TO GRANDMOTHER'S HOUSE WE GO: EXAMINING *TROXEL*, *HARROLD*, AND THE FUTURE OF THIRD-PARTY VISITATION

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I. INTRODUCTION

When the U.S. Supreme Court denied the constitutionality of grandparents' third-party visitation rights under a Washington state statute more than five years ago, some thought the case was a giant barricade on the road to grandmother's house.[1] By declaring that such statutes violated Fourteenth Amendment due process rights when they did not give special weight to parents' preferences, the Court called into question laws allowing grandparents visitation. But where there's a will there's a way, and many states seem to have the will to help grandma out of the *Troxel v. Granville* bind by locating a detour to distinguish the case or by getting rid of the orange barrels altogether in finding their own statutes constitutional. As one scholar notes, "Courts rely upon *Troxel* when it aids a favorable outcome and are easily able to distinguish the decision when it does not. As a result, the question of how to handle family problems in this area remains unsolved."[2]

Ohio recently added to the breadth of case law examining the impact of *Troxel* in *Harrold v. Collier*, determining that although *Troxel* requires the state's courts to give "special weight to the wishes of the parents," it does not require them to find "overwhelmingly clear circumstances" in order to grant third-party visitation.[3] The Ohio visitation statutes call upon courts to consider sixteen factors, among them the parents' wishes, the child's wishes, the relationship between the child and the third party, and "any other factor in the best interest of the child."[4] The Ohio Supreme Court found that because the parents' wishes were considered, even as one of sixteen factors, the *Troxel* burden was met in *Harrold*. The custodial father who opposed visitation

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1. *See* Geri L. Darling, *Grandparents' Rights Survive: Ohio Is the Latest State to Uphold Visitation Laws After* Troxel, ABA J. E-REP., Oct. 2005, at 1.

2. *See* Beth Sherman, *Third Party Visitation Statutes: Society's Changing Views About What Constitutes a Family Must Be Formally Recognized by Statute*, 4 CARDOZO J. CONFLICT RESOL. 99, 100.

3. Harrold v. Collier, 836 N.E.2d 1165, 1167 (Ohio 2005).

4. *Id.* at 1170.

disagreed with the decision and has promised an appeal. His attorney remarked, "giving the factors equal weight is not giving (parental wishes) special weight."[5]

So which path is the correct one? Should courts heed *Troxel*'s advice that parents ought to be the ultimate arbiters of who gets access to their offspring? Should the courts weigh most heavily the unique relationship between the grandparents and grandchildren at issue? Or should they consider the child's best interests above all? Perhaps, as in *Harrold*, the answer will be some combination of the three. No matter what the answer, it is time for a more consistent approach. As Justice Kennedy noted in his *Troxel* dissent, and as the majority conceded, a domestic relations proceeding is disruptive to the parent-child relationship.[6] Unpredictable results, Kennedy argued, put at risk the very relationships the standards seek to protect. "If a single parent who is struggling to raise a child is faced with visitation demands from a third party, the attorney's fees alone might destroy her hopes and plans for the child's future."[7] Kennedy noted that whatever test is used, the Court owes "it to "the Nation's domestic relations legal structure . . . to proceed with caution."[8]

This Comment examines *Troxel* and the future of third-party visitation, noting specifically the divergent approaches various states have applied in its path, and particularly, the approach in *Harrold*. Part II discusses the background of this debate, including the historical nature of parents' Fourteenth Amendment due process rights and demographics describing the changing composition of families, and provides examples of third-party visitation statutes such as those discussed in *Troxel*. Part III considers the interests of parents, grandparents, and children, respectively. It explores the benefits of weighing heavily the parents' interests and desires, grandparents' interests in maintaining or developing a relationship with their grandchildren, and the weight those interests should be given. Part IV asserts that states and courts should apply a totality of the circumstances test in determining whether or not to grant visitation. Finally, Part V concludes that, despite the fact that affairs of the family are primarily a state concern, it is time for the U.S. Supreme Court to iron out the uncertain roadmap it has left in the wake of *Troxel* by setting out a clear standard for the constitutionality of third-party visitation statutes.

5. *See* Darling, *supra* note 1, at 2.

6. *See* Troxel v. Granville, 530 U.S. 57, 75 (2000); *id.* at 101 (Kennedy, J., dissenting).

7. *Id.* at 101.

8. *Id.*

II. THE ROAD TO *TROXEL*: HISTORICAL CONTEXT AND CONTEMPORARY STATISTICS

The road to *Troxel* was a long one. From the establishment of parents' Fourteenth Amendment due process rights to the increasing number of American children growing up outside the nuclear family environment, many factors have impacted legislature and court treatment of third-party visitation rights or lack thereof in current law and will continue to do so. This Part sets out that context and also provides a brief examination of representative third-party visitation statutes.

A. Parents' Right to Care, Custody, and Control

It is long accepted that parents enjoy a fundamental right to the care, custody, and control of their children. In the early nineteenth century, Chancellor James Kent said:

> the rights of parents result from their duties. As they are bound to maintain and educate their children, the law has given them a right to such authority; and in the support of that authority, a right to the exercise of such discipline as may be requisite for the discharge of that sacred trust.[9]

This line of reasoning endured and is implicit in early Supreme Court decisions setting out the substantive due process right of parents to raise their children without unreasonable government intervention. Even today these cases are cited regularly in decisions regarding the rights of children, parents, and the family structure in general, including those involving third-party visitation.

Beginning with *Meyer v. Nebraska*,[10] the Court built a foundation for parents' rights and for the ongoing refinement of the status, rights, and obligations of children. In addition to the explicit prohibition against deprivation "of life, liberty or property without due process of law,"[11] the Court noted that the Fourteenth Amendment also implicitly guarantees other rights, such as freedom from bodily restraint, and the rights to contract, to engage in common occupations of life, to acquire useful knowledge, to marry, to establish a home, and to bring up children.[12] Building on *Meyer* to cement parents' fundamental right in

9. JAMES KENT, COMMENTARIES ON AMERICAN LAW 202, 206 (5th ed. 1844).

10. 262 U.S. 390 (1923).

