

GRANDPARENT RIGHTS – WHAT’S A GOOD PARENT TO DO???

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I. TROXEL vs. GRANVILLE, 530 U.S. 57 (2000)

In *Troxel*, the United States Supreme Court struck down the Washington State grandparents’ visitation statute because the statute (1) was overly broad (“breathhtakingly broad”) and (2) gave no deference to a parent’s wishes for her child.

(a) The statute’s scope was too broad because it permitted “any person” at “any time” to petition for visitation rights.

(b) The lack of deference to the parent’s wishes for her child interfered with the parent’s “due process rights to make decisions concerning the care, custody, and control of [her child].”

- * A parent possesses this fundamental liberty interest, which the Fourteenth Amendment of the Constitution protects. The liberty interest in this case...is perhaps the oldest of the fundamental liberty interests recognized by this Court.
- * “It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.” *Prince v. Massachusetts*, 321 U.S. 158 (1944)
- * A fit parent possesses the right to make decisions relating to the raising of her child, and the Constitution protects that right.
- * There is “a presumption that fit parents act in the best interests of their children ... Accordingly, so long as a parent adequately cares for his or her children (i.e. is fit) there will normally be no reason for the State to inject into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of the parent’s children.”

- * “The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.” *Wisconsin v. Yoder*, 406 U.S. 205 (1972)

(c) Supreme Court found no reason to remand the case for further proceedings in the Washington Supreme Court. (1) Domestic relations litigation is disruptive to the parent-child relationship; (2) The [mother] had already incurred substantial litigation costs.

II. IN THE WAKE OF TROXEL

After *Troxel*, states' grandparents' visitation statutes can be divided into three categories:

- (1) The best interest standard;
- (2) Listed factors for the court to consider; and
- (3) Expressly stating that grandparents must rebut the presumption that a parent acts in the child's best interest.

Alabama's grandparents' visitation statute falls into the third category.

III. §30-3-4.1 GRANDPARENT VISITATION. (Full text attached)

A. HISTORY

The Alabama Supreme Court's opinion in *Ex Parte E.R.G. and D.W.G.*, 73 So. 3d 634 (Ala. 2011) declared the Alabama Grandparent Visitation Act to be unconstitutional.¹ That opinion was issued on June 10, 2011 and just **one day** later

¹ Interesting argument by those challenging statute: "The subject statute is constitutionally infirm because it fails to expressly provide that the parents' decision is presumed to be in the best interest of the children; it violates due process by failing to require a showing of harm to the children as a condition precedent to granting visitation; it gives grandparents a cause of action regardless [of] whether the parents' refusal of

Governor Bentley signed into law Ala. Acts 2011, Act No. 2011-562, which amended the Grandparent Visitation Act (“the new Act”). The new Act became effective September 1, 2011. (See Tripp vs. Owens, Alabama Court of Civil Appeals no. 2120663, March 14, 2014)

The statute explicitly states that a rebuttable presumption exists that the parent with whom the child resides knows what the child’s best interest is, and the statute enumerates several factors to determine the child’s best interest, including the wishes of the living parent.

The statute provides for certain grandparents to file an original action for visitation rights and/or to intervene into existing actions (for custody, divorce, or termination of parental rights) for visitation rights.

NOTE/QUESTION: An assertion of “unfitness” may require a claim for custody rather than visitation. If a grandparent alleges unfitness how can he/she then claim that only visitation rights are sought?

The statute requires that the trial court make specific written findings of fact in support of its ruling. While petitioning grandparent can revisit/petition for visitation rights no more than once every 24 months, the custodial parent can petition for revocation or amendment to the visitation rights “for good cause shown.”

IS IT OR ISN’T IT CONSTITUTIONAL???

As of this date, no appellate decision regarding the Constitutionality of the current grandparent visitation statute.

visitation is reasonable or unreasonable, and the State has no compelling interest in establishing a cause of action for a reasonable parental denial of grandparent visitation and there is no rational relationship between the burden of such provision and any public goal.”
(Randy W. Nichols and Anne Lamkin Durwood of Massey, Stotser & Nichols, P.C.)

