House
Legislative
Analysis
Section

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GRANDPARENTING TIME REVISIONS

House Bill 4104 as passed by the House
Sponsor: Rep. Artina Tinsley Hardman

House Bill 5039 as passed by the House
Sponsor: Rep. Edward Gaffney

Committee: Judiciary

Second Analysis (1-8-04)

THE APPARENT PROBLEM:

A recent state supreme court ruling held that Michigan's law regarding a grandparent's right to petition for visits with a grandchild is unconstitutional. For several decades, a grandparent could seek an order for grandparenting time under very narrow circumstances (generally speaking, when a custody dispute was pending before a court or the grandparent's son or daughter had died) and the custodial parent either limited or ended visitation between the grandparent and child. The result of the recent ruling was that over 20 years of grandparent visitation orders were rendered unenforceable. Many more actions still pending before state courts are in limbo while the courts wait to see how the legislature will respond.

The demise of the state grandparenting time statute began in 2000 when the U.S. Supreme Court ruled that a Washington statute pertaining to third party visitation rights was unconstitutional as applied to a case in which grandparents, after the death of their son, brought an action against the mother of their granddaughters for increased visitation time. In Troxel v Granville, 530 US ___ (2000), the court opined that the entry of the visitation order in that case "was an unconstitutional infringement on Granville's fundamental right to make decisions concerning the care, custody, and control of her two daughters."

The Troxel court did not, contrary to early media reports, strike down the Washington law or any other state nonparental visitation law. Indeed, Justice O'Connor, writing for the majority, stated that the court "would be hesitant to hold that specific nonparental visitation statutes violate the Due Process Clause as a *per se* matter" because many of these cases are adjudicated by the state courts on a case-by-case basis. Justice O'Connor agreed with Justice Kennedy, who wrote the dissenting opinion, that "the constitutionality of any standard for awarding visitation turns on the specific manner in which the standard is applied".

Though the majority of states either declined to review or amend their grandparenting rights laws after the Troxel decision was rendered (all 50 states have some type of grandparenting rights statute), six states, including Michigan, did scrutinize their laws. Earlier this year, in DeRose v DeRose, No. 121246 (July 31, 2003), the Michigan Supreme Court relied on an analysis of the Troxel decision to declare Michigan's grandparenting time law unconstitutional because it failed "to require that a trial court accord deference to the decisions of fit parents regarding grandparenting visitation". In DeRose, the mother of the child in question denied visitation to the child's paternal grandmother after the child's father was convicted of sexually molesting the child's stepsister.

Justice Weaver, in a concurring opinion, acknowledged the importance of the grandparent visitation statute and urged the legislature to correct the statute's constitutional deficiencies. In particular, she identified three flaws: 1) the statute failed to provide a presumption that a fit parent acts in the best interest of his or her child; 2) the statute failed to give any special weight or deference to the fit parent's decision regarding grandparent visitation; and 3) the statute failed to clearly place the burden in the proceedings on the petitioners rather than the parents.

Legislation has therefore been introduced to revise the grandparenting time law to correct the constitutional deficiencies identified by the state supreme court.

THE CONTENT OF THE BILLS:

The bills would amend provisions in the Probate Code of 1939 and the Child Custody Act of 1970 relating to grandparent visitation, now referred to as "grandparenting time". The bills are tie-barred to each other, meaning that neither bill could take effect unless both were enacted into law.

House Bill 4104 would delete a provision in the Adoption Code (Chapter X of the Probate Code of 1939, MCL 710.60) that states that while a stepparent adoption proceeding is pending, a parent of the child's natural parents may seek an order for grandparenting time in the same manner as grandparenting time provisions in the Child Custody Act of 1970.

House Bill 5039 would amend the grandparenting time provisions of the Child Custody Act of 1970 (MCL 722.22 and 722.27b). Under the act, a grandparent may seek an order for grandparenting time of his or her grandchild only if a child custody dispute regarding that child is pending before the court. In addition, if a natural parent of a child is deceased, a parent of the deceased parent may commence an action for parenting time. Furthermore, the act states that a stepparent adoption under the Adoption Code does not terminate the right of a parent of a deceased parent to commence an action for grandparenting time.

The bill would delete the above provisions and give a child's grandparent standing to seek an order for grandparenting time under any of the following circumstances:

- An action for divorce, separate maintenance, or annulment involving the child's parents was pending.

- The child's parents were divorced, separated through a separate maintenance judgment, or have had their marriage annulled.

- The child's parent (who is a child of the grandparent) was deceased.

- With certain exceptions, legal custody of the child has been granted to a person other than the child's parent, or the child is placed outside of, and does not reside in, the home of a parent. (The exceptions pertain to a new provision that would be added by the bill which states that adoption of a child or the placement of a child for adoption under the Adoption Code would terminate the right of a grandparent to commence an action for grandparenting time with that child, unless the child was adopted, or placed for adoption, by a stepparent or a person related to the child within the fifth degree.)

