchildren if visitation is denied to the level of "clear and convincing evidence" in order to further protect the rights of parents in determining the best interests of their children.[33] Alabama also restricts visitation rights to grandparents only, not great-grandparents.[34]

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[30] ALA. CODE § 30-3-4.2(b) (2020).
[31] *Id.* § 30-3-4.2(c)(2).
[32] *Id.* § 30-3-4.2(p) (emphasis added).
[33] *Id.* § 30-3-4.2, Editor's Notes, Alabama Comment.
[34] *See* Thompson v. Thompson, 984 So. 2d 415, 417 (Ala. Civ. App. 2007) (in which a great-grandparent petitioned for visitation under the grandparents' rights statute and was rebuffed because the court reasoned that the statutory definition of "grandparent" was to be strictly construed).

B. Alaska

In Alaska, a grandparent can petition for visitation outside the bounds of a custody dispute by proving that she has established or attempted to establish contact with the grandchild and that visitation is in the grandchild's best interests.[35] Alaska also specifically requires the court to consider whether there has been "a history of child abuse or domestic violence attributable to the grandparent's son or daughter who is parent of the grandchild."[36] A grandparent "must prove by clear and convincing evidence that it is detrimental to the child to limit visitation with the [grandparent] to what the child's otherwise fit parents have determined to be reasonable."[37]

C. Arizona

In Arizona, so-called "intact" families are exempt from intrusion by third-party visitation petitions.[38] Grandparents and great-grandparents may obtain visitation if the parents of the child are either not married, or one of the legal parents is deceased or missing for at least three months, and in the case of a divorce, the marriage between the parents has been dissolved for at least three months.[39] For third parties who are not grandparents or great-grandparents of the subject child and who wish to petition for visitation with said child, the third party must prove that it stands *in loco parentis* to the child and that there is a pending proceeding for dissolution of the parents' marriage at the time of the petition.[40]

Arizona amended its statute in 2012.[41] Prior to this amendment, only grandparents and great-grandparents could petition for visitation, while other third parties could not.[42] In addition, before 2012, unmarried parents could not cure their vulnerability to a visitation petition by marrying, whereas the 2012 amendments provide that parents may do so, bringing the statute in line with that of Ohio.[43]

D. Arkansas

As stated above, Arkansas' grandparent visitation statute is very similar to that of Alabama. As in Alabama, a grandparent can initiate an action for visitation with her grandchild if there is an action for divorce or legal separation of the married parents of the child, one of the married parents of the child has died, the child was born out of wedlock, or an action for termination of the parental rights of a parent has been filed.[44] However, if the parents are opposed to visitation, the grandparent must also prove by a preponderance of the evidence that he "has established a significant and viable relationship with the child for whom he or she is requesting visitation" and that visitation is in the best interests of the child before visitation can be granted.[45]

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[35] *Id.* § 25.20.065(a).
[36] *Id* § 25.20.065(c).
[37] Ross v. Bauman, 353 P.3d 816, 828 (Alaska 2015).
[38] *See* ARIZ. REV. STAT. ANN. § 25-409(C) (Westlaw through 2020 2d. Sess.).
[39] *Id.* § 25-409(C).
[40] *Id.* § 25-409(C).
[41] S.B. 1127, 50th Leg., 2nd Reg. Sess. (Ariz. 2012).
[42] ARIZ. REV. STAT. ANN. § 25-409 (repealed 2013).
[43] *See* ARIZ. REV. STAT. ANN. § 25-409(C)(2) (Westlaw through 2020 2d. Sess.).
[44] ARK. CODE ANN. § 9-13-103(b) (West, Westlaw through July 10, 2020).
[45] *Id.* § 9-13-103(c)(2).

E. California

Unlike many other states, California has not codified the *Troxel*-mandated presumption that a fit parent's opinion on the best interests of his or her child is given special weight in third-party visitation proceedings. Under California's statute, which was enacted pre-*Troxel* in 1994, third-party visitation will only be granted if one of the parents of a child has died.[46] In that instance, "the children, siblings, parents, and grandparents of the deceased parent may be granted reasonable visitation with the child" if the court finds it is in the best interests of the child.[47] Even though the California statute has not been updated since the ruling in *Troxel*, the California common law has honored *Troxel* and refused to grant visitation without a compelling showing of facts "to overcome the presumption that [the surviving parent] is acting with the best interests of [the child] in mind," and in certain cases, found the statute unconstitutional.[48]

F. Colorado

In Colorado, grandparents or great-grandparents may petition for visitation if there is or has been a court action that concerns "the allocation of parental responsibilities relating to that child."[49] The instances in which this can occur are limited by statute to divorce or separation actions regarding the marriage of the child's parents, the death of one of the child's parents, or situations in which the child has been placed outside the home either by legal decree or by voluntary parental action but excluding children who have been placed for adoption.[50] Other than this procedural requirement, Colorado follows the same general best interests of the child standard.[51]

G. Connecticut

In Connecticut, any person who has a "parent-like relationship" with a child may petition the Superior Court for visitation and must include "specific and good-faith allegations" that denial of visitation would cause real and significant harm.[52] The requirement for a parent-like relationship is rather strict, and courts can deny an otherwise very involved grandparent's visitation.[53] For example, in one case, grandparents failed to prove a parent-like relationship and were thus denied visitation, even though they had established a "loving and responsible" relationship with the children, regularly visited the children, and participated in birthday celebrations and outings with the children.[54]

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[46] CAL. FAM. CODE § 3102 (West, Westlaw through Ch. 372 of 2020 Sess.).
[47] *Id.* § 3102(a).
[48] Herbst v. Swan, 125 Cal. Rptr. 2d 836, 841 (Cal. Ct. App. 2002).
[49] COLO. REV. STAT. ANN. § 19-1-117(1) (West, Westlaw through 2020 Sess.).
[50] *Id.* § 19-1-117(1)(a)-(c).
[51] *Id.* § 19-1-117(2).
[52] CONN. GEN. STAT. ANN. § 46b-59 (West, Westlaw through 2020 Sess.).
[53] *See* Roth v. Weston, 789 A.2d 431, 451 (Conn. 2002).
[54] *Id.*

H. Delaware

In Delaware, any adult third party with a "substantial and positive prior relationship" with a child can petition for visitation with that child.[55] However, a person without such a relationship can still petition for visitation if that person is a grandparent, aunt, uncle, or adult sibling of the child.[56] Interestingly, a child can also petition for visitation with the same adults through a *guardian ad litem*.[57]

A person whose parental rights have been terminated can also petition for visitation with their child if "[m]ore than three years have passed since the termination of rights and the child has not been adopted," or if the adoptive parents have entered into an agreement that allows the terminated parent visitation with the child.[58] This is unusual, but not inequitable. Because of the nature of terminations of parental rights, if a child is not adopted in the same action as a termination (such as in a stepparent adoption), the termination is often because the child has been removed from the parent's home by the State. In that situation, if the child is not subsequently adopted, it makes sense for the court to consider whether it is in the child's best interests to have contact with her biological parent, because another parent-like relationship has not been created. This statute could also encourage and strengthen open adoptions, because it allows for enforcement of agreements between adoptive and terminated parents if they are in the best interests of the child.

