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BILL ANALYSIS

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Senate Bill 727 (as enrolled)  
Sponsor: Senator Alan Sanborn  
Senate Committee: Senior Citizens and Veterans Affairs  
House Committee: Judiciary

**PUBLIC ACT 542 of 2004**

Date Completed: 1-24-05

**RATIONALE**

On July 31, 2003, in *DeRose v DeRose*, the Michigan Supreme Court struck down the State's grandparenting time statute. Since 1982, this statute had allowed individuals, under limited circumstances, to seek a court order for time with their grandchildren. 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 proved to be problematic both for grandparents who wanted to secure the right to visit their grandchildren, and for grandparents who already had obtained grandparenting time orders under the State law. Evidently, some custodial parents sought to have grandparenting time orders overturned; while some courts granted these petitions, other courts held the matter in abeyance. In March 2004, the Michigan Court of Appeals held that *DeRose* should be given full retroactive effect and that orders issued under the statute were void.

It was suggested that the constitutional deficiencies in Michigan's grandparenting time statute could and should be rectified, in order to restore the ability of grandparents to seek court orders giving them time with their grandchildren.

**CONTENT**

**The bill amended the Child Custody Act to do the following:**

**-- Specify circumstances under which a child's grandparent may seek a grandparenting time order, including situations in which the parents are**

**divorced or separated, the child's parent (who was the child of the grandparent) has died, the parents were never married but paternity has been established, or the grandparent has provided an established custodial environment.**

- Establish a rebuttable presumption that a fit parent's decision to deny grandparenting time does not create a substantial risk of harm to the child.**
- Place the burden on a grandparent to rebut the presumption by a preponderance of the evidence or, if that burden of proof is found unconstitutional, by clear and convincing evidence.**
- Require the court to consider specific factors in determining the best interests of a child, if the presumption is overcome.**
- Require the court to dismiss a complaint for grandparenting time if two fit parents sign an affidavit opposing a grandparenting time order.**
- Allow the court to refer a complaint or motion for grandparenting time to domestic relations mediation.**
- Limit the circumstances under which the court may modify or terminate a grandparenting time order.**
- Require the court to make a record of its findings and analysis, including its reasons for granting or denying a request for grandparenting time.**

The bill defines "grandparent" as a natural or adoptive parent of a child's natural or adoptive parent. "Parent" means the natural or adoptive parent of a child.

The bill took effect on January 3, 2005.

### Circumstances for Seeking an Order

The Act previously 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.

(As used in this provision, "child custody dispute" included a proceeding in which either of the following occurred:

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

Under the bill, a child's grandparent may 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 is pending before the court.
- The child's parents are divorced, are separated under a judgment of separate maintenance, or have had their marriage annulled.
- The child's parent who was a child of the grandparent is deceased.
- The child's parents have never been married and are not living in the same household, and paternity has 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 is the father of the child.
- Legal custody of the child has been given 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 (except in the case of an adoption, as provided below).
- In the year before a grandparenting time action is commenced, the grandparent provided an established custodial environment for the child as described in

Section 7 of the Act, whether or not the grandparent had custody under a court order.

(Under Section 7, which concerns the modification of custody and support orders, a custodial environment is established if, over an appreciable time, the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. The child's age, the physical environment, and the inclination of the custodian and the child as to the permanency of the relationship, also must be considered.)

A court may not permit a parent of a man who has never been married to the child's mother to seek a grandparenting time order unless he has completed an acknowledgment of parentage, an order of filiation has been entered, or a court has determined that the man is the father. The court may not permit the parent of a putative father to seek a grandparenting time order unless the putative father has provided substantial and regular support or care in accordance with his ability to do so. (Previously, a grandparenting time order could not be entered for the parents of a putative father unless he had acknowledged paternity in writing, had been adjudicated to be the father, or had contributed regularly to the child's support.)

### Commencing an Action; Hearing

Previously, to seek a grandparenting time order, the grandparent had to file a motion for an order to show cause if a custody dispute was pending. 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.

The bill requires 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 has continuing jurisdiction, if the circuit court has continuing jurisdiction.
- Filing a complaint in the circuit court for the county where the child lives, if the court does not have continuing jurisdiction.

As previously required, the complaint or motion must be accompanied by an affidavit setting forth facts supporting the requested order, and the grandparent filing the complaint or motion must give notice of the

filing to each person having legal custody of the child, who then may file an opposing affidavit. The bill also requires that notice be given to each person who has an order for parenting time with the child.

