

NEITHER HARM NOR CLEAR AND CONVINCING EVIDENCE ARE REQUIRED TO MEET CONSTITUTIONAL REQUIREMENTS, SAYS U.S. SUPREME COURT REGARDING GRANDPARENT VISITATION

By Richard S. Victor, Esq.

The debate over what the United States Supreme Court held regarding grandparent visitation in its 2000 ruling in the case of *Troxel v Granville*, appears to finally be over. Grandparent advocates, such as the **Grandparents Rights Organization**, have argued that the high court never intended laws in each state to require such strict prerequisites, as that there would have to be harm to a child before a grandparent would be entitled to see their grandchild, or that Grandparents would have to prove, by clear and convincing evidence, that it would be in a child's best interests, in order to overcome a denial of a custodial or surviving parent, following the death or divorce of the child's parents, to allow them to see their grandchild, in order to meet any constitutional requirement necessary to withstand a constitutional challenge to a state law that did not have such strict or high burden.

Parent right advocate groups have countered saying, if these strict restrictions were not part of a state law, the law would be unconstitutional. In fact, this argument swayed the Michigan legislature so much, that in 2005 it convinced the Michigan legislature to change Michigan's grandparent visitation law to require "harm" to a child's mental, physical or emotional health before any best interest hearing would be allowed for a grandparent to proceed in a request to see their grandchild, following the death, divorce or when the child is born out of

wedlock.

Prior to this new law, a grandparent only needed to show that a request for grandparenting time was in the best interests of the child, based on a set of factors that were contained within the child custody act.

Presently 48 states allow for grandparents, and even great grandparents to request visitation. Michigan's requirements are one of the most restrictive in all of the country for a grandparent to have to prove. In fact, the parent advocate groups that convinced the Michigan legislature to pass this law even wanted it more restrictive by making a grandparent have to prove the "harm" by clear and convincing evidence, a burden that would be almost impossible for most cases to reach.

Before the legislature passed this new law, it heard arguments from those who were convinced that these high restrictions were necessary in order to make sure that Michigan's law would be constitutional. They were not convinced by the arguments that came from legislators, such as **Senator Bruce Patterson**, former **Representative James Howell**, representatives from the **Detroit Area Agency on Aging**, or myself, speaking on behalf of the **Grandparents Rights Organization**, that Troxel did not say such high burdens were required.

The result is that Michigan now has a law that adds unnecessary burdens, for grandparents and for the courts, before a case, where it would otherwise be in a child's best interests to see their grandparents, can be provided. This

unnecessary burden has caused cases to become much more expensive, as well as more time consuming for the parties and the courts than actually necessary. It has caused many families that have suffered loss and dysfunction, as well as acrimony, more emotional disenfranchisement for the children, with the loss of their extended family following the death or divorce of their parent(s). It has made it impossible for many grandparents and grandchildren, who have been amputated by the death or divorce of the child's parent, from ever seeing each other again because of a unilateral and sometimes irresponsible decision made by a custodial or surviving parent.

Grandparent right groups have tried to caution that the fact that there are laws does not necessarily mean that there will be lawsuits.

The reality in these cases is because grandparent visitation laws exist, it allows the ability to force families in dysfunction to come to the table and talk. These cases bring out the emotional realities that occur in the lives of adults. But what is sometimes forgotten is that children become the innocent victims of the illogical behavior of the adults. In cases of death, divorce, and children born out of wedlock, parents are no longer related to the same people as their children. If we honor family and the need for family in the lives of children, how should we define "family."? Should we look at the family through the eyes of the adult or through the eyes of the child?

It appears, the debate on what the U.S. Supreme Court really did rule and require has been resolved, based on the action of the Court on March 6, 2006. In

the case of **Collier v Harrold**, the United States Supreme Court refused to consider making it harder for grandparents to win visitation rights, rejecting an appeal from a father who went to jail to fight court-ordered visitation. In that case, Mr. Collier had asked the justices to strike down the Ohio visitation laws, which allows the court to grant grandparent visitation based on the best interests of the child, on grounds that they interfere with parents' rights to raise their families free from government interference. The Ohio law gives grandparents (as well as any person related to the child by consanguinity or affinity) the right to request visitation with a child in cases of divorce, death of a parent, or if the child is born out of wedlock, if a set of factors would apply that a Judge would review which would convince the court that the grandparent's request was in the child's best interests, given the facts of each specific case. These factors are designed to protect and balance the rights of the child, parents and extended family of the child. The law, as amended following the Troxel decision, requires the court to also consider the wishes and concerns of the child's parents, as expressed by them to the court.

Since Ohio neither has a "harm" standard nor a requirement for a grandparent to prove their case by "clear and convincing" evidence, the high court has once and for all agreed that there is no necessity for such prerequisites in state laws in order to meet constitutional requirements. Therefore, Michigan did not have to be as restrictive in the drafting of its current law and requirements as many in our legislature were forced to believe was necessary in order to pass a constitutionally sound bill.

If Michigan's legislators knew that they did not have to pass such a restrictive bill in order to have a law that would meet constitutional requirements, would it have affected the vote of some of the legislators, especially legislators who represent citizens in our state who care for and are close with their grandchildren? Would this information have provided Michigan with a more user friendly, less costly and less restrictive grandparent visitation law? Should the Michigan legislature revisit this issue and propose the introduction of the exact law our sister state to the south has in place that protects its families and children with a law that we know is constitutionally sound?

If death takes a grandparent from a child, that is a tragedy. But if family acrimony or petty vindictiveness denies a child the unconditional love of a grandparent, as well as the shared memories and experiences that a child has a right to experience during their lifetime, then that is a shame

Richard S. Victor is an Attorney with The Law Offices of Richard S. Victor, PLLC, in Bloomfield Hills, MI, concentrating in high-end divorce and child custody cases. Mr. Victor is recognized in "The Best Lawyers in America" and as a Michigan "Super Lawyer" by Super Lawyers Magazine. He is the founder/executive director of the National Nonprofit Grandparents Rights Organization and a former Chairperson of the Family Law Section of the State Bar of Michigan and recipient of their Lifetime Achievement Award as well as the 2004 Champion of Justice Award from the State Bar of Michigan. Currently he is on the National Board of Governors of the American Academy of Matrimonial Lawyers and has served as National Chairperson for Continuing Legal Education for the Academy since 2004. He can be reached at 100 W. Long Lake Road, Suite 250, Bloomfield Hills, MI 48304 (248) 646-7177.