



Grandparent Visitation Law Back On The Books

Provides Recourse When Visitation Is Denied

By Todd C. Berg

Grandparents who have been denied visitation with their grandchildren can once again turn to the courts for help in their efforts to reunite.

According to the recently reenacted grandparenting statute, grandparents may, under certain, limited circumstances, be permitted "grandparenting time" with their grandchildren where it has otherwise been denied by the grandchildren's parents.

Under the new law — Public Act 542 of 2004 which amends Sect. 722.27b of the Child Custody Act — before a grandparenting order can be entered, the grandparent must prove by a preponderance of the evidence that visitation is in the child's best interests and that denial of visitation may harm the child's health.

Dubbed the "grandparent visitation bill," the new law is widely viewed as the Legislature's response to *DeRose v. DeRose*, where the Michigan Supreme Court, in a 6-1 decision, struck down the state's previous grandparenting statute that had been in effect since 1982.

Sen. Alan Sanborn, R-Richmond, who sponsored Senate Bill 727, which would ultimately become Public Act 542, explained that even though the parent-child relationship is paramount, grandparents can and should play a prominent role in children's lives.

"To deprive a grandchild of the opportunity to bond with his or her grandparents is an incredible hardship, not just to the grandparents, but to the grandchild as well," Sanborn stated. "Grandparents are a tremendously stabilizing influence, sometimes the best thing a kid's got going on in his or her life."

Bloomfield Hills attorney and founder of the national Grandparent Rights Organization Richard S. Victor agreed, and praised the new grandparenting time law for its protection of the vital relationship that exists between grandchild and grandparent.

"It has everything to do with children's rights to have a relationship with their grandparents," Victor declared. "Grandparents offer unconditional love to a child. They can provide the child with the stability and security they need to lead healthy and happy lives."

But Rochester attorney Elizabeth A. Sadowski, past chair of the State Bar's Family Law Section, said she still has doubts about the need for and propriety of a grandparenting law.

"Parents are perfectly capable of making decisions as to whom their children should associate with without having to have a law directing them as to when and how grandparents can see their grandchildren," Sadowski observed.

Protection For Parents

Although grandparent visitation has been criticized for interfering with parents' rights to raise their children and make decisions about whom they will visit, Victor — a driving force behind the

grandparent visitation bill and a champion of grandparents' rights for 30 years — stressed that the new statute provides ample protection for parents' rights.

"If you have an intact family, then the law does not apply," he explained. "Only when there is a death, divorce or a birth out of wedlock does the law apply."

Moreover, he noted that when two fit parents — married, divorced, or never married — decide to deny visitation, the grandparent won't even be able to get his or her case into court.

Rep. Edward Gaffney, R-Grosse Pointe, a member of the SB 727 conference committee and sponsor of House Bill 5039 which initially proposed reenactment of the grandparenting statute but was later incorporated into SB 727 — agreed, adding that not only are there the limits mentioned by Victor, but grandparents now have a burden of proof they did not have under the old statute which they must overcome before the court can order visitation.

"Grandparents must prove by a preponderance of the evidence that it's in the best interests — mentally, physically, and emotionally — of the child that they see their grandparents," Gaffney stated. "To me, that's fair because there should be standards. They shouldn't automatically have a right to visitation."

According to Victor, Michigan's statute goes far beyond what either the Michigan Supreme Court in *DeRose* or the U.S. Supreme Court in *Troxel v. Granville* said was necessary to protect parents' constitutional rights.

"By requiring grandparents to prove that the parent's decision about visitation creates a risk of harm to the child's mental, physical or emotional health, the Legislature is holding them to a higher burden than either *DeRose* or *Troxel* required," he asserted.

Burden Of Proof

Rep. Jim Howell, R-St. Charles, a member of the SB 727 conference committee and past chair of the House Judiciary Committee, said the burden of proof was a hot topic within the committee and may have been the principal obstacle that kept the law from being presented sooner to the House and Senate, where it was ultimately approved without objection from either house.

"There were some who felt very strongly about using the 'clear and convincing' standard, but a majority of us felt that 'clear and convincing' would make the burden impossible to meet," Howell recalled. "You would never see [a grandparenting time petition] granted. It would be an illusory right."