- The grandparent, at any time during the life of the child, provided an established custodial environment, regardless of whether or not the grandparent had custody under a court order.

- The child's parent withheld visitation opportunities from the grandparent to retaliate against the grandparent for reporting child abuse or neglect to the Family Independence Agency or law enforcement if the court found reasonable cause to believe that child abuse or neglect had occurred and that the denial of grandparenting time would cause harm to the child.

- The child's parent had lived separate and away from the other parent and grandchild for more than one year.

- With certain exceptions, the child's parents were never married and were not residing in the same household. Similarly to current law, the bill would specify that a court could not permit the parent of a putative father to seek an order for grandparenting time unless the putative father had acknowledged paternity in writing, been determined to be the father by a court, or had contributed regularly to the child's support.

The bill would define "grandparent" as a natural or adoptive parent of a child's natural or adoptive parent. "Parent" would mean the natural or adoptive parent of a child.

Under the act, a grandparent seeking a grandparenting time order *may* commence an action by filing a complaint or a motion for order to show cause in the circuit court in the county in which the child resides. However, if a dispute is pending, a grandparent is required to file a motion for an order to show cause. Under House Bill 5039, a grandparent seeking a grandparenting time order would be required to file a motion in the circuit court in the county where the court has continuing jurisdiction, or to file a complaint in the circuit for the county where the child resides, if the local circuit court does not have continuing jurisdiction over the child.

The act requires that, in addition to a complaint or motion, the grandparent file an affidavit stating the

facts in support of the request for grandparenting time. The bill would add that the facts stated in the complaint or motion would be facts to establish the grandparent's standing and facts that would overcome the rebuttable presumption added by the bill. The bill would add that in making a determination for grandparenting time, there would be a rebuttable presumption that a fit parent's actions and decisions regarding grandparenting time were in the best interests of the child. In making a determination about the rebuttable presumption as a threshold issue, the court would have to consider all of the following:

- Whether the parent had offered grandparenting time, offered grandparenting time with reasonable conditions, and the amount of grandparenting time offered by the parent.

- Whether there was an established relationship between the grandparent and child during which the grandparent had been a significant part of the child's life.

- The frequency of contact between the grandparent and child.

- Whether the parent's objections to, or lack of an offer of, grandparenting time were related to the best interests of the child.

The bill would retain the provision that permits a party having legal custody of the child to submit an opposing affidavit, and that requires that a hearing be held if the court or either party requests one. The bill would delete a provision that requires the court to enter an order for grandparenting time only upon a finding that such time is in the child's best interests, if a hearing is not held.

If a grandparent did not overcome the above rebuttable presumption, and if the court found that the parents have offered grandparenting time that the parents believed to be in the best interests of the child, the court would have to order grandparenting time in accordance with the parent's offer. If the grandparent did overcome the presumption by a preponderance of the evidence, the court would have to determine whether grandparenting time was in the best interests of the child. If the court did find that the grandparent's request for grandparenting time was in the best interest of the child, then the court would have to enter an order providing for reasonable grandparenting time. The court currently must make a record of the reasons for denying a request for grandparenting time; under the bill, the court would have to make a record of the reasons for granting a request, as well.

The bill would add that, if a grandparent seeks a grandparenting time order and files a motion during a pending proceeding for a divorce, separate maintenance, or annulment, entry of an order would not dismiss the grandparent's motion for grandparenting time. In addition, a court could refer a complaint or motion for grandparenting time to the Friend of the Court for mediation. If a complaint or motion is referred and no settlement is reached within a reasonable period of time, the complaint or motion would be heard by the court.

The act currently states that a court shall not enter an order restricting the movement of a child if the movement is solely for the purpose of allowing a grandparent to exercise his or her rights to grandparenting time. The bill would rewrite this provision, so that the court would be prohibited from entering an order prohibiting a person who has legal custody of a child from changing the domicile of the child if the prohibition is solely for the purpose of allowing a grandparent to exercise his or her grandparenting time.

Currently, the act allows a court to modify or terminate a grandparenting order whenever a modification or termination is in the best interest of the child. The bill would instead specify that a court could so modify or terminate a grandparenting order if there was a change of circumstances and only after a hearing to determine if the modification or termination was in the child's best interests.

In addition, if a grandparenting time order had been entered before July 31, 2003, the grandparent had standing under the bill's provisions, and the child who is the subject of the order is under 18 years of age, the grandparent could petition or move under the bill's provisions for grandparenting time. Upon a motion of a person, the court would have to award costs and fees as provided in the Revised Judicature Act. If standing were alleged under the provision regarding a parent withholding visitation from a grandparent as retaliation for the grandparent reporting child abuse or neglect to the FIA or a law enforcement agency, and if the court found that allegations contained in the affidavits or sworn statements were frivolous, the court would have to award actual and reasonable attorney fees; this would be in addition to the previously mentioned costs and fees allowed under the RJA.

