IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS

THERESA (DeROSE) SEYMOUR,
Plaintiff/Third-Party Defendant,
Appellee,

Vs.

JOSEPH ALLEN DeROSE
Defendant.

Vs.

CATHERINE DeROSE
Third Party Plaintiff – Appellant.

Supreme Court No. 121246
COA No. 232780
Lwr. Ct. No. 97-734836DM

BRIEF ON APPEAL – APPELLEE

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

The trial court granged Appellant Grandmother visitation with her granddaughter pursuant to MCL 722.27b. Appellee Mother appealed that decision to the Court of Appeals, which, in an opinion dated January 25, 2002, declared MCL 722.27b unconstitutional. Appellant Grandmother filed an application for leave to appeal with this court, which was granted on October 8, 2002 limited to the issue of whether MCL 722.27b is unconstitutional, facially or as applied in this case.

STANDARD OF REVIEW:

This Court reviews issues of constitutionality De Novo. Further, there is a well established rule that a statute is presumed to be constitutional unless its unconstitutionality is clearly apparent.

CAN MICHIGAN'S GRANDPARENT VISITATION STATUTE, MCL 722.27b, APPLIED IN A MANNER THAT DOES NOT INFRINGE ON A FIT PARENT'S FUNDAMENTAL RIGHT TO MAKE DECISIONS CONCERNING THE CARE, CUSTODY, AND CONTROL OF THEIR CHILDREN?

Plaintiff/Third party Defendant- Appellee: . . . . . No.

Defendant . . . . . Not participating

Third Pary Plaintiff-Appellant . . . . . Yes.

Court of Appeals . . . . . No.

Trial Court . . . . . Did not address.

COUNTER-STATEMENT OF MATERIAL PROCEEDINGS & FACTS:

Appellee Theresa Seymour filed for divorce in 1997, when thirteen counts of Criminal Sexual Conduct in the First Degree were brought against her then husband, Joseph DeRose. All the counts involved Appellee's then 13-year-old daughter from a prior marriage. Joseph DeRose pled guilty and was sentenced, in December 1997, to 12 to twenty years in prison. Part of his sentence is that he is to have no contact with minor children. Appellee's divorce became final in May 1998. Appellee and Joseph DeRose are the parents of Shaun Ashleigh DeRose (DOB 4/1/1996).

Appellant, the paternal grandmother, filed a pro per motion for visitation, and the first hearing was held on March 10, 1998. The conclusion of the FOC at that time was that Grandmother lacked standing.

Appellant retained counsel, objected to the findings of the Friend of the court, and a new investigation was ordered. In a written investigation dated February 24, 2000, FOC recommended supervised visitation with the minor child and the paternal grandmother. Over Appellee Mother's objections, the recommendation was adopted by this court in an order dated June 12, 2000.

Plaintiff-Appellee filed a timely Motion for Reconsideration with the trial court. That Motion was eventually denied on December 19, 2000. In the meantime, Appellant Grandmother had filed a motion to enforce visitation. Following a hearing at Friend of the Court and a De Novo hearing in the trial court, that motion was finalized on February 5, 2001, with the order of June 12, 2000 being upheld.

Leave to Appeal was eventually granted by the Court of Appeals, and following oral argument, the Court of Appeals held, 2-1, that the Grandparenting Time Statute was unconstitutional, and vacated the trial court's order granting visitation.

Appellant Grandmother filed a motion for reconsideration, which was denied. Appellant then filed an Application for Leave to Appeal which was granted on October 8, 2002.

ARGUMENT

MICHIGAN'S GRANDPARENT VISITATION STATUTE, MCL 722.27b, CANNOT BE APPLIED IN A MANNER THAT DOES NOT INFRINGE ON A FIT PARENT'S FUNDAMENTAL RIGHT TO MAKE DECISIONS CONCERNING THE CARE, CUSTODY, AND CONTROL OF THEIR CHILDREN.

In Michigan, grandparents such as Appellant had a statutory right, pursuant to MCLA 722.27b to request visitation with their grandchildren. MCLA 722.27b provides in part:

> Sec. 7b. (1) Except as provided in this subsection, a grandparent of the child may seek an order for grandparenting time in the manner set forth in this section only if a child custody dispute with respect to that child is pending before the court. If a natural parent of an unmarried child is deceased, a parent of the deceased person may commence an action for grandparenting time. Adoption of the child by a stepparent under chapter X of Act No. 288 of the Public Acts of 1939, being sections 710.21 to 710.70 of the Michigan Compiled Laws, does not terminate the right of a parent of the deceased person to commence an action for grandparenting time.
> (2) As used in this section, "child custody dispute" includes a proceeding in which any of the following occurs:
>
> > (a) The marriage of the child's parents is declared invalid or is dissolved by the court, or a court enters a decree of legal separation with regard to the marriage.
> >
> > (b) Legal custody of the child is given to a party other than the child's parent, or the child is placed outside of and does not reside in the home of a parent, excluding any child who has been placed for adoption with other than a stepparent, or whose adoption by other than a stepparent has been legally finalized.
>
> (3) **A grandparent seeking a grandparenting time order may commence an action for grandparenting time, by complaint or complaint and motion for an order to show cause, in the circuit court in the county in which the grandchild resides. If a child custody dispute is pending, the order shall be sought by motion for an order to show cause. The complaint or motion shall be accompanied by an affidavit setting forth facts supporting the requested order. The grandparent shall give notice of the filing to each party who has legal**