The representative, who was term-limited out last session, explained that even though the conference committee had reached an impasse on the burden of proof issue, they were eventually able to find common ground.

"In the end, the compromise was that the burden of proof would be preponderance of the evidence, but there would also be a 'substantial risk of harm' standard," Howell stated.

Sanborn, who initially favored the 'clear and convincing' burden, emphasized that the committee's compromise bill contained one additional twist.

"We have a fallback provision so that if the Supreme Court determines that 'preponderance' is not enough to satisfy the constitution, then the burden would move up to 'clear and convincing,' he

said. "That's a nice feature we put into the compromise so as to almost ensure that the Supreme Court will be satisfied."

According to the "fallback provision," if an appellate court determines that "preponderance of the evidence" is unconstitutional, then "a grandparent filing a complaint or motion under this section must prove by clear and convincing evidence that the parent's decision to deny grandparenting time creates a substantial risk of harm to the child's mental, physical, or emotional health"

Sadowski said she thinks it will be put to the test.

"This is a constitutional relationship that the court is being asked to invade," she stated. "I don't think one can do that on a mere preponderance. I think it's going to take the 'clear and convincing' burden of proof."

Nevertheless, Sadowski praised the Legislature for its inclusion of the "substantial risk of harm" standard, adding that "without it, it would have been a terrible bill."

Mills agreed that a constitutional challenge would not come as a surprise.

"I think it could very easily be a successful challenge," he ventured. "That's probably why the [fallback provision] is in there."

Open The Floodgates?

But given the hurdles grandparents face under the new statute, Mills said he does not expect a flood of litigation anytime soon.

"They have to prove somehow that the child is being harmed by not seeing the grandparent," Mills said. "You can't just go into court and say, 'My grandson is being harmed because I can't see him.' You've got to have more than that, which means probably employing experts and psychologists, getting examinations done and reports made — and all that tends to be expensive. I think expense will tend to hold down litigation."

Victor agreed there would be no flood of new litigation, but for different reasons.

"Statutes like this don't create new lawsuits," he explained. "What they do create is the right to bring them, which means you can force people to talk. The threat of litigation gets people to talk. It gets them to the table."

Victor even went as far as to suggest that attorneys actually litigating a grandparent visitation case may have already "lost."

"The last place these things will be resolved is in a court or in a trial," Victor declared. "In 30 years, I've tried 10 — maybe not even 10 cases — but I have handled thousands. You don't try these cases. You settle them and you reunite families."

'Grandparenting Time' Revisited

Under the new statute, grandparents have standing to request a grandparenting order when:

- * the grandchild's parents have a pending divorce case or have been divorced;

- * the grandchild's "parent who is a child of the grandparents is deceased";
- * the grandchild's parents were never married but paternity has been established;
- * the grandchild is in the legal custody of someone other than his or her parent; and
- * during the past year, the grandparent has provided "an established custodial environment" for the grandchild.

Standing under the old statute arose only with the death of the child's parent or during the time that a custody dispute involving the child was pending.

Once standing has been established, in order to overcome a fit parent's decision to deny visitation, the grandparent must establish by a preponderance of the evidence that denial of visitation with their grandchild "creates a substantial risk of harm to the child's mental, physical, or emotional health."

Finally, the grandparents must convince the court that a grandparenting order is in the best interests of the grandchild.

Origins of the new statute can be traced back to the Supreme Court's *DeRose* decision in 2003 where the court — based on precedent from the U.S. Supreme Court in *Troxel v. Granville* — struck down Michigan's previous grandparenting statute for allowing courts to order grandparent visitation on the basis of nothing more than a "best interests" finding.

Justice Clifford Taylor wrote that Michigan's statute was constitutionally deficient because "it fail[ed] to require that a trial court accord deference to the decisions of fit parents regarding grandparent visitation."

In her concurrence, Justice Elizabeth Weaver fleshed out what she thought might amount to constitutionally sufficient "deference" by suggesting that the Legislature revise its grandparent visitation statute to: (1) include "a presumption that fit parents act in the best interests of their children"; (2) afford "special weight" to a parent's decision regarding visitation; and (3) place the burden of proof on the grandparents.