

THE CURRENT STATE OF GRAND PARENT VISITATION RIGHTS IN NEW YORK POST TROXEL

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In the year 2000, the United States Supreme Court issued a decision in the case of *Troxel v. Granville* in which a Washington State grand parent visitation statute was declared unconstitutional. In reaching this determination, the United States Supreme Court declared that a parent possesses a fundamental liberty interest in the care, custody and control of their children. The Court further ruled that so long as a parent is fit and adequately cares for his or her children, there will normally be no reason for the state to inject itself into the private realm of the family to further question that ability of that parent to make the best decisions concerning the rearing of that parent's children.

The Washington State statute which was declared unconstitutional by the Supreme Court was an extremely broad one, thereby distinguishing it from New York's current statute as demonstrated below. However, notwithstanding this fundamental divergence, it is important to examine the effect, if any, the Supreme Court ruling has had on grand parent visitation rights in the state of New York.

Constitutionality of Grandparent Visitation Statute

The New York Court of Appeals had occasion to declare New York's grand parent visitation statute to be constitutional **prior** to the Supreme Court's ruling in *Troxel v. Granville*. Thus, the New York Court of Appeals held that allowing a grandparent to visit with a grandchild is not an unconstitutional intrusion into the rights of parents.

In a case decided subsequent to *Troxel*, The Appellate Division, Second Department declared that our state's grandparent visitation statute is not unconstitutional, per se as violative of parents' fundamental rights to rear their children, and that it was not facially invalid. This decision was rendered in early 2002 and determined that the holding in *Troxel* does not mandate a finding that New York's grandparent visitation act is unconstitutional. One of the compelling factors relied upon by the Second Department in reaching its determination was the narrowness of the New York statute as compared with the broadness of the Washington State legislation.

In another case decided subsequent to *Troxel*, the Jefferson County Family Court held that

New York's grandparent visitation statute does not violate substantive due process rights of parents to make decisions concerning the care, custody and control of their children.

The Kings County Family Court has also determined this statute to be constitutional so long as the Courts provide special weight to the decisions of parents and legal guardians.

However, a recent Queens County Family Court case granted the motion by a mother to dismiss a grandparent's petition as a matter of law, on the ground that New York's grandparent visitation statute is unconstitutional.

In addition, a Brooklyn Family Court Judge ruled in a 2001 case that New York's grandparent visitation statute was unconstitutional, stating that it was helplessly flawed and unredeemable. The Court went on the rule that there must be a finding of parental unfitness before a grandparent can assert any visitation right over the objection of a parent. The Court additionally held that *Troxel* created a strong and unequivocal mandate for tight limits on grandparent visitation statutes and that New York's current legislation ran afoul of the United States' Supreme Court's ruling in *Troxel*.

It is important to be aware however that these two rulings were made prior to the Second Department's 2002 decision declaring New York's grandparent visitation statute to be constitutional.

In light of these various and divergent decisions, it is apparent that although there is still a tenuous plurality with respect to the constitutionality of New York's grandparent visitation act, the Court of Appeals and the Second Department holdings in this area upholding its constitutionality are still controlling, at least for the time being.

Grandparent Visitation Law In New York

D.R.L. §72 provides that grandparents may seek visitation with a grandchild where either or both of the parents are deceased, or with respect to an intact family, **where circumstances exist which equity would see fit to intervene.** (*Emphasis added.*)

This standard has been upheld by New York's Court of Appeals as well.

It has also been established that grandparents are not precluded from seeking visitation with a grandchild merely because the nuclear family was intact and the parents were fit.

Therefore, the determination of whether or not a grandparent should be entitled to visit with a grandchild is a **two step process**. It must initially be determined if the grandparent possesses standing. If the Court determines in the affirmative, the final step becomes whether or not visitation is in the grandchild's best interests.

Thus, pursuant to case law from this state, standing should be conferred upon grandparents **where they can establish a sufficient existing relationship with their grandchild.**

Once the issue of standing has been determined, ***the issue next turns to whether or not the requested visitation with the grandchild is in his or her best interests.***

New York Courts have also established that grandparent visitation is appropriate and that visitation is in the grandchild's best interests where one or both of the child's parents have sought to frustrate the grandparent/grandchild relationship, and the grandparents have made a sufficient effort to establish a relationship with the child.

Thus, visitation has been granted to a grandparent who unavailingly wrote letters, sent gifts, and made telephone calls in an effort to seek visitation with their grandchild.

New York courts have also permitted grandparents to visit with a grandchild where the failure of the child's father to avail himself of the opportunity to visit with the child would have otherwise operated to deprive the grandparents of the company of their grandchild. In that instance, the grandchild's father was incarcerated for drug possession and was therefore unavailable to visit with the child. Thus, it was not a situation in which the petitioning grandparents could simply visit with their grandchild when he or she was with their son as the son was imprisoned.

In addition, The Appellate Division, Second Department has held that it was in a grandchild's best interests to have visitation with a grandparent where the child's mother was hospitalized with mental illness and was incapable of visiting with the child herself.

In a recent decision, the Nassau County Supreme Court granted visitation to a grandfather over the objections of the mother who had sole custody of the child. This was an intact family as both parents were living. The Court initially granted standing to the grandfather and ultimately ruled that visitation was in the grandson's best interests on the basis of an established relationship between the two as well as upon the fact that the child's father who was divorced from the mother relocated to California and failed to avail himself of his visitation rights with the child. Thus, it was not as if the grandfather could simply see the grandchild while he was visiting with the father. The Court additionally held that the grandfather could provide the child with an appropriate and safe environment which would provide the child with an additional opportunity for love, affection and attention which could add to his growth and development.

The Court also relied upon the recent decisions on the constitutionality of D.R.L. §72 in reaching this determination, thereby declining to follow the *Troxel* holding.