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# Counter-Revolution in Grandparent Visitation Rules

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## *PERSPECTIVE; Counter-Revolution in Grandparent Visitation Rules; News*

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### **Body**

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#### **News**

#### ***Counter-Revolution in Grandparent Visitation Rules***

Courts across the nation are engaged in a thorough reconsideration of grandparent visitation laws, sharply curtailing them or, in some cases, simply ruling them unconstitutional.

At common law, grandparents had no rights to visitation. Beginning in the 1960s, New York and ultimately all 50 states adopted some form of grandparent visitation law. While some saw this as evidence of humanitarian lawmaking, others saw it as a victory of extensive lobbying by the AARP and other groups determined to create new entitlements for an older generation of voters. These rights came at the expense of a large but diverse and unorganized group of citizens known as parents.

The new rights often hinged on some variant of the best interests of the child test. This highly contestable standard spawned a kind of litigation that was far from humanitarian. Consider, for example, the recent New Jersey case of *Wilde v. Wilde*. Within months after their son committed suicide by shooting himself with a handgun in front of his wife, the man's parents sued their daughter-in-law for visitation with the

couple's child. In court papers the paternal grandparents called the wife a vicious, greedy, vindictive liar and claimed that her spendthrift ways caused her husband to overwork, implying she was partly responsible for his suicide. The grandparents' attack included questioning the wife's mental stability and her mothering ability. Court ordered psychological evaluation produced no evidence that showed her to be unfit in any way. The bitter case finally ended when the Appellate Division ruled that the statute, as applied in such circumstances, violated the mother's fundamental right to raise her child as she saw fit.

In June 2000, in *Troxel v. Granville*, the U.S. Supreme Court confronted one of the nation's most sweeping visitation statutes, enacted by the state of Washington. It allowed any person to seek visitation with a child at any time, if it would be in the best interest of the child. Tommie Granville, a mother of two whose husband, Brad, committed suicide, allowed Brad's parents to continue seeing the children after the suicide, but not as frequently as they wanted. Dissatisfied, the Troxels sued Tommie, pursuing their claim through years of litigation to the Supreme Court.

Despite the often controversial nature of the substantive due process doctrine, a clear majority of the justices agreed that parents have a due process liberty right to the care, custody and control of their own children. The justices found the state statute as applied in the *Troxel* case was unconstitutional, because the state trial judge had simply substituted his own judgment about what was best for the child for that of the admittedly fit mother.

On the key issue of when a state can justifiably infringe on the parent's right to decide with whom the child associates, the plurality would only say that the state must presume parents are acting in the best interests of their children and give parental decisions special weight.

The *Troxel* decision left unanswered several important questions. Must states use strict scrutiny in judging the constitutionality of statutory infringements on parental freedom? How strong is the presumption favoring parental decision-making, and what sort of evidence is sufficient to overcome it? Can states override parental decisions on visitation only to prevent significant harm to the child?

Some state supreme courts have answered these questions, both before and after the *Troxel* decision. High courts of Illinois, Connecticut, Georgia, Oklahoma, Florida and Tennessee have held that to avoid

infringement of parental constitutional rights, grandparents must prove that denying visitation would cause substantial harm to the child. The courts have applied strict scrutiny to ensure that visitation rules are narrowly tailored to serve a compelling state interest. Connecticut added its own requirement that harm to the child be proved by clear and convincing evidence.

States have been sensitive to the notion, articulated best in Justice Anthony M. Kennedy's dissent in the Troxel case, that litigation itself can constitute state intervention that is so disruptive of the parent-child relationship that the constitutional right of a parent to make certain basic determinations for the child's welfare is implicated. He noted that attorney's fees alone might destroy a single mother's hopes and plans for her child. In a similar vein, Maine's high court cited the expense, stress and pain of visitation litigation as a reason to raise legal barriers to deny standing to grandparents in all but the most urgent cases.

In Troxel, state courts were left to determine whether their own visitation statutes were salvageable by resort to judicial interpretations that rein in overly broad statutory authorizations to impose visitation on fit parents. The New York Court of Appeals needs to revisit the issue, which it addressed in the 1991 case of Emanuel S. v. Joseph E. That decision established relatively low threshold requirements for grandparents to meet, even allowing suits against married parents who were in agreement on their opposition to visitation. The New York statute confers automatic standing on grandparents whose child has died, providing no mechanism to deter these intrusive proceedings or to challenge them at the outset.

The Court of Appeals did not address constitutional concerns in Emanuel S. With the perspective provided by Troxel, and by other state high court decisions, it is imperative that New York take steps to cabin this litigation, with its potential to heighten family tensions, destroy family finances and invade family privacy. In addition to the restrictions noted above, the Court, should it choose to save our overly broad statute, might incorporate a suggestion of the Wilde court - that before starting litigation, grandparents should be obliged to make substantial efforts at repairing the breach in their relations with the parent, making respectful and patient overtures. Further, the litigation itself should be conducted with restraint. In other words, the grandparents must refrain from denouncing, demeaning, and impugning the parent's character.

Or the Court might simply acknowledge that the delicate effort to repair dysfunctional human relationships with the iron club of litigation is so misguided as to violate our own state constitutional protections for parents and their children.

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