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Committee on Judiciary

GRANDPARENT VISITATION RIGHTS

Issue Description

Over the last several years, courts have scrutinized laws that give grandparents the right to visit with their grandchildren over the objection of the parents. Multiple courts have struck down these laws as unconstitutional as they are written or applied because they infringe on the parents' constitutional right to raise their child free from government interference. Today there are approximately 35 states with valid grandparent visitation statutes.

In 1984, the Florida Legislature created ch. 752, F.S., which was designed to give grandparents the right to petition for visitation with their grandchildren. However, almost all of the substantive provisions in ch. 752, F.S., have been struck down as unconstitutional. The Legislature has also addressed grandparent visitation rights over the years in the context of ch. 61, F.S., which governs divorce, custody, visitation, and support.

The purpose of this interim project is to review the case law, statutes, and legal scholarship and to consult with legal scholars and practitioners in order to evaluate what options may exist for the enactment of a constitutionally sound grandparent visitation rights statute, if the Legislature wishes to pursue policy in this area.

Background

Development of Grandparent Visitation Rights

Under the United States' common law, there was no legal right to nonparent visitation. The concept behind the common law was to preserve parental autonomy. There was also a common law presumption that parents act in their child's best interest. Changes in family composition, combined with an increase in the lobbying power for the elderly, led state legislatures to begin prescribing grandparent visitation rights in the 1960s. By 1994, all 50 states had some form of grandparent visitation statute.¹ To date Congress has not enacted a uniform grandparent visitation rights law, which has left in place a "potpourri" of state laws.² As of 2007, 23 state supreme courts had ruled on the constitutionality of their grandparent visitation statutes, with the majority finding their statutes constitutional; however, courts in several large states, Florida included, have held their grandparent visitation statutes unconstitutional.³

Conflicts over grandparent visitation rights can arise in a number of scenarios. The parents of a deceased spouse may fear that the surviving spouse will limit or cease their visitation with the grandchild. Additionally, in a divorce scenario, grandparents may have concerns that visitation with the grandchild will be denied because neither parent wants to give up time with the child. The issue can also arise within an intact family. For example, if the parents have different child-rearing beliefs than the grandparents, the parents may wish to limit the exposure their child has to the grandparents.

One challenge in addressing this issue statutorily is that the effects of allowing or disallowing grandparent visitation are not widely known. There is little research in this area; however, one study showed that children with a grandparent-

¹ Kristine L. Roberts, *State Supreme Court Applications of Troxel v. Granville and the Courts' Reluctance to Declare Grandparent Visitation Statutes Unconstitutional*, 41 FAM. CT. REV. 14, 16 (Jan. 2003); Maegen E. Peek, *Grandparent Visitation Statutes: Do Legislatures Know the Way to Carry the Sleigh Through the Wide and Drifting Law?*, 53 FLA. L. REV. 321, 326 (2001).

² Maegen E. Peek, *supra* note 1, at 333.

³ Christopher J. Gearon, *Grandparents Ride Seesaw Over Visitation Rights*, AARP.org, http://www.aarp.org/family/grandparenting/articles/grandparent_visit_rights_update.html (last visited July 16, 2008).

grandchild relationship were more emotionally secure than children without that bond.⁴ Psychologists have proffered that a grandparent-grandchild relationship can be beneficial in helping a child adjust to family disruption, such as divorce or the death of a parent, but that the relationship needs to pre-exist the disruption to benefit the child.⁵ Other studies have shown that a lawsuit over visitation can be as detrimental to a child as a parent disallowing grandparent visitation.⁶ Approximately 4.5 million children in the United States live in grandparent-headed households.⁷ In Florida, 7.1 percent (258,952 children) of all children live in grandparent-headed households.⁸

Florida's Development of Grandparent Visitation Rights

In Florida, a grandparent's right to visitation and custody was created in statutory law, not common law. The Florida Legislature first addressed grandparent visitation in 1978 by amending ch. 61, F.S., to allow courts to award grandparent visitation in a dissolution of marriage proceeding.⁹ However, in practice the changes did not produce the intended effect because Florida courts ruled that grandparents, for the most part, did not have standing to petition for visitation. For example, in *Shuler v. Shuler*, 371 So. 2d 588 (Fla. 1st DCA 1979), the court found that the grandparents did not have standing to petition for visitation because they were not contestants in the divorce proceeding.¹⁰ Essentially, grandparents had to interject themselves into the divorce proceedings in order to petition for visitation.¹¹

Grandparent visitation rights expanded significantly in 1984 when the Legislature enacted ch. 752, F.S., titled "Grandparental Visitation Rights," which gave grandparents standing to petition the court for visitation in certain situations. At its broadest, s. 752.01(1), F.S., required visitation to be granted when the court determined it to be in the best interest of the child and one of the following situations existed:

- (a) One or both of the child's parents were deceased;
- (b) The parents were divorced;
- (c) One parent had deserted the child;
- (d) The child was born out of wedlock; or
- (e) One or both parents, who were still married, had prohibited the formation of a relationship between the child and the grandparent(s).¹²

In 1993, the Legislature amended ch. 61, F.S., further by adding a provision that granted grandparents the same standing as parents for evaluating custody arrangements for a child in cases where the child had resided with the grandparent in a stable relationship.¹³

To date, courts have struck down as unconstitutional almost all of the provisions in ch. 752, F.S. However, these provisions are still found in the Florida Statutes because they have not been repealed by the Legislature.

