

GRANDPARENTS' RIGHTS

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I. Introduction

Over the past few years one of the areas of law that has been in the most flux for both lawyers and clients is the area of Grandparents' rights. This uncertainty began with the United States Supreme Court's ruling in a case called *Troxel v. Granville*. This was a case out of Washington state related to grandparents' having visitation with their grandchildren. Lawyers and courts throughout the nation have been tackling these issues. This paper is simply an overview of the current state of things in Texas. It should be noted that all of positions in this paper are subject to immediate change.

II. Standing

Does a grandparent have certain inalienable rights, just because they are related to the grandchildren? The answer to that question is both no and yes. As a grandparent you are entitled to certain standing provisions that allow you to file suit in the courts for benefits, but without a court order, you have no more legal right than anyone else. This "standing" allows you to file a suit for either access or possession in certain circumstances.

A. General Standing

The general standing provision of the Texas Family Code for a suit affecting the parent-child relationship sets out the individuals who may file a suit affecting the parent-child relationship. This includes people beyond the parents and includes individuals who are the guardian for the child or who have had care custody and control of the child for six months, if brought within 90 days.

§ 102.003. General Standing to File Suit.

- (a) An original suit may be filed at any time by:
 - (1) a parent of the child;
 - (2) the child through a representative authorized by the court;
 - (3) a custodian or person having the right of visitation with or access to the child appointed by an order of a court of another state or country;
 - (4) a guardian of the person or of the estate of the child;
 - (5) a governmental entity;
 - (6) an authorized agency
 - (7) a licensed child placing agency;
 - (8) a man alleging himself to be the father of a child filing in accordance with Chapter 160 [*Uniform Parentage Act*], subject to the limitations of that chapter, but not otherwise;
 - (9) a person, other than a foster parent, who has had actual care, control, and possession of the child for at least six months ending

not more than 90 days preceding the date of the filing of the petitioner;

- (10) a person designated as the managing conservator in a revoke or unrevoked affidavit of relinquishment under Chapter 161 [*Termination of the Parent-Child Relationship*] or to whom consent to adoption has been given in writing under Chapter 162 [*Adoption*];
 - (11) a person with whom the child and the child's guardian, managing conservator, or parent have resided for at least six months ending not more than 90 days preceding the date of the filing of the petition if the child's guardian, managing conservator, or parent is deceased at the time of the filing of the petition;
 - (12) a person who is the foster parent of a child placed by the Department of Protective and Regulatory Services in the person's home for at least 12 months ending not more than 90 days preceding the date of the filing of the petition; or
 - (13) a person who is a relative of the child within the third degree by consanguinity, as determined by Chapter 573, Government Code, if the child's parent are deceased at the time of the filing of the petition.
- (b) In computing the time necessary for standing under Subsections (a)(9), (11), and (12), the court may not require that the time be continuous and uninterrupted but shall consider the child's principal residence during the relevant time preceding the date of commencement of the suit.

Many Grandparents fall within these provisions and may sue for possession and/or access to a grandchild.

B. Grandparents

In addition to the general standing provisions, the Family Code provides for grandparents specific standing to file for managing conservator in certain situations. Additionally, the statute provides for the court to provide leave of court to intervene in an ongoing suit to request a possessory conservatorship.

§ 102.004 Standing for Grandparent.

- (a) In addition to the general standing to file suit provided by Section 102.003(13), a grandparent may file an original suit requesting managing conservatorship if there is satisfactory proof to the court that:
 - (1) the order requested is necessary because the child's present environment presents a serious question concerning the child's physical health or welfare; or
 - (2) both parents, the surviving parent, or the managing conservator or custodian either filed the petition or consented to the suit.

- (b) An original suit requesting possessory conservatorship may not be filed by a grandparent or other person. However, the court may grant a grandparent or other person deemed by the court to have had substantial past contact with the child leave to intervene in a pending suit filed by a person authorized to do so under this subchapter.
- (c) Access to a child by a grandparent is governed by the standards established by Chapter 153 [*Conservatorship, Possession, and Access*].

This right to sue is limited by the rights of any living parents. If all living parents have had their rights terminated, then the rights of the grandparents to sue under section 102.004 has been terminated with the rights of the parents.

§ 102.006 Limitations on Standing.

- (a) Except as provided by Subsection (b), if the parent-child relationship between the child and every living parent of the child has been terminated, an original suit may not be filed by:
 - (1) a former parent whose parent-child relationship with the child has been terminated by court order;
 - (2) the father of the child; or
 - (3) a family member or relative by blood, adoption, or marriage of either a former parent whose parent-child relationship has been terminated or of the father of the child.
- (b) the limitations on filing suit imposed by this section to do not apply to a person who:
 - (1) has a continuing right to possession of or access to the child under an existing court order; or
 - (2) has the consent of the child's managing conservator, guardian, or legal custodian to bring the suit.

