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West Virginia Takes Refuge in Troxel's Safe Harbor: State Ex Rel. Brandon L. v. Moats

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I. INTRODUCTION

This comment examines the West Virginia Supreme Court of Appeals decision, State ex rel. Brandon L. v. Moats, a recent case upholding West Virginia's grandparent's visitation statute. In Brandon L., the court upheld this statute in light of Troxel v. Granville, the United States Supreme Court decision invalidating a Washington state nonparental visitation statute. The West Virginia Supreme Court held that West Virginia's Grandparent Visitation Act does not interfere with the parental fundamental liberty interest in the care, custody, and control of children. Reasoning that West Virginia's statute is more

1 551 S.E.2d 674 (W. Va. 2001).
3 Brandon L., 551 S.E.2d at 685.
narrowly tailored than the "breathtakingly broad" statute invalidated in *Troxel*, the court held that it was constitutional. The supreme court noted that West Virginia's statute requires a trial court to make two determinations: (1) that visitation is in the best interests of the child, and (2) that visitation will not substantially interfere with the parent-child relationship. Additionally, West Virginia's statute includes a list of twelve specific and one general factor that a court must consider in deciding whether to grant a visitation petition. The *Brandon L.* court concluded that this list of determinative factors renders the statute narrowly tailored enough to be constitutional. Relying on precedent, the court also held that adoption of the grandchild has no legal effect on standing to sue under the grandparent visitation statute.

This case comment addresses the significance of *Brandon L.* in the areas of parental rights and substantive due process jurisprudence. Part II focuses on the historical, social, and legal background of grandparent visitation statutes generally and in West Virginia. Part III examines in detail the United States Supreme Court decision in *Troxel v. Granville*. Next, Part IV discusses the West Virginia Supreme Court decision in *Brandon L.* and its significance in light of the *Troxel* decision. In Part V, this comment will survey how other jurisdictions have applied the *Troxel* decision to their own grandparent visitation statutes in comparison to the West Virginia Supreme Court. Finally, Part VI questions the constitutionality of grandparent's visitation rights legislation considering the substantive due process requirements of the Fourteenth Amendment and the holding in *Troxel*. Part VI will also discuss the future of litigation in this area.

II. HISTORICAL, SOCIAL, AND LEGAL BACKGROUND OF GRANDPARENT VISITATION RIGHTS

In the last several decades, the composition of the typical American family has changed drastically with the increase of the divorce rate. In light of this domestic upheaval, many families and children have turned to grandparents for stability. Today, about 70 million Americans are grandparents, and that number is expected to grow to 80 million by 2010. That Americans are living

4 Id.
5 Id. at 685-86.
6 Id. at 684-85. See factors listed infra note 153.
7 See *Brandon L.*, 551 S.E.2d at 685.
8 See id. at 682.
longer and healthier lives also alters the state of grandparenthood in our country. Moreover, as the number of older Americans grows, so too does interest in senior-centered legislation. Accordingly, the so-called "gray lobby" has become one of the most influential groups in the country. Out of these monumental sociological shifts—the increase in number and power of senior citizens and the change in family make-up—has grown the grandparent visitation movement. In the last four decades, grandparents have bound together to advocate legislation that favors grandparents’ rights to have regular visitation with their grandchildren.

A. Social Changes and Grandparenthood

Grandparents serve an important role in the social structure of families in the United States. Social historians and sociologists note the changes that grandparenthood has undergone in the last century. A century ago, family elders wielded more authority in family matters than today. Furthermore, a reciprocal exchange of resources and services existed in which parents raised children, who, upon reaching adulthood, were expected to support their parents as they aged. Scholars have attributed the current shift away from this social structure to several different factors—the decline of the family farm, the economic growth period following World War II, and the advent of the Social Security system—which made the pattern of intergenerational exchange less necessary.

Today, Americans value the autonomy and financial independence of family members. This independence arguably contributed to the formation of

11 See Elaine D. Ingulli, Grandparent Visitation Rights: Social Policies and Legal Rights, 87 W. VA. L. REV. 295, 296-98 (1985) (describing demographic changes that have increased the political power of older Americans, who have higher life expectancies, more education, and are more affluent than ever before); see also Maegen E. Peek, Grandparent Visitation Statutes: Do Legislatures Know the Way to Carry the Sleigh Through the Wide and Drifting Law?, 53 FLA. L. REV. 321, 322-23 (2001).

