

Grandparent Visitation After *Troxel v. Granville*
in Various States and Idaho

By
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I. Introduction

The typical American family has demographically changed. More and more children grow up in the care of their grandparents. The increasing role of grandparents and other non-parental caretakers caused every state by 1993 to enact non-parental visitation statutes.¹ In June, 2000, the U.S. Supreme Court cast doubt on the constitutionality of these statutes in *Troxel v. Granville* 530 U.S. 57 (2001). The U.S. Supreme Court in *Troxel* held Washington's visitation law RCW 26.10.160(3) unconstitutional.

This paper surveys how states have responded to *Troxel* and discusses how Idaho might learn from other states' experience in crafting its own response. This paper first examines *Troxel*. Next it examines non-parental visitation statutes post *Troxel* and subsequent state court interpretations of whether those statutes pass constitutional muster. Based on case law and statutory developments in other states, the paper then describes the changes required of the Idaho's grandparent visitation statute [I.C. § 32-719] and further provides an example of constitutional grandparent visitation statute.

A. The Facts of *Troxel*

The facts in *Troxel v. Granville* represent non-typical familial demographic change apparent in the last century. Tommie Granville had three children before her relationship with Brad Troxel.² Tommie and Brad produced two children together:

¹ *Troxel v. Granville* 530 U.S. 53, 64 (2001). (The *Troxel* court referred to these statutes as non-parental visitation statutes. Other terms included grandparent visitation statutes or third party visitation statutes.)
² *Id* at 60-61.

Isabelle and Natalie. In 1991, Tommie and Brad separated.³ As a result, Brad Troxel moved back in with his parents, Jenifer and Gary Troxel. With Brad back in the house, Jenifer and Gary Troxel had significant contact with their two granddaughters (Isabelle and Natalie) from 1991 until 1993.⁴ Brad Troxel committed suicide in 1993.⁵ After Brad's suicide, Tommie cut off visitation between the children and their grandparents (Jenifer and Gary). In 1994, Jenifer and Gary Troxel filed a petition in Washington Superior Court seeking visitation with their granddaughters under RCW § 26.10.160(3).⁶ That statute allowed "any person" to petition for visitation rights at "any time" and authorized the court to order visitation rights for any person when visitation served "the best interest of the child." Tommie Granville, opposed the grandparent's petition.

The Washington Superior Court granted Jenifer and Gary's petition. The court reasoned that the children would "[benefit] from spending quality time with the [Troxels]."⁷ The Court of Appeals reversed, holding that non-parents lack standing under the statute to seek visitation unless a custody action was pending.⁸ The Washington Supreme Court affirmed the Court of Appeals judgment denying the grandparent's petition for visitation rights. The Washington Supreme Court however, did not agree with

³ Id at 61-62. See also, 1999 WL 1079965. U.S. Pet. Brief (1999). (As a result of separation Brad and Tommie agreed to a parenting plan including custody and visitation which was filed with the state court)

⁴ Id.

⁵ Id.

⁶ Id at 60-62. ("Although the Troxel's at first continued to see Isabelle and Natalie on a regular basis after their son's death, Tommie Granville informed the Troxel in October 1993 that she wished to limit their visitation with her daughters to one short visit per month") *In re Smith*, 137 Wash.2d 1, 6 969 P.2d 21, 23-24 (1998); *In Re Troxel*, 87 Wash App. 131, 133, 940 P.2d 698, 698-699 (1997).

⁷ Id at 61-62.

⁸ In the Washington Court of Appeals view their holding was "consistent with the constitutional restrictions on state interference with parents' fundamental liberty interest in the care, custody and management of their children" *In Re Troxel*, 87 Wash.App.131, 134-135, 940 P.2d 698, 700 (1993).

the Court of Appeals on the question of standing and instead found that the clear language of the statute gave the Troxel's standing.⁹

The Washington Supreme Court held that, on its face, RCW § 26.10.160(3) violated the Federal Constitution. The Court found that a parent's fundamental right to autonomy in child rearing decisions prohibited state interference except to "prevent harm or potential harm to the child." RCW § 26.10.160(3) failed to require a threshold showing of harm and thus was facially unconstitutional.¹⁰ Essentially, Washington's Supreme Court held that the best interest of the child standard could not be applied in third party visitation disputes without violating a parent's fundamental rights unless there was a threshold showing of harm.¹¹ In short, allowing "any person" at "any time" to petition for visitation with the only requirement that it served the best interest of the child, the Washington statute swept too broadly.¹² The U.S. Supreme Court granted certiorari and issued its decision June 5, 2000.

B. The Opinions in Troxel

The U.S. Supreme Court opinion consists of six separate opinions; a plurality written by Justice O'Connor, joined by Chief Justice Rehnquist and Justice Ginsburg and Breyer; two concurrence opinions by Justices Souter and Thomas; and three dissenting opinions by Justices Stevens, Scalia and Kennedy. Troxel v. Granville, 530 U.S. 57, 120 S.Ct. 2054 (2000).

⁹ In re Custody of Smith, 137 Wash.2d 1,14 (1998).

¹⁰ Troxel at 61-63.

¹¹ Smith at 5-12.

¹² Id.

1. The Plurality

Troxel did not focus on the rights of grandparents.¹³ Instead, *Troxel* focused on the relationship between the state and parents.¹⁴ The plurality discussed in great length the history of parental rights and reiterated that parents have a fundamental interest in their care, companionship and custody of their children” which is a liberty interest protected by the Due Process Clause of the Fourteenth Amendment.¹⁵

After Justice O’Connor reiterated parents fundamental rights, she addressed the constitutionality of RCW § 26.10.160(3). RCW § 26.10.160(3) permitted “[a]ny person” to petition for visitation rights “at any time” if the judge found such visitation would serve the best interest of the child.¹⁶ The plurality agreed that RCW § 26.10.160(3) as applied was unconstitutional.¹⁷ They found the “breathtakingly broad” scope of RCW § 26.10.160(3) directly infringed on the fundamental rights of Tommie Granville to make child-rearing decisions.¹⁸ The court did not hold RCW § 26.10.160(3) unconstitutional

¹³ *Troxel* at 57-75.

¹⁴ *Troxel* at 67

¹⁵ *Troxel* at 63-68. See e.g., *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S.Ct. 1208 (1972). (“It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children ‘comes[s] to the this court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements’ “); *Quillion v. Walcott*, 434 U.S. 246, 255, 98 S.Ct. 549 (1978) (“We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected”); *Wisconsin v. Yoder*, 406 U.S. 205, 232, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) (“The history and culture of Western Civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. The primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition “); *Washington v. Glucksberg*, 521 U.S. 702, 720, 117 S.Ct. 2258 (1997) (“In a long line of cases, we have held that, in addition to specific freedoms protected by the Bill of Rights, the ‘liberty’ specially protected by the Due Process Clause includes the right...to direct the education and upbringing of one’s children”) *Meyer v. Nebraska*, 262 U.S. 390, 399, 401, 43 S.Ct. 625, 67 L.Ed. 1042 (1923).

¹⁶ *Id* at 57.

¹⁷ *Id* at 67.

¹⁸ *Id* at 66-67.

on its face. The plurality specifically declined to find that non-parental visitation statutes are unconstitutional per se.¹⁹

Justice O'Connor found RCW § 26.10.160(3) as drafted gave judges a sweeping power to determine what was in the best interest of the child without according "deference" or "special weight" to a fit parent's decision regarding visitation with their child.²⁰ According to the plurality, the trial judge had "presumed the grandparents requests should be granted unless the children would be impacted adversely."²¹ The presumption had the effect of placing the evidentiary burden on the fit custodial parent to disprove why visitation would not be the best interest of the children. As such, it contravened the traditional notion that a fit parent will act in the best interest of their children.²² Thus RCW § 26.10.160(3) had been unconstitutionally applied by the trial judge.²³

In summary the *Troxel* plurality held: (1) the Due Process Clause of the Fourteenth Amendment protects a parent's liberty interest in decisions regarding the care, custody and control of their child; (2) there is presumption that a fit parent will act in the best interest of their child and thus parental decisions with whom a child may interact must be accorded some "special weight" or "deference"; (3) grandparents bear the burden of rebutting that presumption and proving that visitation would be in the best interest of the child. Importantly, the plurality did not explain how much deference or special weight

¹⁹ See *Troxel* at 73, The Washington Supreme Court in *Troxel* found that to survive the due process challenge the non-parental visitation statute required a showing of harm or potential harm to child as a prerequisite granting visitation.

²⁰ Id at 68-69.

²¹ Id at 69.

²² Id.

²³ Id at 67.

is required and instead implicitly left that determination to the discretion of the state courts that are best suited to determine visitation according to their visitation statutes.