⁴ Judith L. Shandling, *The Constitutional Constraints on Grandparents' Visitation Statutes*, 86 COLUM. L. REV. 118, 123 (1986) (citing A. Kornhaber and K. Woodward, *Grandparents/Grandchildren – The Vital Connection* (1981)). However, the methodology of Dr. Kornhaber's study has been criticized as being unsound. Judith L. Shandling at 123 (citing Ingulli, *Grandparent Visitation Rights: Social Policies and Legal Rights*, 87 W. VA. L. REV. 295, 295-98 (1985)).

⁵ *Id.* at 124; see generally Evangelia Bouna and P.K. Smith, *The role of grandparents and the implications of legal issues on grandparent-grandchild relationships in European countries*, United Nations Committee on the Rights of the Child, Geneva, Sept. 16, 2005, available at http://www.crin.org/docs/resources/treaties/crc.40/GDD_2005_Goldsmiths_College.doc (last visited July 16, 2008).

⁶ Judith L. Shandling, *supra* note 4, at 124.

⁷ GrandFacts, *State Fact Sheet for Grandparents and Other Relatives Raising Children, Fact Sheet* (Oct. 2007), http://www.grandfactsheets.org/state_fact_sheets.cfm (last visited July 15, 2008).

⁸ GrandFacts, *A State Fact Sheet for Grandparents and Other Relatives Raising Children, Florida* (Nov. 2007), <http://www.grandfactsheets.org/doc/Florida%2007%20New%20Template.pdf> (last visited July 15, 2008).

⁹ Maegen E. Peek, *supra* note 1, at 354. The first statute was s. 61.13(2)(b), F.S., which later became the equivalent to s. 61.13(2)(b)2.c., F.S. The same year, the Legislature enacted s. 68.08, F.S., which allowed courts to grant grandparent visitation upon the death or desertion of one of the parents.

¹⁰ *Shuler*, 371 So. 2d at 590.

¹¹ Maegen E. Peek, *supra* note 1, at 356.

¹² See ch. 93-279, Laws of Fla. (s. 752.01, F.S. (1993)). Subsequent amendments by the Legislature removed some of these criteria. See s. 752.01, F.S. (2007).

¹³ See ch. 93-236, Laws of Fla. (s. 61.13(7), F.S. (1993)).

Additionally, the courts have struck down two provisions in ch. 61, F.S., that granted visitation or custody rights to grandparents in dissolution proceedings when it was shown to be in the child's best interest.

Findings and/or Conclusions

Analysis of Florida Case Law

Chapter 752, Florida Statutes

Florida courts have considered the constitutionality of s. 752.01, F.S., on several occasions and have “consistently held all statutes that have attempted to compel visitation or custody with a grandparent based solely on the best interest of the child standard . . . to be unconstitutional.”¹⁴ This result is because the fundamental right of parenting is a long-standing liberty interest recognized by both the United States and Florida constitutions.¹⁵ Because child-rearing – inherent in Florida's right of privacy – is considered a fundamental right, when determining whether something unconstitutionally infringes on that right, courts have used the highest standard of review available: the strict scrutiny standard.

In 1996, the Florida Supreme Court addressed its first major analysis of s. 752.01, F.S., in *Beagle v. Beagle*, 678 So. 2d 1271 (Fla. 1996). In *Beagle*, the Court determined that s. 752.01(1)(e), F.S., which allowed grandparents to seek visitation when the child's family was intact, was facially unconstitutional. The Court announced the standard of review applicable when deciding whether a state's intrusion into a citizen's private life is constitutional:

The right of privacy is a fundamental right which we believe demands the compelling state interest standard.¹⁶ This test shifts the burden of proof to the state to justify an intrusion on privacy. The burden can be met by demonstrating that the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means.¹⁷

The Court held that “[b]ased upon the privacy provision in the Florida Constitution, . . . the State may not intrude upon the parents' fundamental right to raise their children except in cases where the child is threatened with harm.”¹⁸

Two years after *Beagle*, the Florida Supreme Court struck down s. 752.01(1)(a), F.S., which permitted visitation when one or both parents of the child were deceased. Specifically, the Court in *Von Eiff v. Azicri*, 720 So. 2d 510 (Fla. 1998), held, “[W]e are unable to discern any difference between the fundamental rights of privacy of a natural parent in an intact family and the fundamental rights of privacy of a widowed parent.”¹⁹ Additionally, the Court explained that the problem with allowing grandparent visitation based on the “best interests of the child” standard is that it permits the judiciary to second-guess parental decisions and instead “substitute its own views regarding how a child should be raised. . . . It is irrelevant, to this constitutional analysis, that it might in many instances be ‘better’ or ‘desirable’ for a child to maintain contact with a grandparent.”²⁰

¹⁴ *Cranney v. Coronado*, 920 So. 2d 132, 134 (Fla. 2d DCA 2006) (quoting *Sullivan v. Sapp*, 866 So. 2d 28, 37 (Fla. 2004)).