I. Florida

In Florida, grandparents can only petition for visitation under very limited circumstances. To petition, both of the child's parents must be deceased, missing, or in a persistent vegetative state, or just one of the child's parents must be deceased, missing, or in a persistent vegetative state and the other parent must be convicted of a felony or other violent crime that poses a substantial threat to the child's welfare.[59] This requirement is so limited that, at the time of publication, no reported cases cite to the statute.

Advocates recently attempted to amend the Florida Constitution to state that the constitutional right to privacy "may not be construed to limit a grandparent's right to seek visitation of his or her grandchildren under certain circumstances."[60] The amendment died in committee in May of 2018.[61]

J. Georgia

Although Georgia's statute allows for a grandparent or other family member to petition for visitation over the objection of a fit parent, the Georgia Supreme Court recently declared subsection (d) of the statute unconstitutional absent a showing by clear and convincing evidence

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[55] DEL. CODE ANN. tit. 13, § 2410(a)(1) (West, Westlaw through Ch. 292 of 150th G.A. (2019-2020)).
[56] *Id.* § 2410(a)(1)-(2).
[57] *Id.* § 2410(b).
[58] *Id.* § 2410(d).
[59] FLA. STAT. ANN. § 752.011 (West, Westlaw through 2020 2d. Sess.).
[60] Daryl Rouson, *Proposal 64: Declaration of Rights, Right to Privacy; Grandparent Visitation*, FLA. CONST. REVISION COMM'N (2017), http://flcrc.gov/Proposals/Commissioner/2017/0064.html?Tab=BillHistory (proposing an amendment to Article I, Section 23 of the state constitution).
[61] *Id.*

that actual harm will befall the child if visitation is not granted.[62] Because subsection (d) of Georgia's statute applies only when a parent has died, is incarcerated, or is incapacitated, the Georgia Supreme Court reasoned that "the harm is [not] so inherent in the limited circumstances in which [the statute] applies" that it is constitutionally unnecessary to require clear and convincing evidence to prove the harm.[63]

K. Hawaii

Hawaii's grandparent visitation statute is simple: it allows a grandparent to petition for visitation at any time, and visitation will be granted if the court finds that it is in the best interests of the child.[64] However, the Supreme Court of Hawaii declared this statute unconstitutional as written, because harm to the child is not considered in the statute at all.[65] Therefore, it appears that Hawaii law currently does not allow grandparents to petition for visitation.

L. Idaho

Idaho also has a simple statute decreeing that visitation can be granted to grandparents and great-grandparents upon a showing that it would be in the best interests of the child.[66] However, unlike in Hawaii, Idaho courts have not invalidated their statute due to *Troxel*. At the time of publication, there are no reported cases that cite to Idaho's statute and analyze the constitutionality of the statute, but it is reasonable to assume that Idaho's statute is vulnerable to such an attack based on Hawaii's reasoning.

M. Illinois

In Illinois, a third party who wishes to petition for visitation can only do so if there has been "an unreasonable denial of visitation by the parent and the denial has caused the child undue mental, physical, and emotional harm."[67] Illinois law also codifies *Troxel* and states that there is a presumption in favor of a fit parent's opinion on whether her child is harmed by a denial of visitation.[68] The Illinois Supreme Court requires that evidence be presented to overcome this presumption and has overturned trial court rulings that held the simple denial of a grandparent-grandchild relationship is enough to prove harm.[69]

N. Indiana

Indiana grandparents have the right to petition for visitation only if the child's parent is deceased, if the parents' marriage has been dissolved, or if the child was born out of wedlock and

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[62] GA. CODE ANN. § 19-7-3 (West, Westlaw through Laws 2020, Act 545); Patten v. Ardis, 816 S.E.2d 633, 637 (Ga. 2018) (invalidating section 19-7-3(d) for violating Georgia's Constitution).
[63] *Patten*, 816 S.E.2d at 637.
[64] HAW. REV. STAT. ANN. § 571-46.3 (West, Westlaw through Act 15 of 2020 Sess.).
[65] Doe v. Doe, 172 P.3d 1067, 1080 (Haw. 2007).
[66] IDAHO CODE ANN. § 32-719 (West, Westlaw through 2020 Sess.).
[67] 750 ILL. COMP. STAT. ANN. 5/602.9(b)(3) (West, Westlaw through P.A. 101-651).
[68] *Id.* § 5/602.9(b)(4).
[69] *See* Flynn v. Henkel, 880 N.E.2d 166, 171 (Ill. 2007).

the father has established paternity.[70] However, the Indiana Supreme Court has limited visitation in cases where a parent is deceased to the deceased parent's parent, which shows that to a certain extent, Indiana follows the derivative rights theory of grandparent visitation.[71]

O. Iowa

In Iowa, a grandparent or great-grandparent may only petition the court for visitation when the parent of the minor child, who must be the child or grandchild of the grandparent or great-grandparent, is deceased.[72] The petitioning grandparent or great-grandparent must show by clear and convincing evidence that they have established a substantial relationship with the child, that visitation is in the child's best interests, and that the presumption in favor of a fit parent's decision to deny visitation has been rebutted.[73]

Before the current statute was enacted, if parents had continually and unreasonably denied visitation to grandparents who sought it, the parents were estopped from claiming that the lack of a substantial relationship denies standing to the grandparents.[74] In addition, a substantial relationship in Iowa could be measured on a sliding scale depending on the age of the child.[75] For example, in *Hough,* the child at issue was three weeks old when the grandparents were denied visitation.[76] The Iowa Supreme Court found that the grandparents had established a substantial relationship, but it was "destroyed . . . by the passage of time" because they petitioned for visitation when the child was a year old.[77] This ruling would seem to be unreasonable, considering that most people recognize that three-week-old infants do not understand much more than how to identify their primary caregiver by smell. However, the parent in this case did not present any evidence that the relationship between the child and grandparent *had* been destroyed, therefore the court had no choice but to accept the supposition that the grandparents had established a lasting substantial relationship.[78]