2. The Concurrences

Justice Souter agreed with the Washington Supreme Court that RCW § 26.10.160(3) was unconstitutional on its face basing this conclusion on the breath of the statute in allowing “any person” at “any time” to petition for and to receive visitation rights subject only to a free-ranging best-interest-of-the-child standard.”²⁴

Justice Souter found it unnecessary to adopt the Washington Supreme Court’s rationale that the statute was unconstitutional in failing to require a showing of harm to justify grandparent visitation.”²⁵

Justice Thomas in concurrence found that the strict scrutiny review was appropriate standard for an infringement of the fundamental right of a parent. Justice Thomas found RCW § 26.10.160(3) unconstitutional under such strict scrutiny or even a applying a lesser level of review.²⁶ “Here, the State of Washington lacks even a legitimate government interest-to say nothing of a compelling one-in second guessing a fit parent’s decision regarding visitation with third parties.”²⁷

3. The Dissenters

Justice Stevens in dissent believed that the U.S. Supreme Court should not have granted certiorari, because it is not the role of the states to address matters of family disputes and the Federal Courts are not equipped to handle family matters on a case by

²⁴ Id at 75 (Souter, J., Concurring).

²⁵ Id at 76-79 (Souter, J., Concurring).

²⁶ Id at 80 (Thomas, J., Concurring).

²⁷ Id.

case basis.²⁸ In addition, Justice Stevens disagreed with the plurality's focus on the analysis between the rights of the parent and the state.²⁹ Justice Stevens' emphasized that "there is at a minimum a third individual, whose interests are implicated in every case to which the statute applies—the child"³⁰ Justice Stevens also disagreed with the Washington Supreme Court's interpretation that the Federal Constitution requires "a showing of actual or potential harm to the child before a court may order visitation over a parent's objections."³¹ "We have never held that the parent's liberty interest in this relationship is so inflexible as to establish a rigid constitutional shield, protecting every arbitrary parental decision from any challenge absent a threshold showing of harm."³²

Like Justice Stevens, Justice Scalia in dissent argued that the Federal courts should attempt stay out of family law.³³ Scalia cautioned against expanding parental enumerated rights; because of the creation of "federally prescribed family law."³⁴ In particular, he believed that the Constitution does not create a judicially enforceable substantive right by parents to direct their children's upbringing.

Justice Kennedy in dissent ruled that the Washington Supreme Court erroneously assumed the state could only interfere with parental rights if there was a showing of harm to the child.³⁵ Kennedy reasoned that the best interest standard could constitutionally support ordering third party visitation without proof of harm, especially where a third party shared a "legitimate and well established relationship with the child" or had served

²⁸ Id at 80, 85-92 (Steven, J., Dissenting).

²⁹ Id at 86 (Steven, J., Dissenting).

³⁰ Id.

³¹ Id at 85-86 (Steven, J., Dissenting).

³² Id at 85-86 (Steven, J., Dissenting).

³³ See Troxel at 81-93 (Stevens J., dissenting at 81-92 and Scalia J., dissenting at 92-93).

³⁴ Id at 92-93 (Scalia, J., Dissenting).

³⁵ Id at 93-102 (Kennedy, J., Dissenting).

“a caregiving role...over a significant period of time”³⁶ The plurality agreed with Justice Kennedy that the application of the [best interest of the child] standard depends how it is applied and that [the best interest standard] could be applied constitutionally.³⁷

4. A Summary of *Troxel*

In synthesizing *Troxel*, the plurality plus Justice Souter’s concurrence held that a states’ third party, grandparent or non-parental visitation statute must not be too broad. The plurality plus Justice Thomas’s concurrence required a statute to have a fit parent presumption in the text of the statute or by the interpretation, in order that the best interest of the child standard be applied constitutionally. The plurality plus Justice Stevens’ dissent imply that state court interpretation and application can sufficiently narrow a state statute to save it constitutionally. The plurality plus Justice Kennedy’s dissent held the best interest of the child standard could be constitutionally applied, especially when the grandparent had established a significant relationship with the child or had been in a “caregiving” role with the child.³⁸

II. State Trends in Application Post *Troxel*

Troxel forced states to revisit their third party visitation statutes. The changes brought about by *Troxel* are far more complex than simply amending a state statute to include a presumption or “special weight” accorded to fit parents’ decisions. Many states concluded that *Troxel* required statutory revision while other states followed Steven’s and Kennedy’s dissenting opinions and allowed their courts to interpret and apply their statutes constitutionally.

³⁶ Id at 98-99 (Kennedy, J., Dissenting).

³⁷ Id at 94-102 (Kennedy, J., Dissenting).

³⁸ Id at 93-102 (Kennedy, J., Dissenting).

The various approaches of the states in addressing their statutes are as follows:

Some states found their statutes unconstitutional on their face; other states found their statutes unconstitutional as applied; and lastly, the majority upheld the constitutionality of their statutes.

A. State Statutes Found Facially Unconstitutional

Florida, Georgia, Hawaii, Illinois, Iowa, Michigan, New Hampshire and New York declared their statutes wholly or partly unconstitutional.³⁹ Florida, Iowa and Georgia found their statute unconstitutional in violation of their state constitutions as well as the Federal Constitution.⁴⁰ The vast majority of these states determined that their statutes did not accord the required “special weight” or “deference” to a fit parent’s decision in denying visitation.⁴¹ Hawaii, Georgia, Iowa, Illinois, Florida and Michigan went further and held that the state may not interfere with the rights of fit parents unless the third party seeking visitation has shown harm or potential harm to the child or that the parent is otherwise unfit.⁴²

The Iowa Supreme Court declared the Iowa third party visitation statute unconstitutional in Santi v. Santi because it “failed to accord fit parents the presumption

³⁹ Fla. Stat. § 752.01 (1997); Ga. Code Ann. § 19-7-3 (1991); Haw. Rev. Stat. § 571-46.3 (1999); Ill. Comp. Stat., ch. 750, § 5/607 (1998); Iowa Code § 598.35 (1999); Mich. Comp. Laws Ann. § 722.27b (West Supp.1999); Minn. Stat. § 257C.08 (2002)(See, Soohee v. Johnson, 731 N.W. 2d 815 (2007) “Because Minnesota Statutes §257C.08, subd. 7 (2006), impermissibly places the burden on the custodial parent to prove that visitation would interfere with the parent-child relationship by interfering with the parent’s fundamental right to the care, custody, and control of his or her child, that section is unconstitutional.” N.H. Rev. Stat. Ann. § 458:17-d (1992); N.Y. Dom. Rel. Law § 72 (McKinney 1999).

⁴⁰ Beagle v. Beagle, 678 So.2d 1271 (Fla.1996), Belair v. Drew, 776 So.2d 1105 (Fla.App.2001), Santi v. Santi, 633 N.W. 2d 312, 320 (Iowa 2001); Brooks v. Parkerson, 454 S.E.2d 769 (Ga.1995).

⁴¹ DeRose v. DeRose, 469 Mich. 320, 666 N.W.2d 636 (Mich. 2003); Wickham v. Byrne, 199 Ill.2d 309 (Ill. 2002); Santi v. Santi 633 N.W. 2d 312, 320 (Iowa 2001); Brooks v. Parkerson, 454 S.E.2d 769 (Ga.1995).

⁴² DeRose v. DeRose, 469 Mich. 320, 666 N.W.2d 636 (Mich. 2003); Wickham v. Byrne, 199 Ill.2d 309 (Ill. 2002); Santi v. Santi, 633 N.W. 2d 312, 320 (Iowa 2001); Brooks v. Parkerson, 454 S.E.2d 769 (Ga.1995); Doe v. Doe, 172 P.3d 1067,1080 (Hawaii 2007).

deemed so fundamental in *Troxel*.⁴³ Iowa Code § 598.35(1999) placed the best interest analysis “squarely in the hands of a judge without first according primacy to the parents’ own estimation of their children’s best interest.”⁴⁴ The *Santi* court determined that a threshold showing of parental unfitness was required before proceeding to the best interest analysis.⁴⁵ Where a parent is unfit, the state may proceed to the best interest analysis without violating their fundamental right to parent.⁴⁶ Initially, the Iowa Supreme court, in *Santi*, did not require a showing of harm or potential harm observing instead that consideration of potential harm to the child would customarily be included in any best interest analysis.⁴⁷ Thereafter, *In Re Marriage of Howard*, the Iowa Supreme Court found that its “statute [§598.35(1)] on its face...[failed] to recognize the degree of harm or potential harm to the child needed to support state intervention.”⁴⁸

Like Iowa, Michigan and Illinois held their statutes facially invalid because they failed expressly to accord fit parents any sort of deference.⁴⁹ Like the Iowa Supreme Court in *In Re Marriage of Howard*, the Illinois and Michigan Supreme Court’s held that proof of harm or potential harm to the child was required to overcome the presumption that a fit parent acts in the best interest of their children.⁵⁰

Hawaii and Georgia also held their grandparent visitation statutes facially unconstitutional. The Hawaii Supreme Court held that the “proper recognition of parental

⁴³ *Santi v. Santi*, 633 N.W. 2d 312, 320 (Iowa 2001) (Section 598.35(7) places the best interest decision squarely in the hands of the judge without first according primacy to the parent’s own estimation of their child’s best interest. Without a threshold showing of unfitness, the statute effectively substitutes sentimentality for constitutionality”).