custody of the grandchild. A party having legal custody may file an opposing affidavit. A hearing shall be held by the court on its own motion or if a party so requests. At the hearing, parties submitting affidavits shall be allowed an opportunity to be heard. At the conclusion of the hearing, if the court finds that it is in the best interests of the child to enter a grandparenting time order, the court shall enter an order providing for reasonable grandparenting time of the child by the grandparent by general or specific terms and conditions. If a hearing is not held, the court shall enter a grandparenting time order only upon a finding that grandparenting time is in the best interests of the child. A grandparenting time order shall not be entered for the parents of a putative father unless the father has acknowledged paternity in writing, has been adjudicated to be the father by a court of competent jurisdiction, or has contributed regularly to the support of the child or children. The court shall make a record of the reasons for a denial of a requested grandparenting time order.

(4) A grandparent may not file more than once every 2 years, absent a showing of good cause, a complaint or motion seeking a grandparenting time order. If the court finds there is good cause to allow a grandparent to file more than 1 complaint or motion under this section in a 2-year period, the court shall allow the filing and shall consider the complaint or motion. The court may order reasonable attorney fees to the prevailing party.

(5) The court shall not enter an order restricting the movement of the grandchild if the restriction is solely for the purpose of allowing the grandparent to exercise the rights conferred in a grandparenting time order.

(6) A grandparenting time order entered in accordance with this section shall not be considered to have created parental rights in the person or persons to whom grandparenting time rights are granted. The entry of a grandparenting time order shall not prevent a court of competent jurisdiction from acting upon the custody of the child, the parental rights of the child, or the adoption of the child.

(7) The court may enter an order modifying or terminating a grandparenting time order whenever such a modification or termination is in the best interests of the child. *Emphasis added.*

Case law has held that "a child custody dispute" exists even after the judgment of divorce is entered. *Brown v. Brown*, 192 Mich App. 44; 480 NW2d 292(1992). *Brown* held that the custody and visitation aspects of the divorce action remain pending until the

child reaches adulthood. The holding in *Brown* became binding authority on the issue under Administrative Order 1990-6. Even though in the instant case there is no actual custody or visitation dispute, and there cannot be since the terms of the father's sentence are that he is to have no contact with any minor child, under *Brown*, there is a custody dispute pending simply because the child is a minor.

Two years ago, the U.S. Supreme Court decided the case of *Troxel v. Granville*, 530 US 57, 120 S. Ct. 2054, 147 L Ed 2d 49 (2000). Ms. Granville was the mother of two children; the father of the children, Brad Troxel, had committed suicide. Plaintiff-Appellant Jennifer Troxel was the paternal grandmother of the children, and brought an action for grandparents visitation under Washington state's statute for non-parental visitation.(*supra,* S. Ct p. 2) The trial court found that visitation was in the best interest of the minor children. *(supra,* S. Ct. p.3) The case was appealed to the Washington Supreme Court which found that the state statute infringed on the fundamental right of parents to rear their children. The Supreme Court granted Certiorari, and in the end, affirmed the decision of the Washington Supreme Court.

The Court focused on a parent's due process rights, stating,

> The liberty interest at issue in this case – the interest of parents in the care, custody, and control of their children – is perhaps the oldest of the fundamental liberty interests recognized by this Court. More than 75 years ago, in *Meyers v. Nebraska*, 262 US 390,399, 401 (1923), we held that the "liberty" protected by the Due Process Clause includes the right of parents to "establish a home and bring up children" and "to control the education of their own." Two years later, in *Pierce v. Society of Sisters,* 268 US 510, 534 – 535 (1925), we again held that the "liberty of parents and guardians" includes the right "to direct the upbringing and education of children under their control." * * * * In subsequent cases also, we have recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children. * * * * In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to

> make decisions concerning the care, custody, and control of their children.(*Troxel, supra,* S. Ct. Pages 6-8)

The court went on to find that the Washington non-parental visitation statute unconstitutionally infringed on Ms. Granville's fundamental parental right. The court noted that "once the visitation petition has been filed in court and the matter is placed before a judge, a parent's decision that visitation would not be in the child's best interest is accorded no deference." *(supra,* S. Ct. p.8) The court noted that the "Washington statute places the best interest determination solely in the hands of the judge. Should the judge disagree with the parent's estimation of the child's best interests, the judge's view necessarily prevails." *(supra*, S. Ct. p.8) That is exactly how the Michigan statute works. Appellee-Mother does not believe it is in her child's best interest to have contact with the paternal grandmother – her opinion is awarded no weight, and essentially counts for nothing. Under the plan language of MCL 722.27b the parents determination counts for nothing, the Judge is simply instructed to makes a best interest evaluation. The factors that make up the best interest test in Michigan are:

> Sec. 3. As used in this act, "best interests of the child" means the sum total of the following factors to be considered, evaluated, and determined by the court:
>
> (a) The love, affection, and other emotional ties existing between the parties involved and the child.
>
> (b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.
>
> (c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.
>
> (d) The length of time the child has lived in a stable, satisfactory

environment, and the desirability of maintaining continuity.

(e) The permanence, as a family unit, of the existing or proposed custodial home or homes.

(f) The moral fitness of the parties involved.

(g) The mental and physical health of the parties involved.

(h) The home, school, and community record of the child.

(i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.

(j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.