P. Kansas

Kansas allows grandparents and stepparents to petition for visitation.[79] The parents of a deceased parent may obtain visitation with a grandchild, even if the grandchild has been adopted by a stepparent.[80] This is an unusual application of the theory of derivative rights to adoptions and may result in inequitable results. For example, a child adopted by a stepparent after a death is vulnerable to visitation petition by a grandparent, whereas a child whose parents have both died and who has been adopted by another family is not vulnerable to this petition. Seen another way, it is also inequitable to the grandparents themselves. A grandparent whose child has died along

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[70] IND. CODE ANN. § 31-17-5-1 (West, Westlaw through 2020 2d. Sess.).
[71] *See In re* Guardianship of A.J.A., 991 N.E.2d 110, 113 (Ind. 2013) (where the mother of a father who murdered the mother of their children petitioned for visitation in part under the theory that the sixty-year prison sentence rendered her son deceased for all practical purposes).
[72] IOWA CODE ANN. § 600C.1(1) (West, Westlaw through 2020 Sess.).
[73] *Id.* § 600C.1(3)(b).
[74] *In re* Hough, 590 N.W.2d 556, 559 (Iowa Ct. App. 1999).
[75] *Id.*
[76] *Id.* at 557.
[77] *Id.* at 558-59.
[78] *Id.* at 558.
[79] KAN. STAT. ANN. § 23-3301(a) (West, Westlaw through 2020 Sess.).
[80] *Id.* § 23-3301(c).

with her spouse cannot obtain visitation with grandchildren who have been adopted, whereas a grandparent can petition for visitation when their child has died, and the grandchild's other parent remarries under Kansas law.

The Kansas Supreme Court has held that the statute, as applied to a child born out of wedlock, violates the equal protection rights of that child, discriminating on the basis of a child's "legitimacy," which serves no important legislative or government purpose.[81]

Kansas, like Iowa, decrees that a substantial relationship must be demonstrated before visitation is allowed and that visitation must be in the best interests of the child.[82] This is a more reasonable take on the "right of companionship" theory than that of Iowa. It is theoretically easier to prove that the maintenance of a previously important relationship is in the best interests of a child than it would be to prove that a new relationship will be better for a child. Additionally, a parent in Kansas is on notice that allowing a grandparent any access to the child would estop an eventual petition for visitation, which allows parents more flexibility in exercising their right to decide with whom their child can spend time.

Q. Kentucky

Kentucky's statute on grandparent visitation was recently found to be unconstitutional on its face because it failed to accord special weight to a fit parent's determination regarding her child.[83] It remains to be seen how Kentucky's legislature will handle grandparent visitation in the future.

R. Louisiana

In Louisiana, the family court is restricted in the factors it can use to determine the best interests of a child in a grandparent or stepparent visitation action.[84] While many states grant family courts wide discretion in determining what factors to consider when deciding the best interests of a child, Louisiana courts can only consider the parent's "fundamental constitutional right to make decisions" concerning their child, the presumption that the fit parent will act in the best interests of the child, the length and quality of the pre-existing relationship, whether the child needs the guidance or tutelage of the petitioner, the preference of the child, and the mental and physical health of the child and relative.[85]

S. Maine

Maine allows grandparents to petition for visitation if there is a "sufficient existing relationship" between the grandparent and grandchild or for "any other compelling state interest" that justifies visitation over the objections of the fit parent.[86] Until 2018, Maine also allowed grandparents to petition for visitation if there had been a "sufficient effort" to establish a significant

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[81] T.N.Y. v. E.Y., 51 Kan. App. 2d 956-958 (2015).
[82] *Id.* § 23-3301(b).
[83] Pinto v. Robinson, 607 S.W.3d 669 (Ky. 2020).
[84] LA. CIV. CODE ANN. art. 136(D) (Westlaw through 2020 Sess.).
[85] *Id.* art. 136(D).
[86] ME. STAT. REV. ANN. tit. 19-A, § 1803(1) (Westlaw through 2019 2d. Sess.).

relationship; however, this clause was repealed by the Maine legislature.[87] It seems likely that this edit to the statute was for efficiency, because a grandparent who has been denied visitation after a sufficient effort to develop a relationship with the child could still petition for visitation under the "compelling state interest" provision of the statute.

T. Maryland

Maryland's grandparent visitation statute is extremely basic, and merely sets forth the requirement that visitation be in the best interests of the child.[88] However, Maryland courts recognize the rules set forth in *Troxel* (which are consistent with Maryland's own common law) when applying the statute. The courts have found that before considering the child's best interests, there is a requirement that either the parents be proven unfit or there exist "other exceptional circumstances" that would overcome the presumption that the parent's wishes are in the best interests of the child.[89]

U. Massachusetts

Massachusetts respects so-called "intact" families and exempts them from intrusion by grandparents seeking visitation.[90] Massachusetts only allows grandparent visitation if parents are divorced, married but living apart, or deceased, or if the child was born out of wedlock.[91] Despite protecting "intact" families, this statute excludes stepparents by adoption, opening them up to visitation petitions from grandparents.[92]

Massachusetts common law requires a "significant preexisting relationship" between the petitioning grandparent and the grandchild, but in cases where there is no such relationship, grandparents can still obtain visitation by showing that visitation is necessary to protect the child from harm[93] In one case, a grandfather who saw his grandchildren several times a month nevertheless failed to establish a "significant preexisting relationship" with the children, and because he could not show that visitation was necessary to protect the children from harm, he was denied visitation rights.[94]

V. Michigan

Michigan exempts most "intact" families from intrusion by grandparent visitation petitions, unless the grandparent was the custodian of the child within the preceding twelve months.[95] However, even non-intact families can fully overcome a petition for grandparent visitation if both parents are fit and submit affidavits stating that they are against the visitation.[96] This irrebuttable presumption is a clever way to solve the problem of non-traditional families who

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[87] Amendment Notes, ME. STAT. tit. 19-A, § 1803 (LEXIS through 2019 2d. Sess.).
[88] MD. CODE ANN., FAM. LAW § 9-102 (West, Westlaw through 2020 Sess.).
[89] *See* Koshko v. Haining, 921 A.2d 171, 192 (Md. 2007).
[90] *See* MASS. GEN. LAWS ANN. ch. 119, § 39D (West, Westlaw through Ch. 113 of 2020 2d. Sess.).
[91] *Id.* § 39D.
[92] *Id.* § 39D.
[93] *See* Dearborn v. Deausault, 808 N.E.2d 1253, 1256 (Mass. App. Ct. 2004).
[94] *Id.*
[95] MICH. COMP. LAWS ANN. § 722.27b(1)(f) (West, Westlaw through P.A. 2020, No. 164).
[96] *Id.* § 722.27b(5).

agree that grandparent visitation is not in the best interests of their children for whatever reason, but who would otherwise be vulnerable to intrusion based on their marital or relationship status.