⁴⁴ *Id.* at 320.

⁴⁵ *Id.* at 321.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *In Re Marriage of Howard*, 661 N.W. 2d 183 (Iowa 2003).

⁴⁹ *DeRose v. DeRose* 469 Mich. 320, 666 N.W.2d 636(Mich. 2003); *Wickham v. Byrne*, 199 Ill.2d 309, 263 Ill. 799 (Ill. 02002).

⁵⁰ *Id.*

autonomy in child-rearing decisions requires that the party petitioning for visitation demonstrate that the child will suffer significant harm in the absence of visitation before the family court may consider what degree of visitation is in the child's best interests.⁵¹

One can see clear trends in states that have found their grandparent visitation statutes facially unconstitutional. All of these states recognized the presumption that a parent, whose unfitness has not been challenged, will act in the child's best interest and thus that the fit parents decision denying visitation must be accorded some special weight or deference. All of these states recognized that grandparents bear the burden of overcoming the presumption.

The second trend found in Hawaii, Georgia, Iowa, Illinois, Florida and Michigan is that there must be a showing of harm or potential harm to the child. These states differ in whether it is a threshold showing of harm which initially permits state intervention, or whether harm is merely a factor considered in the best interest analysis. In these states the showing of harm or potential harm is more prevalent as a threshold requirement.

States that require proof of harm or potential harm to the child go beyond what *Troxel* can be interpreted to require. The effect of this extension of *Troxel* is to limit the range of cases in which judges have discretion to considering granting third party visitation. While the requirement of showing harm or potential harm does limit the court's flexibility, where such a showing of harm is made, the court will be hard pressed to deny visitation having found that such a denial would cause harm or potential harm to the child.

B. Unconstitutional as Applied Statutes

⁵¹ *Doe v. Doe*, 172 P.3d 1067,1080 (Hawaii 2007). See e.g. *Brooks v. Parkerson*, 265 Ga. 189, 454 S.E.2d 769(Ga.1995) (the state may only impose visitation over the parent's objections on a showing that failure to do so would be harmful to the child.)

After *Troxel*, eleven states statutes have been found unconstitutional as applied.⁵² The Arkansas Supreme Court found their state's statute unconstitutional as applied in *Linder v. Linder* because "[r]ather giving the parent's decision presumptive or special weight...as *Troxel* require[d]," the statute was silent on the matter leaving it to the court's discretion. The Arkansas statute also required the judge to provide reasons in writing when denying, but not when granting, grandparent visitation. The effect was to place the burden of proof on the parent to prove that visitation was not in the child's best interest.⁵³ Kansas held their statute unconstitutional as applied in a case in which the trial court made "no presumption...that a fit parent will act in the best interest of his or her child."⁵⁴

In summary states that have held their statutes unconstitutional as applied generally have done so because the judge only engaged in a best interest analysis and did not apply a the fit parent presumption. The absence of a presumption is the same ground on which other states have found their statutes facially unconstitutional.

C. Constitutional Grandparent Visitation Statutes

Thirty-one state grandparent visitation statutes remain constitutional after *Troxel*.⁵⁵ Of the thirty-one states some have not addressed the constitutionality of their

⁵² Ala. Code § 30-3-4.1 (1989); Ark. Code Ann. § 9-13-103 (1998); Colo.Rev.Stat. § 19-1-117 (1999); Conn. Gen. Stat. § 46b-59 (1995); Kan. Stat. Ann. § 38-129 (1993); Md. Fam. Law Code Ann. § 9-102 (1999); N.J. Stat. Ann. § 9:2-7.1 (West Supp.1999-2000); Ohio Rev. Code Ann. §§ 3109.051, 3109.11 (Supp.1999); Okla. Stat., Tit. 10, § 5 (Supp.1999); S.C.Code Ann. § 20-7-420(33) (Supp.1999); Wash. Rev.Code § 26.10.160(3).

⁵³ *Linder v. Linder*, 72 S.W.3d 841, 856-57 (Ark. 2002).

⁵⁴ *Kan. Dep't of Soc. & Rehab. Services v. Paillet*, 16 P.3d 962, 970(Kan. 2001)

⁵⁵ Alaska Stat. Ann. § 25.20.065 (1998) Ariz. Rev. Stat. Ann. § 25-409 (1994); Cal. Fam. Code Ann. § 3104 (West 1994); Del.Code Ann., Tit. 10, § 1031(7) (1999); Idaho Code § 32-719 (1999); Ind. Code § 31-17-5-1 (1999); Ky. Rev. Stat. Ann. § 405.021 (Baldwin 1990); La. Rev. Stat. Ann. § 9:344 (West Supp.2000); La. Civ. Code Ann., Art. 136 (West Supp.2000); Me. Rev. Stat. Ann., Tit. 19A, § 1803 (1998); Mass. Gen. Laws § 119:39D (1996); Minn. Stat. § 257C.08 (2002)(See, *Soohoo v. Johnson*, 731 N.W. 2d 815 (2007) "Because Minnesota Statutes §257C.08, subd. 7 (2006), impermissibly places the burden on the custodial parent to prove that visitation would interfere with the parent-child relationship by interfering

statutes. In addition some state statutes that were held unconstitutional after *Troxel* were amended and as amended, found constitutional.⁵⁶ Many courts in these states have held that to satisfy the [*Troxel*]“special weight” requirement, a presumption that a fit parent decision to decline visitation is in the child best interest must be applied and these courts further held the burden is on the grandparents seeking visitation to rebut the presumption. Despite these holdings, statutes in these states usually do not have language expressly establishing the presumption or placing the burden of proof on the grandparents. So how then did thirty-one states find their statutes constitutional, without such language?

The majority of these states let their courts apply *Troxel* to their own statute and determine visitation based on the facts of the case. Thus if a judge makes a determination that visitation is appropriate and applies the “*Troxel* presumption” and resulting “special weight” requirement, then the statute is applied constitutionally.

For example, when an application of the statute was challenged in Arizona on due process grounds, the Arizona Court of Appeals, in *Jackson v. Tangreen* held that *Troxel* did not render the Arizona statute unconstitutional on its face. The *Jackson* court observed that the *Troxel* plurality declined to find non-parental visitation statutes unconstitutional per se. The *Jackson* court also observed that Arizona’s statute was much more narrowly drawn than Washington statute struck down as unconstitutional as applied

with the parent's fundamental right to the care, custody, and control of his or her child, that section is unconstitutional.” Miss. Code Ann. § 93-16-3 (1994); Mo. Rev. Stat. § 452.402 (Supp.1999); Mont. Code Ann. § 40-9-102 (1997); Neb. Rev. Stat. § 43-1802 (1998); Nev. Rev. Stat. § 125C.050 (Supp.1999); N.M. Stat. Ann. § 40-9-2 (1999); N.C. Gen. Stat. §§ 50-13.2, 50-13.2A (1999); N.D. Cent. Code § 14-09-05.1 (1997); Ore. Rev. Stat. § 109.119 (2001); 23 Pa. Cons. Stat. §§ 5311-5313 (1991); R.I. Gen. Laws §§ 15-5-24 to 15-5-24.3 (Supp.1999); S.D. Codified Laws § 25-4-52 (1999); Tenn. Code Ann. §§ 36-6-306, 36-6-307 (Supp.1999); Tex. Fam. Code Ann. § 153.433 (Supp.2000); Utah Code Ann. § 30-5-2 (1998); Vt. Stat. Ann., Tit. 15, §§ 1011-1013 (1989); Va. Code Ann. § 20-124.2 (1995); W. Va. Code §§ 48-10-301, 48-10-501, 48-10-502 (2008); Wis. Stat. §§ 767.43 (1993-1994); Wyo. Stat. Ann. § 20-7-101 (1999).

⁵⁶ Ga. Code Ann. § 19-7-3 (1991); Ore. Rev. Stat. § 109.119 (1997).

in *Troxel*.⁵⁷ The Arizona statute was narrower in that it required the court to give weight to a parent's visitation decisions and also consider the motivation of the requesting party and the historical and personal relationship between the child and grandparent, as well as determine any adverse impact visitation would have on the child's customary activities.⁵⁸

The Utah Supreme Court held that its state statute did not unconstitutionally infringe on parent's due process rights to care, custody and control of their child, because the statute "incorporated the presumption...and provided guidance to the court in determining whether petitioning grandparents established circumstances under which the court could, supersede [a] parent's decision to deny visitation."⁵⁹

The next part of the paper examines the appropriate factors in a constitutionally valid grandparent visitation statute.

III. Factors, Criteria and Requirement of State Grandparent Visitation Statutes:

Rebutting the Presumption

By examining state statutes and case law after *Troxel*, one can identify components of a constitutionally valid grandparents visitation statute. The required components fall into three categories: (1) "standing" requirements which restrict who may petition for visitation rights and when they may do so; (2) factors that are to be considered or that must be established as a prerequisite to granting visitation petitions filed by those who have standing; and (3) factors enumerated in some state statutes to guide a court's analysis of whether third party visitation in a particular case is in the child's best interest.