¹⁵ In 1980, Florida's citizens approved the addition of a privacy provision in the state constitution, which provides greater protection than the federal constitution. Specifically, Florida's right to privacy provision states: “Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein.” FLA. CONST. art. I, s. 23. Ten states have express privacy provisions in their constitutions: Alaska, Arizona, California, Florida, Hawaii, Illinois, Louisiana, Montana, South Carolina, and Washington. Nat'l Conference of State Legislatures, *Privacy Protections in State Constitutions*, <http://www.ncsl.org/programs/lis/privacy/stateconstpriv03.htm> (last visited Sept. 4, 2008); see also *Beagle v. Beagle*, 678 So. 2d 1271, 1275 (Fla. 1996).

¹⁶ The strict scrutiny standard and the compelling state interest standard are the same standard. The terms are often used interchangeably because the strict scrutiny standard requires the government to have a compelling state interest before it can intrude on a person's fundamental rights. See Maegen E. Peek, *supra* note 1, at 347-48.

¹⁷ *Beagle*, 678 So. 2d at 1276 (quoting *Winfield v. Division of Pari-Mutuel Wagering*, 477 So. 2d 544, 547 (Fla. 1985)).

¹⁸ *Id.*

¹⁹ *Von Eiff*, 720 So. 2d at 515 (quoting *Fitts v. Poe*, 699 So. 2d 348, 348-49 (Fla. 5th DCA 1997)).

²⁰ *Id.* at 516 (quoting *Beagle*, 678 So. 2d at 1277).

An appellate court found the statutory provision authorizing grandparent visitation where the parents are divorced unconstitutional in *Lonon v. Ferrell*, 739 So. 2d 650, 651 (Fla. 2d DCA 1999). Just as in *Beagle* and *Von Eiff*, the court found that a divorced parent has the same privacy rights as a widowed or married parent. Finally, in *Saul v. Brunetti*, 753 So. 2d 26 (Fla. 2000), the Florida Supreme Court found s. 752.01(1)(d), F.S., unconstitutional. The Court held that “the father of an out-of-wedlock child has the same right of privacy” as the father of a child born into a marriage.²¹

Chapter 61, Florida Statutes

The courts have additionally struck down two provisions in ch. 61, F.S., which governs divorce, custody, visitation, and support. In 2000, the Florida Supreme Court struck down s. 61.13(7), F.S., which granted grandparent custodial rights in custody or dissolution of marriage proceedings.²² In *Richardson v. Richardson*, 766 So. 2d 1036 (Fla. 2000), the Court recognized that when a custody dispute is between two fit parents, it is proper to use the best interests of the child standard. However, when the dispute is between a fit parent and a third party, there must be a showing of detrimental harm to the child in order for custody to be denied to the parent.²³ The Court held that s. 61.13(7), F.S., “is unconstitutional on its face because it equates grandparents with natural parents and permits courts to determine custody disputes utilizing solely the ‘best interest of the child’ standard without first determining detriment to the child.”²⁴ The Court found this statutory provision to be even more intrusive on a parent’s right to raise his or her child than the grandparent visitation statute in ch. 752, F.S.²⁵

In January 2004, the Florida Supreme Court struck down the statutory provision that awarded reasonable grandparent visitation if the court found that the visitation would be in the child’s best interest.²⁶ In *Sullivan v. Sapp*, while a motion for rehearing in her paternity suit was pending, the mother died in an automobile accident. The maternal grandmother subsequently petitioned to intervene to obtain visitation with her grandchild. The Court held that although the mother’s death did not void the pending paternity action, the issues of paternity, custody, visitation, and support were not at issue (purely an economic issue remained) and therefore the grandmother did not have standing to intervene. The Court went on to address the constitutionality of the statute in order to “support and maintain uniformity in Florida law.”²⁷ Based on the rationale of earlier Florida cases, the Court declared the provision “unconstitutional as violative of Florida’s right of privacy because it fails to require a showing of harm to the child prior to compelling and forcing the invasion of grandparent visitation into the parental privacy rights.”²⁸

Analysis of Federal Case Law

The U.S. Supreme Court ruled on the issue of grandparent visitation and custody rights in 2001 when the Court struck down a Washington state law as unconstitutional as applied. In *Troxel v. Granville*, 530 U.S. 57 (2000), paternal grandparents petitioned to expand their visitation rights with their deceased son’s children after the children’s biological mother (who had remarried) reduced the visitation from every weekend to once a month. The Washington Supreme Court held that although the grandparents had standing to petition for visitation under state law, the law, as written,

²¹ *Saul*, 753 So. 2d at 28.