W. Minnesota

Minnesota allows the parents of a deceased parent to petition for visitation with their grandchild, and also allows grandparents to intervene in ongoing custody, legal separation, annulment, parentage, or divorce proceedings.[97] Because grandparents may only petition for visitation in these limited circumstances, this statute actually protects unmarried parents who are living together and separated parents who may not require the assistance of the courts to determine the support of their children from invasion by grandparent visitation petitions.

The Minnesota statute places the burden of proving that visitation would interfere with the parent-child relationship on the parent; however, this has been declared unconstitutional by the Minnesota Supreme Court.[98] In *Soohoo v. Johnson*, when a lesbian couple who had raised two children together separated, the parent who had no legal rights to the child requested visitation under Minnesota's third-party visitation statute.[99] The Minnesota Supreme Court ultimately held that visitation was proper because the petitioner had been acting as a parent to the child, but in the process invalidated the portion of the statute which placed the burden of proof on the parent to show that this was not the case.[100]

X. Mississippi

In Mississippi, a grandparent can petition to intervene in an existing court action regarding custody of the grandchild, if the grandparent's child is deceased, or if the grandparent can prove that a "viable relationship" exists between the grandparent and grandchild and visitation is in the child's best interests.[101] Interestingly, a "viable relationship" in Mississippi is defined in the statute as existing when either the grandparent voluntarily and in good faith financially supports the child for at least six months, the grandparents have had frequent visitation with occasional overnight visitation with the child for at least one year, or the grandparent has cared for the child for a significant period of time due to the absence of a parent from the home while in jail or on military duty.[102]

Y. Missouri

Missouri allows visitation petitions from grandparents who have been "unreasonably denied" visitation for more than sixty days upon: dissolution of the parents' marriage, the death of one parent, or when the child has lived with the grandparent "for at least six months within the twenty-four month period immediately preceding the filing."[103] However, Missouri specifically exempts married natural parents who are living together from a petition for visitation from

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[97] MINN. STAT. ANN. § 257C.08(1)-(2) (West, Westlaw through 2020 Sess.).
[98] *Id.* § 257C.08(7), *invalidated by* Soohoo v. Johnson, 731 N.W.2d 815, 824 (Minn. 2007).
[99] *Soohoo*, 731 N.W.2d at 818-19.
[100] *Id.* at 824-26.
[101] MISS. CODE. ANN. § 93-16-3(1)-(2) (West, Westlaw through 2020 Sess.).
[102] *Id.* § 93-16-3(3).
[103] MO. ANN. STAT. § 452.402(1) (West, Westlaw through West ID No. 28 of 2020 Sess.).

grandparents.[104] The combined effect of these statutes is that grandparents can intervene and obtain visitation only when there is a break in the nuclear family, including a break in the custody and care of the child.

Missouri allows paternal grandparents to petition for visitation even if their children have not established paternity. This is an interesting rule because conceivably, a mother would have to allow a grandparent into her child's life even if the child's father does not acknowledge that he is the child's father. In the case of *Matter of C--- E--- R---*, the child's father did not acknowledge paternity, visit with the child, nor pay child support, yet the father's mother was still able to establish standing as a grandparent to obtain visitation with the grandchild.[105]

Z. Montana

Parental fitness is the main focus of Montana's grandparent visitation statute. Before the court can consider the grandparent's visitation petition, it must first hold a hearing to determine whether the parent is fit and, if the grandparent proves by clear and convincing evidence that the parent is unfit, the court considers the best interests of the child in determining whether visitation is appropriate.[106] If the parent is fit, there is a rebuttable presumption that the parent's wishes are in the best interests of the child, which must be rebutted with clear and convincing evidence for visitation to be granted.[107] Montana also makes it clear that a determination of parental unfitness in a grandparent's visitation proceeding does not automatically have an effect on the rights of the parent, "unless otherwise ordered by the court."[108] This is logical because if a parent is truly unfit, visitation with the grandparent will likely not be enough to protect the child's best interests. However, it is possible that an unfit parent has enough support or assistance to care for her child, so her rights should not automatically be affected without further evidence.

AA. Nebraska

In Nebraska, as in some other states, "intact" families are exempt from intrusion by grandparent visitation petitions.[109] Before visitation can be ordered, Nebraska requires that there be a showing of a "significant beneficial relationship" between the grandparent and grandchild, or that there has been one in the past.[110] Nebraska's statute makes clear that the intention of the statute is to *continue* a beneficial relationship between the child and grandparent, not to create one where none had previously existed.[111] This is a reasonable way of focusing the analysis not on the rights of the grandparent or the rights of the parent, but the right of the child herself to preservation of strong, beneficial emotional bonds unless there is good cause to break them.. However, exempting "intact" families from intrusion is still somewhat problematic. Because Nebraska allows grandparent visitation petitions if the parents of the child are not married, but without a requirement that the parents not cohabitate or co-parent their child, parents who do not wish to marry are vulnerable in a way that married parents are not.

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[104] *Id.* § 452.402(1).
[105] *Id.* at 424-25.
[106] MONT. CODE ANN. § 40-9-102(3) (West, Westlaw through 2019 Sess.).
[107] *Id.* § 40-9-102(4).
[108] *Id.* § 40-9-102(9).
[109] NEB. REV. STAT. ANN. § 43-1802(2) (West, Westlaw through Oct. 1, 2020).
[110] *Id.* § 43-1802(2).
[111] *Id.* § 43-1802(2).