11. U.S. CONST. amend. XIV.

12. *Meyer*, 262 U.S. at 399.

raising their children, the Court in *Pierce v. Society of Sisters* held that parents could choose to send their children to private, rather than public, school.[13] The Court found that despite the state's interest in regulating schools and ensuring that certain subjects are taught, forcing parents to send their children to public school "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control" when applying a reasonable relations test.[14] Justice McReynolds stressed that "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[15]

The Court reiterated the importance of parents in making decisions concerning their children in *Prince v. Massachusetts*, despite upholding state action against an aunt's decision to take her niece, over whom she had legal custody, onto the streets to distribute booklets about the Jehovah's Witnesses.[16] Writing for the Court, Justice Rutledge noted that in addition to her First Amendment rights, the aunt's case was buttressed "with a claim of parental right as secured by the due process clause."[17] Relying on *Pierce*, he added, "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."[18] *Prince* demonstrated, though, that parental rights are not absolute. The state's ability to act in *parens patriae*, or to act to guard the general interest in children's well-being, may cause parental rights to be restricted. These and subsequent cases show that the ability of the state to act in children's best interests is often in tension with the right of the parents to raise their children.

B. By the Numbers: Statistics Paint a Complex Picture

One arena in which the battle between the state and the parents plays out is third-party visitation. Despite the rights of the parent to the care, custody, and control of their children, in a world where there are any number of ways to define "family," states in recent years began to mirror societal changes, adopting third-party visitation statutes that in some cases allowed grandparents and others to spend time with children

13. Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925).
14. *Id.* at 534–35.
15. *Id*. at 535.
16. *See* Prince v. Massachusetts, 321 U.S. 158 (1944).
17. *Id*. at 164.
18. *Id*. at 166.

despite parental objections.[19] By the time the Supreme Court considered such a situation in *Troxel v. Granville* in 2000, all fifty states had adopted some variation of a visitation statute.[20] The Court noted the demographic changes of the past century, the popularity of the statutes that came with them, and the difficulty to determine what constitutes an average American family. "While many children may have two married parents and grandparents who visit regularly, many other children are raised in single-parent households," Justice O'Connor wrote for the plurality.

> In 1996, children living with only one parent accounted for 28 percent of all children under age 18 in the United States. . . . Understandably, in these single-parent households, persons outside the nuclear family are called upon with increasing frequency to assist in the everyday tasks of child rearing.[21]

She cited statistics demonstrating the especially significant role of grandparents, including that in 1998, about four million children, close to six percent of all children under the age of eighteen, lived in their grandparents' home, and noted that "because grandparents and other relatives undertake duties of a parental nature in many households, States have sought to ensure the welfare of the children therein by protecting the relationships those children form with such third parties."[22]

Since then, a new Census report has been released bolstering claims that more children are growing up outside the traditional nuclear family.[23] In 2000, the number of grandchildren living with their grandparents had increased to 4.4 million, or 6.1%.[24] Moreover, 5.9 million children lived with a relative other than their parent or parents, including with grandparents, sisters, brothers, aunts, uncles, and other relatives.[25] With increasing numbers of children growing up with adults who are not their parents, considering the types of statutes and case law in existence to protect or terminate these relationships is more important than ever.

19. *See* Troxel v. Granville, 530 U.S. 57, 63 (2000).

20. *Id.* at 99.

21. *Id.* at 63–64.

22. *Id.* at 64.

23. *See* Terry Lugaila & Julia Overturf, U.S. Census Bureau, *Children and the Households They Live In: 2000* (Census 2000 Special Reports, March 2004), *available at* http://www.census.gov/prod/2004pubs/censr-14.pdf (providing statistics regarding the living arrangements of children and reporting that number of people under the age of eighteen increased by 8.5 million from 1990 to 2000).

24. *Id.* at 3.

25. *Id.* at 2.

C. Statutes: Parent-Friendly or Totality of the Circumstances?

One constant before and after the Supreme Court decided *Troxel* is the disparity among states' third-party visitation statutes. Some make it extremely difficult to circumvent the parents' wishes while others consider several factors before making a decision about visitation with grandparents or other interested parties. Today, statutes generally take one of two approaches. Some states have adopted an exceptional circumstances standard that requires a finding of serious physical or psychological harm or a substantial likelihood of such harm before the court will look beyond the desires of the parents.[26] Alternatively, some state statutes call for the consideration of several various factors, including parental preference.[27] These states often do not require a finding of harm and are, therefore, more likely to grant visitation to grandparents and other third parties.[28]

Two statutes that demonstrate some of the factors courts consider outside of parents' opinions include those in Mississippi and West Virginia. The factors in Mississippi's statute include: potential disruption on the child's life; suitability of the grandparents' home; the age of the child; the age, and physical and mental health of the grandparents; emotional ties between the grandparents and the grandchild; moral fitness of the grandparents; distance between the grandparents' home and the child's home; and "willingness of the grandparents to accept that the rearing of the child is the responsibility of the parent, and that the parent's manner of child rearing is not to be interfered with by the grandparents."[29]

Similarly, in West Virginia, factors to consider include: the child's age; the relationship between the child and the grandparent; the relationship between the parents and the grandparent; time elapsed since the child last had contact with the grandparent; effect of visitation on the parent-child relationship; scheduling concerns of the parents; the good faith of the grandparent in seeking visitation; whether the child has formerly lived with or been primarily cared for by the grandparents; the parents' preference; and, finally, "[a]ny other factor relevant to the best interests of the child.[30]

26. *See* Moriarty v. Bradt, 827 A.2d 203, 221 (2003) (Long, J., concurring); *see also* N.J. STAT § 9:2-9 (2006).

27. *See* W. VA. CODE § 48-10-502 (1998).