⁵⁷ Id at 103.

⁵⁸ Id.

⁵⁹ *In Re estate of S.T.T.* 114 P.3d 1083, 1089-1092 (Utah 2006).

A. Standing.

The Washington statute at issue in *Troxel* read that “any person” could petition the court for visitation at “any time.”⁶⁰ By criticizing these features of these statutes for their breathtaking breadth, the plurality in *Troxel* implied that a state must limit which third parties can petition for visitation and when they can do so. The rationale for such limits is clear; parents should not be continuously exposed to the risk of defending their decisions about third party visitation anytime a grandparent or other third party chooses to challenge that decision in court.

This portion of the paper focuses on restrictions on grandparent’s standing to petition for visitation rights. Those restrictions establish threshold requirements. The majority of state statutes limit the standing of grandparents to petition the court for visitation except when: (1) a parent dies; (2) the parents legally separate or divorce; (3) the child is born out of wedlock.

1. Death

Thirty-one statutes allow petitions for visitation when one of the parents has died.⁶¹ Logically when a parent dies, the other parent may move away, remarry or sever

⁶⁰ *Troxel* at 66.

⁶¹ Ala. Code § 30-3-4.1 (1989); Ariz. Rev. Stat. Ann. § 25-409 (1994); Ark. Code Ann. § 9-13-103 (1998); Colo. Rev. Stat. § 19-1-117 (1999); Ill. Comp. Stat., ch. 750, § 5/607 (1998); Ind. Code § 31-17-5-1 (1999); Iowa Code § 598.35 (1999); Kan. Stat. Ann. § 38-129 (1993); Ky. Rev. Stat. Ann. § 405.021 (Baldwin 1990); La. Rev. Stat. Ann. § 9:344 (West Supp.2000); Me. Rev. Stat. Ann., Tit. 19A, § 1803 (1998); Mass. Gen. Laws § 119:39D (1996); Mich. Comp. Laws Ann. § 722.27b (West Supp.1999); Minn. Stat § 257C.08 (2002); Miss. Code Ann. § 93-16-3 (1994); Mo. Rev. Stat. § 452.402 (Supp.1999); Neb. Rev. Stat. § 43-1802 (1998); Nev. Rev. Stat. § 125C.050 (Supp.1999); N.H. Rev. Stat. Ann. § 458:17-d (1992); N.M. Stat. Ann. § 40-9-2 (1999); N.Y. Dom. Rel. Law § 72 (McKinney 1999); Ohio Rev. Code Ann. §§ 3109.051, 3109.11 (Supp.1999); Okla. Stat., Tit. 10, § 5 (Supp.1999); 23 Pa. Cons. Stat. §§ 5311-5313 (1991); R.I. Gen. Laws §§ 15-5-24 to 15-5-24.3 (Supp.1999); S.C. Code Ann. § 20-7-420(33) (Supp.1999); Tenn. Code

ties with the deceased's family. Thirty-one states consider this an appropriate occasion for considering grandparent visitation,

Indiana Code § 31-17-5-1 provides that "a child's grandparent may seek visitation rights if (1) the child's parent is deceased." Oklahoma's statute (10 Okl. St. Ann. 5) provides that "any grandparent of an unmarried minor child may seek and be granted reasonable visitation" if the district court finds it "in the best interest of the child" and... the intact nuclear family had been disrupted by the death of one the child's parents and the grandparent had a preexisting relationship with the child." Pennsylvania's statute (23 Pa. C.S.A. 5311) allows the court to grant visitation when one of the child's parents is deceased and such visitation is in the best interest of the child and would not interfere with the parent-child relationship.

These statutes differ in important ways. In Indiana, death of one parent is one of several circumstances that give grandparent the standing to petition for visitation. In Indiana, once a grandparent has standing to petition, the court will proceed directly to the best interest determination. In Oklahoma and Pennsylvania, death of one parent creates standing, but unlike Indiana, other criteria must be satisfied before moving to the best interest determination. Death of one of the parents, either as a prerequisite for giving grandparents standing to petition or considered with other criteria, is a circumstance that the majority of states recognize as an appropriate occasion for considering grandparent visitation.

Ann. §§ 36-6-306, 36-6-307 (Supp.1999); Tex. Fam. Code Ann. § 153.433 (Supp.2000); Utah Code Ann. § 30-5-2 (1998); Vt. Stat. Ann., Tit. 15, §§ 1011-1013 (1989); Va. Code Ann. § 20-124.2 (1995).

2. Divorce

Twenty-eight states consider divorce or dissolution of the parents' marriage in their statutes as a circumstance that gives grandparents standing to seek visitation.⁶² In a divorce, the court may limit or schedule visitation. Some states allow a petition for grandparent visitation during the divorce proceeding. This allows the judge to make a determination of visitation and custody for both the parents and visitation for the grandparents. The Utah statute permits "grandparents...[to] file a petition for visitation rights in a pending divorce proceeding."⁶³

Other statutes allow petitions after the divorce has finalized, such as Louisiana. Louisiana's statute provides "if the parents of the minor child are legally separated...for a period of six months, the grandparent...may have reasonable visitation" if the court finds it to be in the best interest of the child.⁶⁴ Some statutes are vague as to when grandparents can petition in connection with the parents' divorce or separation.

3. Wedlock

⁶² Ala. Code § 30-3-4.1 (1989); Ariz. Rev. Stat. Ann. § 25-409 (1994); Ark. Code Ann. § 9-13-103 (1998); Colo. Rev. Stat. § 19-1-117 (1999); Fla. Stat. § 752.01 (1997); Ga. Code Ann. § 19-7-3 (1991); Ill. Comp. Stat., ch. 750, § 5/607 (1998); Ind. Code § 31-17-5-1 (1999); Iowa Code § 598.35 (1999); La. Rev. Stat. Ann. § 9:344 (West Supp.2000); Mass. Gen. Laws § 119:39D (1996); Mich. Comp. Laws Ann. § 722.27b (West Supp.1999); Minn. Stat § 257C.08 (2002); Miss. Code Ann. § 93-16-3 (1994); Mo. Rev. Stat. § 452.402 (Supp.1999); Neb. Rev. Stat. § 43-1802 (1998); Nev. Rev. Stat. § 125C.050 (Supp.1999); N.H. Rev. Stat. Ann. § 458:17-d (1992); N.M. Stat. Ann. § 40-9-2 (1999); Ohio Rev. Code Ann. §§ 3109.051, 3109.11 (Supp.1999); Okla. Stat., Tit. 10, § 5 (Supp.1999); 23 Pa. Cons. Stat. §§ 5311-5313 (1991); R.I. Gen. Laws §§ 15-5-24 to 15-5-24.3 (Supp.1999); S.C. Code Ann. § 20-7-420(33) (Supp.1999); Tenn. Code Ann. §§ 36-6-306, 36-6-307 (Supp.1999); Utah Code Ann. § 30-5-2 (1998); Va. Code Ann. § 20-124.2 (1995) W. Va. Code, § 48-10-401,402 (2001).

⁶³ Utah Code Ann. § 30-5-2 (1998).

⁶⁴ La. Rev. Stat. Ann. § 9:344 (West Supp.2000).

Eighteen states statutes allow grandparents to petition for visitation when the child is born out of wedlock or when the paternity of the child is at issue.⁶⁵ Where a child is born out of wedlock, the grandparents are at risk of not having access to the child and if paternity is established, the grandparents are permitted to petition the court for visitation.

B. Overcoming the Presumption: Prerequisites and Factors of the Best Interest Analysis

The majority of states after *Troxel* have expressly recognized in either statute or case law, the presumption that a fit parent acts in the best interest of his or her child.⁶⁶ The states also identify various circumstances that are either required to overcome that presumption or are factors considered in determining whether the presumption has been overcome.

1. Harm

⁶⁵ Ala. Code § 30-3-4.1 (1989); Ariz. Rev. Stat. Ann. § 25-409 (1994); Ark. Code Ann. § 9-13-103 (1998); Fla. Stat. § 752.01 (1997); Ill. Comp. Stat., ch. 750, § 5/607 (1998); Ind. Code § 31-17-5-1 (1999); Mass. Gen. Laws § 119:39D (1996); Mich. Comp. Laws Ann. § 722.27b (West Supp.1999); Minn. Stat § 257C.08 (2002); Neb. Rev. Stat. § 43-1802 (1998); Nev. Rev. Stat. § 125C.050 (Supp.1999); N.M. Stat. Ann. § 40-9-2 (1999); Ohio Rev. Code Ann. §§ 3109.12; Okla. Stat., Tit. 10, § 5 (Supp.1999); R.I. Gen. Laws §§ 15-5-24 to 15-5-24.3 (Supp.1999); Utah Code Ann. § 30-5-2 (1998); Va. Code Ann. § 20-124.2 (1995); Wis. Stat. §§ 767.43 (1993-1994).