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

#### Rebuttable Presumption; Fit Parents

The bill states that, in order to give deference to the decisions of fit parents, it is presumed that a fit parent's decision to deny grandparenting time does not create a substantial risk of harm to the child's mental, physical, or emotional health. To rebut the presumption, a grandparent filing a complaint or motion for grandparenting time must prove by a preponderance of the evidence that the parent's decision does create a substantial risk of harm to the child's mental, physical, or emotional health.

If a court of appellate jurisdiction determines in a final and nonappealable judgment that this burden of proof is unconstitutional, a grandparent filing a complaint or motion for grandparenting time must prove by clear and convincing evidence that the parent's decision to deny grandparenting time creates a substantial risk of harm to the child's mental, physical, or emotional health, in order to rebut the presumption.

If the grandparent does not overcome the presumption, the court must dismiss the complaint or deny the motion.

The bill also requires the court to dismiss a complaint or motion for grandparenting time if two fit parents sign an affidavit stating that they both oppose a grandparenting time order. This does not apply, however, if one of the fit parents is a stepparent who adopted a child and the grandparent seeking the order is the natural or adoptive parent of a parent of the child who is deceased or whose parental rights have been terminated.

#### Entry of Order; Best Interests Determination

Under the bill, if the court finds that a grandparent has met the standard for rebutting the presumption described above, the court must consider whether it is in the best interests of the child to enter an order for

grandparenting time. Previously, the Act required the court to enter an order for reasonable grandparenting time if the court found that grandparenting time was in the best interests of the child. The bill retains this requirement but requires the court to find by a preponderance of the evidence that entering a grandparenting time order is in the best interests of the child.

Under the bill, in determining the best interests of the child, the court must 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 considers 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 parent's decision to deny, or lack of an offer of, grandparenting time is related to the child's well-being or is for some other unrelated reason.
- Any other factor relevant to the child's physical and psychological well-being.

#### Mediation

Under the bill, if the court has determined that a grandparent has met the standard for rebutting the presumption described above, the court may refer the complaint or motion for grandparenting time to domestic relations mediation as provided by Supreme Court rule. If the complaint or motion is referred to the Friend of the Court mediation service and no settlement is reached within a reasonable time, the court must hear the complaint or motion.

## Modification of Order

The Act previously 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. The bill, however, prohibits the court from modifying or terminating a grandparenting time order unless it finds by a preponderance of the evidence, on the basis of facts that have arisen since the order was entered or that were unknown to the court when it entered the order, that a change has occurred in the circumstances of the child or his or her custodian and that a modification or termination of the existing order is necessary to avoid creating a substantial risk of harm to the child's mental, physical, or emotional health. If the court modifies or terminates the order, it must include specific findings of fact in its order in support of the decision.

## Other Provisions

Change of Domicile. 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 may not enter an order prohibiting an individual who has legal custody of a child from changing the child's domicile if the prohibition is primarily for the purpose of allowing a grandparent to exercise the rights conferred in a grandparenting time order.

Frequency of Filing. As the Act had provided, a grandparent may 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 finds good cause to allow a grandparent to file more than one complaint or motion in a two-year period, the court must allow the filing and consider the complaint or motion.

Court Record. The bill requires the court to make a record of its analysis and findings regarding the rebuttable presumption, the determination of a child's best interests, the limit on filing more than once every two years, and the modification or termination of a grandparenting time order. The record must 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.)

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

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.

Public Act 340 of 1982 enacted the grandparenting time statute that was the subject of the *DeRose* decision. (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). As described above, these provisions allowed a person to seek a grandparenting time order only if a child custody dispute with respect to the child was pending before the court. Also, if the natural parent of an unmarried child was deceased, a parent of the deceased person could bring an action for grandparenting time (as Public Act 80 of 1971 originally allowed).

For purposes of Section 7b, a custody dispute was considered "pending" even after a

judgment of divorce had 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 was 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 harmed 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.

On March 23, 2004, the Michigan Court of Appeals held that the *DeRose* decision should be given full retroactive effect (*Johnson v White*, 261 Mich App 332). In this case, the trial court had held the defendant in contempt for violating the plaintiff's grandparenting time order. The Court of Appeals overturned the grandparenting time order, and found that the trial court abused its discretion in refusing to vacate the judgment of contempt. The Court stated, "[I]t is presumably possible for a constitutional grandparent visitation statute to be written...However, in the meantime, we hold that all orders based on and entered since the enactment of MCL 722.27b...are void *ab initio* [from the beginning] and thus, are no longer to be given legal effect."