28. *See* Martin v. Coop, 693 So. 2d 912, 915 (Miss. 1997).

29. *Id*.

30. *See supra* note 27.

D. Troxel*: Parents Reign Supreme*

The first and, to date, only Supreme Court consideration of parents' fundamental rights versus third-party interests under visitation statutes was in *Troxel v. Granville*.[31] As previously discussed, the case has served as an impetus for states to reconsider, and sometimes bolster, their own third-party visitation statutes.[32] In Troxel, the relationship at stake was between paternal grandparents Gary and Jenifer Troxel and their two granddaughters, Natalie and Isabelle.[33] The girls were the daughters of Tommie Granville and Brad Troxel, who shared a relationship but never married.[34] After the couple separated in 1991, Brad lived with his parents, regularly hosting weekend visitation there for his daughters. After Brad committed suicide in 1993, the girls continued to visit their grandparents regularly. Several months later, Tommie informed the Troxels that she wished to limit their visitation to one daytime visit per month in addition to special family holidays.[35] Thereafter, the grandparents petitioned the court for an established visitation schedule that exceeded what the girls' mother was willing to allow, and, though the grandparents did not receive everything they asked for, the court granted a visitation schedule of one weekend per month, one week during the summer, and four hours on each grandparent's birthday.[36] Even after the children's mother married and her husband prepared to adopt the girls, the trial court found on remand that visitation with the Troxels was in Natalie and Isabelle's best interests. The Washington Court of Appeals reversed and a divided Washington Supreme Court affirmed the reversal, holding that the U.S. Constitution permits a state to interfere with the parents' rights to rear their children "only to prevent harm or potential harm to a child."[37] The court held that "[p]arents have a right to limit visitation of their children with third persons," and that between parents and judges, "parents should be the ones to choose whether to expose their children to certain people or ideas."[38]

The U.S. Supreme Court affirmed the decision, noting that the Washington statute—which allowed any person to petition for court-

31. Troxel v. Granville, 530 U.S. 57, 63 (2000).
32. See *supra* notes 1–5 and accompanying text.
33. *Troxel*, 530 U.S. at 60.
34. *Id*.
35. *Id.* at 71.
36. *Id.*
37. *Id.* at 63.
38. *Id*.

ordered visitation at any time over a custodial parent's objection if visitation was found to be in the child's best interest—was "breathtakingly broad."[39] The Court found that a common disagreement is not enough for the state to intervene. It noted that the fundamental rights of parents deserve special weight, especially because the mother, Tommie Granville, was never found to be an unfit parent. Quoting *Parham v. J.R.*, the Court said that

> the law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. . . . [H]istorically, it has recognized that natural bonds of affection lead parents to act in the best interests of their children.[40]

The Court said that the Washington trial court "contravened" that presumption, and noted that though in an ideal world parents might gladly cultivate relationships between the grandparents and their children, the world is far from perfect.[41] Writing for the majority, Justice O'Connor explained, "the decision whether such an intergenerational relationship would be beneficial in any specific case is for the parent to make in the first instance."[42] Furthermore, if the parent's decision becomes subject to review, "the court must accord at least some special weight to the parent's own determination."[43] Finally, the Court considered that the mother in question had not denied the grandparents' visitation outright, but merely reduced their amount of visitation.

Notably, the Court's decision, despite seemingly backing parents first and foremost, was a narrow one. In addition to the fact that the mother was not denying visitation outright, which distinguishes Troxel from many other visitation cases, the Court declined to offer a blanket test to determine the constitutionality of visitation statutes. Justice O'Connor explicitly noted that the Court neither considered whether the Fourteenth Amendment's Due Process Clause requires all non-parental visitation statutes to include a showing of harm or of potential harm, nor defined the precise scope of parental due process in the visitation context.[44] Instead, the Court merely held that the Washington statute was unconstitutional as applied to the particular facts of the case. As has

39. *Id.* at 67.

40. *Id.* at 68 (quoting Parham v. J.R., 442 U.S. 584, 602 (1979)).

41. *Id*.

42. *Id.* at 70.

43. *Id.*

44. *Id.* at 73.

become evident in the years since Troxel, much discretion is left for courts to allow visitation. Ohio's *Harrold v. Collier* is just one case that has determined that *Troxel* is satisfied merely by considering parents' desires as one factor among many. Still, some courts and statutes emphasize the parents' fundamental rights and, therefore, consider foremost their interests, wishes, desires, and objectives.

III. DIVERGENT INTERESTS IN THIRD-PARTY VISITATION CASES

Considering the historical traditions and contemporary debate about who should make determinations regarding a child's best interests and what constitutes a family, it is no surprise that courts continue to take into account many viewpoints. Some prefer to be conservative in their application of *Troxel*, giving the most weight to parents' desires. Others empathize with grandparents who have in many cases helped to raise the children in question. Many approach the issue considering what is best for the child first and foremost, and often do so by utilizing a balancing test of various factors. This Part considers, in turn, the interests of each party and the cases that discuss them.

A. Mother Knows Best: Considering Parents' Desires

Though *Troxel v. Granville* may be a tool for parents who oppose a third-party's petition for custody, it is not the only available method. Many other cases, before and after *Troxel*, rely significantly on parents' fundamental rights and are hesitant in some circumstances to countermand a parent's wishes.

In *McDuffie v. Mitchell*, the Court of Appeals of North Carolina affirmed the lower court's dismissal of maternal grandparents' petition for visitation with their grandchildren after their mother's death.[45] There, the two children's parents were married until their oldest child was six years old.[46] After the couple divorced, the mother obtained custody and moved from New Jersey to North Carolina.[47] Three years later, she became ill and died.[48] The father then obtained custody, but the maternal grandparents filed a complaint seeking custody and visitation.[49] Without even assessing the nature of the children's

45. 573 S.E.2d 606, 606–07 (N.C. Ct. App. 2002).

46. *Id*.