12 Erica L. Strawman, Grandparent Visitation: The Best Interests of the Grandparent, Child, and Society, 30 U. TOL. L. REV. 31, 34 (1998); Peek, supra note 11, at 323 (describing the influence of the elderly lobby and quoting House Representative Thomas Downey who remarked, "It is a well known fact that seniors are the most active lobby in this country, and when it comes to grandparents there is no one group more united in their purpose.").


14 Id. at 194.

15 Id.

16 See id. Of course, the children of older citizens still contribute to their parents’ financial security indirectly through their payments to the Social Security fund.

17 See id. at 195.
what some have termed the "new social contract."18 This "contract" refers to the social understanding within families that parents have the right to determine the extent to which "grandparents will nurture their grandchildren."19 Some commentators have decried the effects of this "social contract" because it destroys the "primordial bond between grandparents and grandchildren."20 These commentators see grandparents as the foundation of the family and assert that characterizations of "meddling in-laws" contribute to the degenerating role of grandparents in their grandchildren's lives.21 They stress the important role of grandparents in keeping families together through an emotional support system.22 Although some scholars have cast doubt on the idea that grandparents in America were ever as influential as they are in other countries such as Japan, sociological changes in the last several decades have elevated the role of grandparents in this country and may lend some credence to the notion that grandparents serve as the foundation of the family.23

As the stability of the American family becomes more precarious, the role of grandparents gains more significance. The increase in the divorce rate creates a "functional role for grandparents similar to the roles they had when higher parental mortality and lower standards of living necessitated more intergenerational assistance."24 Grandparents also provide emotional and financial assistance for their families in the event of divorce.25 Thus, children of divorced parents often develop stronger ties to their custodial grandparents than do children in intact families.26 The heightened importance of grandparents in the wake of divorce demonstrates that "strong, functional intergenerational ties are linked to family crises, low incomes, and instability rather than to health, prosperity, and stability."27 Therefore, the fact that grandparents are taking a back-

19 Id. at 92.
20 Id. at 92; see also In re Nearhoof, 359 S.E.2d 587, 590 (W. Va. 1987).
21 See KORNHABER & WOODWARD, supra note 18, at 187.
22 Id.
23 See CHERLIN & FURSTENBER, supra note 13, at 194. See generally id. (discussing the role of grandparents historically in America).
24 Id. at 197.
25 See AARP, Facts About Grandparents Raising Grandchildren, at http://www.aarp.org/confacts/grandparents/grandfacts.html (last visited Nov. 8, 2002) (stating that approximately 11% of grandparents also serve as caregivers to their grandchildren and that 4.5 million grandparents in the United States have custody of their grandchildren).
26 See CHERLIN & FURSTENBER, supra note 13, at 197.
27 Id.
seat role in the family in some cases may actually signal an advance in social welfare.\textsuperscript{28}

Another social factor greatly affecting the state of grandparenthood is population changes. The number of grandparents and older Americans in general is growing rapidly. Currently, about one third of adults in the United States are grandparents.\textsuperscript{29} By the year 2030, one in every five Americans will be over the age of 65.\textsuperscript{30} This population change has led Andrew Churlin and Frank Furstenber to posit a supply and demand theory related to grandparenthood in their book, \textit{The New American Grandparent}. In that book, Churlin and Furstenberg theorize that the rise in population of older Americans and the dramatic decrease in the birth rate since the 1950s has resulted in a higher demand for grandchildren.\textsuperscript{31} Since 1900, the percentage of Americans 65 years and older has more than tripled (4.1\% in 1900 to 12.7\% in 1999).\textsuperscript{32} In 1900 there were 3.1 million people 65 years and older; by 1999 that number had risen to 34.5 million.\textsuperscript{33} With older Americans living longer and the birthrate declining, the demand for grandchildren has risen while the supply has diminished. This demographic reversal from a century ago alters the strategies that grandparents adopt in their family relationships.\textsuperscript{34} Sociologists have suggested that grandparents may become more accommodating in their relations with their children and more circumspect about the norm of noninterference in order to maintain family ties.\textsuperscript{35} Maintaining close relationships with their grandchildren has become increasingly important to grandparents in light of these considerations, giving rise to grandparents who are more involved in their grandchildren's lives and who demand legal visitation "rights."

