

## Grandparent Visitation and Third Party Visitation

**Current Status:** Illinois' grandparent visitation law has bounced around a lot since 2002. First enacted in 1981, the law was held to be unconstitutional in 2002. Then a new law was passed. Then **that law** was held to be unconstitutional. Then **another law** was passed. That law, too, was immediately challenged.

The present law has been challenged, but those challenges have been disposed of without a ruling on the law's constitutionality. So, Illinois' law is still constitutionally viable. Moreover, as of October, 2007, House Bill 3010 proposes an amendment<sup>1</sup> to the current law that possibly would make the law more palatable to the Illinois Supreme Court in a constitutional challenge. The amending legislation is on hold to wait and see how the Illinois Supreme Court handles the cases now before it.

Grandparent visitation is alive and well in Illinois. Good, sharp lawyering can create and enforce grandparent visitation, regardless of the status of the current law.<sup>2</sup> Call our knowledgeable and capable attorneys to learn how Illinois law applies to your situation.

**Felzak v. Hruby and Flynn v. Henkel:** In March, 2007, the Illinois Supreme Court agreed to consider *Felzak v. Hruby*<sup>3</sup> (a DuPage County case) to consider the validity and enforceability of a visitation **agreement** entered into between a child's parent and grandparent at a time when the old law was in effect, but was later ruled unconstitutional. The question is: if parties believe a law is valid and reach an agreement thinking the law is constitutional, but the law is later held to be unconstitutional, is the agreement still valid and binding?

In *Flynn v. Henkel*,<sup>4</sup> another case before the Illinois Supreme Court, the trial court allowed the grandparents visitation, finding that the mother unreasonably denied the visits in retaliation for the father's pressing his paternity case. The case is still before the Supreme Court as of our most-recent publication.

**History of Grandparent Visitation:** Grandparent visitation has been around a long time. In one case from 1943,<sup>5</sup> for example, grandparents were awarded visitation when the child's father was inducted into the armed forces. In a 1947, case<sup>6</sup> a father had died and had named his parents trustees of a fund for the benefit of the child and, as the grandparents, they were awarded visitation. Then, with the maturation of the Baby Boom generation, divorce became more common and, just as custody and visitation issues became more prevalent in family court, so, too, did the issue of grandparent visitation. In the early days, there was no statute defining the rights of grandparent visitation. Cases touching on grandparent visitation sounded only in the common law.<sup>7</sup>

In the late 1970's and early 1980's, the law of divorce underwent substantial changes and, before long, the notion of grandparent's visitation rights was beginning to present itself as a real issue. In the late 1970s, states began to amend their divorce laws to secure visitation rights for grandparents and Illinois followed suit.

Before Illinois adopted its present set of custody and visitation laws in 1977, the "Divorce Act" controlled all custody and visitation decisions. Under that law, courts could award grandparents visitation over the objection of the natural parents only in cases of "special circumstances."<sup>8</sup>

In 1981 Illinois enacted a grandparent visitation law that defined situations where grandparents could seek court-ordered visits with their grandchildren. Initially, the cases that were filed were cases where one parent had died, was incarcerated, or was serving in the military or for some other reason could not exercise visitation. For twenty years, the law operated fairly effectively and grandparent visitation was allowed in such situations. Although the law didn't specifically say so, grandparent visitation was awarded instead of – not in addition to – the regular visitation rights of the non-custodial parent. The general rule was if a non-custodial parent **could** exercise visitation, it was only during those times that the grandparents (the parents of the non-custodial parent) could see the children. If, however, a non-custodial parent **could not** exercise visitation (due to military service, imprisonment, etc.) and the custodial parent refused contact with the absent parent's family, then the court would step in to ensure contact between the grandparents and the children.

Again, as the Baby Boom generation matured and became grandparents, and as their own children divorced, they

began seeking visitation with their grandchildren. More and more cases were presented and, together they began to present some complex scenarios. Eventually, constitutional problems began to arise in "grandparent" cases. The right to raise one's children as one sees fit is among the most fundamental rights people have. How could it be that a parent objecting to grandparent visitation could be overruled by the government, and forced to subject his or her children to the very thing he or she opposed? How could the government justify forcing parents to send their children on "visits" when BOTH parents joined together to oppose the visits? It all seemed too "big brotherish" to tolerate.

**Troxel v. Granville:** In 2000, the U.S. Supreme Court, in *Troxel v. Granville*,<sup>9</sup> found the grandparent visitation statute in the State of Washington<sup>10</sup> to be unconstitutional. In the *Troxel* case, the father had died and his parents wanted visitation with their grandchildren. The mother agreed and offered one day a month. The grandparents wanted more time and pursued the matter in court using the Washington law. There were three primary factors that led the Supreme Court to conclude the law was invalid:

1. The law did not require a judge to presume the parent's decision about visitation was valid, nor to accord any weight to that "best interest of the child" decision.
2. There was no allegation in the *Troxel* case that the mother was "unfit," and the Supreme Court noted that "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."
3. The judge presumed that the grandparent visitation should be granted unless the children would be adversely affected. This presumption "contravened the traditional presumption that a fit parent will act in the best interests of his or her child."