(A) In determining whether the act is constitutional, the court is bound by the following presumption:

[I]n passing upon the constitutionality of a legislative act, the courts uniformly approach the question with every presumption and intendment in favor of its validity, and seek to sustain rather than strike down the enactment of a coordinate branch of government. All these principles are embraced in the simple statement that it is the recognized duty of the court to sustain the act unless it is clear beyond reasonable doubt that it is violative of the fundamental law. *Home Indemnity Co. v. Anders*, 459 So.2d 836, 840 (Ala. 1994)

(B) *Tripp v. Owens*: Appeal from Madison County Circuit Court.

Paternal grandparents (son died in automobile accident during pendency of divorce action) sought visitation rights with their grandson via a Petition to the Circuit Court. In advance of any answer or response, the Court dismissed the action citing *Ex Parte E.R.G. and D.W.G.*

On appeal, the Court of Civil Appeals determined that, pursuant to the new Act, the grandparents should have the opportunity to prove that visitation would serve the best interest of the child through an evidentiary hearing, unless the constitutionality of the new Act is duly challenged and the new Act is ruled unconstitutional in accordance with the ordinary rules of civil procedure and applicable statute.

In her Answer, the mother did challenge the constitutionality of the new Act and served notice upon the Attorney General of that challenge as follows:

Copy of Answer via certified mail to:

**The Hon. Luther Strange
Attorney General
501 Washington Avenue
Montgomery, Alabama 36130-0152**

The parties' settled this case in advance of trial.

(C) The Utah Supreme Court stated its statute (in same category as Alabama's statute) was constitutional because the statute (1) explicitly includes the presumption that a fit parent acts in the child's best interest and (2) provides the court with criteria to determine if the grandparent has met circumstances to supersede the parent's decision. *In re Estate of Thurgood*, 144 P.3d 1083 (Utah 2006).

Application of the Utah Supreme Court's rationale may lead to a finding of constitutionality.

(D) However, the statute could be found unconstitutional because it provides that a grandparent may seek visitation rights if the parents have prohibited a relationship between the child and grandparent. See Ala. Code § 30-3-4.1(b)(5). If a parent possesses the fundamental right to make decisions regarding family relationships and child rearing, does it matter if that parent's decision excludes visitation with a grandparent?

(E) The statute could also be unconstitutionally applied if the grandparent does not rebut the presumption, but the trial court awards visitation rights anyway. Is this why the statute requires the trial court make specific written findings of fact in support of its ruling?

IV. OTHER CASES OF NOTE RE: RIGHTS OF PARENTS

1. EX PARTE CHRISTOPHER, 145 So.3d 60 (Ala. 2013)

Although this case is the one that overturned *Bayliss* (college expenses) on the grounds of the definition of "child," rather than on constitutional grounds, Justice Moore's concurrence is replete with citations to the fundamental rights of parents.

2. ***EX PARTE E.R.G. and D.W.G., 73 So.3d 634 (Ala. 2011)***

Noted above as the case that overturned the previous Grandparent Visitation Act. Includes a substantial (opinion is 54 pages in length) discussion of the various fundamental rights of parents.

§ 30-3-4.1. Grandparent visitation.