47. *Id*. at 607. The father was given visitation rights, and he sued the mother in 2000, alleging that she had denied him proper visitation. *Id*.

48. *Id*.

49. *Id*.

relationship with the grandparents, the lower court dismissed the claim, and the Court of Appeals affirmed.[50] In support of its ruling, the court found that where one parent dies,

> the surviving parent has a natural and legal right to custody and control of the minor children. This right is not absolute, but it may be interfered with or denied only for the most substantial and sufficient reasons, and is subject to judicial control only when the interests and welfare of the children clearly require it.[51]

Similarly, in *Wickham v. Byrne*, the Illinois Supreme Court denied two sets of grandparents' petitions for visitation with their grandchildren, finding the parents' interests controlling. In the first petition, a grandmother sought visitation with her one-year-old grandson following her daughter's death.[52] Honoring the wishes expressed in his wife's last will and testament, the child's father maintained a relationship with his mother-in-law, making the more than fifty minute drive to her home several times so she could see her grandson.[53] The grandmother eventually requested more frequent visits, including overnight stays.[54] Although he assented to visit more frequently as his schedule allowed, the father refused overnight trips.[55] When the grandmother could not work out the details with her former son-in-law, she filed a petition requesting mandatory visitation with her grandson for two weekends per month.[56] The lower court granted only limited visitation, noting that the grandmother had attempted to come between her grandson and his father by filing frivolous reports with the Department of Children and Family Services and that she had interfered with her grandson's medical care without consent.[57]

In the second petition at issue in this case, the grandparents sought visitation with their grandchildren, one of whom was three years old and the other an infant.[58] Their request followed an initial period after the death of their son when the grandparents maintained a close relationship with their grandchildren, babysitting them two to three times per

50. *Id*. The court actually based its ruling on a state rule that only permits third-parties to apply for visitation or custody when an on-going custody dispute is underway. When the mother died, her dispute with her father automatically ended. *Id*. at 608.

51. *Id*. at 607–08 (internal citations and quotations omitted).

52. 769 N.E.2d 1, 2 (Ill. 2002).

53. *Id*.

54. *Id*.

55. *Id*.

56. *Id*.

57. *Id*. at 3.

58. *Id*.

month.[59] Eventually, they asked the mother for more visitation time and overnight stays, but she refused.[60] She told the grandparents she was unhappy that they had not followed her directions for caring for the children, that she was uncomfortable with their lifestyle, and that she did not like the people the children were exposed to while in the grandparents' care.[61] As an alternative to the grandparents' request, the mother offered visitation in her home. Unsatisfied, the grandparents filed for mandatory visitation to meet their own terms.[62] The mother then moved the children six hours away from their grandparents.[63]

The petitioning grandparents argued on appeal that under the state's third-party visitation statute, "the trial judge steps into the shoes of the deceased parent to protect and maintain the children's family heritage."[64] However, the court found that the U.S. Constitution only authorizes interference with fundamental rights where the health, safety, and welfare of a child are in jeopardy.[65] Further, the court found that a relationship between a child and his or her grandparent did not "involve a threat to the health, safety, or welfare of children."[66] The court reasoned:

> Parents have the constitutionally protected latitude to raise their children as they decide, even if these decisions are perceived by some to be for arbitrary or wrong reasons. The presumption that parents act in their children's best interest prevents the court from second-guessing parents' visitation decisions. Moreover, a fit parent's constitutionally protected liberty interest to direct the care, custody, and control of his or her children mandates that parents—not judges—should be the ones to decide with whom their children will and will not associate.[67]

In both cases, the court followed the parents' wishes and denied the visitation requests of the grandparents.[68]

In another case, *Punsly v. Ho*, the Fourth District Court of Appeals of California also denied grandparents their request for visitation with their

59. *Id*.

60. *Id*.

61. *Id*.

62. *Id*.

63. *Id*. The mother claimed that she wanted "to make a fresh start, telling [the Langhams], 'I don't come back for my own family and I don't come back for my friends.'" *Id*.

64. *Id*. at 6.

65. *Id*.

66. *Id*.

67. *Id*. at 8.

68. *Id*. The court also held that portions of the Illinois grandparent-visitation statute were facially unconstitutional as a violation of parents' due process rights. *Id*.

granddaughter.[69] There, the mother and father divorced when the child was two years old, and the mother took custody.[70] Four years later, the father died of bone cancer.[71] Following his death, the grandparents visited with their granddaughter every two months and spoke with her often over the telephone.[72] After two years, the grandparents were unable to see their granddaughter for a period of time so they petitioned the court for a mandatory visitation schedule.[73] After negotiations, the mother offered a more limited plan but the lower court imposed its own visitation scheme.[74] Using *Troxel* as a framework, the court held that the mother's desire to limit visitation should be honored because the grandparents made no allegations that she was unfit and the mother had not denied all visitation. The court also held that visitation may not be in the child's best interest because the mother was concerned that the grandparents used inappropriate language and were not sensitive to the child's biracial background.[75]

In the 2002 case *DeRose v. DeRose*, the Michigan Court of Appeals found that the state's grandparent visitation statute violated a mother's substantive due process right to make decisions regarding childrearing because it mandated that the trial court consider whether visitation was in the child's best interest without affording deference to the mother's wishes.[76] In *Olds v. Olds*, the Iowa Supreme Court similarly denied maternal grandparents visitation rights with their grandchild, based on narrower statute than the Washington state statute in *Troxel*.[77] The petitioners' daughter, the child's mother, denied the grandparents visitation rights and opposed their petition for rights on the ground that visitation would not be in the best interest of her child.[78] The Iowa statute limited which parties could petition for grandchild visitation by noting that petitions could only be filed when the child's parents are divorced, a petition for dissolution of marriage has been filed, the grandparent's child who is the parent of the child in question has died, or the child was placed in a foster home.[79] In this case, the parents were