BB. Nevada

In Nevada, any person who has resided with and "has established a meaningful relationship" with a child may petition for visitation rights, "regardless of whether the person is related to the child."[112] Grandparents and siblings of children can petition for visitation without making a showing of living with and having a meaningful relationship with the child if one of the child's parents is deceased, if the parents are separated or divorced, if the parents were never married, or if one of the parent's rights have been terminated.[113] The concept of allowing any person who has lived with and has a meaningful relationship with a child to petition for visitation with the child is reasonable when viewed as a way of continuing important bonds that the child has developed with a loved one, regardless of shared DNA. This standard for visitation may benefit relationships traditionally unprotected by the legal system, such as LGBTQIA+ relationships in which the individuals living with and raising a child may not have legal rights, but still have strong bonds with the child. While grandparents and siblings are certainly favored in Nevada because they can file for visitation without even having a meaningful relationship with the child, the idea that other people should have access to a child in order to continue meaningful, beneficial relationships with that child should certainly be encouraged.

CC. New Hampshire

New Hampshire's grandparent visitation statute allows petitions for visitation if the "nuclear family" is absent for some reason.[114] However, New Hampshire carves out a unique exception to this rule: grandparent visitation will not be entertained "where access by the grandparent or grandparents to the minor child has been restricted for any reason prior to or contemporaneous with the divorce, death, relinquishment or termination of parental rights, or other cause of the absence of a nuclear family."[115] This is an interesting exception because it contemplates situations in which a parent who restricts a grandparent's access to her child prior to a divorce will not then be forced to allow access after a divorce. For parents who have problematic relationships with their own families, this is an excellent rule because it means that boundaries agreed to by both parents for their children before divorce will be able to continue afterwards.

DD. New Jersey

New Jersey's grandparent visitation statute opens visitation to any grandparent or sibling of a child upon a finding that such visitation would be in the best interests of the child.[116] New Jersey courts recognize that litigation itself is a strain on parents and therefore "a grandparent's statutory right to hale a parent into court must be carefully circumscribed, particularly where . . . the parent's fitness is not disputed."[117]

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[112] NEV. REV. STAT. ANN. § 125C.050(2) (West, Westlaw through 2020 Special Sess.).
[113] *Id.* § 125C.050(1).
[114] N.H. REV. STAT. ANN. § 461-A:13(I), (III) (Westlaw through 2020 Sess.).
[115] *Id.* § 461-A:13(I).
[116] N.J. STAT. ANN. § 9:2-7.1(a) (West, Westlaw through L.2020, c. 109 and J.R. No. 2).
[117] Wilde v. Wilde, 775 A.2d 535, 545 (N.J. Super. Ct. App. Div. 2001).

In *Wilde*, the paternal grandparents of two children sued the children's mother for visitation a mere five months after the children's father died by suicide in front of her.[118] The grandparents had repeatedly visited the children without the mother's consent at the children's school, and directed their attorney to send the mother a threatening letter after she denied them a single proposed visit.[119] In addition, the grandfather submitted several unfounded and slanderous certifications to the court, including an allegation that the mother caused the father's suicide due to her reckless shopping habits.[120] At the trial court level, a court-ordered therapist testified that if visitation was ordered, the mother would require intensive therapeutic mediation because exposure to the grandparents was likely to be very upsetting for her.[121] The Superior Court held that the grandparent visitation statute was unconstitutional as applied, ruling that in a situation where the grandparents have acted with such hostility and without attempting gentler methods to gain visitation after a single rebuffed visit, the grandparents do not have standing to sue for visitation.[122]

EE. New Mexico

New Mexico exempts "intact" families from grandparent visitation petitions and applies similar standards as many other states in determining the best interests of the child.[123] However, in cases where visitation is not in the best interests of the child, the court has jurisdiction to order "other reasonable contact between the grandparent and the child," such as "regular communication by telephone."[124]

In *Williams v. Williams,* grandparents who had participated in the raising of their grandchild and had court-ordered visitation were nevertheless denied visitation by the father, who moved from New Mexico to Georgia and would not inform the grandparents of the location of the child.[125] The trial court ordered that the father transport the child to Texarkana, Texas, to participate in visitation with his grandparents.[126] However, the father refused, stating that the burden was too high on him and arguing that *Troxel* dictated that his wishes regarding contact with the grandparents should be respected.[127] The New Mexico Court of Appeals disagreed, reminding the father that there had been significant concerns regarding his ability to parent at the trial court level and that the father created the travel burden by moving to Georgia.[128]

FF. New York

In New York, grandparents can petition for visitation if one or both of the parents of the grandchild are deceased, or if "circumstances show that conditions exist which equity would see fit to intervene."[129] In cases where there is animosity between the parents and the grandparents,

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[118] *Id.* at 540-41.
[119] *Id.*
[120] *Id.* at 541-42.
[121] *Id.* at 542.
[122] *Id.* at 546.
[123] N.M. STAT. ANN. § 40-9-2 (West, Westlaw through 2020 2d. Sess.).
[124] *Id.* § 40-9-2(I).
[125] Williams v. Williams, 50 P.3d 194, 196 (N.M. Ct. App. 2002).
[126] *Id.*
[127] *Id.* at 196-97.
[128] *Id* at 199-200.
[129] N.Y. DOM. REL. LAW § 72 (McKinney, Westlaw through L.2020, ch. 1-250).

New York courts can review determinations made by forensic evaluators regarding the source of the animosity.[130] For example, in *Mastronardi v. Milano-Granito*, the trial court deferred to the judgment of a forensic evaluator, who determined that the grandparents were not responsible for the animosity between the grandparents and parents.[131] Therefore, the court found that the animosity alone was insufficient to deny visitation.[132]

GG. North Carolina

North Carolina's grandparent visitation statute is quite limited. Grandparent visitation can only be ordered as a part of a pre-existing custody suit, and only "where a substantial relationship exists between the grandparent and child."[133] In 2017, a bill was introduced in the North Carolina legislature that would have vastly expanded this statute by allowing grandparents to institute actions for visitation without an open custody case, but it died in committee.[134]

HH. North Dakota

In North Dakota, a nonparent can petition for visitation if the nonparent has been a "consistent caretaker" of the child, or if the nonparent "has a substantial relationship with the child," the termination of which "would result in harm to the child."[135] Being a consistent caretaker requires, among other things, that the nonparent care for the child without expectation of payment, which prevents people like nannies or babysitters from vying for visitation with children.[136]