(k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

(l) Any other factor considered by the court to be relevant to a particular child custody dispute. MCL 722.23

The standard provides valid guidance for making many judicial decisions involving minor children, but it does not relieve the due process problems of the grandparent visitation statute. As set forth more fully above, the best interest test does not give any deference to a fit parents decision, and therefore is violative of the parents fundamental liberty interest in rearing their children. Moreover, the best interest test, in the context of the Grandparent Visitation Statute, simply provides a blue print for the trial judge to substitute his or her opinion for that of a fit parent. The best interest test may be well known and well published, but it does not protect a fit parents fundamental due process rights. That is where the grandparent visitation statute fails.

Appellant's statement that "state supreme or other individual high state courts including those in Alabama, Arizona, California, Colorado, Illinois, Indiana, Kansas,

Louisiana, Maine, Mississippi, Maryland, Massachusetts, Missouri, New Jersey, New York, Ohio, Oregon, Texas, West Virginia, and Wisconsin, have all held their respective grand parent visitation statutes to be constitutionally sound" is misleading at best. Most of the courts listed by Appellant held that the grandparent statute at issue had been unconstitutionally APPLIED, but could be applied in a constitutional manner with court interpretation.[1]

In *Troxel,* Justice O'Conner stated that "[t]he problem here is not that the Washington Superior Court intervened, but that when it did so, it gave no special weight at all to Granville's [the mother's] determination of her daughter's best interests." (*Troxel, supra*, S. Ct. p.10) The standard set forth in MCL 722.23, the so called 'best interest test,' gives no weight to a fit parent's determination. Even if the best interest test had been carefully analyzed by the DeRose trial court, the determination would still be constitutionally troublesome, because no deference would be given to the fit parents decision. Any grandparent visitation determination made pursuant to MCL 722.23 violates the constitution because it gives no weight to a fit parent's decision, and

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[1] The states of Alabama in *State v. AMK,* 826 so. 2d 889 (Ala. Civ. App. 2002) and *L.B.S. v. L.M.S.*, 826 So. 2d 178 (Ala. Civ. App. 2002); Arizona in McGovern v. McGovern, 201 Ariz. 172, 33 P.3d 506, (Ariz. Ct. App. 2001), California in Zasueta v. Zasueta, 102 Cal App. 4th 1242 (2002) Indiana, *Crafton v. Gibson*, 752 N.E. 2d 78 (Ind. Ct. App.2001), Louisiana in *Wood v.Wood*, La. App. 2002-0860, 2002 La. App. Lexis 2819 (La. App. 1 Cir. Sept 27, 2002) Massachusetts, in *Blixt v. Blixt*, 437 Mass. 649, 774 N.E. 2d 1052(2002), Maryland, *Brice v. Brice*, 133 Md. App. 302; 754 A.2d 1132(2002), New Jersey, *Wilde v. Wilde,* 341 N. J. Super 381, 775 A.2d 535 (N.J. Super Ct. App. Div. 2001), and Texas, *Roby v. Adams*, 68 S.W. 3d 822 (Tex. App. El Paso 2002) all held that the grandparent visitation statute had been unconstitutionally applied, but found ways to make their respective statutes pass constitutional muster. The state of Colorado has not directly assessed their Grandparents visitation statute, though in the context of an adoption matter, they held it to be facially constitutional and remanded to see how it was applied. The State of Illinois' Supreme Court found several sections of their statute facially unconstitutional. *Wickham v. Byrne*, 199 Ill. 2d 309, 769 N.E. 2d 1 (2002). The Maine courts have not specifically addressed this issue, though they have stated that the best interest of the child standard alone is insufficient standard for determining when the state may intervene in a parent's decision making. *In Re Alana,*, 2002 ME 126, 802 A. 2d 976 (2002). Mississippi, Oregon, New York and West Virginia all held that their statute already gave special weight to a parents decision, and therefore already met the constitutional requirements. Missouri and Ohio held that their statutes are constitutional, for reasons that are suspect to Appellee.

therefore unreasonably interferes with a fit parents fundamental liberty interest in rearing their children.

The Supreme Court explored the best interest of the child issue further, noting that no one had suggested that the mother was in any way unfit, just as no one has in the instant case. *(supra,* S. Ct. p. 9) "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 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." *(supra*, S. Ct. p.10) The court went on to examine the trial courts reasoning, and found that the court seemed to be saying that a grandparent's request should be granted unless it was somehow BAD for the children; the trial court had put the burden on the fit custodial parent the burden of "disproving that visitation would be in the best interest of her daughters." That is exactly what happens when a request for grandparent visitation is filed under Michigan's visitation law, MCL 722.27b. In the *Derose* case, the trial judge noted that no one had made any allegations that the grandmother was in any way unfit [no one has], and that children always benefit from contact with their grandparents. (5/25/00 transcript, Appendix p. 19a) The Supreme Court stated as follows about that type of reasoning:

> The decisional framework employed by the Superior Court directly contravened the traditional presumption that a fit parent will act in the best interest of his or her child. * * * * In that respect, the court's presumption failed to provide any protection for Granville's fundamental constitutional right to make decisions concerning the rearing of her own daughters. * * * * In an ideal world, parents might always seek to cultivate the bonds between grandparents and their grandchildren. Needless to say, however, our world is far from perfect, and in it the decision whether such an intergenerational relationship would be beneficial in any specific case is for the parent to make in the first instance. And, if a fit parent's decision of the kind at issue here becomes subject to judicial review, the court must

> accord at least some special weight to the parent's own determination. *(Troxel, supra, S. Ct. p.*11-12, cites omitted.)