All of these sociological factors have combined to create a legal climate in which grandparents and parents each assert fundamental rights to children.\textsuperscript{36} Many civil actions involving grandparent visitation statutes express the friction between the competing ideas of, on one hand, grandparents having independent rights to their grandchildren, founded in biology and morality, and on the other

\begin{footnotes}
\item[28] Id.
\item[29] See The Communication Project, \textit{supra} note 10.
\item[30] Id.
\item[31] See \textsc{Cherlin & Furstenber}, \textit{supra} note 13, at 201-04.
\item[33] Id.
\item[34] \textsc{Cherlin & Furstenber}, \textit{supra} note 13, at 202.
\item[35] See \textit{id.} at 203. This noninterference is similar to what Kornhaber and Woodward term the "new social contract." For a fuller discussion of Cherlin and Furstenber's study on grandparents, see Karen Czapanskiy, \textit{Grandparents, Parents and Grandchildren: Actualizing Interdependency in Law}, 26 \textsc{Conn. L. Rev.} 1315, 1322-31 (1994).
\item[36] See, \textit{e.g.}, Coalition for the Restoration of Parent's Rights, \textit{at} http://www.parentsrights.org (last visited Nov. 8, 2002).
\end{footnotes}
hand, grandparents having no separate legal rights because parents have the fundamental and exclusive right to raise their children as they wish. However, as grandparents have become an increasingly powerful lobbying group in this country, they have used their influence to get visitation legislation passed in every state.\(^{37}\) In 1978, the “elderly lobby” successfully advocated a joint resolution of Congress asking the President to proclaim a national Grandparent’s Day.\(^{38}\) On September 9, 1979 Jimmy Carter declared,

Grandparents are our continuing tie to the near-past, to the events and beliefs and experiences that so strongly affect our lives and the world around us. Whether they are our own or surrogate grandparents who fill some of the gaps in our mobile society, our senior generation also provides our society a link to our national heritage and traditions.\(^{39}\)

Today, more grandparents than ever before live longer and more affluent lives, have more leisure time, and greatly value their relationships with their grandchildren. With their large numbers, grandparents have become a powerful force in developing grandparent-friendly legislation that bestows independent legal visitation rights with grandchildren.

B. Common Law

Under common law, grandparents had no legal right to visit their grandchildren.\(^{40}\) Instead, the common law favored parental autonomy in making decisions about child-rearing.\(^{41}\) This rule was justified on the basis that thrusting a child in the middle of a conflict between parents and grandparents would not further the child’s interests.\(^{42}\) Therefore, under common law, parents had only a moral duty to allow visitation with grandparents, and courts could not truncate a

\(^{37}\) See Culley, \textit{supra} note 9, at 238; Strawman, \textit{supra} note 12, at 33.

\(^{38}\) See Peek, \textit{supra} note 11, at 322-23.


\(^{40}\) See Quintal, \textit{supra} note 9, at 835-36; see also King v. King, 828 S.W.2d 630, 632 (K.Y. 1992).

\(^{41}\) See Peek, \textit{supra} note 11, at 324-25 (explaining the parental rights doctrine basis of common law preference for parental autonomy).

\(^{42}\) See \textit{id.} at 324.
parent's right to deny visitation. This tide began to change in the 1960s with the introduction of grandparent visitation statutes.

West Virginia common law followed the majority view of nonparental rights. The West Virginia Supreme Court decided only a few cases involving grandparent visitation rights before the enactment of the Grandparent Visitation Act. In 1978, the court held in *Brotherton v. Boothe* that “[a] parent who properly performs his parental duties has the right to determine with whom his child will associate.” Further, the supreme court asserted that a court that decrees visitation with a child to a nonparent over the objections of the child’s parent “exceeds its authority.” *Brotherton* was upheld in 1979 in *Jeffries v. Jeffries.* Therefore, until the passage of legislation to the contrary, grandparents in West Virginia had no legal right to visit their grandchildren.