69. 105 Cal. Rptr. 2d 139 (Cal. Ct. App. 2001).
70. *Id*. at 141.
71. *Id*.
72. *Id*.
73. *Id*.
74. *Id*.
75. *Id*. at 146–47.
76. *See* DeRose v. DeRose, 643 N.W.2d 259 (Mich. Ct. App. 2002).
77. *See* Olds v. Olds, 356 N.W.2d 571, 572 (Iowa 1984).
78. *Id.*
79. *Id.* at 573.

not married but nor were they divorced. Therefore, the grandparents did not have the right to petition for visitation. The Iowa Supreme Court affirmed, noting that enforcing visitation would hamper parental authority, force the child into the midst of conflict, and coerce what should remain a moral rather than a legal obligation.[80]

Other courts protect parents by imposing the burden on the grandparents. The California Family Code requires courts to find that a preexisting relationship exists between the grandparent and the grandchild, and balance the child's interest in that relationship with the parents' "exercise [of] parental authority" before it may grant visitation.[81] A parent who has been awarded sole custody is entitled to a "rebuttable presumption affecting the burden of proof that the visitation of a grandparent is not in the best interest" of the child if the parent objects to visitation.[82] Other statutes and case law require a grandparent seeking visitation to show by clear and convincing evidence that the best interest of the child would be served by the visitation.[83] Still other states require grandparents to demonstrate harm to the child, potential of harm to the child, or custodial unfitness before intervening and awarding visitation.[84] In 2003, the *In re Marriage of Howard* court went so far as to hold that *Troxel* not only suggests that parent fitness or lack thereof is a factor for consideration, but that it actually requires a showing of custodial parental unfitness before intervening against the parents' wishes.[85] Even where state courts want to protect relationships between children and third parties, they are still able to offer deference to parents' rights and demonstrate the importance of those rights by continuing to weigh heavily parental preferences in standing and custody decisions. Instead of impinging on these areas, some courts have relied on generous definitions of parental unfitness, detrimental influence, or unsuitability to give increased weight to third-party advocacy in custody disputes where necessary.[86] In addition, where there is such a relationship between a child and a third party that the party is found to have acted *in loco parentis*, or as having intentionally assumed parental responsibilities, courts may be hesitant to set aside the

80. *Id.*

81. CAL. FAM. CODE § 3104 (West 2004).

82. *Id.*

83. *See* Nelson v. Nelson, 674 N.W.2d 473, 481 (Neb. 2004); NEB. REV. STAT. § 43-1802(2) (2005).

84. *See* Blixt v. Blixt, 774 N.E.2d 1052, 1060 (Mass. 2002); Linder v. Linder, 72 S.W.3d 841, 858 (Ark. 2002).

85. *See In re* Marriage of Howard, 661 N.W.2d 183, 191–92 (Iowa 2003).

86. *See* MARGARET M. MAHONEY, STEPFAMILIES AND THE LAW 7 (1994).

fundamental right of custodial parents to rear their children as they see fit.[87] Perhaps this is because, unlike in a biological relationship, a relationship *in loco parentis* can be terminated at will.[88]

So with the historical foundation of parents' rights to care, custody, and control of their children, and *Troxel*'s decision to weigh heavily parents' rights in considering third-party visitation, where do grandparents' interests and the interests of children come into play, if at all? Some courts have decided to take a different path than *Troxel*, focusing instead on the importance of the relationship between the third party and the child, or on the child's best interests.

B. If Mother Says No, Just Ask Grandma

While the Court in *Troxel* held that a parent's wishes should be given "special weight" in third-party visitation battles, it did recognize that "[i]n many [families], grandparents play an important role."[89] The importance of grandparents can be especially pronounced in single-parent homes. Recognizing this fact, many states have enacted grandparent-visitation statutes to ensure the opportunity for intergenerational, familial bonding.[90] The Court found that "[b]ecause grandparents and other relatives undertake duties of a parental nature in many households, States have sought to ensure the welfare of the children therein by protecting the relationships those children form with such third parties."[91]

Despite the Court's holding in *Troxel*, many courts have struggled to

87. *Id*.

88. *See* Carter v. Brodrick, 644 P.2d 850 (Alaska 1982).

89. Troxel v. Granville, 530 U.S. 57, 64 (2000).

90. *Id*. *See* ALASKA STAT. ANN. § 25.20.065 (2005); ARIZ. REV. STAT. ANN. § 25-409 (2006); ARK. CODE ANN. § 9-13-103 (2005); COLO. REV. STAT. § 19-1-117 (2006); DEL. CODE ANN. tit. 10, § 1031(7) (2005); FLA. STAT. § 752.01 (2005); GA. CODE ANN. § 19-7-3 (2005); HAW. REV. STAT. § 571-46.3 (2005); IDAHO CODE ANN. § 32-719 (2005); ILL. COMP. STAT. 750 § 5/607 (2006); IND. CODE § 31-17-5-1 (2005); KY. REV. STAT. ANN. § 405.021 (West 2005); LA. REV. STAT. ANN. § 9:344 (2005); LA. CIV. CODE ANN. art. 136 (2005); MASS. GEN. LAWS ch 119, § 39D (2006); MICH. COMP. LAWS ANN. § 722.27b (2006); MINN. STAT. § 257C.08 (2006); MISS. CODE ANN. § 93-16-3 (2005); MO. ANN. STAT. § 452.402 (West 2005); MONT. CODE ANN. § 40-9-102 (2005); NEB. REV. STAT. § 43-1802 (2005); NEV. REV. STAT. § 125C.050 (Supp. 2005); N.M. STAT. ANN. § 40-9-2 (West 2006); N.Y. DOM. REL. LAW § 72 (McKinney 2006); N.C. GEN. STAT. §§ 50-13.2, 50-13.2A (2005); N.D. CENT. CODE § 14-09-05.1 (2005); 23 PA. CONS. STAT. §§ 5311–5313 (2005); R.I. GEN. LAWS §§ 15-5-24 to 15-5-24.3 (Supp. 2005); S.C. CODE ANN. § 20-7-420(33) (Supp. 2005); S.D. CODIFIED LAWS § 25-4-52 (2005); TENN. CODE ANN. §§ 36-6-306, 36-6-307 (Supp. 2005); TEX. FAM. CODE ANN. § 153.433 (Vernon Supp. 2005); UTAH CODE ANN. § 30-5-2 (2005); VT. STAT. ANN. tit. 15, §§ 1011-1013 (2005); VA. CODE ANN. § 20-124.2 (2005); WIS. STAT. §§ 767.245, 880.155 (2006); WYO. STAT. ANN. § 20-7-101 (2005).