The Supreme Court found that the findings made by the Washington trial court were so slim, that it demonstrated that the case "involved nothing more that a simple disagreement between the Washington Superior Court and Granville [mother] concerning her children's best interests." The court went on to state " the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make childrearing decisions simply because a state judge believes a 'better' decision could be made." (*supra,* S. Ct. p.14)

Plaintiff is in a position much like that of Ms. Granville. Plaintiff does not think it is in her daughter's best interest to have a relationship with her paternal grandmother. No one has ever made any allegations that either Plaintiff, or the Paternal Grandmother, are in any way unfit. The court, however, simply substituted its opinion of what is in the best interest of the child in the place of the mother's. The reasoning for the Derose court's decision was that "grandmothers are important." (5/25/00 transcript, Appendix p. 19a) The holding of the Supreme Court of the United States is that under these circumstances, the substitution of the courts opinion of best interest for that of a fit parent is a violation of that parents due process right to make decisions concerning the care, custody and control of her children.

Justice O'Conner, speaking for the court, stated that "the Due Process Clause does

Washington statute that made it unconstitutional, and that they were NOT finding all nonparental visitation statutes unconstitutional. The flaws the court found in the Washington statue exist in the Michigan statute as well. There is no deference for a fit parent's determinations, and the Michigan statute allows a state judge to substitute his or her opinion of what is in the best interest of the child for that of a fit parent. The Supreme Court stated, "As we have explained, the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a "better" decision could be made." Moreover, the language of MCL 722.27b actually gives the grandparents the presumption, putting the burden on the parent to disprove the grandparents claim. The statute requires that the judge make a record only of the reasons for a denial of the requested grandparenting time order. MCL 722.27b(3). Essentially, the visitation is granted unless the judge has good reason to deny it. That is a complete reversal of the due process standards set forth in the *Troxel* decision.

All the states have some form of a grandparent visitation statute on the books, and most have been challenged since the *Troxel* decision. The particulars of the statutes vary greatly, and its suprising how quickly the legislatures of many states have acted to reform their legislation in the wake of *Troxel*. While a few courts found that their particular statutes were already in compliance with constitutional requirements[2], most courts found that their statutes were being applied in an unconstitutional manner, and found a variety of ways to bring them into compliance. Many of the state courts declared all or part of their grandparent visitation statutes unconstitutional, and then went on to judicially

[22] Namely Kansas, Missouri and New York.

interpret the statutes to meet due process requirements in several ways, or a combination of ways.

First, many courts added a presumption that the determination of a fit parent was always in the best interest of the child, and that the grandparents bore the burden of overcoming this presumption. Second, many courts interpreted their statutes to require giving some kind of special weight to a fit parent's decision regarding visitation. Last, some courts created a requirement that the petitioning grandparent prove by clear and convincing evidence that there was parental unfitness, or that there would be actual harm to the child if visitation were denied.

COURTS THAT ADDED A JUDICIALLY CREATED PRESUMPTION IN FAVOR OF PARENTS:

The Alabama Court of Civil Appeals addressed it's grandparenting statute in *L.B.S. v. L.M.S.*, 826 So. 2d 178 (Ala. Civ. App. 2002) and *R.S.C. v. J.B.C.*, 812 So. 2d 361(Ala. Civ. App. 2001) and held portions of the grandparenting statute to be unconstitutional. Like Michigan's statute, a rebuttable presumption was created that grand parent visitation was in the best interest of the children. The court held that the presumption for the grandparents was invalid and eliminated this provision, since it directly contravened the Troxel decision. Moreover, the court added a factor to the statute, that the fit parents decision (whatever that decision might be) must be given great weight, and that there must be a "presumption in favor of a fit parent's decision regarding grandparent visitation" that "will place a heightened burden of proof on the grandparent petitioning for visitation. Because the fundamental right of a parent is at issue, a grandparent seeking visitation bears the burden of showing, by clear and convincing evidence, that the best interest of the child is served by awarding grandparent visitation."

The court allowed the law to stand with those limitations. One Alabama Judge dissented, arguing the statute was facially unconstitutional, and yet another concurred in the main opinion, but thought that in addition to the modifications that their should be a requirement that the grandparents make a showing of harm to the child before visitation could be granted. (*L.B.S.* at 188) Similarly, the Arizona Court of Appeals also held the Arizona grandparent visitation statute to be constitutional on its face, but judicially created a rebuttable presumption that fit parents act in the best interest of their children, and that special weight must be given to a fit parents determination regarding grand parent visitation. *McGovern v. McGovern*, 201 Ariz. 172 (Ariz. Ct. App. 2001).

In Arkansas the Supreme Court found the grandparent visitation statute to be unconstitutional as applied, and further found that only one section of the statute survived constitutional review. *Seagrave v. Price*, 349 Ark. 433 (Ark. 2002), *Linder v. Linder*, 348 Ark. 322, (Ark. 2002). The court held that to be applied constitutionally, there must be a presumption in favor of the fit parent's decision.