²² The subsection read that “[i]n any case where the child is actually residing with a grandparent in a stable relationship, whether the court has awarded custody to the grandparent or not, the court may recognize the grandparents as having the same standing as parents for evaluating what custody arrangements are in the best interest of the child.” Section 61.13(7), F.S. (1997).

²³ *Id.* at 1039.

²⁴ *Id.* at 1043.

²⁵ *Id.* at 1040.

²⁶ *Sullivan v. Sapp*, 866 So. 2d 28 (Fla. 2004). Specifically, s. 61.13(2)(b)2.c., F.S. (2001), provided: “The court may award the grandparents visitation rights with a minor child if it is in the child’s best interest. Grandparents have legal standing to seek judicial enforcement of such an award. This section does not require that grandparents be made parties or given notice of dissolution pleadings or proceedings, nor do grandparents have legal standing as ‘contestants’ as defined in s. 61.1306. A court may not order that a child be kept within the state or jurisdiction of the court solely for the purpose of permitting visitation by the grandparents.”

²⁷ *Sullivan*, 866 So. 2d at 34.

²⁸ *Id.* at 37-38.

violated a parent's federal constitutional right to raise a child without state interference.²⁹ The U.S. Supreme Court subsequently agreed and found the law to be "breathtakingly broad" within the context of a "best interest" determination.³⁰ The Court determined that no consideration had been given to the decision of the parent and added that the parent's fitness to make decisions had not been questioned or otherwise raised as an issue.³¹ The Court further noted that no weight had been given to the fact that the mother had in fact assented to visitation before the lawsuit was filed.³² Based on these observations, the Court found the Washington statute unconstitutional as applied because "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."³³ However, the Court did not hold that all nonparental visitation statutes were facially unconstitutional, instead leaving such a determination to be made by the states on a case-by-case basis.³⁴

After the *Troxel* decision there continues to be debate in state courts regarding grandparent visitation due, in part, to the lack of a concrete standard because of the plurality decision by the Court.

Analysis of Other Jurisdictions

Currently, there are approximately 35 states with valid grandparent visitation statutes.³⁵ However, these statutes vary in content, often using the "best interests of the child" standard, enumerating conditions that must exist prior to allowing a grandparent to petition for visitation, or specifying factors to help guide the court in deciding what is in the child's best interest. Some provisions in the Florida Statutes that are analogous to practices used in other states have been ruled unconstitutional by Florida's courts; however, there are some practices from other states that may provide guidance to the Florida Legislature if it wishes to draft grandparent visitation legislation. Senate professional staff selected several states to spotlight their valid grandparent visitation statutes. Florida differs from most states because the Florida Constitution provides a specific right to privacy that many states do not have. This right to privacy is often cited by Florida courts as creating a higher hurdle to cross in enacting a valid grandparent visitation rights statute. The first two states listed below, Arizona and Montana, also have a separate right-to-privacy provision in their constitutions.

Arizona

In 1983, Arizona enacted a grandparent visitation statute that provides, in part:

- A. The superior court may grant the grandparents of the child reasonable visitation rights to the child during the child's minority on a finding that the visitation rights would be in the best interests of the child and any of the following is true:
1. The marriage of the parents of the child has been dissolved for at least three months.
 2. A parent of the child has been deceased or has been missing for at least three months. . . .
 3. The child was born out wedlock.³⁶

Some of the factors the court may consider in assessing the child's best interests include: the historical relationship between the child and the grandparent, the motivations of both parties, the quantity of visitation time requested, and, where a parent is deceased, the value of maintaining an extended-family relationship.³⁷

²⁹ This right is derived from the Due Process Clause of the Fourteenth Amendment, which protects the fundamental right of parents to make decisions as to the care, custody, and control of their children. *Troxel*, 530 U.S. at 65.

³⁰ *Id.* at 67.

³¹ *Id.* at 67-68.

³² *Id.* at 71. The plurality goes on to discuss certain state statutes that expressly provide that a court cannot award visitation unless a parent unreasonably denies visitation to the concerned third party. *See* Miss. Code Ann. s. 93-16-3(2)(a) (1994); Ore. Rev. Stat. s. 109.121(1)(a)(B) (1997); R.I. Gen. Laws. ss. 15-5-24.3(a)(2)(iii)-(iv) (Supp. 1999).

³³ *Id.* at 72-73.

³⁴ *Id.* at 73.

³⁵ Senate professional staff conducted Westlaw searches on every state's grandparent visitation statute to determine whether it was still good law.