91. *Troxel*, 530 U.S. at 64.

determine just what "special weight" means. When, if ever, is it appropriate for a court to supersede a parent's wishes, granting grandparental visitation despite objection? Of course, all statutes and courts purport to place the child's best interest paramount. However, the path a court chooses in discerning that interest could mean the difference between allowing a child the opportunity to visit with his or her grandparents and prohibiting it. Two primary approaches are dominant—deference to the parents' wishes, as previously discussed, or a totality of the circumstances balancing test that recognizes the importance of a child's connection to his extended family.

Taking the latter approach, as the Supreme Court of Ohio did in *Harrold v. Collier*[92] under Ohio Revised Code § 3901.11, courts are able to follow *Troxel* without necessarily foreclosing the opportunity for grandparent visitation. In *Collier*, the court found that the parent's wishes are to be given special weight since the statute required the court to identify and balance them against the child's best interest.[93] However, under this type of analysis courts are able to move beyond the idea that a fit custodial parent's desires are definitive. This is achieved by also taking into account the child's relationship with his or her grandparents and the grandparents' interests, insofar as they align with the child's. The *Collier* court found that "nothing in *Troxel* suggests that a parent's wishes should be placed before a child's best interest."[94]

One court that considered grandparents' interests was the Court of Appeals of Kansas in *State v. Paillet*.[95] Like the court in *Collier*, this court decided to consider several factors instead of only considering the parent's wishes. In this case, the grandparents filed for visitation with their one-year-old grandchild, whose father died two months after his paternity was confirmed by court order.[96] The mother and the paternal grandparents had a tenuous relationship, and the mother had authorized her attorney to tell the grandparents that she would refuse all visitation.[97] Under the state's third-party visitation statute, a grandparent must prove that visitation is in the child's best interest and that an existing relationship is present between the grandparents and grandchild. The court held that when a surviving parent denies his or her "child visitation with the parent or parents of the deceased parent, *absent some compelling reason to the contrary*, the statutory requirement of an

92. 836 N.E.2d 1165 (2005).

93. *Id.* at 1171–72.

94. *Id*. at 1172.

95. 3 P.3d 568 (Kan. Ct. App. 2000).

96. *Id*. at 569.

97. *Id*. at 570.

existing substantial relationship between the grandparent and the child shall not be required before granting visitation rights to the grandparent."[98]

This case demonstrates that the analysis that a court takes in reaching a child's best interest can greatly affect the possibility that grandparents will be granted visitation with their grandchildren. Where courts equate "serious weight" with total weight, parents' wishes seem to be all but determinative as to whether and when their children will visit with grandparents. However, if like the *Collier* court, a court looks at all the circumstances—the parent's interests and the character of the grandparents' relationship with the grandchild—the possibility of overriding the parent's objection still remains.

C. Protecting the Child's Best Interests

Other cases that use a totality of the circumstances approach often consider foremost the best interests of the child. In *Zeman v. Stanford,* the Supreme Court of Mississippi upheld the constitutionality of its grandparent visitation statute.[99] The statute requires the court to find a viable relationship between the grandparent and child, and that visitation is in the best interests of the child.[100] The court quoted one of its prior decisions, where it had noted that the best interests of the child "must always remain the polestar consideration"[101] and listed ten factors a court should consider in determining grandparent visitation.[102] Among others, these factors included the age of the child, the emotional ties between the child and grandparents, and the distance between the parties' homes.[103]

Considering all those factors, the court determined that the grandparents should be granted visitation despite the father's objections.[104] The court found that the grandparents had established a viable relationship with the children since birth.[105] The children routinely ate Sunday dinners with their grandparents, and spent holidays

98. *Id*. at 571 (emphasis added).

99. Zeman v. Stanford, 789 So. 2d 798, 802–03 (Miss. 2001) (citing MISS. CODE ANN §§ 93-16-1 to 93-16-7 (1994)).

100. *Id.* (citing MISS. CODE ANN § 93-16-3).

101. *Id.* at 804 (quoting Martin v. Coop, 693 So. 2d 912, 915 (Miss. 1997)).

102. *Id.*

103. *Id. See* MISS. CODE ANN. §§ 93-16-1 to 93-16-7 (1994); W. VA. CODE § 48-2B-1 to 48-2B-7 (1999); OHIO REV. CODE ANN. §§ 3109.11, 3109.12 (2006). For the text of the statute, see *infra* note 127 and accompanying text.

104. *Zeman*, 789 So. 2d at 804.

105. *Id.* at 800.

and cousins' birthdays at the grandparents' home.[106] This in mind, the court determined that visitation was in the children's best interest.[107] This case and treatment demonstrates how Mississippi's statute allows the court discretion to make decisions that are in the best interest of the child even if a parent disagrees.