II. Ohio

Ohio's statutory law only allows grandparent visitation in situations when there is an active custody case, when the mother of the child was unmarried at the time of the child's birth, or when one of the parents is deceased.[137] However, Ohio's Court of Appeals held that section 3109.12 was unconstitutional as applied in a case where an unmarried couple had a child and later married.[138] The court in *Santos* reasoned that there was no rational reason for differentiating between married parents based on when they married, and therefore the statute was found unconstitutional.[139]

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[130] Mastronardi v. Milano-Granito, 72 N.Y.S.3d 152, 154 (N.Y. App. Div. 2018).
[131] *Id.*
[132] *Id.*
[133] N.C. GEN. STAT. ANN. § 50-13.2(b1) (West, Westlaw through 2019 Sess.).
[134] Expand Grandparent Visitation Rights, H.B. 505, 2017 Gen. Assemb. (N.C. 2017), https://webservices.ncleg.gov/ViewBillDocument/2017/2072/0/DRH10157-LU-75.
[135] N.D. CENT. CODE ANN. §14-09.4-03(1) (West, Westlaw through Jan. 1, 2020).
[136] *Id.* §14-09.4-03(2).
[137] OHIO REV. CODE ANN. §§ 3109.051, 3109.11, 3109.12 (West, Westlaw through File 56 of 2019-2020 Sess.).
[138] Santos v. Parks, 105 N.E.3d 1283, 1287-88 (Ohio Ct. App. 2018).
[139] *Id.* at 1287.

JJ. Oklahoma

Oklahoma exempts "intact" families from intrusion by grandparent visitation petitions.[140] Oklahoma's Supreme Court has held that to grant grandparent visitation for non-intact families with fit parents, there must be a showing of harm to the child if visitation is not commenced.[141] In *Neal v. Lee,* a grandparent was granted visitation with her grandchild at the trial court level against the mother's wishes.[142] The Oklahoma Supreme Court applied *Troxel* and found that because there had been no allegation of harm or unfitness, the mother's choice to deny visitation was constitutionally protected and the grandmother could not succeed in petitioning for visitation.[143] Interestingly, the court determined that remand would not be in anyone's best interests due to the financial strain of litigation on the parents of the child and therefore simply granted the mother's motion to terminate visitation without remanding the matter to the trial court.[144]

KK. Oregon

In Oregon, any person who has "established emotional ties" to a child or has an "ongoing personal relationship with a child" may petition for visitation.[145] Oregon courts are directed by statute to consider several factors when determining whether the *Troxel* presumption has been overcome, such as whether the parent has fostered and encouraged the relationship between the child and the petitioner.[146] However, the statute is silent on whether fostering of this relationship is a positive or negative factor when it comes to overcoming the *Troxel* presumption.[147]

Oregon courts have clarified this issue, holding that evidence showing the parent previously fostered a relationship indicates that, at least at one point, the parent approved of the relationship and encouraged it.[148] This evidence can be used to argue that a parent's objection to visitation is not due to a legitimate concern about the petitioner, but due to some interpersonal issues that have no bearing on a child's best interests.[149] While it is unclear from the statute and its application in the courts whether this is always the conclusion to be made, it is reasonable to assume that if the parent presents some evidence as to why his or her mind has changed regarding the nonparent, the court would consider that evidence when making its determination.

LL. Pennsylvania

In Pennsylvania, a grandparent or great-grandparent may petition for visitation (referred to as "partial physical custody") of a child whose parent is deceased or who has lived with his or her grandparents or great-grandparents for a period of at least twelve consecutive months.[150] They may also petition when there is an open custody case, the child has a preexisting relationship with the

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[140] OKLA. STAT. ANN. tit. 43, § 109.4(B) (West, Westlaw through ch. 5 of 2020 2d. Sess.).
[141] Neal v. Lee, 14 P.3d 547, 550 (Okla. 2000).
[142] *Id.* at 548-49.
[143] *Id.* at 550.
[144] *Id.* at 551.
[145] OR. REV. STAT. ANN. § 109.119(3)(b) (West, Westlaw through 2020 Reg. Sess.).
[146] *Id.* § 109.119(4).
[147] *See id.* § 109.119.
[148] *In re* Marriage of Southard, 365 P.3d 1089, 1097 (Or. Ct. App. 2015).
[149] *Id.* at 1096-97.
[150] 23 PA. STAT. AND CONS. STAT. ANN. § 5325 (West, Westlaw through 2020 Sess. Act 78).

grandparents or great-grandparents, and the child's parents do not agree on whether visitation is appropriate.[151] Challenges brought to this statute and its predecessor, the Grandparents Visitation Act, include a suit brought by a widowed father who argued that treating children who have lost a parent differently than children who have living married parents is a violation of the Equal Protection Clause.[152] In *Fausey v. Hiller,* the court reasoned that treating these children differently does not violate equal protection because it is for the "justified and reasonable purpose of protecting a child's emotional well-being and accounting for the different needs of a child whose parent has died."[153] *Fausey* is a flawed test case for this argument, because the child at issue had a loving and involved relationship with his grandmother, and the court found that the child received emotional support from his grandmother regarding the death of his mother.[154] A court may rule differently in a case in which a grandparent petitions for visitation with a child whose parent has been deceased for some years, because the need for emotional support from a specific grandparent may be less acute or even unnecessary for a child as years go by.

MM. Rhode Island

In Rhode Island, a grandparent whose child is deceased may petition for visitation with her grandchild.[155] A grandparent may also intervene in a divorce proceeding to petition for visitation with her grandchild.[156] Finally, a grandparent can petition for visitation if the grandparent has repeatedly attempted to visit and has been denied a visit with her grandchild for the thirty-day period immediately preceding when the petition is filed.[157] This means that grandparents cannot petition for visitation without a death or divorce if they cannot provide proof of recent repeatedly rebuffed visitation attempts.

NN. South Carolina

To grant grandparent visitation, South Carolina requires a finding that "awarding grandparent visitation would not interfere with the parent-child relationship."[158] However, the case law on what constitutes interference with the parent-child relationship is extremely limited, providing family court judges very little guidance on recognizing interference. In *Grantham v. Weatherford*, grandparents publicly blamed the death of their daughter on the father of their grandchildren, but the Court of Appeals still found that they could be granted visitation in part because they promised to respect the father's parenting.[159] It is clearly foreseeable that the parties in this case may have to return to court if the grandparent and father disagree again about the nebulous issue of whether the grandparent is respecting the father's parenting.