In the California case of *Punsly v. Ho*, 87 Cal. App. 4th 1099, the court stated:

> "The Punslys' [grandparents] arguments fail to persuade us. The Punslys' emphasis on "the sweeping breadth" of Washington's statute is misplaced. Undoubtedly, section 3102 (Cal. Grandparent visitation law] provides greater restrictions on who may petition for visitation and when. However, similar to the Washington statute, section 3102 authorizes a court to grant such visitation to a child's grandparents solely upon finding it is in the best interests of the child. It is when a court exercises this discretion to substitute its own judgment of a child's best interest for that of a competent custodial parent, that a parent's fundamental rights are threatened. Further, this threat is not mitigated by the appointment of minor's counsel, whose similar function is to provide an independent assessment of a child's best interests. This injection of the state's judgment into the affairs of a fit parent, not the details of the statute authorizing such an intrusion, fueled the *Troxel* opinion." At 1106-1107, cites omitted.

The Appellate courts in Illinois have addressed this issue several times, first in *Lulay v. Lulay*, 193 Ill. 2d 455(2000), where the majority of the court found the statute unconstitutionally as applied, with three dissenters saying it was unconstitutional on its face. Then came *Wickham v. Byrne*, 199 Ill. 2d 309(2002) where the court held two sections of the Grandparent visitation statute facially unconstitutional. See also *Schweigert v. Schweigert*, 201 Ill. 2d 42 (2002).

The *Wickham* court said:

> Section 607(b)(1) [grandparent visitation statute] contains a similar flaw to the statute at issue in *Troxel*. Section 607(b)(1) permits grandparents, great-grandparents, or the sibling of any minor child visitation if 'the court determines that it is in the best interests and welfare of the child.' Like the statute in *Troxel*, section 607(b)(1), in every case, places the parent on equal footing with the party seeking visitation rights. Further, like the statute in *Troxel*, section 607(b)(1) directly contravenes the traditional presumption that parents are fit and act in the best interests of their children. The statute allows that 'State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made.' *Troxel*. Section 607(b)(1) exposes the decision of a fit parent to the unfettered value judgment of a judge and the intrusive micromanaging of the state. Because we can conceive of no set of circumstances under which section 607(b)(1) of the Act would be valid, we hold that it is unconstitutional on its face. For the same reasons, we hold that section 607b)(3) is facially unconstitutional. Cites omitted. Wickham at 320-321.

In *Wood v Wood*, La. App. 2002-0860, 2002 La. App. LEXIS 2819 (la. App. 1 Cir. Sept. 27, 2002) the Louisiana Court held that the trial court must presume the parent acted in the best interest of child, and must give special or material weight to a parent's decision. They did not, however, say anything directly about the constitutionality of the Louisiana Grand parent visitation statute.

In *Brice v. Brice*, 133 Md. App. 302 754 A. 2d 1132 (2000), the Maryland Court held that the grand parent visitation statute was applied unconstitutionally and reversed the Lower court's visitation order.

> Even though Maryland statute is narrower than Washington's 'breathtakingly broad' statute, the Supreme Court's holding in Troxel was not decided on the fact that 'any person' could petition for visitation, but, rather, was decided on *grandparents* seeking visitation rights. Second, Lisa [Mother] opposed any court ordered visitation, whereas Granville sought a lesser amount of visitation than the Troxels. This factor also does not change our analysis because the lower court granted the Brices [grandparents] based on Lisa's alleged proposed visitation schedule."

The Massachusetts Supreme Court wound up holding that their grand parent visitation statue was unconstitutional as applied, though three Justices would have held it unconstitutional its face. The majority opinion stated:

> What clearly emerges from the plurality decision in Troxel, with respect to due process, are the following principles:
>
> 1) reaffirmation that a parent's liberty interest in child rearing is indeed fundamental, and is certainly fundamental in this context,
> 2) "any third party" should not be permitted to seek visitation,
> 3) in determining whether grandparent visitation should occur, there exists a 'presumption that a fit parent will act in the best interest of his or her child,' and the decision of a fit parent concerning grandparent visitation is entitled to considerable deference, *Blixt v. Blixt*, 437 Mass. 649, 774 N. E. 2d 1052 (2002) at 655, cites omitted.

The court went on to state that, "before a parent or parents are called upon to litigate fully a grandparent visitation complaint, with all the attendant stress and expense, the grandparent or grandparents should make an initial showing that satisfies a judge that the burden of proof, set forth above, can be met." *Blixt*, at 667.

The Massachusetts court believed that judicial interpretation could save the existing statute, though three of the justices felt that could not. One of the dissenters phrased it this way,

> The visitation statute was enacted well before *Troxel*. *Troxel* now tells us that a statute providing for court-ordered visitation with children can be constitutional, but makes clear that a statute predicated solely on a 'best interest' standard will not pass muster. We should therefore tell the Legislature that, in light of *Troxel*, a statute allowing judges to override parents' decisions concerning visitation with grandparents cannot be premised merely on a judicial determination of the child's 'best interest.' If it wishes to, the Legislature may then enact those precise requirements, definitions, standards, and procedural protections that it intends, consistent with constitutional requirements. There is more than one way to devise a visitation statute that would survive strict scrutiny, and it is up to the legislature, not this court, to decide which of those many possible approaches it wishes to take." Dissent At 679-680

Mississippi court held that their statute already contained the built in protections that *Troxel* required, namely, giving special weight to a fit parents decision, and that therefore they had no due process problem with the statute. But, they did find that the trial court had improperly acted as if the presumption favored grandparents petitioning for visits. The court went on to state that there was no finding that the parents were unfit, or had acted unreasonably, and that there was evidence that visits with the grandparents might actually NOT be in the child's best interest, and reversed the order for visitation. *Stacey v. Ross*, 798 So. 2d 1275 (Miss. 2001).