West Virginia takes a slightly different approach than Mississippi, but nonetheless has a third-party visitation statute that adequately protects the interest of the child.[108] In *State ex rel. Brandon L. v. Moats*, the West Virginia Supreme Court of Appeals upheld its grandparents' visitation statute requiring that visitation be found in the best interests of the child.[109] The statute demands that the visitation not substantially interfere with the parent-child relationship, in accordance with factors listed in the statute.[110] The court found its statute passed constitutional muster under *Troxel* because it expressly requires consideration of parental preference and disallows visitation detrimentally affecting the parent-child relationship.[111] Additional factors West Virginia courts consider include the good faith of the grandparents' filing the motion, age of the children, time available for the children to spend with grandparents, and whether the grandparents have been significant caretakers for the children in the past.[112]

This West Virginia statute is another example of a statute that complies with *Troxel* but nonetheless protects the child's interest by including several of factors. Statutes such as these give preference to the parents but, as the West Virginia Supreme Court of Appeals notes, also provide:

> a comprehensive and fair means by which the best interests of the child[ren] and the relationships with their respective parent[s] or grandparent[s] can be protected from harm resulting either from the inconsiderate or excessive demands of grandparents or the obstinate or unreasonable and *insignificant* objections of parents, any of which may, on occasion, be driven more by emotion than pursuit of the proper interest of the children and their parents."[113]

Finally, and significantly because of its recency, Ohio has also upheld the constitutionality of its visitation statute. In *Harrold v. Collier*, the

106. *Id.*
107. *Id.*
108. State *ex rel.* Brandon L. v. Moats, 551 S.E.2d 674 (W. Va. 2001).
109. *Id.* at 676.
110. *Id.* at 677.
111. *Id.* at 685.
112. *Id.* at 684–85. *See supra* note 27 and accompanying text.
113. *Id.* at 688.

court found that although it was "obligated to afford some special weight to wishes of parents of minor children" when ruling on third-party visitation statutes, it was not required to consider only those wishes.[114]

Here, two unmarried parents, Renee Harrold and Brian Collier, had a daughter, Brittany.[115] Though Renee enjoyed custody, Brian attended supervised visitation with his daughter twice per week.[116] During this time, Brittany lived with her mother and maternal grandparents.[117] This living situation continued until Brittany was two years old, at which time her mother died of cancer.[118] The maternal grandparents were awarded temporary custody and Brittany continued living in their home.[119] Brian Collier then filed for legal custody in his capacity as Brittany's father, which he gained when she was five years old.[120] She was removed from her grandparents' home and was not taken to visit.[121] When the grandparents filed a motion for visitation, the magistrate noted that denying the motion was against Brittany's best interest because Brittany had lived with her grandparents for three years after her mother's death.[122] Not only had she developed a close relationship with them, but continuing that relationship would provide an important link to her mother.[123] Still, he denied the motion, finding that *Troxel* required evidence of overwhelmingly clear circumstances that support visitation before granting it in the face of parental opposition.[124] He noted that although the statutory authority supported visitation, insufficient proof existed to find overwhelmingly clear circumstances to grant visitation over the parent's objection.[125] Ohio's Ninth District Court of Appeals, however, overruled the magistrate's decision finding that the Washington statute in *Troxel* was distinguishable from Ohio's non-parental visitation statute.[126]

114. Harrold v. Collier, 836 N.E.2d 1165, 1167 (Ohio 2005).

115. *Id.* at 1166–67.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. Harrold, 836 N.E.2d at 1166–67.

121. *Id.*

122. *Id*.

123. *Id.* at 1167.

124. *Id.*

125. *Id.*

126. *Id*. The Fifth District Court of Appeals also found Ohio's statute to be distinguishable from the Washington statute at issue in *Troxel* in *In re Talkington*, No. 2003 CA 00226, 2004 WL 1784603 (Ohio Ct. App. Aug. 9, 2004).

The Ohio statute includes a long list of factors a court should consider regarding third-party visitation, such as existing relationships and interaction; distance between residences involved, available time and scheduling, age of the child; the child's adjustment to home, school, and community; "the wishes and concerns of the child, as expressed to the court; . . . [t]he health and safety of the child"; the mental and physical health of all parties; and "[a]ny other factor in the best interest of the child."[127]

In upholding the constitutionality of the statute, the court noted that the Ohio statute balances the best interest of the child against the parent's desires.[128] The court found that the father's opposition to grandparent visitation was outweighed by the child's best interests when evaluated in terms of the factors enumerated in Ohio Revised Code § 3109.051(D).[129] This was particularly true because the grandparents had lived with and helped raise Britney for the first five years of her life.[130] The court emphatically noted that "nothing in *Troxel* suggests that a parent's wishes should be placed before the child's best interest."[131]

IV. TOTALITY OF THE CIRCUMSTANCES: THE BEST APPROACH

A parent's right to the care, custody, and control of their children has a long and established history.[132] Not so established, however, is how to handle third-party visitation statutes. How much deference should courts give parental preference when determining third-party visitation requests? The Supreme Court has given some guidance in *Troxel,* but its holding is limited in several ways. *Troxel* was a plurality opinion, and it addressed a very specific Washington statute.[133] Washington's statute permitted "[a]ny person" to petition the court for visitation at "any time," and authorized the court to grant visitation whenever "visitation may serve the best interests of the child."[134] While the plurality invalidated the statue and held that a fit parent's decision must

127. OHIO REV. CODE ANN. § 3109.051 (LexisNexis 2006).

128. *Harrold*, 836 N.E.2d at 1172.

129. *Id.* at 1171–72.

130. *Id.* at 1173.

131. *Id.* at 1172.

132. Meyer v. Nebraska, 262 U.S. 390, 400–02 (1923); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925); Prince v. Massachusetts, 321 U.S. 158, 165–67 (1944).

133. Troxel v. Granville, 530 U.S. 57, 64 (2000). Washington's statute is a much broader statute than many other states'. *Troxel*, 530 U.S. at 60. *Cf.* OHIO REV. CODE §§ 3109.11, 3109.12 (LexisNexis 2006).

134. *Troxel*, 530 U.S. at 64. *See* WASH. REV. CODE 26.10.160(3) (2006).

be given "at least some special weight,"[135] the plurality did not define the precise scope of parental due process.[136] These factors arguably limit the precedential value of *Troxel* and leave room for lower courts to uphold their visitation statutes by either distinguishing their visitation statutes or upholding them because parental preference is included as one of the factors to consider in determining whether to allow visitation.

