

Grandparents' Visitation After Divorce and Death: Litigation Strategies and Proactive Steps to Protect Rights

TUESDAY, OCTOBER 29, 2019

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

David A. Canale, Partner, **Meriwether & Tharp**, Atlanta
Michael K. Goldberg, Managing Partner, **Goldberg Law Group**,
Scottsdale, Ariz. and Chicago

The audio portion of the conference may be accessed via the telephone or by using your computer's speakers. Please refer to the instructions emailed to registrants for additional information. If you have any questions, please contact **Customer Service at 1-800-926-7926 ext. 1.**

Sound Quality

If you are listening via your computer speakers, please note that the quality of your sound will vary depending on the speed and quality of your internet connection.

If the sound quality is not satisfactory, you may listen via the phone: dial **1-877-447-0294** and enter your **Conference ID and PIN** when prompted. Otherwise, please **send us a chat** or e-mail sound@straffordpub.com immediately so we can address the problem.

If you dialed in and have any difficulties during the call, press *0 for assistance.

Viewing Quality

To maximize your screen, press the 'Full Screen' symbol located on the bottom right of the slides. To exit full screen, press the Esc button.

Continuing Education Credits

FOR LIVE EVENT ONLY

In order for us to process your continuing education credit, you must confirm your participation in this webinar by completing and submitting the Attendance Affirmation/Evaluation after the webinar.

A link to the Attendance Affirmation/Evaluation will be in the thank you email that you will receive immediately following the program.

For additional information about continuing education, call us at 1-800-926-7926 ext. 2.

If you have not printed the conference materials for this program, please complete the following steps:

- Click on the link to the PDF of the slides for today's program, which is located to the right of the slides, just above the Q&A box.
- The PDF will open a separate tab/window. Print the slides by clicking on the printer icon.



GRANDPARENT VISITATION



DEMOGRAPHIC CHANGE

- The Grandparent Visitation Act was a legislative reaction to significant changes in the nuclear family including:
 - Increase in the rate of divorce
 - More families where both mother and father are working full-time jobs
 - Rise in single parent homes
 - Dramatic increase in the percentage of American who are grandparents.
 - By 2034, according the Census Bureau, the population 65 and older will exceed the population under 18; by 2060 the 65 and older crowd is projected to have almost doubled.
 - There are some 74 million baby boomer alone.

ILLINOIS GRANDPARENT VISITATION ACT

Visitation by grandparents, great-grandparents, step-parents, and siblings.

- I. Grandparents, great-grandparents, step-parents, and siblings of a minor child who is one year old or older may bring a petition for visitation and electronic communication under this Section if there is an unreasonable denial of visitation by a parent that causes undue mental, physical, or emotional harm to the child and if at least one of the following conditions exists:
 - a) the child's other parent is deceased or has been missing for at least 90 days. For the purposes of this subsection a parent is considered to be missing if the parent's location has not been determined and the parent has been reported as missing to a law enforcement agency; or
 - b) a parent of the child is incompetent as a matter of law; or
 - c) a parent has been incarcerated in jail or prison for a period in excess of 90 days immediately prior to the filing of the petition; or
 - d) the child's parents have been granted a dissolution of marriage or have been legally separated from each other or there is pending a dissolution proceeding involving a parent of the child or another court proceeding involving parental responsibilities or visitation of the child (other than an adoption proceeding of an unrelated child, a proceeding under Article II of the Juvenile Court Act of 1987, or an action for an order of protection under the Illinois Domestic Violence Act of 1986 or Article 112A of the Code of Criminal Procedure of 1963) and at least one parent does not object to the grandparent, great-grandparent, step-parent, or sibling having visitation with the child. The visitation of the grandparent, great-grandparent, step-parent, or sibling must not diminish the parenting time of the parent who is not related to the grandparent, great-grandparent, step-parent, or sibling seeking visitation; or
 - e) (i) the child is born to parents who are not married to each other; (ii) the parents are not living together; (iii) the petitioner is a grandparent, great-grandparent, step-parent, or sibling of the child; and (iv) the parent-child relationship has been legally established. For purposes of this subdivision (E), if the petitioner is a grandparent or great-grandparent, the parent-child relationship need be legally established only with respect to the parent who is related to the grandparent or great-grandparent. For purposes of this subdivision (E), if the petitioner is a step-parent, the parent-child relationship need be legally established only with respect to the parent who is married to the petitioner or was married to the petitioner immediately before the parent's death.

