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Senate Bill 727 (Substitute S-2 as reported)
Sponsor: Senator Alan Sanborn
Committee: Senior Citizens and Veterans Affairs

Date Completed: 12-18-03

RATIONALE

On July 31, 2003, in *DeRose v DeRose*, the Michigan Supreme Court struck down the State's grandparenting time statute, which had been in place since 1982. This decision followed a 1999 United States Supreme Court case, *Troxel v Granville*, in which four justices found that a State of Washington grandparent visitation statute was unconstitutional as applied, and two justices considered the statute itself unconstitutional. The Michigan Supreme Court decision has proven problematic both for grandparents who would like to secure the right to visit their grandchildren, and for grandparents who had obtained grandparenting time orders under the State law. Evidently, some custodial parents are seeking to have grandparenting time orders overturned; some courts are granting these petitions, while others are holding the matter in abeyance.

It has been suggested that the constitutional deficiencies in Michigan's grandparenting time statute can and should be rectified, in order to restore the opportunity of grandparents to obtain court orders giving them time with their grandchildren.

CONTENT

The bill would amend the Child Custody Act to do the following:

- Specify circumstances under which a child's grandparent could seek a grandparenting time order, including situations in which the parents were divorced or separated, the child's parent (who was the child of the grandparent) had died, or the parents were never married but paternity had been established.**

- Create a rebuttable presumption that a fit parent's actions and decisions regarding grandparenting time were in the child's best interests.**
- Place the burden on a grandparent to prove by clear and convincing evidence that grandparenting time was in the child's best interests.**
- Require the court to give deference to a fit parent's position.**
- Require the court to consider specific factors in determining the best interests of a child.**
- Allow the court to refer a complaint or motion for grandparenting time to the Friend of the Court for mediation.**
- Require the court to make a record of its findings and analysis, including its reasons for granting or denying a request for grandparenting time.**

(Since the statutory provisions concerning grandparenting time were found to be unconstitutional, they are described in the past tense below.)

The Act allowed a grandparent to seek an order for grandparenting time with a child if a child custody dispute was pending before the court. If a natural parent of an unmarried child was deceased, a parent of the deceased person could bring an action for grandparenting time. If a custody dispute was pending, the grandparent had to file a motion for an order to show cause. Otherwise, the grandparent had to file a complaint or a complaint and motion for a show cause order, in the circuit court in the county where the child lived.

Under the bill, a child's grandparent could seek a grandparent time order under one or more of the following circumstances:

- An action for divorce, separate maintenance, or annulment involving the child's parents was pending before the court.
- The child's parents were divorced, were separated under a judgment of separate maintenance, or had had their marriage annulled.
- The child's parent who was a child of the grandparent was deceased.
- The child's parents had never been married and were not living in the same household, and paternity had been established by the completion of an acknowledgment of parentage under the Acknowledgment of Parentage Act, by an order of filiation entered under the Paternity Act, or by a court's determination that the individual was the father of the child.

The court could not permit a parent of a man who had never been married to the child's mother to seek a grandparenting time order unless he had completed an acknowledgment of parentage, an order of filiation had been entered, or a court had determined that the man was the father. The court could not permit the parent of a putative father to seek a grandparenting time order unless the putative father had provided substantial and regular support or care in accordance with his ability to do so.

The bill specifies that adoption of a child or placement of a child for adoption would terminate the right of a grandparent to commence an action for grandparenting time with that child. Adoption of a child by a stepparent, however, would not terminate the right of a grandparent to commence an action.

The bill would require a grandparent seeking a grandparenting time order to commence an action as follows:

- Filing a motion with the circuit court in the county where the court had continuing jurisdiction, if the circuit court had continuing jurisdiction.
- Filing a complaint in the circuit court for the county where the child lived, if the court did not have continuing jurisdiction.

As previously required, the complaint or motion would have to be accompanied by an affidavit setting forth facts supporting the requested order. The Act had required the

grandparent filing the complaint or motion to give notice of the filing to each person who had legal custody of the child, who then could file an opposing affidavit. The bill would retain this provision, and require that notice also be given to each person who had an order for parenting time with the child.

As provided before, the court would have to hold a hearing on its own motion or if a party requested a hearing, and parties submitting affidavits would have to be given an opportunity to be heard.

Under the bill, in a determination of a grandparenting time request, there would be a rebuttable presumption that a fit parent's actions and decisions regarding grandparenting time were in the child's best interests. The burden would be on the grandparent filing a complaint or motion to prove by clear and convincing evidence that ordering grandparenting time would be in the child's best interests. When making its decision, the court would have to give deference to a fit parent's position.