The Oregon Courts also created a presumption that fit parents act in best interest of children. *Williamson v. Hunt,* 183 Or. App. 339 (2002). In a custody case, the Pennsylvania court noted that the Pennsylvania statute puts burden of proof on the grandparents, not parents – so the statute was constitutionally OK. *Douglas V. Wright*,

2002 PA Super 18; 801 A.2d 586 (PA Super Ct 2002). In Texas as well, the court found that grandparents have the burden to overcome presumption that a fit parent acted in the best interest of the parents of child in order to establish the "best interest prong of visitation statute." *Roby v. Adams*, 68 S.W. 3d 822 (Tex App. El Paso 2002). West Virginia Courts held that State's statute to be constitutional because it required grandparents to carry a heavy evidentiary burden. *State ex Rel. Brandon L. v. Moats*, 209 W. Va. 752, 551 S.E. 2d 674 (2001)

STATES REQUIRING EVIDENCE OF ACTUAL HARM OR PARENTAL UNFITNESS:

In addition to presuming a parent's decision regarding visitation to be in the child's best interest, several courts went further. The Connecticut Supreme Court in *Crockett v. Pastore*, 259 Conn. 240(2002) found their state's grandparent visitation statute to have been unconstitutionally applied. The court set forth new requirements for the statute, and found that because the petitioning grandparent failed to "allege and prove that she has a parent-like relationship with the child and that the trial court's failure to grant visitation to her would cause the child to suffer serious, real and significant harm, we conclude that the trial court did not have jurisdiction over the plaintiff's petition for visitation." *Pastore* at 250. The Indiana Appellate Court took a similar view in *Crafton v. Gibson*, 752 N.E. 2d 78, (Ind. Ct. App. 2001) where the court found the grand parent visitation statute not to be unconstitutional on face, but held that grandparents must show evidence of parental unfitness; and that court must presume that a fit parents decision is in the children's best interest. In *Scott v. Scott*, 80 S.W. 3d 447 (Ky. Ct. App. 2002) the Kentucky courts reached essentially the same result, holding that the grandparent

visitation statute was unconstitutional as applied, and that to meet due process requirements, the trial court must give presumptive weight to a fit parent's decision, and the grandparent must prove the parent unfit by clear and convincing evidence, and prove harm to child before court ordered visitation will be considered. Should one believe this standard is simply too high to me met, be reassured that the Kentucky grandmother met her high burden and was granted visitation.

The Supreme Court of Iowa examined their state's grandparent visitation statute, in the context of petitioning grandparents against married parents, and found their statute to be:

> [F]undamentally flawed, not because it fails to require a showing of harm, but because it does not require a threshold finding of parental unfitness before proceeding to the best interest analysis. It is true that a consideration of potential harm to the child would customarily be included in any best-interest analysis. . . .But, unlike the other subsections of section 598.35 which contemplate some breakdown between parents before a judge is authorized to make a difficult choice for them, section 598.35(7) permits the court to usurp that judgment over the joint decision of two fit parents. In other words, rather than narrowly tailoring the statute to serve the needs of children with disputing parents, the legislature has broadly swept even fit parents and intact families under the court's wing. Given the liberty interests at issue, it cannot be permitted to do so. As the *Troxel* court stated, the Due Process clause does not permit a State to infringe on the fundamental right of parents to make childrearing decisions simply because a state judge believes a 'better decision could be made. *Santi v. Santi*, 633 NW 2d 312 (Iowa) Cites Omitted.

STATES THAT FOUND A REQUIREMENT THAT
A PARENT'S DECISION BE GIVEN 'SPECIAL WEIGHT':

New York Supreme Court Appellate Division in February 2002, held that their grand parent visitation statute was not facially unconstitutional, and remanded the case further proceedings, but stated they were giving "no opinion with respect to application

of the statute to the facts." *Hertz v. Hertz*, 291 A. D. 2d 91, 738 N.Y.S.2d 62 (N.Y. App. Div. 2d Dep't 2002) In an earlier decision, the New York Court held that their statute was not unconstitutionally applied because it gave "special weight" to a parents decision. *Morgan v. Grzesik*, 287 A. D. 2d 150, 732 N.Y.S.2d 773(N.Y. App. Div. 4th Dept 2001)

The New Mexico court dealt with a case where grandparents had actually raised the minor child for a number of years, and were petitioning for visitation since the child was now back in parental custody. The Court held that their statute did not violate due process because it required that a parents decision be given "special weight," and further took into consideration whether the grandparent had ever acted as a parent, and for what length of time.[3] *Williams v. Williams*, 2002 NMCA 7; 132 N.M. 445; 50 P.3d 194 (NM 2002)

Several states examined the *Troxel* decision, but in a context other than grandparent visitation. The Maine court has not directly dealt with the instant issue. In *In re Alana*, 2002 ME 126; 802 A. 2d 976 (2002), the court was dealing with termination of parental rights, but did state that the best interest of the child standard, alone, is insufficient standard for determining when the state may intervene in the decision making of a competent parent. *Rideout v. Riendeau,* 2000 ME 198, 761 A. 2d 291(2000) dealt with a situation where grandparents had acted as parents for some time. The Maine Court specifically did not address situations where there was no relationship. Finally, the New Jersey Superior Court held their visitation statute unconstitutional as applied, noting that "although facial attack has substance, we reverse because grandparent visitation statute is

[3] For good or ill, the New Mexico court relied primarily on a 2001 Illinois Appellate case, *In re Mehring*, 324 Ill. App. 3d 262 (Ill. App. Ct. 5th Dist. 2001) which was essentially overturned by later Illinois Supreme Court Cases. See *Lulay* and *Wickham, supra.*

unconstitutional as applied." *Wilde v. Wilde*, 341 N.J. Super. 381 (N.J. Super. Ct. App. Div. 2001).