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[151] *Id.* § 5325.
[152] Fausey v. Hiller, 851 A.2d 193, 194-95 (Pa. Super. Ct. 2004), *aff'd*, 904 A.2d 875 (Pa. 2006).
[153] *Id.* at 198.
[154] *Id.* at 199.
[155] 15 R.I. GEN. LAWS ANN. § 15-5-24.1 (West, Westlaw through Ch. 79 of 2020 2d. Sess.).
[156] *Id.* § 15-5-24.2.
[157] *Id.* § 15-5-24.3.
[158] S.C. CODE ANN. § 63-3-530(A)(33) (Westlaw through 2020).
[159] Grantham v. Weatherford, 819 S.E.2d 765, 766, 768 (S.C. Ct. App. 2018).

OO. South Dakota

In South Dakota, a grandparent or great-grandparent can obtain visitation with or without a petition if the visitation is in the best interests of the child, if visitation will not interfere with the parent-child relationship, or if the parents have "denied or prevented the grandparent a reasonable opportunity to visit the grandchild."[160] Consistent with *Troxel,* South Dakota courts must give deference to a fit parent's wishes regarding her child. For example, in *Medearis v. Whiting,* a mother who was raped by the father of her child restricted visitation with her child's paternal grandmother because of the grandmother's abhorrent conduct surrounding her son's arrest and imprisonment for said rape, and because the mother believed that she should be responsible for how her child learned about his father and the circumstances of his incarceration.[161] The trial court gave no deference to the mother's determination of the best interests of her child and granted the grandmother visitation privileges.[162] The South Dakota Supreme Court, however, ultimately held that this was an unconstitutional infringement on the mother's due process rights and reversed that decision.[163] *Medearis* is an excellent example of a good reason a parent may want to deny visitation with grandparents.

PP. Tennessee

Tennessee requires the grandparent seeking visitation to prove that there is "a danger of substantial harm to a child" if visitation is not granted.[164] The loss of a relationship with the grandparent may be proof of this danger if the grandparent establishes that there was an existing substantial relationship between the grandparent and grandchild and that a "loss or severe reduction of the relationship is likely" to cause severe emotional harm, or the "danger of other direct and substantial harm to the child."[165] Alternatively, the grandparent could show that the grandparent was a primary caregiver of the child and reduction of this relationship "could interrupt provision of the daily needs of the child," causing harm to the child.[166] An expert witness is not required to prove that the loss of this substantial relationship would harm the child; courts are instead directed to determine whether a reasonable person would find the act harmful to the child based on the facts of the case.[167]

Unlike many other states, Tennessee courts have taken a stance against the implication that married parents have different rights than single parents and refuse to consider that factor in determining the validity of a visitation petition.[168] For example, in *Ellison v. Ellison*, the previous version of the statute was found unconstitutional because it treated single and married parents differently when determining whether the parent was fit.[169]

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[160] S.D. CODIFIED LAWS § 25-4-52 (Westlaw through 2020 Sess.).
[161] Medearis v. Whiting, 695 N.W.2d 226, 228-29 (S.D. 2005).
[162] *Id.* at 231-32.
[163] *Id.* at 233.
[164] TENN. CODE ANN. § 36-6-306(b)(1) (West, Westlaw through 2020 1st Sess.).
[165] *Id.* § 36-6-306(b)(1)(A)-(B).
[166] *Id.* § 36-6-306(b)(1)(C).
[167] *Id.* § 36-6-306(b)(3).
[168] Ellison v. Ellison, 994 S.W.2d 623, 625 (Tenn. Ct. App. 1998).
[169] *Id.*

QQ. Texas

Texas grandparent visitation rights are strongly based in the derivative rights theory. Texas grandparents can only petition for visitation if their own child is incarcerated, incompetent, dead, or "does not have actual or court-ordered possession of or access to the child."[170] Texas also requires that grandparents prove denying them access to their grandchildren would "significantly impair the child's physical health or emotional well-being."[171] For example, in *In re Kelly*, the trial court was found to have abused its discretion when it granted visitation to grandparents who had only alleged that their grandchild could benefit from visitation, not that the child would be harmed without it.[172] This finding is consistent with the spirit of *Troxel,* which held that a court is not allowed to decide what is best for a child over the objections of her parents as long as the parents are fit.

RR. Utah

Grandparents in Utah can obtain visitation over the wishes of a fit parent if the grandparent establishes they have "filled the role of custodian or caregiver to the grandchild . . . in a manner akin to a parent" and "the loss of this relationship would cause substantial harm to the child."[173] In an instance where a grandparent believes a parent to be unfit, the grandparent must show by clear and convincing evidence that "both parents are unfit or incompetent in a manner that causes potential harm to the grandchild."[174] In *Jones v. Jones,* paternal grandparents were granted visitation with their grandchildren on the basis that the father had died and the mother had restricted visitation with the grandparents.[175] However, visitation was only restricted after the grandparents brought the very young child home late after a visit, and after a series of escalating demands by the grandparents for visitation, including a threat of litigation.[176] The Utah Supreme Court held that the statute was unconstitutional as applied to the facts of the case because there was no factual evidence of harm to the child if visitation was denied, merely evidence that the child may someday benefit from the relationship with her grandparents.[177]

SS. Vermont

Vermont only allows a petition for grandparent visitation in situations in which one of the parents has abandoned the child, is "mentally or physically incapable of making a decision," or has died.[178] The standard for proving unfitness in Vermont is similar to the standard for proving

[170] TEX. FAM. CODE ANN. § 153.433 (West, Westlaw through 2019 Reg. Sess.).
[171] *Id.* § 153.433(b).
[172] *In re* Kelly, 399 S.W.3d 282, 284 (Tex. App. 2012).
[173] UTAH. CODE. ANN. § 30-5-2(3)(a) (West, Westlaw through 2020 6th Special Sess.).
[174] *Id.* § 30-5-2(3)(b).
[175] Jones v. Jones, 307 P.3d 598, 605-06, 608 (Utah Ct. App. 2013), *aff'd,* 359 P.3d 603, 604 (Utah 2015).
[176] *Id.*
[177] *Id.* at 613-14.
[178] VT. STAT. ANN. tit. 15, § 1012 (West, Westlaw through 2019-2020 Sess.).

