

**Can Grandparents, Others Get Visitation? State Courts Are in Disarray**  
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Where grandparents can obtain visitation over the parents' objections, this state statute is constitutional, says West Virginia's highest court in the latest ruling on an issue that is sharply splitting the state courts. This is the most recent case to apply a U.S. Supreme Court decision from last year on this issue. The Supreme Court's decision was narrow and left many questions unanswered, and the state courts are reaching very different conclusions in trying to apply it.

Some cases involve parties other than grandparents. "The real hot-button cases now are those involving third parties, such as de facto parents, and cases dealing with sibling visitation," says Boston child welfare attorney Andrew L. Cohen.

In many cases, lawyers who sense a brewing conflict over visitation may want to act quickly to protect their clients' rights, experts say.

In the case last year, the Supreme Court examined a Washington statute allowed anyone at all to obtain visitation if it was in the child's best interests. The Court said this was "breathhtakingly broad" but didn't strike it down; instead it said the statute was improper as applied because the lower court put the burden of proof on the parents, made few findings of fact and allowed more visitation than necessary. (Troxel v. Granville, 530 U.S. 57; 2000 LWUSA 506; Search words for LWUSA Archives: Troxel and Unanswered.)

The latest Case In the West Virginia case, the parents divorced and the father's parents often cared for the child and supervised visitation between him and his father. However, when the mother remarried, her new husband adopted the child and she cut off all contact with the grandparents. They sought visitation.

The state statute, which applied only to grandparents, provided that visitation could be ordered if it was in the best interests of the child. The statute set forth 13 factors to be considered in making this determination, including the effect such visitation would have on the relationship between the child and his or her parents, the relationship between the parents and the grandparents, and the parents' wishes.

The mother argued that the statute was unconstitutional because it interfered with her right to raise her child as she saw fit.

But the court said, "The West Virginia statutory scheme stands in stark contrast to the simplistic and broadly-worded [one] scrutinized in Troxel. [O]ur statute does not permit just 'any person' to file a petition under the act. In addition to setting forth the axiomatic standard of best interests by which any visitation decisions are to be made under the act, [it] requires a correspondent affirmative determination that such visitation 'would not substantially interfere with the parent-

child relationship'.

"Our statutory scheme addresses almost every concern addressed by the Court in Troxel.[B]ecause our act expressly requires consideration of parental preference and because no grant of visitation can be accomplished with an initial determination that such visitation will not detrimentally affect the parent-child relationship, the constitutional deficiencies presented [there] are not present here."

The consideration of the parent-child relationship was crucial to the court's decision, say lawyers.

"If visitation is detrimental to the parent-child relationship, then it will be detrimental to the child," says Grafton, W.Va., attorney Chaelyn W. Casteel, who served as a guardian ad litem in the West Virginia case.

What Should You Do? Lawyers who are handling a grandparent visitation case should consider the following steps, experts say: Act quickly. Lawyers shouldn't take their time, says Elkins, W.Va., attorney David W. Hart, who represented the grandparents in the West Virginia case. "It's often smart to pursue a visitation order as soon as you think there may be a problem in order to preserve your rights when a divorce or adoption disrupts the family. For example, some statutes say that if an order is in place before a stepparent adopts the child, that order survives the adoption."

Review the statute carefully. Most statutes provide that the best interest standard controls whether visitation is granted, but each state has different criteria. As a result, it's important to examine your state's requirements carefully.

For example, in some states "the grandparent is precluded from filing a request for visitation if they did not do so at the time the parents divorced," says Bloomfield Hills, Mich., attorney Richard S. Victor, who founded the Grandparents Rights Organization. In others, you need evidence that the parent is actually denying access to the child, says Mark D. Olson, a Seattle attorney who represented the grandparents in the Supreme Court case.

Request a guardian ad litem. Appointing a guardian ad litem can be helpful for all the parties, especially the child, say experts.

The Supreme Court's decision "increased the need for some form of investigator to get involved and determine whether the child's interest is enough to overcome the deference that must be paid to the parent's decision. Now, judges need to dig deeper and a GAL can provide that additional investigation," says Cohen.

And in many cases a GAL will have the best chance of getting to the bottom of any underlying issues.

"The GAL is not seen by the parties as an opponent, so [they] tend to cooperate with him or her," says Casteel.

Consider mediation. Some experts say that mediation can help resolve these cases.

"Often the issue at the core of the hostility that has nothing to do with visitation. If mediation could resolve that issue, then the parties will have an easier time agreeing on visitation," says Casteel.

Mediation also allows the parties to step back and see the "harm that a court case would bring to the child and themselves," says Harvey G. Landau, a White Plains, N.Y., family lawyer. Mediators can also provide a forum for investigating alternative methods of visitation, such as Internet visitation, he says.

But other lawyers say that in such an emotionally charged atmosphere, mediation is of little value.

"A lot of times you have a situation where the parent feels the grandparent is undermining them or the grandparent says 'my daughter-in-law hates me.' It is unlikely that mediation is going to work in these kind of situations," says Linda Medeiros, a Salem, Mass., family law practitioner.

The earlier mediation is attempted, the better the chance for success, experts say.

"As time goes on, these cases get more and more emotional. If you try mediation early on, when the conflict first arises, you have a better chance of success," says Hoboken, N.J., mediator Anju D. Jessani.

### Eroding Parents' Rights?

Some attorneys say that permitting grandparent visitation erodes parents' rights. "Parents are allowed to make bad decisions all the time. What makes the grandparent issue so important that you can infringe on fit parents' right to raise their child as they see best?" asks Medeiros.

But grandparents' rights advocates disagree.

"Parents' decisions can be overridden. Look at areas such as vaccinations and schooling [where] parents are required to take actions regardless of their viewpoint. The law looks at the best interest of the child, not the best interest of the parent," says Victor.

Grandparent visitation is especially necessary in today's society, says Hart. "All over the country grandparents occupy a special position in their grandchildren's lives. They often act as caregivers. To completely sever that relationship is not good for the child."

West Virginia Supreme Court of Appeals. *State v. Honorable Alan D. Moats*, No. 29288. July 6, 2001. *Lawyers Weekly USA* Nos. 9921112 (majority) and 9921114 (dissent). To link to the full text of either of the opinions, go to: [www.lawyersweeklyusa.com/opinions](http://www.lawyersweeklyusa.com/opinions)