The Act had required the court to enter an order for reasonable grandparenting time if the court found, at the conclusion of the hearing, that grandparenting time was in the best interests of the child. The bill would retain this requirement. Under the bill, in determining the best interests of the child, the court would have to consider all of the following:

- The love, affection, and other emotional ties existing between the grandparent and the child.
- The length and quality of the prior relationship between the child and the grandparent, the role performed by the grandparent, and the existing emotional ties of the child to the grandparent.
- The grandparent's moral fitness.
- The grandparent's mental and physical health.
- The child's reasonable preference, if the court considered the child to be old enough to express a preference.
- The effect on the child of hostility between his or her parent and the grandparent.
- The grandparent's willingness, except in the case of abuse or neglect, to encourage a close relationship between the child and his or her parent or parents.

- Any history of physical, emotional, or sexual abuse or neglect of the child by the grandparent.
- Whether the child would be harmed by granting grandparenting time or whether the child would be harmed by denying grandparenting time.
- Any other factor relevant to the child's physical and psychological well-being.

The bill would allow the court to refer a complaint or motion for grandparenting time to the Friend of the Court mediation service. If the complaint or motion were referred and no settlement were reached through mediation within a reasonable time, the court would have to hear the complaint or motion.

Previously, the court could not enter an order restricting the movement of a grandchild if the restriction was solely for the purpose of allowing a grandparent to exercise the rights conferred in a grandparenting time order. The bill provides, instead, that the court could not enter an order prohibiting an individual who had legal custody of a child from changing the child's domicile if the prohibition were primarily for the purpose of allowing a grandparent to exercise the rights conferred in a grandparenting time order.

As the Act had provided, a grandparent could not file a complaint or motion seeking a grandparenting time order more than once every two years, absent a showing of good cause. If the court found good cause to allow a grandparent to file more than one complaint or motion in a two-year period, the court would have to allow the filing and consider the complaint or motion.

The Act allowed the court to enter an order modifying or terminating a grandparenting time order whenever a modification or termination was in the child's best interests. Under the bill, the court could modify or terminate a grandparenting time order if there were a change in circumstances and a modification or termination were in the child's best interests.

The bill would require the court to make a record of its analysis and findings regarding the determination of a child's best interests, the limit on filing once every two years, and the modification or termination of a grandparenting time order. The record would

have to include the reasons for granting or denying a requested grandparenting time order. (Previously, the court had to make a record of the reasons for denying an order.)

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.

MCL 722.22 & 722.27b

BACKGROUND

History of Michigan's Statute

Public Act 80 of 1971 enacted Michigan's first statutory provision allowing grandparents to seek visitation. This Act added Section 7a to the Child Custody Act (MCL 722.27a). Under Section 7a, if the father or the mother of an unmarried child was deceased, the deceased person's parent could bring an action in circuit court for visitation. If the court found that visitation would be in the best interests of the child, it could provide for visitation.

Public Act 161 of 1980 repealed Section 7a and added grandparent visitation language to Section 7 of the Child Custody Act, which describes the powers of the circuit court in child custody disputes (MCL 722.27). According to this language, if a child custody dispute has been submitted to the court as an original action or has arisen incidentally from another circuit court action or judgment, the court may provide for reasonable visitation of a child by the maternal or paternal grandparents, and upon petition may consider the reasonable visitation of maternal or paternal grandparents for the best interests of the child. These provisions remain in Section 7.

The current grandparenting time statute was enacted by Public Act 340 of 1982. (Original references to "grandchild visitation" were replaced with "grandparenting time" in 1996.) The 1982 Act added Section 7b to the Child Custody Act (MCL 722.27b), which contains the provisions found to be unconstitutional. These provisions allow a person to seek a grandparenting time order only if a child custody dispute with respect to the child is pending before the court. Also, if the natural parent of an unmarried child is deceased, a parent of the deceased person may bring an

action for grandparenting time (as Public Act 80 of 1971 originally allowed). As used in Section 7b, "child custody dispute" includes a proceeding in which either of the following occurs:

- a) The marriage of the child's parents is dissolved or declared invalid by the court, or the court enters a decree of legal separation (i.e., the parents are divorced or legally separated, or the marriage is annulled).
- b) Legal custody of the child is given to a party other than his or her parents, or the child is placed outside of and does not reside in the home of a parent; this provision does not apply to a child who has been placed for adoption with, or adopted by, someone other than a stepparent.