PRE-WICKHAM V. BYRNE – “BEST INTEREST STANDARD”

- *West v. West*: The appellate court held constitutional the grandparent visitation provision of the Marriage and Dissolution of Marriage Act because it did not violate the fundamental rights of parents to care for their children.
 - The Court stated that the Grandparent Visitation Act was a remedy for the consequences of a disrupted family where the parents might not be as able to consider the best interests of the child.
- *McVey v. Fredrickson*: The grandparents were only awarded visitation one day per month with their grandchildren after the death of their father.
 - The appellate court found that the trial court did not abuse its discretion by only awarding one day per month because even though the children had a pre-existing relationship with the grandparents the children were enjoying a normal nuclear family life after their mother re-married.

TROXEL V. GRANVILLE

- Unmarried parents has two daughters, and while living together the father would regularly bring the children to visit with their grandparents. The father passed away in 1993, and the mother later informed the grandmother that she wished to limit their visitation to one visit per month.
- The Court stated that when problems arise between parents and grandparents the trial court must accord at least some special weight to the parent's determination.
- Additionally the Court found it important to recognize that the surviving parent never sought to cut off visitation entirely. The Court noted that other states expressly provide that courts cannot award visitation unless it has been unreasonably denied by the parent.

LULAY V. LULAY

- Grandmother petitioned for visitation under the Grandparent Visitation Act seeking visitation with her three grandchildren. Parents, Michael and Kiley Lulay shared joint custody of their children.
- The court ruled that 607(b)(1) to be an unconstitutional infringement on Michael and Kiley Lulay's fundamental right to raise their children and determine with whom their children should associate.
- In this matter, where the parents were divorced and both parents opposed grandparent visitation, the application of 607(b)(1) was unconstitutional.

WICKHAM V. BYRNE

- After Paul Byrne's wife died a year after their daughter was born, Virginia Wickham wanted to remain in the child's life.
- The court ruled that refusing grandparents visitation with their grandchildren does not involve a threat to the health, safety, or welfare of children.
- The Wickham court found section 607(b)(1) and (3) facially unconstitutional because it applied the "best interests" standard. This ultimately created the new standard for grandparent visitation, which is that there needs to be proof of emotional or mental harm to a child if visitation is denied.

REQUIREMENTS AND CHANGES TO THE GRANDPARENT VISITATION ACT:

- On January 1, 2005, grandparent visitation was re-established in Illinois.
- The Act requires a grandparent, great-grandparent or sibling of a child to show an unreasonable denial of visitation by a parent in order to have standing to petition for court-imposed visitation.
- The person petitioning for visitation must be able to allege that at least one parent does not object to the grandparent, great-grandparent, or sibling having visitation with the child.
- It does exclude children who are subject to the jurisdiction of Juvenile Court.

5 AMENDMENTS TO THE ILLINOIS GRANDPARENT VISITATION ACT

1. The Act will not apply to a child less than one year old
2. The new act states that grandparents have standing to file a petition for visitation rights in a pending dissolution or any other proceeding that involves custody or visitation issues.
3. A petition for grandparent visitation must be filed in the county where the child resides.
4. A grandparent who otherwise satisfies the requirements under the Act will be able to petition for visitation “if a parent has been missing for at least 3 months or if a parent has been incarcerated in jail or prison during the three months preceding the filing of a petition.
5. Any person who was related to the child as grandparent, great-grandparent or sibling prior to an adoption has standing to bring an action pursuant to the Illinois Grandparent Visitation Act.