Lastly, the bill would retain a provision that prohibits a grandparent from filing a complaint or motion

seeking a grandparenting time order more often than once every two years without good cause.

FISCAL IMPLICATIONS:

According to the House Fiscal Agency, the bills could increase costs to the judiciary depending on how they affected caseloads and judicial and clerical workloads. (10-9-03)

ARGUMENTS:

For:

Opinions may differ on the DeRose court's interpretation and application of the Troxel decision to the state's grandparent visitation law, but the state supreme court's ruling in DeRose nonetheless rendered the Michigan law unconstitutional, thereby voiding all existing grandparenting time orders and putting a hold on pending actions. Therefore, it is imperative that the legislature move quickly to revise the statute so that it can pass constitutional muster.

House Bill 5039 is superior to the old law in many respects. Foremost, it would address the deficiencies raised in the majority opinion and articulated so clearly by Justice Weaver in the concurring opinion by "creating a rebuttable presumption that a fit parent's action and decisions regarding grandparenting time are in the best interests of the child"; placing the burden on grandparents by requiring the grandparent to overcome the presumption by a preponderance of the evidence (even then, a visitation order is not guaranteed – a court must still determine that visits with the grandparent are in the child's best interest); and by giving deference to a parent's decision regarding grandparent visits by requiring a court to order grandparenting time in accordance with a parent's offer of visitation if the grandparent failed to overcome the rebuttable presumption and to dismiss the case altogether if the presumption had not been overcome and no offer of visitation had been made by the parent.

For:

The recently voided law had been interpreted to apply only to grandparents of children whose parents had at one time been married. The grandparents of children whose parents never married only had standing to petition for visits if their son or daughter had died. Legislation has been offered many times through the years to correct this oversight. It has long been considered unfair to children that a child who lost a parent had their rights to a relationship with the grandparents protected whereas the child whose parents were both living did not share that same level of protection. House Bill 5039 would rightfully expand standing to include grandparents whose living sons or daughters never married the child's other parent.

For:

Confusion appears to remain as to the ruling in the Troxel case. The U.S. Supreme Court did not strike down the Washington law as unconstitutional, nor did it strike down all grandparenting rights laws. It did, however, agree that the Washington statute swept "too broadly" and that the statute as applied to the Troxel case did not give deference to the fit parent's decision regarding visits with the grandmother; therefore, the entry of the order constituted an infringement on the mother's 14th Amendment Due Process Clause rights to make decisions concerning her daughters' care, custody, and control without undue state infringement.

House Bill 5039 does provide adequate protections to parents so that state infringements on their constitutional rights to rear their children would not happen. It also would rightfully focus the protection on the relationship between a child and his or her grandparents. To do otherwise would treat the child as property of the parents rather than as a person in his or her own right. Too often, the acrimony that accompanies a breakdown of the parents' relationship is transferred to the parents of the noncustodial parent and they are unfairly restricted in their access to and ability to maintain a relationship with the grandchild or grandchildren.

In both the U.S. and the state supreme court decisions, the writers of the opinions acknowledged the significant role for good that grandparents can play in the lives of the grandchildren. These relationships need to be protected, albeit properly balanced so that the rights of parents to care for their children are not impeded. House Bill 5039 contains such protections. It would clearly define the circumstances under which grandparents have standing to seek a visitation order, it creates deterrents for frivolous suits, it protects the rights of unrelated adoptive parents, and it establishes clear guidelines for courts in determining what is in the best interests of the child. (Previously, a court could overrule a parent's decision simply because it disagreed as to what was best for the child.) Also of importance, it would protect the right of a child to maintain a relationship with a grandparent from a parental decision motivated by fear, anger, hurt, or resentment.

Against:

Some remain opposed to House Bill 5039 because they feel that, as written, language contained in the bill could create undue pressure on a parent to agree to some sort of visitation schedule out of fear or concern that refusal to do otherwise would result in possibly lengthy and costly litigation and could result in the court ordering more visits than the parent believed to be in his or her child's best interest.

Response:

According to some family law specialists, the majority of actions seeking grandparenting time orders never make it to trial. The pre-trial hearings and mediation involved in these proceedings usually suffice to get the parties talking. Once dialogue is established, concerns are aired and discussed, often leading the parties to resolve the conflicts and decide on a visitation arrangement amenable to both sides. The strength of House Bill 5039 is that it would bring both parties to the table, and in so doing, enable the parties involved to resolve differences quickly with minimal court intervention. In the long run, the bill could likely result in savings to courts (and thus taxpayers) by decreasing the number of cases that go to trial as well as the number of cases appealed.