³⁶ Ariz. Rev. Stat. Ann. s. 25-409 (2008); *see also* Ariz. Laws 1983, ch. 109, s. 1 (1983).

³⁷ Ariz. Rev. Stat. Ann. s. 25-409.

The Arizona Constitution does include a right to privacy; however, it has been argued that Arizona's right to privacy – scripted after Washington's right to privacy – was intended to apply solely in the criminal context of search and seizure.³⁸ Over the years, Arizona courts have expanded their constitutional right to privacy; however, there is no indication of an Arizona court that has discussed the right to privacy in relation to the grandparent visitation statute.

Although Arizona does recognize the fundamental right to parent, its statute has been upheld. The court explained its reasoning for upholding the statute in *Graville v. Dodge*, 985 P.2d 604 (Ariz. App. I 1999). First, the court agreed with Justice O'Connor's dissent in *City of Akron v. Akron Ctr. for Reproductive Health, Inc.*,³⁹ where she suggested “that not every state regulation that impinged on a fundamental right had to be examined with strict scrutiny.”⁴⁰ Based on this principle, the Arizona court found:

[Section 25-409] does not substantially infringe on parents' fundamental rights. Other courts have noted that “[g]ranteeing visitation is a far lesser intrusion, or assertion of control, than is an award of custody’ and thus not nearly as invasive of parents’ rights.” Grandparent visitation is not automatic The statute permits reasonable visitation only if the trial court finds visitation to be “in the best interests of the child.” The statute also requires the court to consider a number of relevant factors to focus its analysis on the best interests of the child. . . . Thus, the statute is structured to enable the court to make grandparent visitation a minimal burden on the rights of the child's parents.⁴¹

Upon deciding that the statute did not substantially infringe on parental rights, the court held that it would analyze the constitutionality of the statute using the rational basis test, rather than strict scrutiny. After reviewing the legislative intent behind Arizona's law, the court held that it “is rationally related to furthering the state's legitimate interest in enabling children to become responsible adults by fostering relationships between grandchildren and their grandparents. We thus hold that the statute is constitutional.”⁴²

After the U.S. Supreme Court decided *Troxel*, Arizona again addressed the constitutionality of its grandparent visitation statute. In *McGovern v. McGovern*, 33 P.3d 506 (Ariz. App. II 2001), the court noted the statute's “self-limiting features”⁴³ and held that a trial court must not only apply the statute as written, but must also recognize the presumption that a fit parent acts in his or her child's best interest and that special weight must be given to a fit parent's determination regarding visitation in order for the statute to be constitutional.⁴⁴

Montana

Montana's grandparent visitation statute,⁴⁵ enacted in 1979, provides that before a court may grant a petition for grandparent-grandchild visitation over the objection of a parent whose parental rights have not been terminated, the court must determine whether the objecting parent is a fit parent.⁴⁶ If the court finds that a parent is fit, there must be clear and convincing evidence that visitation is in the child's best interest and that the presumption in favor of the parent has been rebutted by the petitioner before visitation may be ordered. Even if a parent is found to be unfit, there still must be a finding, by clear and convincing evidence, that visitation is in the child's best interest. Montana's statute also allows the court to appoint an attorney to represent the interests of the child and provides that a person is not

³⁸ See Jodi A. Jerich, *Considerations of the Arizona Legislature: The Effects of State Constitutionalism*, 35 ARIZ. ATT'Y 30, 33 (Dec. 1998); *Beagle*, 678 So. 2d at 1275 n. 9.

³⁹ *City of Akron v. Akron Ctr. for Reproductive Health, Inc.*, 462 U.S. 416, 462-63 (1983) (O'Connor, J., dissenting), overruled by *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

⁴⁰ *Graville*, 985 P.2d at 609.

⁴¹ *Id.* at 610 (internal citations omitted).

⁴² *Id.* at 611.

⁴³ The “self-limiting features” the court referred to include: (1) the statute is permissive, not mandatory; (2) visitation rights are only allowed if it is found to be in the child's best interest and at least one of three enumerated conditions exist; and (3) the court must consider relevant factors when determining a child's best interest. *McGovern*, 33 P.3d at 511.

⁴⁴ *Id.* at 512.

⁴⁵ Mont. Code Ann. s. 40-9-102 (2008).