⁶⁶ Ala. Code § 30-3-4.1 (1989); Ariz. Rev. Stat. Ann. § 25-409 (1994); Ark. Code Ann. § 9-13-103 (1998); Cal. Fam. Code Ann. § 3104 (West 1994); Colo. Rev. Stat. § 19-1-117 (1999); Conn. Gen. Stat. § 46b-59 (1995); Del. Code Ann., Tit. 10, § 1031(7) (1999); Fla. Stat. § 752.01 (1997); Ga. Code Ann. § 19-7-3 (1991); Haw. Rev. Stat. § 571-46.3 (1999); Idaho Code § 32-719 (1999); Ill. Comp. Stat., ch. 750, § 5/607 (1998); Ind. Code § 31-17-5-2 (1999); Iowa Code § 598.35 (1999); Kan. Stat. Ann. § 38-129 (1993); Ky. Rev. Stat. Ann. § 405.021 (Baldwin 1990); Md. Fam. Law Code Ann. § 9-102 (1999); Mass. Gen. Laws § 119:39D (1996); Mich. Comp. Laws Ann. § 722.27b (West Supp.1999); Minn. Stat § 257C.08 (2002); Miss. Code Ann. § 93-16-3 (1994); Mo. Rev. Stat. § 452.402 (Supp.1999); Mont. Code Ann. § 40-9-102 (1997); Nev. Rev. Stat. § 125C.050 (Supp.1999); N.M. Stat. Ann. § 40-9-2 (1999); N.Y. Dom. Rel. Law § 72 (McKinney 1999); Ohio Rev. Code Ann. §§ 3109.051, 3109.11 (Supp.1999); Okla. Stat., Tit. 10, § 5 (Supp.1999); Ore. Rev. Stat. § 109.121 (1997); 23 Pa. Cons. Stat. §§ 5311-5313 (1991); R.I. Gen. Laws §§ 15-5-24 to 15-5-24.3 (Supp.1999); S.C. Code Ann. § 20-7-420(33); S.D. Codified Laws § 25-4-52 (1999); Tenn. Code Ann. §§ 36-6-306, 36-6-307 (Supp.1999); Tex. Fam. Code Ann. § 153.433 (Supp.2000); Utah Code Ann. § 30-5-2 (1998); Vt. Stat. Ann., Tit. 15, §§ 1011-1013 (1989); Va. Code Ann. § 20-124.2 (1995); W. Va. Code §§ 48-2B-1 to 48-2B-7 (1999).

Some states will award grandparent visitation based on a showing that harm or potential harm will occur if visitation is denied.⁶⁷ Nine statutes required harm as a condition precedent or as a factor to an award of visitation.⁶⁸ Seventeen states included harm or potential harm as criteria through case law.⁶⁹ The lack of statutory amendment to include the harm standard after *Troxel*, suggests it is not being required as a prerequisite by the states, but rather is merely a factor considered in the determination of visitation.

The harm standard as a prerequisite places an extremely high burden on the grandparent at the outset. If a grandparent cannot show harm or potential harm, the court has no discretion to allow visitation. A lack of harm or potential harm should not equate to a denial of visitation, especially when visitation will be in the best interest of the child.

The *Troxel* court was concerned with judges substituting their own determination for that of the fit parent. A bright line rule, such as a required showing of harm or potential harm while satisfying *Troxel* may actually restrict a judge's ability to protect the

⁶⁷Ala. Code § 30-3-4.1 (1989); Ark. Code Ann. § 9-13-103 (1998); Cal. Fam. Code Ann. § 3104 (West 1994); Conn. Gen. Stat. § 46b-59 (1995); Ga. Code Ann. § 19-7-3 (1991); Haw. Rev. Stat. § 571-46.3 (1999); Ill. Comp. Stat., ch. 750, § 5/607 (1998); Iowa Code § 598.35 (1999); Ky. Rev. Stat. Ann. § 405.021 (Baldwin 1990); Mass. Gen. Laws § 119:39D (1996); Me. Rev. Stat. Ann., Tit. 19A, § 1803 (1998); Mich. Comp. Laws Ann. § 722.27b (West Supp.1999); Miss. Code Ann. § 93-16-3 (1994); Mo. Rev. Stat. § 452.402 (Supp.1999); N.J. Stat. Ann. § 9:2-7.1 (West Supp.1999-2000); N.C. Gen. Stat. §§ 50-13.2, 50-13.2A (1999); N.D. Cent. Code § 14-09-05.1 (1997); Okla. Stat., Tit. 10, § 5 (Supp.1999); Ore. Rev. Stat. § 109.121 (1997); S.C. Code Ann. § 20-7-420(33) (Supp.1999); Tenn. Code Ann. §§ 36-6-306, 36-6-307 (Supp.1999); Tex. Fam. Code Ann. § 153.433 (Supp.2000); Utah Code Ann. § 30-5-2 (1998); Vt. Stat. Ann., Tit. 15, §§ 1011-1013 (1989); Va. Code Ann. § 20-124.2 (1995); Wis. Stat. §§ 767.43 (1993-1994).

⁶⁸Ark. Code Ann. § 9-13-103 (1998); Ga. Code Ann. § 19-7-3 (1991); Ill. Comp. Stat., ch. 750, § 5/607 (1998); Mich. Comp. Laws Ann. § 722.27b (West Supp.1999); Mo. Rev. Stat. § 452.402 (Supp.1999); Okla. Stat., Tit. 10, § 5 (Supp.1999); Tenn. Code Ann. §§ 36-6-306, 36-6-307 (Supp.1999); Tex. Fam. Code Ann. § 153.433 (Supp.2000); Utah Code Ann. § 30-5-2 (1998).

⁶⁹Ala. Code § 30-3-4.1 (1989); Cal. Fam. Code Ann. § 3104 (West 1994); Conn. Gen. Stat. § 46b-59 (1995); Haw. Rev. Stat. § 571-46.3 (1999); Iowa Code § 598.35 (1999); Ky. Rev. Stat. Ann. § 405.021 (Baldwin 1990); Mass. Gen. Laws § 119:39D (1996); Me. Rev. Stat. Ann., Tit. 19A, § 1803 (1998); Miss. Code Ann. § 93-16-3 (1994); N.J. Stat. Ann. § 9:2-7.1 (West Supp.1999-2000); N.C. Gen. Stat. §§ 50-13.2, 50-13.2A (1999); N.D. Cent. Code § 14-09-05.1 (1997); Ore. Rev. Stat. § 109.121 (1997); S.C. Code Ann. § 20-7-420(33) (Supp.1999); Vt. Stat. Ann., Tit. 15, §§ 1011-1013 (1989); Va. Code Ann. § 20-124.2 (1995); Wis. Stat. §§ 767.43 (1993-1994).

child's best interest. A child's interests maybe best served by factors considered rather than as a bright line prerequisite.

2. Substantial Interference with the Parent-Child Relationship

Eighteen states limit grandparent visitation by allowing visitation when it would not substantially interfere with the parent-child relationship.⁷⁰ In *Troxel*, if the Washington statute contained such a provision then all Tommie Granville would have been required to do would have been to prove that having her children visit her deceased partner's parents substantially interfered in her relationship with her children. This factor is consistent with *Troxel* because it still gives weight to a fit parent's preference but permits visitation if it does not substantially interfere in that parent's role.

3. Established personal relationship between the Grandparent and Child.

Twenty-five state statutes consider a personal relationship between the grandparent and the child as a factor or prerequisite in awarding grandparent visitation."⁷¹ These statutes reflect that awarding visitation to a grandparent who has an established

⁷⁰Ariz. Rev. Stat. Ann. § 25-409 (1994); Ill. Comp. Stat., ch. 750, § 5/607 (1998); Me. Rev. Stat. Ann., Tit. 19A, § 1803 (1998); Minn. Stat § 257C.08 (2002); Neb. Rev. Stat. § 43-1802 (1998); Nev. Rev. Stat. § 125C.050 (Supp.1999); N.H. Rev. Stat. Ann. § 458:17-d (1992); N.J. Stat. Ann. § 9:2-7.1 (West Supp.1999-2000); N.M. Stat. Ann. § 40-9-2 (1999); N.D. Cent. Code § 14-09-05.1 (1997); Ohio Rev. Code Ann. §§ 3109.051, 3109.11 (Supp.1999); Okla. Stat., Tit. 10, § 5 (Supp.1999); 23 Pa. Cons. Stat. §§ 5311-5313 (1991); S.C. Code Ann. § 20-7-420(33) (Supp.1999); S.D. Codified Laws § 25-4-52 (1999); Vt. Stat. Ann., Tit. 15, §§ 1011-1013 (1989); W. Va. Code, § 48-10-501-502 (2001); Wyo. Stat. Ann. § 20-7-101 (1999).