Section 7b(7), which seems to be a source for the concern about undue pressure on parents, would more likely act as a deterrent in cases involving grandparents bringing an action because they are dissatisfied with the offered amount of visitation. For instance, the Troxel case involved a grandmother who refused to respect and accept the children's mother's decision to limit visits to one per month and visits on holidays. Under House Bill 5039, a grandparent in a similar situation would be ordered by the court to abide by the mother's offer of visitation if, like in Troxel, they did not prevail. Further, in light of the burden of proof being placed on the grandparent to overcome the presumption that a decision of a fit parent is in the best interest of a child, it would be prudent for grandparents to accept any offer of visitation at the outset rather than chance incurring the custodial parent's legal expenses.

Against:

Where many do not dispute the reasoning for expanding standing to grandparents whose living child never married the grandchild's other parent, House Bill 5039 would expand the standing of grandparents to include too many others. In so doing, it may be considered to be so overbroad that it would still fail a constitutional test. In addition, some feel that the bill as written still assumes that grandparent visits should be given in every case. Further, it is believed by some, such as the Family Law Section of the State Bar of Michigan, that the level of evidence needed to overcome the rebuttable presumption should be raised to the level of clear and convincing evidence rather than the current level contained in the bill of a preponderance of the evidence.

Against:

Though many admit that the committee substitute for House Bill 5039 is an improvement over the bill as introduced, shortcomings still remain. For instance, the bill makes no allowance for situations involving sexual or physical abuse. The children of a battered parent often have witnessed the abuse or been similarly abused by the offending parent. A significant number of domestic violence homicides occur each year during visitation transfers. A noncustodial parent may have been denied visitation and/or have a personal protection order (PPO) restricting contact with the custodial parent or the children, or both. Victims of domestic violence often have to relocate, even hide, to protect themselves and their children from further violence. Therefore, contact with grandparents may not be safe or advisable.

A grandparent, even one that does acknowledge the violence committed by his or her son or daughter, may not be able to provide adequate protection should the batterer show up when a visit is taking place or when the children are being returned to the custodial parent. In addition to the physical danger this presents, such an event could be psychologically damaging to the children as well as the custodial parent. If a custodial parent is keeping his or her location a secret out of fear that the other parent would kidnap the children or pose a threat to their physical safety, forced visitation with the grandparents could put that family at risk.

At a minimum, the bill should be amended to exclude cases involving domestic violence or sexual assault.

Response:

A grandparent is not the same as an abusive parent. Many, if not most, grandparents abhor the violence inflicted by their children on their grandchildren or grandchildren's other parent. Often, it is a grandparent who the grandchild has confided in that first brings the domestic violence or sexual assault to the proper authorities. Not all violence is learned at home; violence can accompany mental illness, alcoholism, and drug abuse. Also, a domestic violence conviction can range from a one-time push or verbal threat to repeated physical, verbal, and

emotional abuse over the course of many years to murder. To create a blanket exclusion for these grandparents would be unfair to them and would not necessarily be in the best interests of the children involved. The grandparent should not be automatically penalized for the actions of a son or daughter, nor should they be the target of a custodial parent's fear or anger. A beneficial relationship for the children and grandparent may still be possible.

However, this concern does underscore the necessity for courts to scrutinize motions for visitation orders on a case by case basis. The dialogue between the parties that the bill may encourage could enable some of these situations to be resolved so as to afford some manner of contact between the grandparents and the grandchildren while maintaining the family's safety and well-being. For instance, a court could impose strict confidentiality restrictions on the grandparents in relation to addresses and phone numbers, allow only supervised visits in an agency facility, or deny visitation altogether until the threat of harm is resolved.

POSITIONS:

The National Nonprofit Grandparents Rights Organization supports the bills. (12-1-03)

A representative of AARP indicated support for the bill package. (11-12-03)

The Michigan State University Extension submitted written testimony in support of House Bill 5039. (10-3-03)

The Michigan Advocacy Project is neutral, but has some concerns regarding House Bill 5039. (12-1-03)

The Family Law Council/State Bar of Michigan is neutral on House Bill 4104 and still has some reservations regarding House Bill 5039. (12-1-03)

The Michigan Coalition Against Domestic and Sexual Violence acknowledges that the bills are improved over the introduced version, but the organization continues to have concerns. (12-01-03)

The Michigan Conference-National Organization for Women (NOW) acknowledges that the bills are improved over the introduced version, but the organization continues to have concerns. (12-01-03)

The Michigan Parents for Better Family Solutions submitted written testimony in opposition to House Bill 5039. (10-7-03)

Analyst: S. Stutzky/M. Wolf

■This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.