C. West Virginia Statutory Law

After the decisions in *Brotherton* and *Jeffries*, the West Virginia legislature enacted the first grandparent visitation rights statute in 1980. This statute altered the common law to give grandparents the legal right to seek visitation in certain circumstances. West Virginia Code section 48-2-15 allowed a court to order grandparent visitation as a part of a divorce or annulment proceeding involving the custody of minor children where the grandparents were related to the child through a party whose whereabouts are unknown or who failed to appear and defend the cause of action. Section 48-2B-1 allowed grandparents to petition for visitation at any time regardless of whether a divorce or annulment proceeding was being conducted, as long as the parent of the grandchild was deceased. This statute allowed the court to order “reasonable and seasonable

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44 See Culley, supra note 9, at 238-40.
46 Id. at 38.
47 Id. at 37.
48 253 S.E.2d 689 (W. Va. 1979) (holding that grandparents have no legal right to custody or to visit and communicate with a grandchild over the parent’s objections).
50 Id. at 539.
51 See id. at 535; see also W. VA. CODE § 48-2-15 (1980).
visitation rights . . . as the court may deem proper and in the best interest of the child or children.\textsuperscript{53}

In \textit{In re Nearhoof},\textsuperscript{54} the West Virginia Supreme Court recognized that sections 48-2B-1 and 48-2-15 create an independent right in the grandparent to seek visitation with a child.\textsuperscript{55} At issue in that case was whether adoption precludes granting grandparents' visitation rights when the mother of a child is deceased and the natural father's second wife seeks to adopt the child. The supreme court held that a court may order reasonable visitation with the children of a grandparent's deceased child where the grandchild has been adopted by the spouse of the deceased child's former spouse.\textsuperscript{56} Thus, the court concluded that adoption does not sever the grandparents' legal rights to visitation.\textsuperscript{57} This decision signaled a retreat from the majority view that adoption severs all family ties.\textsuperscript{58}

Since the first grandparent visitation rights legislation enactment in 1980, the West Virginia legislature has twice amended the original statute and introduced new legislation on this subject. In 1992, new, more expansive legislation was enacted.\textsuperscript{59} These changes permitted grandparent visitation in five situations: \textsuperscript{60}

1. where divorce, annulment, or separate maintenance is ordered;
2. upon abandonment, abrogation, or judicial preclusion of parental visitation;
3. where a parent is deceased;
4. where the minor child has resided with the grandparent, and
5. where the parents are unwed.\textsuperscript{61}

The expanded statute also required the courts to consider the following factors in determining visitation: "(1) the amount of previous contact between the grandparent and the child; (2) whether such visitation would interfere with the parent-child relationship; and (3) the overall effect of grandparent visitation on the child's best interests."\textsuperscript{62} In response to this legislation, commentators suggested that the legislature should provide a concrete list of factors that the courts must use to guide the otherwise


\textsuperscript{54} 359 S.E.2d 587 (W. Va. 1987).

\textsuperscript{55} See id. at 590; see also Price, \textit{supra} note 49, at 540.

\textsuperscript{56} Nearhoof, 359 S.E.2d at 592.

\textsuperscript{57} See id. For more information on the adoption issue, see \textit{infra} Part IV.

\textsuperscript{58} See \textit{Nearhoof}, 359 S.E.2d at 591 n.5 (citing Ingulli, \textit{supra} note 11, at 314-15, and explaining the majority rule for adoption, i.e., stepparent adoptions terminate visitation rights of natural grandparents).

\textsuperscript{59} See Price, \textit{supra} note 49, at 541.

\textsuperscript{60} See id. at 542.

\textsuperscript{61} W. VA. CODE §§ 48-2B-2 to -6 (1992) (current version at § 48-10-101 (2001)); see Price, \textit{supra} note 49, at 542-44. The code also lists conditions that must be present for visitation to be ordered.

\textsuperscript{62} Price, \textit{supra} note 49, at 545.
subjective determination of the "best interests" of the child.\textsuperscript{63} Other jurisdictions had already adopted statutes that listed factors to aid courts in making the subjective "best interests of the child" determination.\textsuperscript{64}

Finally, in 1998, the West Virginia legislature adopted a list of thirteen factors to consider in determining whether to grant visitation to a grandparent.\textsuperscript{65} West Virginia's current statute has twelve separate and fairly detailed sections.\textsuperscript{66} The statute allows a grandparent to seek visitation—even when the family is intact—upon a finding that the visitation would be in the best interests of the child and would not substantially interfere with the parent-child relationship.\textsuperscript{67} This statutory scheme is similar to legislation adopted in other states as it relies primarily on the traditional "best interests of the child" analysis.