The Washington grandparent visitation law was extremely broad in scope, too: any person (not just family members) could petition for visitation at any time (not just during a custody case). The U.S. Supreme Court limited its ruling to the facts of *Troxel*, meaning that a grandparent visitation law with more restrictive language – like Illinois' – might pass Constitutional muster.

**Lulay v. Lulay:** Later that year the issue was considered by the Illinois Supreme Court in *Lulay v. Lulay*<sup>11</sup> where the husband/father's parents sued for visitation with their grandchildren. Both divorced parents joined forces in opposing the paternal grandparent's visitation claim. Under those circumstances, the Illinois Supreme Court ruled, the statute was unconstitutional.<sup>12</sup> A court could not step in and force parents to send their children off to visitation when the parents were in agreement and opposed to the visitation.

**Wickham v. Byrne:** Then, in the 2002 case of *Wickham v. Byrne*, the Illinois Supreme Court ruled that the Illinois grandparent visitation statute was flat-out unconstitutional.<sup>13</sup>

In the summer of 2004, Governor Rod Blagojevich signed a new law<sup>14</sup> designed to pass constitutional muster and to permit grandparents to obtain visitation with their grandchildren. The new law was a vast improvement on the old, unconstitutional law – but it was challenged almost immediately in the case of *Mulay v. Mulay*.

**Mulay v. Mulay:** Jim Mulay, a Peoria County Sheriff's Deputy was killed in the line of duty in May, 2003. He was survived by his two children (ages 5 and 2), his wife, and his parents. His parents had been involved with his children since birth and, for two years after his death, they continued to be involved in their grandchildren's lives. Grandpa Mulay told Andy Kravetz of the Peoria Journal Star "We had the children about 75% of the time because she worked, he worked, and we had the children an awful lot of the time. His death didn't change it a lot ... we were very involved in their lives."<sup>15</sup> In June, 2005, however, Officer Mulay's widow informed the grandparents that from that point on, they could see the grandkids only at their T-Ball games... period. She remarried and has since moved to near Des Moines, Iowa.

The Mulays went to court to use the revised Illinois grandparent visitation law. Their case was dismissed from the Peoria County Circuit Court when the trial judge concluded that Illinois' revised grandparent visitation law was unconstitutional. The Mulays appealed. In March, 2007, the Illinois Supreme Court vacated the trial judge's order on other, non-constitutional grounds, and sent the case back to the Peoria judge to consider it.<sup>16</sup>

Also in March, 2007, the Illinois Supreme Court said it would consider the constitutionality of a case<sup>17</sup> from DuPage County. In that case, the trial judge **awarded** the grandparent visitation. The judge found that the parent had unreasonably denied the grandparent visitation and that the child would suffer in the absence of grandparent visitation. The parent appealed and we await the Supreme Court's ruling in both cases.

**Family Visitation:** Although visitation is not transferable from a parent to another person, under certain circumstances the common law permits a non-custodial parent to ask the court to permit his or her family to have visitation with the child when the parent is not able to.<sup>18</sup> Indeed, it is possible for third-party, non-parents to petition for visitation rights based solely on common law theories. In one famous case,<sup>19</sup> the mother died in child birth and the baby lived with the maternal grandparents for the first five years. The father was then awarded custody and he sought to keep the child from the maternal grandparents. The grandparents went to court – without using the grandparents' visitation law – and were awarded visitation with the child based on common law principles.

**Court-Approved Agreements:** Grandparent visitation cases, like most family law cases, end up settling out of court before a trial takes place. Illinois' grandparent visitation law has bounced around so much, however, the question arises as to whether or not those agreements are valid. Here's the problem: when a judge makes a ruling, the ruling is based on the law. If the law is later held to be unconstitutional, then the ruling is no longer valid. So, what happens if parties to a visitation hearing settle the matter before the judge rules, but they rely on the existing law when making their settlement. When that same law is later found to be unconstitutional, is the agreement then valid, or not?

The answer is not simple. In one case,<sup>20</sup> the Illinois Supreme Court held that "courts are obligated to uphold voluntary visitation agreements made by fit parents as long as they do not violate public policy."<sup>21</sup> Another, (appellate) case<sup>22</sup> upheld the grandparent visitation schedule, but the reasoning took over 38 pages and touched on elements of family law, the Fourteenth Amendment, and contract law.

**Frequency:** Grandparent visitation schedules vary from case to case. Most schedules are agreed on. In the cases that have been presented for review,<sup>23</sup> the norm for grandparent visitation is about one day per month.

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This article was written by the law office of Cowell Taradash, P.C., whose attorneys are familiar with the latest court decisions, recent changes in the law and even the tendencies of many judges. We can help. Contact us at 866.987.6723 or [info@illinoisdivorce.com](mailto:info@illinoisdivorce.com).