C. Access

The last area and most common available to Grandparent to sue is access. Most grandparents file under this section since all they want is the right to see the grandchildren. They are not looking to gain any decision making rights that would be given a possessory or managing conservator. A suit for access may be brought by a grandparent in either an original suit or a modification.

§ 153.432. Suit for Access.

- (a) A biological or adoptive grandparent may request access to a grandchild by filing:
 - (1) an original suit; or
 - (2) a suit for modification as provided by Chapter 156 [*Modification*].

- (b) A grandparent may request access to a grandchild in a suit filed for the sole purpose of requesting the relief, without regard to whether the appointment of a managing conservator is an issue in the suit.

III. Constitutionality

As previously motioned the United States Supreme Court heard the case of *Troxel v. Granville*. The Court's much debated and splintered opinion has led to the uncertainty that has followed and is the cause of the uncertainty today.

A. *Troxel v. Granville*

In *Troxel*, the father of two children died shortly after the parties had filed for divorce. The paternal grandparents requested that the mother give them visitation with their grandchildren. The mother denied the requested visitation schedule and a trial then occurred. The trial court ruled that the relationship between the kids and the grandparents was important and that the children would benefit from the contact. The case was eventually appealed to the Supreme Court of the United States where the Supreme Court held Washington's statute to be unconstitutional in this case. The Supreme Court held in a majority opinion that

“[T]he visitation order in this case was an unconstitutional infringement on Granville's fundamental right to make decisions concerning the care, custody, and control of her two daughters. The Washington Superior Court failed to accord the determination of Granville, a fit custodial parent, any material weight. In fact, the Superior Court made only two formal findings in support of its visitation order [that grandparents were part of large, loving family that would give children opportunities and that children would benefit from time with grandparents]. . . . These slender findings, in combination with the court's announced presumption in favor of grandparent visitation and its failure to accord significant weight to Granville's already having offered meaningful visitation to the Troxels, show that this case involves nothing more than a simple disagreement between the Washington Superior Court and Granville concerning her children's best interests Neither the Washington nonparental visitation statute generally which places no limits on either the persons who may petition for visitation or the circumstances in which such a petition may be granted nor the Superior Court in this specific case required anything more. Accordingly, we hold that § 26.10.160(3), as applied in this case, is unconstitutional. *Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d, 49, 68 USLW 4458 (U.S. 2000).

Since this opinion was released by the United States Supreme Court, the Texas Appellate Courts have sought to determine if the Texas statutes allowing grandparents' rights are unconstitutional.

B. In re Aubin

In the Aubin case out of the Beaumont Court of Appeals, an unrelated third-party couple sought primary possession of a child of another mother. In this case, the appellate court held that the mothers desire to not allow the unrelated couple to have possession of her child was an exercise of her fundamental right as a parent and that such a right was protected by the Due Process Clause of the United States Constitution.

C. Lilly v. Lilly

In the Lilly case out of the Austin Court of Appeals, the court found the grandparents visitation statute in section 153.433 to be constitutional. The court went on to say that the constitutionality of the Texas law had been proven prior to Troxel. The court distinguished this case from Troxel based upon there being no ongoing court action in Lilly, unlike Troxel.

D. Roby v. Adams

In Roby, finally a Texas court had a factual scenario that was very similar to Troxel. The El Paso Court of Appeals held that Troxel creates a presumption that a fit parent acts in the best interest of the child and that it is the grandparents' burden to overcome this burden. While not making the Texas grandparents' rights statute unconstitutional, the court put grandparents to an extreme test and place the burden of proving the need of visits upon grandparents.

§ 102.003. General Standing to File Suit.

- (a) An original suit may be filed at any time by:
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 - (3) a custodian or person having the right of visitation with or access to the child appointed by an order of a court of another state or country;
 - (4) a guardian of the person or of the estate of the child;
 - (5) a governmental entity;
 - (6) an authorized agency
 - (7) a licensed child placing agency;
 - (8) a man alleging himself to be the father of a child filing in accordance with Chapter 160 [*Uniform Parentage Act*], subject to the limitations of that chapter, but not otherwise;
 - (9) a person, other than a foster parent, who has had actual care, control, and possession of the child for at least six months ending not more than 90 days preceding the date of the filing of the petitioner;
 - (10) a person designated as the managing conservator in a revoke or unrevoked affidavit of relinquishment under Chapter 161 [*Termination of the Parent-Child Relationship*] or to whom consent to adoption has been given in writing under Chapter 162 [*Adoption*];
 - (11) a person with whom the child and the child's guardian, managing conservator, or parent have resided for at least six months ending not more than 90 days preceding the date of the filing of the petition if the child's guardian, managing conservator, or parent is deceased at the time of the filing of the petition;
 - (12) a person who is the foster parent of a child placed by the Department of Protective and Regulatory Services in the person's home for at least 12 months ending not more than 90 days preceding the date of the filing of the petition; or
 - (13) a person who is a relative of the child within the third degree by consanguinity, as determined by Chapter 573, Government Code, if the child's parent are deceased at the time of the filing of the petition.
- (b) In computing the time necessary for standing under Subsections (a)(9), (11), and (12), the court may not require that the time be continuous and uninterrupted but shall consider the child's principal residence during the relevant time preceding the date of commencement of the suit.