While courts should consider a parent's fundamental right to care, custody, and control, a totality of the circumstances approach is best suited balancing the interests of all involved parties, particularly the children's. Mississippi, West Virginia, and Ohio all have statutes that place importance on the child's interest and have been determined constitutional under *Troxel.* These states and others like them have successfully incorporated the *Troxel* decision into a totality of circumstances test by relying on a list of factors that guide a court in determining visitation.[137] The Ohio Supreme Court noted in *Harrold* that the Ohio statute complies with *Troxel* because one of the factors a court must consider in determining visitation is a consideration of the parents' wishes and concerns.[138] The court said that

> nothing in [the Ohio statute] prevents the trial court from giving special weight to the parent's wishes and concerns regarding visitation. In fact, special weight is required . . . since the statute explicitly identifies the parents' wishes regarding the requested visitation or companionship as a factor that must be considered when making its "best interest of the child" evaluation. This requirement is not minimized simply because Ohio has chosen to enumerate 15 other factors that must be considered by the trial court in determining a child's best interest in the visitation context.[139]

By requiring courts to consider the parents' interests, a state statute complies with *Troxel,* but it also leaves room for the court to look at the best interest of the child. A variety of factors, such as the prior relationship and interaction with the grandparents,[140] including whether the child has resided with the grandparents,[141] whether the grandparents have been significant caretakers for the child,[142] the age of the child,[143]

135. *Troxel*, 530 U.S. at 70.

136. *Harrold*, 836 N.E.2d at 1168 (quoting *Troxel*, 530 U.S. at 73).

137. See OHIO REV. CODE § 3109.051; W. VA. CODE §§ 48-2B-5(1)–(13) (2006); MISS. CODE ANN. § 93-16-3 (1994); Martin v. Coop, 693 So. 2d 912, 916 (Miss. 1997).

138. *Harrold*, 836 N.E.2d at 1171–73.

139. *Id.* at 1172.

140. OHIO REV. CODE § 3109.051(D)(1); W. VA. CODE § 48-2B-5(b)(2).

141. W. VA. CODE § 48-2B-5(b)(10).

142. *Id.* § 48-2B-5(b)(11).

143. Martin v. Coop, 693 So. 2d 912, 916 (Miss. 1997) (discussing the third of ten factors to be

the emotional ties between the grandparents and the child,[144] the amount of disruption visitation would have on the child's life,[145] the mental and physical health of the parties,[146] and, if possible, a child's expressed preferences,[147] should be considered in making visitation determinations. This approach would prevent the harsh results in cases such as *In re Marriage of Howard* where the grandparents were denied visitation because they failed to show custodial parental unfitness[148] or in *Wickham v. Byrne* where the court denied grandparent visitation despite the deceased wife's last will and testament requesting that her son maintain a relationship with her parents.[149] While a totality of the circumstances approach might not have led to a different result in the above cases, the approach would have at least balanced the three competing interests instead of deferring wholly to the parents.

Other states should follow the example set in states where multiple factors and interests are considered. Courts should keep in mind that decisions to grant or withhold visitation affect children and will have a long-term impact. Essentially, the decision will mean the children will either have relationships with their grandparents or they will not. Though courts should not force parents to enable certain third-party relationships, they should also not deprive children of important external relationships, especially when those children are deprived of one or both natural parents.[150] This is particularly important in cases like *Harrold,* where the child has lived with or spent a substantial amount of time with the grandparents requesting visitation. Once a court impedes this family connection, the child is helpless to remedy it. Courts should err on the side of caution when deciding whether to, in all practical purposes, terminate a child-grandparent relationship. Visitation disputes are not necessarily what they appear. These cases are often littered with inconsiderate or excessive demands of grandparents or inflexible, unreasonable, or insignificant objections of parents, all which may be driven more by emotion or spite than the best interest of the child.[151] Even where the parent's objection is reasonable, the best interests of families and children require ensuring that the children's interests are

considered in determining grandparent visitation); W. VA. CODE § 48-2B-5(b)(1).

144. *Martin*, 693 So. 2d at 916 (discussing the fifth of the ten factors).

145. *Id.* (discussing the first of the ten factors).

146. OHIO REV. CODE § 3109.051(D)(9) (LexisNexis 2006); *see also Martin*, 693 So. 2d at 916 (discussing the sixth factor, which considers the moral fitness of the grandparents).

147. OHIO REV. CODE § 3109.051(D)(6).

148. *In re* Marriage of Howard, 661 N.W.2d. 183, 191–92 (Iowa 2003).

149. Wickham v. Byrne, 769 N.E.2d 1, 3 (Ill. 2002).

150. State *ex. rel.* Brandon L. v. Moats, 551 S.E.2d 674, 683 (W. Va. 2001).

151. *Id.* at 688.

fairly considered before denying third-party visitation. States should enact statutes that provide a fair and comprehensive way of resolving these messy family issues and should not close the road to grandmother's house without determining whether that is truly in the best interest of the child.

V. CONCLUSION

As this Comment demonstrates, states are inconsistent in their application of the Supreme Court's ruling in *Troxel* when determining the constitutionality of third-party visitation statutes. Some states have interpreted the holding as requiring a showing of harm to the child or the unfitness of a custodial parent before allowing for third-party visitation. Others, including Ohio, have distinguished their third-party visitation statutes from the one discussed in *Troxel* and have employed a variety of tests to determine whether visitation is proper. These states have often employed a child's best interest analysis using *Troxel's* presumption that parents act in the best interest of their children as a guiding principle.[152] With the divergent reactions of state courts, the Supreme Court should consider revisiting this area and encourage lower courts to employ the latter standard. In the meantime, states and courts should do so on their own—after all, that is in the best interest of the child.

152. Kristine Roberts, *State Supreme Court Applications of* Troxel v. Granville *and the Courts' Reluctance to Declare Grandparent Visitation Statutes Unconstitutional*, 41 FAM. CT. REV. 14, 26 (2003).