CASES THAT APPELLEE ASSERTS ARE WRONGLY DECIDED

Three courts, Ohio, Missouri and Wisconsin, have upheld their visitation statutes, for reasons that, Appellee respectfully asserts, are simply wrong. These cases do not comport with the specific declarations of Troxel, or with the essence of Troxel. The Supreme Court of Missouri, *Blakely v. Blakely*, 83 S. W. 3d 537 (2002) reviewed a grant of grandparent visitation. The parents were married, and had consented voluntarily to monthly visits with the grandparents in principal. The parties could not agree on times, and the trial court had ordered two hours every 90 days. The Supreme Court reviewed the matter and affirmed the trial court. By the time this matter was before the court, the visitation statute in question in *Blakely* had already been modified by the Missouri legislature to add a presumption that Parents act in the best interest of the minor children. Missouri SB No. 923 (2002), sec. 452.402.2. The Blakely court performed its analysis under the old standard irregardless of the change in the law. The court basically held that the old Missouri grand parent visitation statute, which allowed only "occasional Temporary visitation," was such a minor inconvenience that it did not rise to the level of a due process violation. Unlike the principals set forth in Troxel, the court found that this statute "balanced" the needs of parents and grandparents because grandparents had to show that visitation was "unreasonably" denied. The court also looked to the fact that their best interest test included procedural safeguards, such as appointing a guardian ad Litem, and seeking out the children's wishes. The *Troxel* court's problem with best interest tests was NOT that they were poorly applied, but that the courts determination of

best interest had replaced the parents determination of best interest. The Missouri court did not address, or carefully ignored, the due process issues raised in *Troxel*, and instead relied on an older Missouri case for the basis of its opinion. The important factor to the *Troxel* court was the existence of the intrusion in to the parental realm, not the extent. The Missouri Court, perhaps because they were reviewing a law already amended, simply missed this point.

The Ohio Appellate Court issued a three paragraph opinion in which they found their visitation statute constitutional. *Epps v. Epps*, 2001 Ohio App. LEXIS 3688. They distinguished Ohio's statute from the one in *Troxel* because the Ohio statute allowed an order for grandparent visitation "only upon a disruptive, precipitating event; herein divorce." What would cause the Ohio Court to opine that divorce is more disruptive than

> daughter and her maternal grandparents. Under *Troxel*, this decision should be presumed to be in the child's best interest and should be given special weight. But it was not. The magistrate's belief that a child should have healthy contact with extended family trumps the Appellee's decision. In a case of dueling decisions as to best interest of a child, the parent's decision, under *Troxel* should prevail." 2002 Ohio 6178 (2002)

The state of Wisconsin adopted a similarly strained position. In *Robin H. v. Ronald J.B.*, 243 Wis. 2d 116. 627 N. W. 2d 548, 2001 Wi App 101, (2001) the court held that the trier of fact must adopt a presumption that a fit parent's decision regarding visitation is in best interest of child. The court then states that the trial judge must also do best interest analysis. Without requiring that the grandparents overcome the presumption, there can be no reason to do a best interest test. Otherwise, the court is simply setting itself up for dueling opinions of what is best for the child; the parents determination or the Judge's determination. That goes to the heart of what Justice O'Connor was talking about when she wrote the Troxel decision. Due Process is offended when the court substitutes it's "better" opinion regarding grandparent visitation in place of the fit parent's decision. The judiciary in Wisconsin has set up a contest between the fit parent and the trial court everytime.

The Michigan Court of Appeals has applied *Troxel* in the context of a custody dispute. *Heltzel v. Heltzel*, 248 Mich App 1 (2001), while it does incorporate the standards set forth in *Troxel*, it does so in a context quite different from either the instant case or *Troxel* itself. The divorced mother in Heltzel voluntarily, via stipulation entered with the court, gave her mother custody of her daughter, apparently believing she was not at that time financially able to provide for the child. Eventually the mother re-married and otherwise got her life back on solid ground and petitioned the court for custody.

Heltzel did not involve the grandparents' visitation act, MCL 722.27b, in any way. Heltzel was a dispute between a parent and grandparents who had been acting as parents for several years. The *Heltzel* court found that the custody laws were not applied constitutionally pursuant to *Troxel*, but believed that those particular laws *could* be applied constitutionally, and provided direction on how to do so. The court in *Heltzel* acknowledge the principals set forth in *Troxel*, and the fact that a fit parent's decisions regarding their children were not being met by the subjective best interest test currently in use. The *Heltzel* court then tried to fashion a way to make that test work under the *Troxel* standard.