⁴⁶ Before declaring a parent unfit, the court must find, based upon clear and convincing evidence, that one or more of the conditions provided in s. 42-2-608 have occurred.

allowed to petition the court for visitation more than once every two years, unless special circumstances arise.⁴⁷ The Supreme Court of Montana has upheld this statutory structure as being consistent with the *Troxel* decision.⁴⁸

In 1972, a right to privacy provision was added to Montana's constitution and it became "the strongest protection for privacy rights of any state in this country" at that time.⁴⁹ By 1972, privacy rights were thought to involve three types of interests: (1) "search and seizure rights," (2) "disclosural rights," and (3) "autonomy rights."⁵⁰ The Montana Supreme Court has not had many occasions to address "autonomy rights," but when it has, the court has "ruled in favor of extending the scope of individual privacy beyond that recognized by the United States Supreme Court."⁵¹

Montana also has another constitutional provision that is unique and has the possibility of playing an important role in cases involving grandparent visitation. Article II, section 15 of the Montana Constitution provides: "The rights of persons under 18 years of age shall include, but not be limited to, all the fundamental rights of this Article unless specifically precluded by laws which enhance the protection of such persons." This provision recognizes that children have fundamental rights such as "freedom, pursuing life's basic necessities, enjoying and defending life and liberty and seeking safety, health and happiness in lawful ways and the rights of individual dignity and privacy."⁵² This constitutional provision may help third-party visitation lawsuits survive because "the focus is on the best interests of the children, and not on parental rights."⁵³

Missouri

In *Blakely v. Blakely*, 83 S.W.3d 537 (Mo. 2002), Missouri's Supreme Court upheld the constitutionality of its grandparent visitation statute, which provides in part:

1. The court may grant reasonable visitation rights to the grandparents of the child . . . when:
 - (1) The parents of the child have filed for a dissolution of their marriage . . . ; or
 - (2) One parent of the child is deceased and the surviving parent denies reasonable visitation to a parent of the deceased parent of the child; or
 - (3) The child has resided in the grandparent's home for at least six months within the twenty-four month period immediately preceding the filing of the petition; **and**
 - (4) A grandparent is unreasonably denied visitation . . . for a period exceeding ninety days. However, if the natural parents are legally married to each other and are living together with the child, a grandparent may not file for visitation pursuant to this subdivision.
2. The court shall determine if the visitation by the grandparent would be in the child's best interest or if it would endanger the child's physical health or impair the child's emotional development. Visitation may only be ordered when the court finds such visitation to be in the best interests of the child. However, when the parents of the child are legally married to each other and are living together with the child, it shall be a rebuttable presumption that such parents know what is in the best interest of the child.⁵⁴

Additionally, Missouri's law permits the court to appoint a guardian ad litem for the child and to order a home study to assist in determining the best interests of the child.⁵⁵

⁴⁷ Mont. Code Ann. s. 40-9-102(6) and (7).

⁴⁸ See *Polasek v. Omura*, 136 P.3d 519, 522-23 (Mont. 2006).

⁴⁹ Patricia A. Cain, *The Right to Privacy Under the Montana Constitution: Sex and Intimacy*, 64 MONT. L. REV. 99, 101 (2003). According to this article, Montana, Alaska, and Hawaii provide the most strongly worded privacy provisions out of the 10 states that have explicit privacy provisions in their constitutions. *Id.* at n. 7. For the full text of Montana's constitutional right to privacy, see MT. CONST. art. II, s. 10.

⁵⁰ Cain, *supra* note 49, at 104 (quoting Jon Devlin, *Privacy and Abortion Rights Under the Louisiana State Constitution: Could Roe v. Wade Be Alive and Well in the Bayou State?*, 51 LA. L. REV. 685, 691 (1991)).

⁵¹ *Id.* at 106.

⁵² P. Mars Scott, *Significant Changes in Family Law*, 25 MONT. LAW 15, 17-18 (Nov. 1999).

⁵³ *Id.* at 18.

⁵⁴ Mo. Ann. Stat. s. 452.402 (2008) (emphasis added).

⁵⁵ Mo. Ann. Stat. s. 452.402.3 and 4.

In *Blakely*, the court distinguished the Missouri statute from the Washington statute that the U.S. Supreme Court held unconstitutional in *Troxel*. First, the court in *Blakely* found that Missouri's statute was much narrower than Washington's statute. Specifically, "the statute contemplates only 'occasional, temporary visitation, which may only be allowed if a trial court finds visitation to be in the best interest of the child and does not endanger the child's physical or emotional development.' [T]he statute permit[s] only a 'minimal intrusion on the family relationship and ... [is] ... narrowly tailored to adequately protect the interests of parents and children.'"⁵⁶ Additionally, the Missouri legislature included a threshold "waiting period" requirement before allowing a grandparent to petition for visitation. Accordingly, a grandparent does not have automatic standing to petition for visitation, but must demonstrate that parents have unreasonably denied visitation for a period exceeding 90 days.⁵⁷ Third, after showing that visitation was denied for more than 90 days, the grandparent must then prove that the denial of visitation was unreasonable, which provides a parent the rebuttable presumption of validity discussed in *Troxel*.⁵⁸ Lastly, the Missouri statute provides procedural safeguards in determining the best interests of the child, thereby helping to eliminate "unfettered discretion of the trial judge."⁵⁹

Based on the statutory requirements identified above, the Missouri courts have continued to uphold the validity of the grandparent visitation statute over the years. Missouri does not have a state constitutional right to privacy.