For purposes of Section 7b, a custody dispute is considered "pending" even after a judgment of divorce has been entered, according to various decisions of the Michigan Court of Appeals (e.g., *Brown v Brown*, 192 Mich App 44 (1991)).

Troxel v Granville (530 U.S. 57)

This case originated in the State of Washington and addressed a state statute providing, "Any person may petition the court for visitation rights at any time...The court may order visitation rights for any person when visitation may serve the best interest of the child...". The Troxels petitioned the Washington Superior Court (the trial court) for the right to visit their deceased son's daughters, and the girls' mother, Granville, objected to the amount of visitation sought. The court ordered more visitation than Granville desired, and the state Court of Appeals reversed and dismissed the petition. In affirming, the Washington Supreme Court held that the statute unconstitutionally infringed on parents' fundamental right to rear their children. The court reasoned that the U.S. Constitution permits a state to interfere with this right only to prevent harm to the child. The court also found the statute overbroad.

When the U.S. Supreme Court decided the case, four of the justices--Justice O'Connor, who wrote the plurality opinion, Chief Justice Rehnquist, and Justices Ginsburg and Breyer--concluded that the Washington

statute, as applied to the facts of the case, violated Granville's constitutional right to make decisions concerning her daughters. According to the Court, "[I]t cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."

This opinion described the Washington statute as "breathtakingly broad", and pointed out that, once a visitation petition "...is placed before a judge, a parent's decision that visitation is not in the child's best interest is accorded no deference. [The statute] contains no requirement that the court accord the parent's decision any presumption of validity or any weight whatsoever. Instead, the Washington statute places the best-interest determination solely in the hands of the judge. Should the judge disagree with the parent's estimation of the child's best interests, the judge's view necessarily prevails."

The plurality opinion stated that several factors compelled the conclusion that the statute, as applied, violated the Due Process Clause. These factors included the absence of an allegation or finding that Granville was an unfit parent. "That aspect is important, for there is a presumption that fit parents act in the best interests of their children...[S]o 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...". According to the opinion, the problem was not that the trial court intervened, but that it "gave no special weight at all" to the mother's determination of her daughters' best interests. The opinion also noted that Granville had agreed to visitation before the petition was filed, but the trial court gave this no weight.

The opinion described the case as "nothing more than a simple disagreement between the Washington Superior Court and Granville concerning her children's best interests". The Due Process Clause, however, "...does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made".

Because the decision was based on the overbreadth of the statute and its application in the case, the justices stated, "[W]e do not consider...whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation. We do not, and need not, define today the precise scope of the parental due process right in the visitation context...[T]he constitutionality of any standard for awarding visitation turns on the specific manner in which that standard is applied..."

In a separate opinion concurring in the judgment, Justice Souter concluded that the Washington Supreme Court's decision to invalidate the statute itself--based on its overbreadth--was consistent with the U.S. Supreme Court's prior cases. "Consequently, there is no need to decide whether harm is required or to consider the precise scope of the parent's right or its necessary protections."

Justice Thomas also wrote a separate opinion concurring in the judgment. He agreed that, "[T]his Court's recognition of a fundamental right of parents to direct the upbringing of their children resolves this case." According to Justice Thomas, strict scrutiny is the appropriate standard of review applicable to infringement of fundamental rights, and the State of Washington "...lacks even a legitimate governmental interest--to say nothing of a compelling one--in second-guessing a fit parent's decision regarding visitation with third parties."

Justices Stevens, Scalia, and Kennedy wrote separate dissenting opinions.

DeRose v DeRose (469 Mich 320)

This case involved a dispute between a mother and a paternal grandmother, who sought visitation with her granddaughter. The child was born during the parents' marriage. After the father was sentenced to 12 to 20 years' imprisonment for criminal sexual conduct (CSC), the parties divorced and the mother was awarded sole legal and physical custody. The grandmother filed a petition for visitation while the divorce was pending, and the mother opposed visitation because the grandmother denied that her son was guilty of CSC (despite his own admission).

After a hearing, at which no testimony or evidence was presented, the Wayne County Circuit Court granted the petition. A panel of the Michigan Court of Appeals reversed that decision and held that the grandparent visitation statute was unconstitutional on the basis of *Troxel*. The Michigan Supreme Court granted leave to appeal and found the statute unconstitutional as written.