HIGHLIGHTS OF THE GRANDPARENT VISITATION ACT

- The burden is on the party filing a petition under the Grandparent Visitation Act to prove that the parent's action and decision regarding visitation are harmful to the child's mental, physical, or emotional health.
- Reasonable visitation does not necessarily require over night visits
- The requirements for modifying an existing order are more difficult.
- There is an attorney's fees provision, assessing such fees and costs against a party seeking to modify a visitation order if the court finds that the modification action is vexatious and constitutes harassment.

FACTORS FOR THE TRAIL COURT TO CONSIDER

- Preferences of a child, if the child is old enough to state a preference;
- The mental and physical health of the child;
- The mental and physical health of the person seeking visitation;
- The length and quality of the prior relationship between the child and the person seeking visitation;
- The good faith of the parent and/or the party seeking visitation;
- Whether the child resided with the petitioner for at least 6 consecutive months;
- Whether the petitioner had frequent visitation with the child for at least 12 months; and
- Any other factor that establishes that the loss of the relationship between the petitioner and the child is likely to harm the child's mental physical or emotional health.

CONCLUSION

- Supreme Court precedent and historical tradition suggest that family members have a fundamental right to participate in child rearing and education.
- A fit parent must be given deference and a more stringent standard than the best interests of the child must be invoked to before visitation is granted.

THANK YOU

- Michael K. Goldberg, Managing Partner
- Goldberg Law Group
- mgoldberg@goldberglawoffice.com

Grandparents' Visitation Rights
Litigation

Why Grandparents' Visitation?

- Changing family dynamics - more grandparents are raising or caring for grandchildren
- Divorced parents – family breakup leads to disruption of prior contact pattern
- Substance abuse - leads to parents losing/relinquishing custody of their children to grandparents
- Illegitimacy – single parents often use grandparents for caretaking
- Incarceration
- Mental health issues – parents can't care for their children

In these cases, grandparents who have developed strong emotional ties to grandchildren want continued contact!

History of statutes in US

- By mid-1990s, almost all states in the US had enacted grandparent visitation statutes.
- Not a grant of “grandparent rights.” There are no “rights” to visitation—just the ability to seek visitation (also custody if appropriate.)
- There is a trend to extend—In GA, the statute now extends to “family members”—defined as grandparents, great-grandparents, and siblings.
- Some states are considering or have broadened categories of persons who can request custody/visitation. GA now has an “equitable caregiver” statute. 19-7-3. Uses same constitutional criteria.

Parental Rights Under 14th Amendment

The U.S. Supreme Court has long recognized a constitutionally protected interest of parents to raise their children without undue state interference.

Meyer v. Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 (1923) (language instruction); *Pierce v. Society of Sisters*, 268 U.S. 510, 534–35, 45 S.Ct. 571, 573, 69 L.Ed. 1070 (1925) (religious schools); *Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S.Ct. 438, 442, 88 L.Ed. 645 (1944); *Ginsberg v. New York*, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968); *Stanley v. Illinois*, 405 U.S. 645, 651–52, 92 S.Ct. 1208, 1212–13, 31 L.Ed.2d 551 (1972); *Wisconsin v. Yoder*, 406 U.S. 205, 235, 92 S.Ct. 1526, 1543, 32 L.Ed.2d 15 (1972); *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388, 1394, 71 L.Ed.2d 599 (1982) *Prince v. Massachusetts*, *supra*, 321 U.S. at 166, 64 S.Ct. at 442.

Extent of Parental Authority

- Parents have the right to establish a home, direct the upbringing of their children, control their children's education, etc.
- State may sever or interfere with parental rights only in cases where acting in police power to prevent harm or protect health or welfare of children.

What is Constitutional?