⁷¹Ala. Code § 30-3-4.1 (1989); Alaska Stat. Ann. § 25.20.065 (1998); Ark. Code Ann. § 9-13-103 (1998); Cal. Fam. Code Ann. § 3104 (West 1994); Fla. Stat. § 752.01 (1997); Ill. Comp. Stat., ch. 750, § 5/607 (1998); Kan. Stat. Ann. § 38-129 (1993); La. Civ. Code Ann., Art. 136 (West Supp.2000); Me. Rev. Stat. Ann., Tit. 19A, § 1803 (1998); Mass. Gen. Laws § 119:39D (1996); Minn. Stat § 257C.08 (2002); Miss. Code Ann. § 93-16-3 (1994); Neb. Rev. Stat. § 43-1802 (1998); Nev. Rev. Stat. § 125C.050 (Supp.1999); N.J. Stat. Ann. § 9:2-7.1 (West Supp.1999-2000); N.M. Stat. Ann. § 40-9-2 (1999); Ohio Rev. Code Ann. §§ 3109.051, 3109.11 (Supp.1999); Okla. Stat., Tit. 10, § 5 (Supp.1999); Ore. Rev. Stat. § 109.121 (1997); 23 Pa. Cons. Stat. §§ 5311-5313 (1991); Tenn. Code Ann. §§ 36-6-306, 36-6-307 (Supp.1999); Utah Code Ann. § 30-5-2 (1998); Vt. Stat. Ann., Tit. 15, §§ 1011-1013 (1989); W. Va. Code, § 48-10-501-502 (2001); Wis. Stat. §§ 767.43 (1993-1994).

personal relationship is generally in the child's best interest. Establishment of a historical or personal relationship will overcome the presumption required by *Troxel*.

E. Unfitness

Only five statutes specifically consider parental unfitness as a factor in deciding whether to grant visitation.⁷² Most states however recognize the presumption that a fit parent acts in their child's best interest. Whenever a parent is unfit, the presumption is inapplicable. As a factor, unfitness is a powerful indicator which still allows the judge to determine what is in the best interest given that unfortunate situation.

F. Best Interest of the Child Analysis

All fifty states continue after *Troxel* to use the best interest of the child standard in the determination of grandparent visitation.⁷³ Those advocating for parents disfavor a best interest standard because it permits judge to substitute his judgment for that of a fit parent. This is the danger that *Troxel* perceived. In many states, however, state statutes specify factors that must guide the best interest determination.

⁷² Iowa Code § 598.35 (1999); Md. Fam. Law Code Ann. § 9-102 (1999); Mont. Code Ann. § 40-9-102 (1997); Okla. Stat., Tit. 10, § 5 (Supp.1999); Utah Code Ann. § 30-5-2 (1998).

⁷³ Ala. Code § 30-3-4.1 (1989); Alaska Stat. Ann. § 25.20.065 (1998); Ariz. Rev. Stat. Ann. § 25-409 (1994); Ark. Code Ann. § 9-13-103 (1998); Cal. Fam. Code Ann. § 3104 (West 1994); Colo. Rev. Stat. § 19-1-117 (1999); Conn. Gen. Stat. § 46b-59 (1995); Del. Code Ann., Tit. 10, § 1031(7) (1999); Fla. Stat. § 752.01 (1997); Ga. Code Ann. § 19-7-3 (1991); Haw. Rev. Stat. § 571-46.3 (1999); Idaho Code § 32-719 (1999); Ill. Comp. Stat., ch. 750, § 5/607 (1998); Ind. Code § 31-17-5-2 (1999); Iowa Code § 598.35 (1999); Kan. Stat. Ann. § 38-129 (1993); Ky. Rev. Stat. Ann. § 405.021 (Baldwin 1990); La. Rev. Stat. Ann. § 9:344 (West Supp.2000); La. Civ. Code Ann., Art. 136 (West Supp.2000); Me. Rev. Stat. Ann., Tit. 19A, § 1803 (1998); Md. Fam. Law Code Ann. § 9-102 (1999); Mass. Gen. Laws § 119:39D (1996); Mich. Comp. Laws Ann. § 722.27b (West Supp.1999); Minn. Stat. § 257C.08 (2002); Miss. Code Ann. § 93-16-3 (1994); Mo. Rev. Stat. § 452.402 (Supp.1999); Mont. Code Ann. § 40-9-102 (1997); Neb. Rev. Stat. § 43-1802 (1998); Nev. Rev. Stat. § 125C.050 (Supp.1999); N.H. Rev. Stat. Ann. § 458:17-d (1992); N.J. Stat. Ann. § 9:2-7.1 (West Supp.1999-2000); N.M. Stat. Ann. § 40-9-2 (1999); N.Y. Dom. Rel. Law § 72 (McKinney 1999); N.C. Gen. Stat. §§ 50-13.2, 50-13.2A (1999); N.D. Cent. Code § 14-09-05.1 (1997); Ohio Rev. Code Ann. §§ 3109.051, 3109.11 (Supp.1999); Okla. Stat., Tit. 10, § 5 (Supp.1999); Ore. Rev. Stat. § 109.121 (1997); 23 Pa. Cons. Stat. §§ 5311-5313 (1991); R.I. Gen. Laws §§ 15-5-24 to 15-5-24.3 (Supp.1999); S.C. Code Ann. § 20-7-420(33) (Supp.1999); S.D. Codified Laws § 25-4-52 (1999); Tenn. Code Ann. §§ 36-6-306, 36-6-307 (Supp.1999); Tex. Fam. Code Ann. § 153.433 (Supp.2000); Utah Code Ann. § 30-5-2 (1998); Vt. Stat. Ann., Tit. 15, §§ 1011-1013 (1989); Va. Code Ann. § 20-124.2 (1995); W. Va. Code §§ 48-2B-1 to 48-2B-7 (1999); Wis. Stat. §§ 767.245, 880.155 (1993-1994); Wyo. Stat. Ann. § 20-7-101 (1999).

1. Best Interest of the Child Factors: Overcoming the Presumption in the Child's Best Interest.

Fourteen states include factors in the best interest analysis in their grandparent visitation statutes or directly referenced therein.⁷⁴ Most other states consult the factors in the child custody statute applicable usually in divorce child custody determinations.

There are a number of best interest factors by statute.

a. Willingness of the Grandparent to Encourage a Close Relationship Between Parent and Child.

Of the fourteen states that list best interest factors in their grandparent or third party statutes, nine consider the willingness of the grandparent to encourage a close relationship between the child and parent.⁷⁵ This factor is similar to the substantial interference prerequisite considered in the statutes of other states. If the court finds that the grandparent is going to encourage and continue to encourage a relationship between parents and child, then grandparent visitation is less likely to substantially interfere with the parent-child relationship.

b. Preference of the Child

Eight state statutes consider the preference of the child, where the child demonstrates the necessary level of maturity and capacity.⁷⁶ This is true in both

⁷⁴ Ala. Code § 30-3-4.1 (1989); Ariz. Rev. Stat. Ann. § 25-409 (1994); Ark. Code Ann. § 9-13-103 (1998); (1999); Fla. Stat. § 752.01 (1997); La. Civ. Code Ann., Art. 136 (West Supp.2000); Me. Rev. Stat. Ann., Tit. 19A, § 1803 (1998); Mich. Comp. Laws Ann. § 722.27b (West Supp.1999); Nev. Rev. Stat. § 125C.050 (Supp.1999); N.J. Stat. Ann. § 9:2-7.1 (West Supp.1999-2000); N.M. Stat. Ann. § 40-9-2 (1999); Okla. Stat., Tit. 10, § 5 (Supp.1999); Tenn. Code Ann. §§ 36-6-306, 36-6-307 (Supp.1999); Vt. Stat. Ann., Tit. 15, §§ 1013 (1989) W. Va. Code, § 48-10-501-502 (2001).

⁷⁵ Ala. Code § 30-3-4.1 (1989); Fla. Stat. § 752.01 (1997); La. Civ. Code Ann., Art. 136 (West Supp.2000); Me. Rev. Stat. Ann., Tit. 19A, § 1803 (1998); Mich. Comp. Laws Ann. § 722.27b (West Supp.1999); Nev. Rev. Stat. § 125C.050 (Supp.1999); Okla. Stat., Tit. 10, § 5 (Supp.1999); Tenn. Code Ann. §§ 36-6-306, 36-6-307 (Supp.1999); Vt. Stat. Ann., Tit. 15, §§ 1013 (1989).

⁷⁶ Ala. Code § 30-3-4.1 (1989); Fla. Stat. § 752.01 (1997); La. Civ. Code Ann., Art. 136 (West Supp.2000); Me. Rev. Stat. Ann., Tit. 19A, § 1803 (1998); Mich. Comp. Laws Ann. § 722.27b (West Supp.1999); Nev. Rev. Stat. § 125C.050 (Supp.1999); Tenn. Code Ann. §§ 36-6-306, 36-6-307 (Supp.1999); Vt. Stat. Ann., Tit. 15, §§ 1013 (1989).

grandparent visitation statutes which consider best interest factors directly in their statutes and states which consider best interest of the child in another custody factor.

c. Mental and Physical Health of the Child

The mental and physical health of the child is considered in seven state statutes.⁷⁷

This factor appears consistent with the “harm or potential harm” prerequisite.

d. Mental and Physical Health of the Grandparents

The mental and physical health of the grandparents is considered in eight state statutes.⁷⁸

e. Capacity of Grandparents in Love, Affection and Guidance for the Child.