In a five-justice majority opinion, the Court attempted to find commonalities among the U.S. Supreme Court's plurality opinion in *Troxel* and the two opinions that concurred in the judgment. "[I]t appears to us that all six justices agreed that parents have what they described as a 'fundamental right' to raise their children. Further,...both Justice O'Connor and Justice Souter found that parents have the right to make decisions for children, and such decisions must be accorded 'deference' or 'weight.'...Therefore, a visitation statute of the sort at issue here must...require that a trial court accord deference to the decisions of fit parents regarding third-party visitation."

According to the Michigan Supreme Court, "There is no indication that the statute requires deference of any sort be paid by a trial court to the decisions fit parents make for their children...[I]t is for this reason...that we find our statute is constitutionally deficient." The Court also stated that it had not addressed whether a showing of harm or potential harm to the child is necessary for intervention into the parent-child relationship.

In a separate opinion, Justice Weaver concurred in only the result of the majority. Justice Weaver stated that she wished to emphasize that grandparent visitation statutes are not unconstitutional per se. According to Justice Weaver, the Michigan statute is flawed because "(1) the statute does not provide a presumption that fit parents act in the best interests of their children, (2) the statute fails to accord the fit parent's decision concerning visitation any 'special weight,' and (3) the statute fails to clearly place the burden in the proceedings on the petitioners, rather than the parents." Justice Weaver indicated that the Legislature might wish to consider a separate list of best-interest factors for the court to consider when deciding whether to award grandparent visitation. In a footnote, Justice Weaver stated that she was expressing no opinion regarding whether a statute must require a showing that the child would be

harmful if grandparent visitation were not granted.

In a dissenting opinion, Justice Kelly wrote that she would hold the trial court's *application* of the statute, but not the statute itself, unconstitutional. Justice Kelly agreed that parents' fundamental right to control their children's upbringing is protected by the Due Process Clause, but found that the statute served a compelling governmental interest (to promote the well-being of children by allowing grandparent visitation when it is in the best interest of the children). Justice Kelly also found that the statute was narrowly tailored to serve this interest. She interpreted the statute within the context of the Child Custody Act, under which "...grandparents obtain visitation only if they can prove, by clear and convincing evidence, that a parent's decision regarding visitation is not in the best interests of the children. Additionally, the act limits the discretion a court can exercise in determining the children's best interests." Justice Kelly found that the application of the statute to the case was unconstitutional because the trial court substituted its opinion for that of the child's mother and overrode the mother's decision without finding clear and convincing evidence on the basis of the best interest factors.

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

When a noncustodial mother or father spends time with his or her child, the child's maternal or paternal grandparents often are able to see the child at the same time. However, when the noncustodial parent dies or is absent for another reason, such as imprisonment or extended military leave, the custodial parent sometimes will deny the child's grandparents an opportunity to see or spend time with their grandchild. This might occur even after the grandparents have been the child's primary care giver or have had a significant role in the child's life. In some cases, a parent will virtually abandon his or her child with the grandparents and then retrieve the child after a period of time, severing all ties with the grandparents. These are the types of situations in which grandparents have sought court-ordered grandparenting time.

The care and attention that children receive from grandparents are important in intact families, and may be crucial to a child's welfare in single-parent situations, especially if that parent is involved in drugs, criminal activity, or other undesirable behavior. The grandparents may provide the only stability and constancy in the child's life, especially if the child has experienced the loss of a parent through death, divorce, imprisonment, or abandonment. In addition, many grandparents have sustained their own long marriages--the type of environment the child might not otherwise know. A child who is denied contact with his or her grandparents may suffer a serious loss, just as though the grandparents had died.

While most parents who sever their children's ties with grandparents presumably have a valid reason to do so, some are motivated by vindictiveness or unfounded hostility--toward either the absent parent or the grandparent. Other parents might simply feel no obligation to maintain the child's relationship with his or her grandparents, because the parent is no longer legally related to them, or never was. Although it is important--as well as constitutionally necessary--to respect parents' wishes, it also is important that courts have the ability to step in when parents make irrational decisions that are harmful to their children. The *DeRose* decision has jeopardized all grandparenting orders issued under the Michigan statute, and made it impossible for grandparents to obtain new orders.

The bill would restore the ability of grandparents, under limited circumstances, to seek court-ordered grandparenting time, and would protect the right of children to see their grandparents. As required by the U.S. Supreme Court in *Troxel* and the Michigan Supreme Court in *DeRose*, a court would have to give deference to a fit parent's position regarding grandparenting time, and therefore could not substitute its own judgment for that of the parent. Since there is a presumption, according to *Troxel*, that fit parents act in the best interests of their children, the bill would place the burden on a grandparent to overcome that presumption.