abuse or neglect, which means that mere benefit to the child is not enough to justify ordering grandparent visitation.[179]

TT. Virginia

Any person with a "legitimate interest" in a child may be granted visitation in Virginia if the visitation is in the best interest of the child.[180] However, when both parents of a child object to visitation, the grandparent must make a showing of harm to the child as a result of denial of visitation prior to the court's "best interest of the child" analysis.[181] In *Williams v. Williams,* two parents decided to "detach" from their relationship with their child's grandparents and deny the grandparents visitation with the child.[182] The grandparents' subsequent petition for visitation was granted by the trial court based on the best interest of the child; however, the appellate court held that because there was never a showing of harm to the child, the trial court could not properly make a best interests determination for visitation.[183]

UU. Washington

Washington passed legislation in 2018 to change the nonparent visitation statute.[184] Under this law, a nonparent can petition for visitation with a child if there is an "ongoing and substantial relationship" between the nonparent and the child, the nonparent is related in some way to the child or the child's parent, and the child will likely "suffer harm or a substantial risk of harm if visitation is denied."[185]

VV. West Virginia

West Virginia has enacted an extremely comprehensive set of statutes regarding grandparent visitation rights.[186] West Virginia sets forth twelve specific factors that courts must consider when determining whether it is proper for a grandparent to have visitation with a grandchild, but also allows the courts to consider any other relevant evidence to the issue.[187] When there is an ongoing action concerning custody of the child, grandparents may be granted visitation if the party to which the grandparent is related has not responded or defended the action, or is missing.[188] If the action is brought outside the bounds of an existing custody-related action, the grandparent can be granted visitation if the related parent does not have custody or visitation with the child and the grandparent shows by "a preponderance of the evidence that visitation is in the

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[179] *See* Craven v. McCrillis, 868 A.2d 740, 743 (Vt. 2005) (where a grandparent of a child who complained of boredom and general unhappiness was not granted visitation because she did not prove unfitness of the parent or harm to the child if visitation was not granted).
[180] VA. CODE ANN. § 20-124.2(B) (West, Westlaw through 2020 Sess.).
[181] *See* Williams v. Williams, 485 S.E.2d 651, 654 (Va. Ct. App. 1997), *aff'd as modified*, 501 S.E.2d 417 (Va. 1998).
[182] *Id.* at 652.
[183] *Id.* at 652, 654.
[184] S.B. 5598, 65th Leg., 2018 Reg. Sess. (Wash. 2018), https://legiscan.com/WA/text/SB5598/2017.
[185] WASH. REV. CODE ANN. § 26.11.020 (West, Westlaw through 2020 Sess.).
[186] W. VA. CODE ANN. §§ 48-10-101 to 48-10-1201 (West, Westlaw through 2020 Sess.).
[187] *Id.* § 48-10-502.
[188] *Id.* § 48-10-701.

best interest of the child."[189] If the related parent has custody of the child, visitation will not be granted unless there is clear and convincing evidence that visitation is in the best interest of the child.[190]

WW. Wisconsin

Wisconsin restricts grandparent and stepparent visitation only to cases in which the child at issue has one or more deceased parents.[191] In cases where some visitation has been offered but that visitation is not satisfactory to the nonparent, the parent's wishes concerning the nature and frequency of the visitation are presumed to be in the child's best interests, as held under *Troxel*.[192] This presumption, however, is rebuttable.[193] For example, in one case in which a parent offered supervised visitation to grandparents, the trial court found, and the appellate court concurred, that the grandparents had successfully rebutted the presumption that supervised visitation was in the best interests of the child and thus allowed unsupervised visitation.[194]

XX. Wyoming

In Wyoming, grandparents can petition to gain visitation with their grandchildren at any time.[195] Wyoming also requires that the rights of parents not be substantially impaired by an order of visitation, which could open the door for parents in Wyoming to attempt to claim that financial or other reasons are good enough to deny visitation to grandparents.[196]

IV. CONCLUSION

The practical results of *Troxel*'s litigation and ultimate ruling were not positive for the Troxels. In an interview immediately after the ruling, Tommie Granville indicated that although she initially allowed some visitation with the Troxels, she may not allow any visitation after the ordeal of the lawsuit.[197] Tommie stated that defending the lawsuit was a "huge waste of time, money, and emotion."[198] This result should not be ignored by grandparents wishing to have a positive relationship with their grandchildren. As Justice O'Connor wrote in the Court's opinion, litigation itself is a burden on parents, [199] and while approaching the courts for help in exercising a legal right should never be discouraged, grandparents should think long and hard about whether this adversarial action is the right approach to obtaining or maintaining a relationship with their grandchildren.

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[189] *Id.* § 48-10-702.
[190] *Id.* § 48-10-702.
[191] WIS. STAT. ANN. § 48.9795 (West, Westlaw through 2019 Act 186).
[192] *In re* Nicholas L., 731 N.W.2d 288, 290 (Wis. Ct. App. 2007).
[193] *Id.*
[194] *Id.* at 293-94.
[195] WYO. STAT. ANN. § 20-7-101(a) (West, Westlaw through 2020 Sess.).
[196] *Id.* § 20-7-101(a).
[197] Timothy Egan, *After Seven Years, Couple Is Defeated*, NY TIMES (June 6, 2000), https://www.nytimes.com/2000/06/06/us/after-seven-years-couple-is-defeated.html.
[198] *Id.*
[199] Troxel v. Granville, 530 U.S. 57, 75 (2000).

States should also be aware that constitutional challenges to statutes that only allow grandparents to intrude upon intact families may occur and ultimately succeed. Tennessee's stance on differentiating between the rights of single and married parents could spread, causing many other states' grandparent visitation statutes to be invalidated.[200] States should be prepared for constitutional attacks on "non-traditional families" in an age where marriage is increasingly unpopular. Public opinion on the benefits of the so-called "nuclear family" is vastly different than it used to be.

Finally, states should be aware that even though there is an aging population of baby boomer and Generation X grandparents with financial resources to which millennial parents may not have access, these parents still have the right to decide what is best for their children. Statutes that allow grandparents to invade the lives of parents through a petition for visitation should also ensure that there are barriers preventing unnecessary invasions into family life. As Justice O'Connor recognized in *Troxel,* litigation is no picnic, and it does a disservice to parents and children to allow unfettered and baseless petitions.

[200] *See* discussion *supra* at Tennessee.