When considering a challenge to the constitutionality of a statute, the court is to adhere to the well-established rule that a statute is presumed to be constitutional and is so construed unless its unconstitutionality is clearly apparent. *People v. Noble*, 238 Mich. App. 647, 651; 608 N.W. 2d 123(1999), *People v. Boomer*, 250 Mich App. 534 (2002). Moreover, "[t]o make a successful facial challenge to the constitutionality of a statute, the challenger 'must establish that no set of circumstances exists under which the act would be valid.'" *Council of Organizations and Others for Ed About Parochiaid, Inc. v. Governor,* 455 Mich 557, 568, 602; 566 N. W. 2d 208 (1997) quoting *United States v. Salerno,* 481 U.S. 739, 745; 107 S. Ct. 2095; 95 L.Ed. 2d 697(1987). The constitutionality of an act must rest on the provisions of the act itself, and not on the compensating actions of those affected by the act. *Rasser v. Federal Collateral Society, Inc.*, 299 Mich. 206, 215; 300 N.W. 45 (1941).

Appellee asserts that there is no set or circumstances under which the statute as it is currently written can be valid. The statute, in essence, provides that the when a grand parent files for visitation the trial court, without or without benefit of a hearing, "shall enter a grandparenting time order only upon a finding that grandparenting time is in the best interests of the child." MCL 722.27b(3). Moreover, by requiring that the judge only make written findings of the reasons for his denial of a request, the statute gives a presumption to the grandparents that the request for visitation is in the child's best interest. The Michigan Statute gives no deference to a fit parent's decision, and hence, violates due process.

> (3) A grandparent seeking a grandparenting time order may commence an action for grandparenting time, by complaint or complaint and motion for an order to show cause, in the circuit court in the county in which the grandchild resides. If a child custody dispute is pending, the order shall be sought by motion for an order to show cause. The complaint or motion shall be accompanied by an affidavit setting forth facts supporting the requested order. The grandparent shall give notice of the filing to each party who has legal custody of the grandchild. A party having legal custody may file an opposing affidavit. A hearing shall be held by the court on its own motion or if a party so requests. At the hearing, parties submitting affidavits shall be allowed an opportunity to be heard. **At the conclusion of the hearing, if the court finds that it is in the best interests of the child to enter a grandparenting time order, the court shall enter an order providing for reasonable grandparenting time of the child by the grandparent by general or specific terms and conditions. If a hearing is not held, the court shall enter a grandparenting time order only upon a finding that grandparenting time is in the best interests of the child.** A grandparenting time order shall not be entered for the parents of a putative father unless the father has acknowledged paternity in writing, has been adjudicated to be the father by a court of competent jurisdiction, or has contributed regularly to the support of the child or children. **The court shall make a record of the reasons for a denial of a requested grandparenting time order.** MCL 722.27b(3) emphasis added.

Appellee knows of no interpretation of those words that would pass constitutional scrutiny. Troxel stands for the proposition that the starting place in the dispute between a grandparent and parent is that a fit parent must be given credit for making a decision (whatever it may be) that is in their child's best interest. There is simply no room for that in this statute. If the court was to judicially interpret the statute to require such a starting place, it is difficult to see how that would be easily and uniformly integrated with the existing statute.

As the Court of Appeals said, such an effort would require a significant, substantive re-writing of the statute. To render the statute constitutional, the court would have to read into it requirements that go beyond the test of the statute and do more than simply define the term "best interest of the child" more clearly.

If this court was inclined to find a constitutional interpretation, the road is full of difficulties. Appellee would urge the court that the best course of action is to find the statute facially unconstitutional and allow the legislature to fashion a new constitutional statute.

CONCLUSION

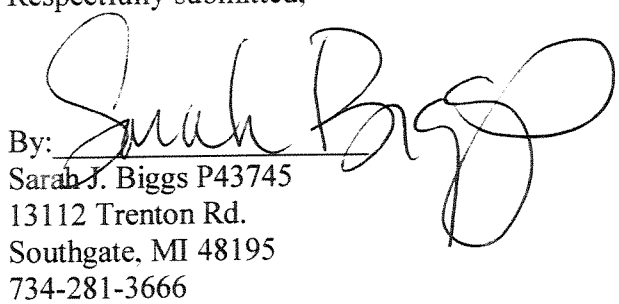
In an unpublished New York appellate case, the court succinctly states the concern the grand parent visitation cases bring up, "as for the children the litigation is ostensibly designed to serve, they are placed at the center of intergenerational warfare that creates intense loyalty conflicts for them, threatens to undermine their parents' authority, and humiliates either their parents, their grandparents, or both. They learn about family problems that parents' might otherwise choose to shield them from, and they suffer from the tremendous emotional toll that litigation against their parents exacts. These lawsuits come at a very high cost – loss of security, harmony, and peace in the family setting that children need." *Farag v. Ghebriyal*, 2001 N.Y. Misc. Lexis 453, 2001 N.Y. Slip Op 40152U (N.Y. Fam. Ct. Sept. 28, 2001), unpublished.

The Michigan Grandparent visitation statute, MCL 722.27b, which allows a grandparent to request visitation as long as the child is a minor, and which grants visitation whenever it is in the "best interest of the child" is violative of due process in that it allows the court to substitute its judgment for that of a fit parent without granting any weight or deference to the parents determination. There is no practical way to apply the statute in a constitutional manner. It is unconstitutional on its face.

RELIEF SOUGHT

Plaintiff herein respectfully requests that this court affirm the Court of Appeals decision of January 25, 2002 holding that MCL 722.27b is violative of the due process rights of fit parents and facially unconstitutional.

Respectfully submitted,



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