As Justice Weaver suggested, the bill also contains a list of specific factors for the court to evaluate in determining a child's best interests. These reflect many of the factors that people cite when describing situations in which parents deny grandparenting time: the

emotional ties between the grandparent and the child, the length and quality of their relationship, and the role the grandparent has played in the child's life. Another significant factor is the harm that a child would experience if grandparenting time were denied. While many people refer to the "grandparents' right" to time with their grandchildren, it is the child whose interests are paramount. Requiring consideration of these factors would help ensure that the court granted or denied grandparenting time based on what would be best for the child, according to his or her individual circumstances.

Response: The bill also should prevent the parent of a noncustodial parent from seeking grandparenting time if the noncustodial parent opposed it, or if both of the child's parents agreed that the grandparent should not have standing to seek an order. Since a grandparent's rights are derivative of the rights of his or her own child, that individual should be able to determine whether his or her parent could spend time with the child.

Supporting Argument

The bill would allow grandparents to seek grandparenting time even though the child's parents were never married. Previously, in such a situation, a person could seek a grandparenting time order only if his or her own child had died. Under the bill, if the grandchild's parents had never been married and were not living together, the parents of the child's father could file a complaint for grandparenting time as long as his paternity had been established. This is a vital provision considering the degree to which children are born out of wedlock. In these cases, the relationship between grandparents and grandchildren can be just as significant as in situations involving divorce, and the consequences of terminating that relationship can be equally devastating.

Opposing Argument

The bill would make it extraordinarily difficult for a person to obtain a grandparenting time order against the wishes of a child's parent. Combined, the rebuttable presumption, the requirement that the court defer to a fit parent's position, and the clear and convincing standard would create an unreasonably high hurdle for a grandparent to overcome. Although the plurality opinion in *Troxel* said that there is a presumption that fit parents act in their children's best interest, it did not require clear and convincing evidence to

overcome that presumption. There can be a tremendous amount of fabrication and distortion in domestic relations cases, and most events are not witnessed by a third party. Making it nearly impossible for a court to order grandparenting time would not promote the child's best interests.

Response: The Fourteenth Amendment to the U.S. Constitution provides that no state may "deprive any person of life, liberty, or property, without due process of law". According to *Troxel*, the interest of parents in the care, custody, and control of their children "...is perhaps the oldest of the fundamental liberty interests recognized by this Court." Although the Court did not explicitly address the standard of proof, the highest possible standard should be required in order to interfere with this parental right. In civil cases, that standard is clear and convincing evidence.

Opposing Argument

The bill should require a grandparent to show that actual harm to the child would result if grandparenting time were denied, in order to overcome the rebuttable presumption and the deference given to a fit parent's position. This would ensure that the court did not substitute its own judgment for the parent's decision and that grandparenting time orders were issued only in rare circumstances. When a court engages in a best-interest analysis, the court still is deciding what *it* thinks would be in the child's best interests. The court should intervene only when it believes that a fit parent's decision is so far removed from what is best for the child that the result harming the child.

Response: Both the U.S. Supreme Court plurality in *Troxel* and the Michigan Supreme Court majority in *DeRose*, as well as Justices Souter and Weaver, said that they were not addressing whether a showing of harm or potential harm was necessary to intervene into the parent-child relationship. The bill would handle the issue fairly, by requiring the court to determine whether harm to the child would result from either denying or granting grandparenting time. Taken together, the best-interest factors would provide real parameters for judges.

Opposing Argument

The bill fails to define "fit parent"; a parent who is considered legally fit still might make irrational decisions concerning the child's grandparents, or might be motivated purely by vindictiveness. The bill's best-interest

factors do not include the reasons for a parent's denial of grandparenting time.

Opposing Argument

It is not necessary to establish a separate list of best-interest factors. The grandparenting time provisions are within the Child Custody Act, which already lists factors for judges to evaluate in deciding a child's best interest in custody disputes. In grandparenting time proceedings, the judge could consider the factors that would be relevant.

Response: While some of the proposed factors are the same as, or similar to, the existing factors for custody disputes, the factors in the bill are specific to the relationship between a grandparent and a grandchild, and the fitness of the grandparent.

Legislative Analyst: Suzanne Lowe

FISCAL IMPACT

The bill would have no fiscal impact on the State and an indeterminate fiscal impact on local units of government. The bill could increase local court costs to the extent that it would re-enact provisions allowing a grandparent to seek a grandparenting time order. To the extent that the complaints or motions for grandparenting time were successfully mediated by the Friend of the Court, the bill would potentially decrease local court costs.

Fiscal Analyst: Bethany Wicksall

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.