## **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 invalidated all grandparenting orders issued under the Michigan statute, and made it impossible for grandparents to obtain new orders.

The bill restores the ability of grandparents, under limited circumstances, to seek court-ordered grandparenting time, and protects 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 must give deference to a fit parent's position regarding grandparenting time, and therefore may not substitute its own judgment for that of the parent. According to *Troxel*, there is a presumption that fit parents act in the best interests of their children. The bill codifies this by establishing a presumption that a fit parent's decision to deny grandparenting time does not create a substantial risk of harm to the child. The bill then places 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. 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 will help ensure

that the court grants or denies grandparenting time based on what is best for the child, according to his or her individual circumstances.

The bill also prohibits the court from ordering grandparenting time if two fit parents of the child oppose it. Since a grandparent's rights are derivative of the rights of his or her own child, that individual should have a say in whether his or her parent spends time with the child.

### **Supporting Argument**

In addition to restoring the ability that grandparents had to seek grandparenting time orders before the *DeRose* decision, the bill expands the circumstances under which individuals may file a complaint or motion for grandparenting time.

Previously, if a child's parents were never married, a person could seek a grandparenting time order only if his or her own child (the parent of the grandchild) had died. Under the bill, if a grandchild's parents have never been married and are not living together, the parents of the child's father may file a complaint for grandparenting time as long as his paternity has 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.

The bill also allows grandparenting time actions in situations in which a grandparent has provided an established custodial environment for the child, whether or not the grandparent has legal custody. If a person has been providing a home for his or her grandchild, the grandparent should have the opportunity to continue seeing the child after that living arrangement has changed.

### **Opposing Argument**

The bill should require a grandparent to prove by clear and convincing evidence that harm to the child will result if grandparenting time is denied, in order to overcome the presumption that a fit parent's denial of grandparenting time does not create a substantial risk of harm to the child. 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.

**Response:** The bill strikes a reasonable compromise by requiring a grandparent to overcome the presumption by a preponderance of the evidence. A clear and convincing standard would make it extraordinarily difficult for a person to obtain a grandparenting time order against the wishes of a child's parent. There can be a tremendous amount of fabrication and distortion in domestic relations cases, and most events are not witnessed by a third party. Nevertheless, the bill will require clear and convincing evidence if an appellate court, in a final nonappealable decision, holds that the preponderance of the evidence standard is unconstitutional.

### **Opposing Argument**

The bill should require a court to find that actual harm to a child would result if grandparenting time were denied, before entering a grandparenting time order. This would help 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.

**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 in the parent-child relationship. The bill handles the issue fairly by setting forth factors that will provide real parameters for judges. Moreover, the court will determine whether grandparenting time is in a child's best interest only after the grandparent already has overcome the presumption and shown that denial of grandparenting time will create a substantial risk of harm to the child.

### **Opposing Argument**

The bill fails to define "fit parent" or require the court to determine that a parent is "fit". A parent who is considered legally fit still might make irrational, unsupportable decisions concerning the child's grandparents, or might



be motivated purely by vindictiveness. Although the bill's best-interest factors include whether the parent's decision to deny, or not offer, grandparenting time is related to the child's well-being, the court will not even get to a best-interest analysis if the presumption concerning a "fit parent's" decision is not overcome, or if two "fit parents" oppose grandparenting time.

### **Opposing Argument**

The bill treats stepparents who adopt a child differently than it treats other adoptive parents. Under the bill, a child's adoption terminates the right of a grandparent to seek a grandparenting time order *except* in the case of a stepparent adoption. Also, a court must dismiss a complaint or motion for grandparenting time if two fit parents sign an affidavit opposing it, *unless* one of the parents is a stepparent who adopted the child. When a person's parental rights to child have been terminated (as they are in a stepparent adoption), the grandparent's rights also should be severed, since the rights of a child's grandparent flow from the rights of the parent. The bill's distinction between adoptive parents is unfair and discriminatory.

**Response:** The bill retains a distinction that had previously existed in the statute. That is, a grandparenting time order could not be sought if a child had been adopted by someone *other than* a stepparent.

Legislative Analyst: Suzanne Lowe

### **FISCAL IMPACT**

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