III. \textit{Troxel v. Granville} and the Constitutionality of Grandparent Visitation Statutes

To alter common law limitations on nonparental visitation rights, every state in the nation has adopted some form of grandparent's visitation legislation.\textsuperscript{68} However, this legislation's constitutionality has come into question since the United States Supreme Court's decision in \textit{Troxel v. Granville}.\textsuperscript{69} In \textit{Troxel}, the Court found Washington's grandparent visitation statute unconstitutional.\textsuperscript{70} The controversy in that case arose between a mother and the paternal grandparents of her children.\textsuperscript{71} Tommie Granville and Brad Troxel, who were unmarried, had two daughters.\textsuperscript{72} After their relationship ended in 1991, Brad lived

\textsuperscript{63} See id. at 548.
\textsuperscript{64} See id. at 548 n.65.
\textsuperscript{65} W. VA CODE § 48-2B-6 (1998) (current version at § 48-10-601 (2001)).
\textsuperscript{66} W. VA CODE §§ 48-10-101 to -1201 (2001). The domestic relations laws were recodified by 2001 W. Va. Acts 91. Sections 48-2B-1 to -12 were recodified as §§ 48-10-101 to -1201 as of September 1, 2001.
\textsuperscript{67} W.VA. CODE § 48-10-501 (2001).
\textsuperscript{71} See id. at 60.
\textsuperscript{72} Id.
with his parents and brought his daughters there for weekend visits on a regular basis until he committed suicide in 1993.\textsuperscript{73} Initially, Brad’s parents continued to see their granddaughters regularly. After about five months, however, Tommie Granville informed the Troxels that she wanted to limit their visits to one short visit per month.\textsuperscript{74} The Troxels filed a petition for visitation, which the Superior Court granted.\textsuperscript{75} Granville appealed to the Washington Court of Appeals, which, finding visitation in the children’s best interests, remanded the action to the Superior Court.\textsuperscript{76} Thereafter, the Washington Court of Appeals reversed the visitation order finding that the Troxels lacked standing.\textsuperscript{77} The Washington Supreme Court then granted the Troxel’s petition for review of the constitutional issues and found the statute unconstitutional.\textsuperscript{78} During the course of this litigation, Granville married and her husband legally adopted the children.\textsuperscript{79}

In the plurality opinion authored by Justice O’Connor, the Supreme Court reiterated its view that the Fourteenth Amendment’s Due Process Clause “includes a substantive component that ‘provides heightened protection against government interference with certain fundamental rights and liberty interests.’”\textsuperscript{80} The Court also acknowledged the fundamental liberty interest that parents have in the care, custody, and control of their children as “perhaps the oldest of the fundamental liberty interests recognized by this Court.”\textsuperscript{81} Although the Court’s foregoing discussion clearly suggested that it would apply strict scrutiny to the Washington statute, the Court failed to articulate the standard of review.\textsuperscript{82} Rather than specifying a level of scrutiny, the Court used oblique references to “heightened protection” without ever defining that standard.\textsuperscript{83}

Instead of deciding that the statute was a \textit{per se} invalid interference with a fundamental parental due process right, the Court invalidated the statute as it applied to Tommie Granville.\textsuperscript{84} The Court found fault with Washington’s stat-

\begin{itemize}
\item \textsuperscript{73} Troxel, 530 U.S. at 60.
\item \textsuperscript{74} Id. at 60-61.
\item \textsuperscript{75} Id. at 61.
\item \textsuperscript{76} Id.
\item \textsuperscript{77} Id. at 62.
\item \textsuperscript{78} Id. at 63.
\item \textsuperscript{79} Id. at 62.
\item \textsuperscript{80} Id. at 65 (quoting Washington v. Glucksberg, 521 U.S. 702, 720 (1997)).
\item \textsuperscript{81} Id. at 65-66.
\item \textsuperscript{82} See id. at 80 (Thomas, J., concurring).
\item \textsuperscript{83} White, supra note 68, at 108-09. Generally, under strict scrutiny the statute must serve a compelling government interest and be narrowly tailored to achieve that interest, and under rational basis review, the statute must be rationally related to a legitimate government interest. Id. at 108.
\item \textsuperscript{84} See Troxel, 530 U.S. at 73-75.
\end{itemize}
ute in two areas. First, the statute stated in "breathtakingly broad" terms that "any person may petition the court for visitation rights at any time." Second, the statute did not require that a court accord any special weight to the parent's decision about the best interests of the child. In its discussion, the Court concentrated on the lack of consideration of parental preference.