Oklahoma

Oklahoma's grandparent visitation statute has also been upheld and provides, in part, for a court to grant visitation if: (1) the court deems visitation to be in the child's best interest; (2) the parents are unfit or the grandparent overcomes the presumption that fit parents are acting in the child's best interest by showing the child would suffer harm without visitation; and (3) the intact family has been disrupted by at least one of a range of enumerated conditions (e.g., the parents are divorcing or a parent is deceased or incarcerated).⁶⁰ The statute specifies that a judge may not grant grandparent visitation if the family is intact and both parents object to the visitation. Further, the statute enumerates factors the court must consider in deciding the best interests of the child (e.g., a preexisting relationship between the child and grandparent; the mental and physical health of the grandparent; the motivation of the parents in denying visitation).

In 1998, as a matter of first impression, the court in *McGuire v. Morrison*, 964 P.2d 966 (Okla. Civ. App. 1 1998), was asked to determine whether Oklahoma's grandparent visitation statute impermissibly and substantially infringed on a parent's fundamental right "to the companionship, care, custody and management of their child(ren)."⁶¹ The court determined that the proper test for determining grandparent visitation is the best interests of the child test and that the "threat of harm, *physical or emotional*, has always been at the center of the best-interest-of-the-child test in Oklahoma."⁶² Accordingly, the court held that Oklahoma's statute was constitutional because "(1) protection of the best interests of children constitutes a valid and compelling state interest, and (2) the Oklahoma best-interest-of-the-child test contemplates an examination of potential harm to the child(ren) in the grandparental visitation calculus."⁶³

That same year, Oklahoma's Supreme Court also ruled on the constitutionality of its grandparent visitation statute. The court ruled that the statute was unconstitutional when applied to an intact nuclear family where there was no harm or threat of harm to the child involved.⁶⁴ In its opinion, the court said that a state may use its police powers to protect a child's welfare, but only when the decisions of the parent would result in harm.⁶⁵ Moreover, the court held:

⁵⁶ *Blakely*, 83 S.W.3d at 543-44 (quoting *Herndon v. Tuhey*, 857 S.W.2d 203, 210-11 (Mo. 1993)) (emphasis in original).

⁵⁷ *Id.* at 544.

⁵⁸ *Id.* at 545.

⁵⁹ *Id.* These procedural safeguards include providing a home study and appointing a guardian ad litem.

⁶⁰ Okla. Stat. Ann. Tit. 10, s. 5 (2008).

⁶¹ *McGuire*, 964 P.2d at 967.

⁶² *Id.* at 968 (emphasis added).

⁶³ *Id.*

⁶⁴ *In re Herbst*, 971 P.2d 395 (Okla. 1998).

⁶⁵ *Id.* at 398.

To reach the issue of a child's best interests, there must be a requisite showing of harm, or threat of harm, to bring the issue before the court or some instance of death or divorce which brings the child's domestic situation within the province of the court. Absent a showing of harm, (or threat thereof) it is not for the state to choose which associations a family must maintain and which the family is permitted to abandon.⁶⁶

Oklahoma's grandparent visitation statute has been amended to incorporate changes discussed by the courts, and it is still recognized as good law today.⁶⁷

Legal, Policy, and Practical Considerations

Practitioners and legal scholars with whom Senate professional staff spoke for this project agreed that crafting legislation in this area is going to be difficult because a parent's fundamental right to parent is involved. Currently, the Family Law Section of The Florida Bar has created an ad hoc committee to research the feasibility of extended family visitation rights, which includes grandparents, siblings, stepparents, and others. The committee plans to investigate laws around the country to see which have been challenged and which have survived. The committee anticipates that its report will be available by June 2009.⁶⁸

Although the Florida courts have invalidated most of Florida's statutory provisions regarding grandparent visitation, it appears that the following are minimum themes that they have enumerated as being critical for such a statute to possibly pass constitutional muster:

- Specify that there is a presumption that a fit parent acts in the best interests of the child;
- Treat all parents equally (i.e., do not favor married parents over unwed or divorced parents); and
- Require evidence of demonstrable harm to the child as the basis for awarding visitation rights.

Additionally, the courts have made it clear that grandparent visitation must be evaluated using the strict scrutiny test.

Determining what the courts mean by the word "harm" is one of the biggest challenges in drafting legislation. This word consistently is used in Florida court opinions, but there is no certainty as to how the courts define it. Is it the same standard as used in ch. 39, F.S.,⁶⁹ in cases of dependency or termination of parental rights? Or will a lesser standard of harm, such as emotional harm, suffice? If the latter is true, would the emotional harm need to manifest itself in a physical manner, such as the physical symptoms associated with stress or depression? Many practitioners and legal scholars believe that in order to reach the level of a compelling state interest, the "harm" must be some sort of physical harm as is often seen in dependency cases. For example, the "harm to the child" standard seen in dependency cases most often is equated to "abuse, neglect, or abandonment."⁷⁰ However, under s. 39.01, F.S., "harm" can occur, in part, when "any person inflicts or allows to be inflicted upon the child physical, mental, or *emotional* injury."⁷¹ While it is clear – through statutory and case law – what physical and mental injury mean, it is unclear what "emotional injury" means because it has not been defined in statute.⁷²

⁶⁶ *Id.* at 399.