This factor found in seven state statutes is similar to the personal relationship or substantial interference prerequisite.⁷⁹

f. Domestic Violence, Sexual, Emotional or Physical Abuse and Neglect by the Grandparents

These obvious factors are specifically considered in seven states as they pertain to the safety, health and welfare of the child.⁸⁰

g. The Historical Relationship between Child and Grandparent

⁷⁷ Ala. Code § 30-3-4.1 (1989); Fla. Stat. § 752.01 (1997); La. Civ. Code Ann., Art. 136 (West Supp.2000); Me. Rev. Stat. Ann., Tit. 19A, § 1803 (1998); Okla. Stat., Tit. 10, § 5 (Supp.1999); Vt. Stat. Ann., Tit. 15, §§ 1013 (1989).

⁷⁸ Ala. Code § 30-3-4.1 (1989); (1999); Fla. Stat. § 752.01 (1997); La. Civ. Code Ann., Art. 136 (West Supp.2000); Me. Rev. Stat. Ann., Tit. 19A, § 1803 (1998); Mich. Comp. Laws Ann. § 722.27b (West Supp.1999); Nev. Rev. Stat. § 125C.050 (Supp.1999); Okla. Stat., Tit. 10, § 5 (Supp.1999); Vt. Stat. Ann., Tit. 15, §§ 1013 (1989).

⁷⁹ Ark. Code Ann. § 9-13-103 (1998); (1999); La. Civ. Code Ann., Art. 136 (West Supp.2000); Me. Rev. Stat. Ann., Tit. 19A, § 1803 (1998); Mich. Comp. Laws Ann. § 722.27b (West Supp.1999); Nev. Rev. Stat. § 125C.050 (Supp.1999); Okla. Stat., Tit. 10, § 5 (Supp.1999); Vt. Stat. Ann., Tit. 15, §§ 1013 (1989).

⁸⁰ Ala. Code § 30-3-4.1 (1989); Me. Rev. Stat. Ann., Tit. 19A, § 1803 (1998); Mich. Comp. Laws Ann. § 722.27b (West Supp.1999); N.J. Stat. Ann. § 9:2-7.1 (West Supp.1999-2000); N.M. Stat. Ann. § 40-9-2 (1999). Tenn. Code Ann. §§ 36-6-306, 36-6-307; W. Va. Code, § 48-10-502 (2001).

This factor is considered by thirteen states that specify the best interest factors in their grandparent visitation statutes. It is almost identical to the established relationship prerequisite found in nineteen states' statutes themselves.⁸¹

h. Motivation of the Grandparent Seeking Visitation

Six states consider the motivation of the grandparent seeking visitation.⁸²

i. Motivation of the Party Denying Visitation

Three state statutes consider the motivation of the parent in denying visitation.⁸³

j. Quantity of Time Requested and the Adverse Effects in Child's Customary Activities.

Four states consider the amount of visitation requested and the adverse effects of the visitation on the child's customary activities.⁸⁴

k. Any other factors relevant to the best interest of the child.

Eight state statutes provide a catch-all provision that allows the court in its discretion to consider all relevant factors in determining the best interest of the child.⁸⁵

IV. Idaho: Hurry Up and Decide

The Idaho Grandparent Visitation Statute [I.C. § 32-719] reads:

⁸¹ Ariz. Rev. Stat. Ann. § 25-409 (1994); Ark. Code Ann. § 9-13-103 (1998); (1999); Fla. Stat. § 752.01 (1997); La. Civ. Code Ann., Art. 136 (West Supp.2000); Me. Rev. Stat. Ann., Tit. 19A, § 1803 (1998); Mich. Comp. Laws Ann. § 722.27b (West Supp.1999); Nev. Rev. Stat. § 125C.050 (Supp.1999); N.J. Stat. Ann. § 9:2-7.1 (West Supp.1999-2000); N.M. Stat. Ann. § 40-9-2 (1999); Okla. Stat., Tit. 10, § 5 (Supp.1999); Tenn. Code Ann. §§ 36-6-306, 36-6-307 (Supp.1999); Vt. Stat. Ann., Tit. 15, §§ 1013 (1989) W. Va. Code, § 48-10-502 (2001).

⁸² Ariz. Rev. Stat. Ann. § 25-409 (1994); Me. Rev. Stat. Ann., Tit. 19A, § 1803 (1998); N.J. Stat. Ann. § 9:2-7.1 (West Supp.1999-2000); Okla. Stat., Tit. 10, § 5 (Supp.1999); Tenn. Code Ann. §§ 36-6-306, 36-6-307; W. Va. Code, § 48-10-502 (2001).

⁸³ Ariz. Rev. Stat. Ann. § 25-409 (1994); Me. Rev. Stat. Ann., Tit. 19A, § 1803 (1998); Mich. Comp. Laws Ann. § 722.27b (West Supp.1999).

⁸⁴ Ariz. Rev. Stat. Ann. § 25-409 (1994); Me. Rev. Stat. Ann., Tit. 19A, § 1803 (1998); N.M. Stat. Ann. § 40-9-2 (1999); Okla. Stat., Tit. 10, § 5 (Supp.1999).

⁸⁵ Ala. Code § 30-3-4.1 (1989); Fla. Stat. § 752.01 (1997); Me. Rev. Stat. Ann., Tit. 19A, § 1803 (1998); Mich. Comp. Laws Ann. § 722.27b (West Supp.1999); Nev. Rev. Stat. § 125C.050 (Supp.1999); N.J. Stat. Ann. § 9:2-7.1 (West Supp.1999-2000); Vt. Stat. Ann., Tit. 15, §§ 1013 (1989); W. Va. Code, § 48-10-501-502 (2001).

The district court may grant reasonable visitation rights to grandparents or great grandparents upon a proper showing that the visitation would be in the best interest of the child.”⁸⁶

Idaho has not squarely addressed the constitutionality of their grandparent visitation statute after *Troxel*, despite being presented with that opportunity. In March of 2006, the Idaho Supreme Court decided *Leavitt v. Leavitt* in which it had the opportunity to address the constitutionality of I.C. § 32-719.⁸⁷ However, the Idaho Supreme Court declined to do so because the requested review was raised by the prevailing party. “We need not consider Leavitt’s challenge to the constitutionality of I.C. § 32-719.”⁸⁸ Nonetheless, *Leavitt*, is significant in understanding the law in Idaho.

Leavitt involved a visitation dispute between a father (Leavitt) and his mother-in-law (Crawford). Crawford petitioned for visitation during a divorce proceeding between Leavitt and his wife and through stipulation received contingent visitation rights to take effect when the mother was unable to exercise her custodial time with the child.⁸⁹ Crawford was granted contingent visitation rights. The rights arose upon the death of Crawford’s daughter (i.e. the child’s mother). Even before the daughter’s death, Crawford regularly cared for the child.⁹⁰ After the death, however, the relationship between Leavitt and Crawford became adversarial. For example, Crawford reported Leavitt for alleged child abuse (never proven) five times. Leavitt began proceedings to terminate Crawford’s visitation rights. The magistrate granted that relief, but the district court reversed and entered a structured visitation order.

⁸⁶ See I.C. 32-719. (This statute is the grandparent visitation statute recognized in *Troxel v. Granville*)

⁸⁷ *Leavitt v. Leavitt*, 142 Idaho 664 (Idaho, 2006).

⁸⁸ Id. at 671

⁸⁹ Id.

⁹⁰ Id.

The Idaho Supreme Court upheld the magistrate's decision permanently terminating Crawford's visitation rights. The Court held that "the magistrate court acted...consistently with the applicable legal standards because its decision by the principles announced in *Troxel*."⁹¹ Specifically, the magistrate "properly weighed Crawford's visitation rights against Leavitt's fundamental right to direct [the child] Adam's upbringing." Because there was no dispute about Leavitt's fitness as parent, the magistrate also properly "afforded Leavitt the presumption that a fit parent acts in a child's best interest."⁹² The Idaho Supreme Court further held that the magistrate's decision in the case was "based on the exercise of reason," because it took into account: the "highly adversarial" relationship between Leavitt and Crawford; that relationship's adverse effect on the "that stability of Adam's life"; and the improvement in Adam's behavior since Crawford's visitation was terminated.⁹³

The Idaho Supreme Court did address its view of *Troxel* despite not squarely addressing the constitutionality of Idaho grandparent visitation statute. The Idaho Supreme court stated "Briefly the *Troxel* Court...determined (1) there is a presumption that a fit parent acts in the best interest of his or her child; (2) a judge must accord 'special weight' to a fit parent's decision; and (3) a court may not 'infringe on the fundamental right of parents to make a child rearing decisions simply because [it] believes a 'better' decision could be made."⁹⁴ Strangely, despite the fact that the court did not address the constitutionality of I.C. § 32-719 it held that the factors considered in

⁹¹ Id.

⁹² Id.