§ 102.004 Standing for Grandparent.

- (a) In addition to the general standing to file suit provided by Section 102.003(13), a grandparent may file an original suit requesting managing conservatorship if there is satisfactory proof to the court that:
 - (1) the order requested is necessary because the child's present environment presents a serious question concerning the child's physical health or welfare; or
 - (2) both parents, the surviving parent, or the managing conservator or custodian either filed the petition or consented to the suit.
- (b) An original suit requesting possessory conservatorship may not be filed by a grandparent or other person. However, the court may grant a grandparent or other person deemed by the court to have had substantial past contact with the child leave to intervene in a pending suit filed by a person authorized to do so under this subchapter.
- (c) Access to a child by a grandparent is governed by the standards established by Chapter 153 [*Conservatorship, Possession, and Access*].

§ 102.006 Limitations on Standing.

- (a) Except as provided by Subsection (b), if the parent-child relationship between the child and every living parent of the child has been terminated, an original suit may not be filed by:
 - (1) a former parent whose parent-child relationship with the child has been terminated by court order;
 - (2) the father of the child; or
 - (3) a family member or relative by blood, adoption, or marriage of either a former parent whose parent-child relationship has been terminated or of the father of the child.
- (b) the limitations on filing suit imposed by this section to do not apply to a person who:
 - (1) has a continuing right to possession of or access to the child under an existing court order; or
 - (2) has the consent of the child's managing conservator, guardian, or legal custodian to bring the suit.

Subchapter H. Rights of Grandparent

§ 153.431. Grandparental Appointment as Managing Conservators.

If the parents are deceased, the grandparents may be considered for appointment as managing conservators, but consideration does not alter or diminish the discretionary power of the court.

§ 153.432. Suit for Access.

- (a) A biological or adoptive grandparent may request access to a grandchild by filing:
 - (1) an original suit; or
 - (2) a suit for modification as provided by Chapter 156 [*Modification*].
- (b) A grandparent may request access to a grandchild in a suit filed for the sole purpose of requesting the relief, without regard to whether the appointment of a managing conservator is an issue in the suit.

§ 153.433. Possession of and Access to Grandchild.

The court shall order reasonable access to a grandchild by a grandparent if:

- (1) at the time the relief is requested, at least one biological or adoptive parent of the child has not had that parent's parental right terminated; and
- (2) access is in the best interest of the child, and at least one of the following facts is present:
 - (A) the grandparent requesting access to the child is a parent of a parent of the child and that parent of the child has been incarcerated in jail or prison during the three-month period preceding the filing of the petition or has been found by a court to be incompetent or is dead;
 - (B) the parents of the child are divorced or have been living apart for the three-month period preceding the filing of the petition or a suit for the dissolution of the parents' marriage is pending;
 - (C) the child has been abused or neglected by a parent of the child;
 - (D) the child has been adjudicated to be a child in need of supervision or a delinquent child under Title 3;
 - (E) the grandparent requesting access to the child is the parent of a person whose parent-child relationship with the child has been terminated by court order; or
 - (F) the child has resided with the grandparent requesting access to the child for at least six months within the 24-month period preceding the filing of the petition.

§ 153.434. Limitation on Right to Request Access.

A biological or adoptive grandparent may not request possession of or access to a grandchild if:

- (1) each of the biological parent of the grandchild has:
 - (A) died;
 - (B) had the person's parental rights terminated; or
 - (C) executed an affidavit of waiver of interest in child or an affidavit of relinquishment of parental rights under Chapter 161 [*Termination of the Parent-Child Relationship*] and the affidavit designates an authorized agency, licensed child-placing agency, or person other than the child's stepparent as the managing conservator of the child; and
- (2) the grandchild has been adopted, or is the subject of a pending suit for adoption, by a person other than the child's stepparent.