⁶⁷ See generally *Vance v. Loy*, 158 P.3d 503 (Okla. Civ. 3 2007).

⁶⁸ Conversation with Scott Rubin, Chair of the Family Law Section of The Florida Bar (Aug. 12, 2008).

⁶⁹ Chapter 39, F.S., titled "Proceedings Relating to Children," covers situations such as child abuse, protective investigations, change of custody, domestic violence, and termination of parental rights. There is currently a grandparent visitation rights provision in ch. 39, F.S.; however, the statute only comes into effect when the issue of the child's health and welfare and possibly the parents' fitness is already at issue before the court. See s. 39.509, F.S.

⁷⁰ Conversation with Judge Emily Peacock, Domestic Relations/Family Law Division, Thirteenth Judicial Circuit (Aug. 8, 2008); conversation with Scott Rubin, Chair of the Family Law Section of The Florida Bar (Aug. 12, 2008); conversation with JoLen Rawls Wolf, Professor at the Florida State University College of Law (Aug. 14, 2008).

⁷¹ Section 39.01(31)(a), F.S. (emphasis added). Section 39.01(41), F.S., provides that "mental injury" means "an injury to the intellectual or psychological capacity of a child as evidenced by a discernible and substantial impairment in the ability to function within the normal range of performance and behavior."

⁷² Westlaw research conducted by Senate professional staff also failed to explain how the courts interpret the term "emotional injury" within the ch. 39, F.S., context.

There is no guarantee that grandparent visitation laws of other states would be upheld in Florida, but there are some provisions from these laws that may withstand constitutional scrutiny by a Florida court. For example, both Montana and Oklahoma require a court to determine whether a parent is fit or unfit, and the grandparents must also rebut the presumption that a fit parent acts in the best interest of the child. Other possible considerations would be listing factors for a court to consider when deciding if “harm” would occur, appointing a guardian ad litem, and conducting a home study or evaluation of the child.

Just as there are viable statutes in other states that the Legislature may want to consider, there are some portions of other states’ statutes that most likely would be unconstitutional in Florida and should not be considered. For example, unlike Arizona and Missouri, Florida may want to avoid differentiating between parents because its courts have already held that all parents, regardless of their status, have the same fundamental rights. Additionally, the best interests of the child test as a basis for awarding visitation will not be upheld in Florida because grandparent visitation is evaluated using the strict scrutiny test, not the rational basis test as in Arizona.

In addition to the legal impediments associated with drafting a grandparent visitation statute that passes constitutional muster, there are some practical effects that must also be taken into consideration. For example, how does a grandparent become an interested party to a dissolution of marriage proceeding? What type of initial pleading requirement does the grandparent have to meet? What happens if one party relocates? What options are available to the parent if the grandparent becomes ill after visitation is granted? These are just some of the practical questions that arose during the course of this project and, while the answers will require additional research and development, they are some of the issues that should be considered if the Legislature pursues legislation in this area.

Options and/or Recommendations

Based on a review of case law, as well as discussions with practitioners and legal scholars, it appears that the Florida courts have enumerated certain factors that are important in constructing a grandparent visitation statute. After reviewing these findings, Senate professional staff recommends that the Legislature weigh the following considerations if it decides to craft new legislation in this area:

- Allow any grandparent to be able to petition for visitation, regardless of the parents’ marital status.
- Create a rebuttable presumption that a fit parent acts in the best interests of the child when denying or allowing visitation.
- Require the grandparent to submit a verified petition alleging that the child will suffer demonstrable harm if visitation is denied.
- Require the grandparent to then prove by clear and convincing evidence that the failure to allow visitation has caused or is likely to cause demonstrable harm to the child’s health, safety, or welfare.
- Appoint a guardian ad litem for the child.
- Require a professional evaluation of the child pursuant to the Florida Family Law Rules of Procedure.
- Enumerate factors that the court must consider when determining whether a denial of visitation will demonstrably harm the child’s health, safety, or welfare.
- Place a limit on the number of times a grandparent can file an original action for visitation, absent a real, substantial, and unanticipated change of circumstances.

The report on third-party visitation being prepared by the Family Law Section of The Florida Bar may also provide helpful information for crafting legislation. This report, however, will not be available until after the 2009 Regular Session. If the Legislature wishes to wait for this report to be released before addressing grandparent legislation, then, at a minimum, Senate professional staff recommends that in the upcoming Regular Session the Legislature consider repealing the provisions of ch. 752, F.S., that have been held unconstitutional (e.g., ss. 752.01 and 752.07, F.S.) in order to avoid confusion and so people do not mistakenly rely on them.