⁹³ Id at 670 ("This liberty interest, encompassing a parent's right to determine with whom his or her child may associate, is entitled to equally heightened protection in the visitation rights context. Given such a fundamental right, we conclude the clear and convincing standard of proof applies to actions brought under I.C. § 32-719.")

⁹⁴ Id at 671, 120 S.Ct at 71-73.

the best interest of the child custody statute (I.C. § 32-717) could not be used in the grandparent visitation best interest determination. “The best interest factors of I.C. § 32-717(1) are not applicable to a best interest determination required by I.C. § 32-719 in a dispute between a parent and grandparents over visitation.”⁹⁵

I.C. § 32-719 uses the best interest of the child standard, but in holding that I.C. § 32-717 (which provides a list of factors the courts considers in making a best interest determination) did not apply to I.C. § 32-719, the Idaho Supreme Court essentially left Idaho without any sort of guidance of what best interest factors maybe constitutionally considered. The *Leavitt* decision essentially removed any factors, or guidance which the courts could use to make a proper determination in the best interest of the child in the grandparent visitation context.⁹⁶

A. *Leavitt v. Leavitt* and the Constitutionality of 32-719

If the Supreme Court of Idaho were to revisit the constitutionality of I.C. § 32-719, the court would likely find it unconstitutional as applied given *Troxel*. The Idaho Supreme Court in *Leavitt* pointed out that the Washington statute which used “any person” and “at any time” was “breathhtakingly broad.” *Leavitt* reiterated that a court may “not infringe on the fundamental right of parents to make child rearing decisions simply because [it] believes a ‘better’ decision could be made.” This implies that a fit parent has the definitive right to determine with whom their child may associate and any statute which permits a court to infringe on that right may be unconstitutional. The Supreme Court also focused on “the fundamental rights of a fit parent and the “presumption” that they act in the best interest of their child[ren]. I.C. § 32-719 contains no language which

⁹⁵ Id.

⁹⁶ Id.

recognizes that presumption. In arguing for constitutionality, one must consider that numerous state courts have upheld the constitutionality of their grandparent visitation statutes by allowing their courts to recognize this presumption and accord the parent "special weight." Thus, I.C. § 32-719 could be found constitutional if courts interpret *Troxel* as requiring courts to recognize the presumption in every case.

An advocate for constitutionality of I.C. § 32-719 would urge that the Supreme Court imposed the greatest burden of proof i.e. "clear and convincing evidence" to grandparent visitation cases and such a standard coupled with having the decision of a fit parent being "accorded special weight" would narrow Idaho statute enough to survive a challenge of constitutionality.

I.C. § 32-719 (Idaho's grandparent visitation statute) resembles the Washington statute struck down in *Troxel*. The U.S. Supreme Court found Washington's statute "breathhtakingly broad" not just because it allowed "any person" but because it allowed "any person" to petition "at any time." I.C. 32-719 does limit "any person" by substituting grandparent or great grandparents. I.C. 32-719 does not limit when a grandparent or great-grandparent can bring a petition, which essentially means a petition can be brought "at any time." As a result forty state statutes limit standing of when a grandparent can bring a petition for visitation (either by death of one parent, divorce, a child born out of wedlock or the requirement an established relationship between the grandparent and the child). I.C. § 32-719 lacks any limitation on when grandparent or great-grandparent can bring a petition [standing] and thus appears to be unconstitutional. Given that I.C. § 32-719 does not limit standing nor contain any language recognizing the presumption in favor of fit parents as required by *Troxel*, (although now supplied by case law in *Leavitt*),

Idaho needs a revision of its grandparent visitation statute, particularly when "different" best interest factors also need to apply.

V. Constitutional Visitation Statute in the Best Interest of Children

After consideration of all fifty state grandparent visitation statutes and interpretations of *Troxel*, the Idaho statute should be amended along the following line.

A. Grandparents may petition for reasonable visitation rights under the provisions of this section if one of the following has occurred

1. a child's parent dies
2. child's parents marriage has been dissolved
3. the parents of the child are legally separated
4. the child was born out of wedlock
5. a parent of the child has abandoned the child
6. a parent of the child is incarcerated
7. a parent(s) of the child has unreasonably denied access to the child

B. A grandparent shall be awarded reasonable visitation if visitation is in the best interest of the child and one of the following is proven:

1. the grandparent requesting visitation with the child by a preponderance of the evidence establishes a historical personal relationship with the child; or
2. that denial of visitation would cause harm or potential harm to the child; or
3. that the parent is unfit; or
4. that visitation would not substantially interfere with the parent child relationship

C. In determining the best interest of the child the court shall consider the following

1. any harm or potential harm to the child if visitation is denied
2. whether visitation will substantially interfere with the parent child relationship
3. parental unfitness
4. history by the grandparent of child abuse, domestic violence, neglect or sexual abuse
5. the willingness of the grandparent to encourage a close relationship between the parent and child
6. the preference of the child
7. mental and physical health of the child
8. mental and physical health of the grandparent
9. capacity of the grandparent to encourage love, affection and guidance
10. motivation of the party seeking visitation
11. motivation of the party denying visitation

12. quantity of time requested and adverse impact on the child's customary activities
13. any other factors relevant to the best interest of the child.

VI. Conclusion

The U.S. Supreme Court in *Troxel* attempted to clarify the constitutional aspects of grandparent visitation. Whether that attempt succeeded or not, *Troxel* forced every state to determine the constitutionality of its statute governing grandparent visitation. The majority of states have left interpretation and the scope of *Troxel* up to their courts, perhaps in the view that courts are better equipped than legislatures to deal with the facts and circumstances of each case. Other states have amended statutes. Though states have responded to *Troxel*, further change is inevitable as the nature of society and family change. While the U.S. Supreme Court normally refrains from interfering with the family, it may someday revisit grandparent, third party or non-parental visitation and clarify what standards, prerequisites and factors are consistent with the constitutionally protected liberty interest of parents.

STATE BY STATE GRANDPARENT VISITATION STATUTES

| States | Death | Dissolve | Wedlock | Harm | Substantial/Interfere | Personal | History | Best | BIOTC Factors | Presumption | Unfitness |
|------------------|-------|----------|---------|------|-----------------------|----------|---------|------|---------------|-------------|----------------|
| Alabama | X | X | X | X⊙ | | X | X(BI) | X | X | X⊙ | |
| Alaska | | | | | | X | X | X | | | |
| Arizona | X | X | X | | X⊙ | | | X | X | X⊙ | |
| Arkansas | X | X | X | X | | X | | X | X | X | |
| California | | | | X⊙ | | X | | X | | X | |
| Colorado | X | X | | | | | | X⊙ | | X⊙ | |
| Connecticut | | | | X⊙ | | | | X | | X⊙ | |
| Delaware | | | | | | | | X | | X⊙ | |
| Florida*** | | X | X | | | X(BI) | | X | X | X⊙ | |
| Georgia*** | | X | | X | | | | X | | X⊙ | |
| Hawaii*** | | | | X⊙ | | | | X | | X⊙ | |
| Idaho | | | | | | | | X | | X⊙ | |
| Illinois*** | X | X | X | X | X | X | | X⊙ | X | X | |
| Indiana | X | X | X | | | | | X⊙ | | X⊙ | |
| Iowa*** | X | X | | X⊙ | | | | X | | X⊙ | X⊙ |
| Kansas | X | | | | | X | | X | | X | X(considered)⊙ |
| Kentucky | X | | | X⊙ | | | | X | | X⊙ | |
| Louisiana | X | X | | | | X(BI) | | X | X | | |
| Maine | X | | | X⊙ | X | X | X(BI) | X | X | | |
| Maryland | | | | | | | | X | | X⊙ | X⊙ |
| Massachusetts | X | X | X | X⊙ | | X⊙ | | X | | X⊙ | |
| Michigan*** | X | X | X | X | | | X(BI) | X | X | X | |
| Minnesota | X | X | X | | X | X | | X | X | X | |
| Mississippi | X | X | | X⊙ | | X | | X | X | X | X(considered)⊙ |
| Missouri | X | X | | X | | | | X | X | X | |
| Montana | | | | | | | | X | | X | X |
| Nebraska | X | X | X | | X | X | | X | | | |
| Nevada | X | X | X | | X(BI) | X | | X | X | X | |
| New Hampshire*** | X | X | | X⊙ | X | | | X | | | |
| New Jersey | | | | X | X | X | X | X | X | | X(considered)⊙ |
| New Mexico | X | X | X | | X(BI) | X | X(BI) | X | X | X⊙ | X(considered)⊙ |
| New York*** | X | | | | | | | X | X | X | X(considered)⊙ |
| North Carolina | X⊙ | X⊙ | X⊙ | X⊙ | | | X | X | | | |
| North Dakota | | | | X⊙ | X | | | X | | | |
| Ohio | X | X | X | | X | X | | X | | X⊙ | |
| Oklahoma | X | X | X | X | X(BI) | X | | X | X | X | X |
| Oregon | | | | X⊙ | | X | | X | | X | |
| Pennsylvania | X | X | | | X | X | | X | | X⊙ | |
| Rhode Island | X | X | X | | | | | X | | X | |