- *Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed 2d 49, US Supreme Court case involving Washington grandparent visitation statute, **which permitted any person at any time to petition for visitation with a minor child if court concluded it was in the child's best interests.** U.S. Supreme Court decided that statute was unconstitutional as applied and affirmed Wash Supreme Court's ruling that statute unconstitutionally infringes on parents' fundamental right to rear their children.
- Case arose when paternal grandparents petitioned for visitation rights to grandchildren after mother reduced their contact. Father and mother never married; father committed suicide; contact continued but was later substantially reduced by mother.
- **Any Grandparent visitation statute based solely on a "best interests" standard is likely unconstitutional.**

Being proactive

- Most of these cases really come down to a power struggle between the parent and grandparent
- “Go along to get along” strategy – is this good advice for the client?
- Avoid litigation if possible – should be last resort!
- Does counseling help?
- Alienation issues

Various state statutory criteria

- **NY** - filing for visitation rights for grandparents is permitted when one or both of the children's parents have died, if the children and grandparents have a substantial relationship or if the parents are attempting to interfere with their efforts to have a relationship.
- **CA** - court may grant reasonable visitation rights to the grandparent if the court finds that there is a preexisting relationship between the grandparent and the grandchild that has engendered a bond such that visitation is in the best interest of the child; and balances the interest of the child in having visitation with the grandparent against the right of the parents to exercise their parental authority.
- **GA**- court may grant any family member of the child reasonable visitation rights if the court finds by clear and convincing evidence that the health or welfare of the child would be harmed unless such visitation is granted and if the best interests of the child would be served by such visitation.

Florida's Statute

- **Petition for grandparent visitation with a minor child.**—A grandparent of a minor child whose parents are deceased, missing, or in a persistent vegetative state, or whose one parent is deceased, missing, or in a persistent vegetative state and whose other parent has been convicted of a felony or an offense of violence evincing behavior that poses a substantial threat of harm to the minor child's health or welfare, may petition the court for court-ordered visitation with the grandchild under this section.
- (1) Upon the filing of a petition by a grandparent for visitation, the court shall hold a preliminary hearing to determine whether the petitioner has made a prima facie showing of parental unfitness or significant harm to the child. Absent such a showing, the court shall dismiss the petition and may award reasonable attorney fees and costs to be paid by the petitioner to the respondent.
- (2) If the court finds that there is prima facie evidence that a parent is unfit or that there is significant harm to the child, the court may appoint a guardian ad litem and shall refer the matter to family mediation as provided in s. [752.015](#). If family mediation does not successfully resolve the issue of grandparent visitation, the court shall proceed with a final hearing.
- (3) **After conducting a final hearing on the issue of visitation, the court may award reasonable visitation to the grandparent with respect to the minor child if the court finds by clear and convincing evidence that a parent is unfit or that there is significant harm to the child, that visitation is in the best interest of the minor child, and that the visitation will not materially harm the parent-child relationship.**

Significant Case Law

- **GA** – *Patten v. Ardis*, 304 Ga. 140, 816 S.E.2d 633 (2018) - statute allowed a grandparent to petition for visitation when a parent was incarcerated, incapacitated, or deceased; only required showing of “best interests.” Declared unconstitutional under GA Const.

Proactive Steps and Pre-litigation Strategies

- Include grandparents in a custodial agreement (permitted caregiver, driver, etc.)
- Estate planning – have grandparents named as a testamentary guardian
- Mediation
- Informal Settlement Discussions

Litigating the Issue

Burden of proof – Clear and Convincing Evidence

Evidentiary standard – generally, must show likelihood of harm and best interests

Choice of forum – Which court? Does your state offer multiple possible forums?

Know your judge!

What evidence suffices?

- Strong emotional ties
- History of living in same household
- Pattern of regular contact or caretaking
- History of financial support
- Does the child have needs that only GP can meet?
- Fact/expert witnesses

What contact can be expected? Probably less than a custodial parent

Defending the case

- Constitutional challenges – Is statute too broad? Is it unconstitutional in application?
- Procedural defenses under state civil practice rules
- Use of the Guardian Ad Litem
- Expert witnesses (child's counselor, if they will participate)

Questions?

Thank You

David A. Canale, Partner
Meriwether & Tharp
dcanale@mtlawoffice.com