Alabama Statutes

Title 30. MARITAL AND DOMESTIC RELATIONS

Chapter 3. CHILD CUSTODY AND SUPPORT

Article 1. General Provisions

Current through Act 457, 2014

§ 30-3-4.1. Grandparent visitation

- (a) For the purposes of this section, the term "grandparent" means the parent of a parent of a minor child, including an adopted child, the parent of a minor child's parent who has died, or the parent of a minor child's parent whose parental rights have been terminated when the child has been adopted pursuant to Section 26-10A-27 , 26-10A-28 , or 26-10A-30 , dealing with stepparent and relative adoption.
- (b) Except as otherwise provided in this section, a grandparent may file an original action for visitation rights to a minor child if it is in the best interest of the minor child and one of the following conditions exist:
 - (1) One or both parents of the child are deceased.
 - (2) The marriage of the parents of the child has been dissolved.
 - (3) A parent of the child has abandoned the minor.
 - (4) The child was born out of wedlock.
 - (5) The child is living with one or both biological or adoptive parents, who are still married to each other, whether or not there is a broken relationship between either or both parents of the minor and the grandparent and either or both parents have used their parental authority to prohibit a relationship between the child and the grandparent.
- (c) Any grandparent may intervene in and seek to obtain visitation rights in any action when any court in this state has before it any question concerning the custody of a minor child, a divorce proceeding of the parents or a parent of the minor child, or a termination of the parental rights proceeding of either parent of the minor child, provided the termination of parental rights is for the purpose of adoption pursuant to Sections 26-10A-27 , 26-10A-28 , or 26-10A-30 , dealing with stepparent or relative adoption. If the termination of parental rights is for the purpose of adoption, and the potential adoptive parent or parents are not stepparents or relatives, the grandparent may intervene in the action for the purpose of

seeking to obtain visitation, provided that the grandparent has an established relationship with the child. The right of the grandparent to seek visitation terminates if the court approves a petition for adoption by an adoptive parent who is not a stepparent or a biological relative of the child.

- (d) Upon the filing of an original action or upon intervention in an existing proceeding pursuant to subsections (b) and (c), the court shall determine if visitation by the grandparent is in the best interests of the child. Visitation shall not be granted if the visitation would endanger the physical health of the child or impair the emotional development of the child. If the child is living with one or both biological or adoptive parents, there shall be a rebuttable presumption for purposes of this section that the parent or parents with whom the child is living know what is in the best interests of the child. In determining the best interests of the child, the court shall consider the following:
- (1) The willingness of the grandparent or grandparents to encourage a close relationship between the child and the parent or parents.
 - (2) The preference of the child, if the child is determined to be of sufficient maturity to express a preference.
 - (3) The mental and physical health of the child.
 - (4) The mental and physical health of the grandparent or grandparents.
 - (5) Evidence of domestic violence inflicted by one parent upon the other parent or the child. If the court determines that evidence of domestic violence exists, visitation provisions shall be made in a manner protecting the child or children, parents, or grandparents from further abuse.
 - (6) If a parent has relinquished custody either voluntarily or by court order or if a parent has abandoned a child financially, whether the grandparent has an established relationship with the child.
 - (7) The wishes of any parent who is living.
 - (8) Other relevant factors in the particular circumstances.
- (e) The court shall make specific written findings of fact in support of its rulings. A grandparent who petitions for visitation may do so no more than once every 24 months. The fact that one grandparent has petitioned for visitation shall not preclude another grandparent from subsequently petitioning for visitation within the 24-month period. After visitation rights have been granted to any grandparent, the legal custodian, guardian, or parent of the child may petition the court for revocation or amendment of the visitation rights, for good cause shown, which the court, in its discretion, may grant or deny. Unless evidence of abuse is alleged or other exceptional circumstances, a petition shall not be filed with respect to any one grandparent who has been granted visitation more than once in any two-year period.

If more than one grandparent has successfully petitioned for visitation, the parent may petition no more than once every 24 months for revocation or amendment of visitation with respect to each order of visitation.

- (f) If the court finds that the grandparent or grandparents can bear the cost without unreasonable financial hardship, the court, at the sole expense of the petitioning grandparent or grandparents, may appoint a guardian ad litem for the minor child.
- (g) Notwithstanding the foregoing, a grandparent may not be granted visitation with a grandchild where the parent related to the grandparent has either given up legal custody voluntarily or by court order or has abandoned the child financially unless the grandparent has an established relationship with the child and the court finds that visitation with the grandparent is in the best interests of the child.

Cite as ALA. CODE § 30-3-4.1 (1975)

History. Act 99-436, p. 862, §1; Act 2003-383, p. 1084, §1; Act 2011-539, §1; Act 2011-562, §1.