I. Introduction

On December 11th, 2002, Final Merits were heard in this cause. At the request of the trial Judge, Associate Judge Deborah Richardson, CARL DEASON, Intervenor, submits this Brief in Support of Entry of Final Order. Intervenor specifically addresses why the proposed Order submitted to the Court is not precluded by the U.S. Supreme Court case Troxel v. Granville, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d, 49, 68 USLW 4458 (U.S. 2000).

II. Legal Background of Troxel

The trial court in Troxel v. Granville, 530 U.S. 57, 120 S. Ct. 2054 (2000) granted the paternal grandparents, the Troxel's visitation one weekend each month, a week each summer, and four hours on each grandparent's birthday. Ms. Granville, the mother, appealed, and the Washington Supreme Court held the statutes were facially unconstitutional because they interfered with a parent's decision-making without requiring a showing that the child might be harmed by the decision and because they were too broad in allowing "any person" to petition for visitation at "any time." Id. at 2058-59; see In re Custody of Smith, 969 P.2d 21, 30 (Wash. 1998).

The United States Supreme Court granted certiorari and affirmed the Washington Supreme Court's judgment. Troxel, 120 S. Ct. at 2059. A plurality of the Court held that, as applied to the particular facts, the Washington statute unconstitutionally infringed on a parent's right to make decisions concerning the care, custody, and control of her children. Id. at 2060-61 (plurality opinion by O'Connor, joined by Rehnquist, Ginsburg, and Breyer; two concurring opinions by Souter and Thomas; three dissenting opinions by Stevens, Scalia, and Kennedy). The Court did not address whether a nonparental visitation statute must require a showing of harm or potential harm to the child before granting visitation. Id. at 2064. Instead, noting that "much state court adjudication in this context occurs on a case-by-case basis," the Court emphasized that it was ruling on "the sweeping breadth" of the Washington statute and its application to the specific facts at hand:

. . . [T]he visitation order in this case was an unconstitutional infringement on Granville's fundamental right to make decisions concerning the care, custody, and control of her two daughters. The Washington Superior Court failed to accord the determination of Granville, a fit custodial parent, any material weight. In fact, the Superior Court made only two formal findings in support of its visitation order [that grandparents were part of large, loving family that would give children opportunities and that children would benefit from time with grandparents]. . . . These slender findings, in combination with the court's announced presumption in favor of grandparent visitation and its failure to accord significant weight to Granville's already having offered meaningful visitation to the Troxels, show that this case involves nothing more than a simple disagreement between the Washington Superior Court and Granville concerning her children's best interests Neither the Washington nonparental visitation statute generally which places no limits on either the persons who may petition for visitation or the circumstances in which such a petition may be granted nor the Superior Court in this specific case required anything more. Accordingly, we hold that § 26.10.160(3), as applied in this case, is unconstitutional. Id. at 2063-64.

III. Troxel and the Texas Family Code Grandparent Possession and Access Statute

Section 153.433 of the Texas Family Code is not "breathtakingly broad," as was the Washington statute in *Troxel*. Id. at 2061. Section 153.433 allows only grandparents, under particular circumstances, to petition for access to a child, provided it is in the child's best interest. Tex. Fam. Code § 153.433. The Texas grandparent access statute has already been examined and held to be constitutional. *Deweese v. Crawford*, 520 S.W.2d 522, 526 (Tex. Civ. App. Houston [14th Dist.] 1975, writ ref'd n.r.e.), overruled on other grounds by *Cherne Indus., Inc. v. Magallanes*, 763 S.W.2d 768, 772 (Tex. 1989) ("The state has sufficient interest in the family relationship to permit legislation in this area."); see *Dolman*, 586 S.W.2d at 608.

IV. Factual Distinction between the Troxel and this cause.

Troxel applies to visitation cases and is not appropriate when allegations of the parents fitness are in questions. In *Re Crystal Aubin*, 29 S.W.3d 199, (Tex.App. Beaumont 2000). "Accordingly, so long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *Troxel* at 2061 (2000).

At the final hearing before Associate Judge Deborah Richardson on December 21st, 2000, Respondent Mother acknowledged voluntarily turning actual care control and custody of the child to the paternal grandfather Carl Deason for extended periods of time. She also acknowledged being incarcerated since the filing of the suit and living in a homeless shelter with the child.

Respondent father did not appear at the final hearing, but both paternal grandfather and Respondent mother acknowledged that the father had no contact with the child for several years.

V. Conclusion

Intervenor, Carl Deason, paternal grandfather would show that the entry of a Final Order in this cause appointing him joint-managing conservator of the child does not violate the Constitutional Rights of the Respondent mother and Respondent father. Further he would show that the Texas Family Code Grandparent Possession and Access provision do not contradict Troxel, and further that Troxel is not applicable in cases where the fitness of the parents is at issue.