The Court found it problematic that "[i]n effect, the judge placed on Granville, the fit custodial parent, the burden of disproving that visitation would be in the best interest of her daughters." The Court asserted that instead of placing this burden on parents, the statute should reflect a presumption that "fit" parents act in the best interests of their children. In fact, the Court explained 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 to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." Therefore, the Court concluded that if a "fit" parent's decision about visitation comes under review, the court "must accord at least some special weight to the parent's own determination." As the statute was written, it placed "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." Moreover, the Court cited the Washington Supreme Court finding that Washington's statute is unconstitutional because it "requires no threshold of harm," even though the "Constitution permits a State to interfere with the right of parents to rear their children only to prevent harm or potential harm to a child." However, the Court did not address the necessity of finding harm in the opinion. The Court also emphasized that Granville did not intend to eliminate visitation completely, but rather that she only wanted to limit the visitation

85 Id. ("[Washington Revised Code] section 26.10160(3) provides: 'Any person may petition the court for visitation rights at any time including, but not limited to, custody proceedings. The court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances.").
86 Id. at 67 (quoting Washington's statute).
87 Id.
88 Id. at 69.
89 Id.
90 Troxel, 530 U.S. at 68-69 (citing Parham v. J.R., 442 U.S. 584, 602 (1979)).
91 Id.
92 Id. at 70.
93 Id. at 67.
94 Id. at 63. The U.S. Supreme Court did not expressly discuss this aspect of the statute in its opinion, but it did affirm the Washington Supreme Court decision which rested partially on that ground.
with the Troxels. As the Court noted, in many jurisdictions courts may only award visitation when a parent has denied visitation. Therefore, little factual basis existed for awarding visitation in this case.

On those grounds, the Court found that Washington’s statute was unconstitutional because of its “sweeping breadth” and “the application of that broad, unlimited power” in the specific facts of the case. By finding the Washington statute “breathtakingly broad” and invalid as applied to Granville, the plurality sidestepped the question of whether all nonparental visitation statutes must include a showing of harm or potential harm to the child before visitation is awarded. The Court also avoided defining the “precise scope of the parental due process right in the visitation context.” Instead, the Court recognized that “much state-court adjudication in this context occurs on a case-by-case basis” and decided that it would be better to allow state courts to continue interpreting and applying their own state statutes. Thus, the Court did not find all third-party visitation statutes per se invalid, nor did it address the scope of parental rights in the context of third party visitation.

Justice Souter wrote a concurring opinion in which he asserted that the Washington statute should be invalidated on its face, not just in its application to Granville. He found the statute to be an unconstitutional infringement on parental due process rights. Justice Thomas also concurred in the judgment and wrote separately to point out that the plurality did not articulate an appropriate standard of review. Thomas would apply strict scrutiny to infringements of fundamental rights. Moreover, Justice Thomas declared that Washington lacked even a legitimate interest in “second-guessing a fit parent’s decision regarding visitation with third parties.”

Justice Stevens authored a dissenting opinion, in which he initially asserted that the Court should have denied certiorari because “there was no pressing need to review a State Supreme Court decision that merely requires the state legislature to draft a better statute.” He then intimated that parental rights

95 See Troxel, 530 U.S. at 71.
96 See id. (citing the statutes of Mississippi, Oregon, and Rhode Island).
97 Id. at 73.
98 Id. at 57, 73.
99 Id. at 73.
100 Id.
101 See id. at 76 (Souter, J., concurring).
102 Id. at 80 (Thomas, J., concurring).
103 See id. (Thomas, J., concurring).
104 Id. (Thomas, J., concurring).
105 Id. at 80-81 (Stevens, J., dissenting).
have never been absolute, and suggested that children might have a fundamental interest in "preserving established familial or family-like bonds." Justice Scalia also authored a dissenting opinion in which he stated his belief "that the State has no power to interfere with parent's authority over the rearing of their children . . ." Nonetheless, Scalia asserted that the Constitution does not empower the Supreme Court to deny legal effect to laws that infringe on an unenumerated right. Scalia claimed that expanding substantive due process to include the parental right to exclude third parties from visitation would create new law, which he felt would be better left to state legislators who "have the great advantages of doing harm in a more circumscribed area . . ." The fragmented, plurality opinion draws attention to the differing approaches of the Justices to parental rights. Lower courts across the country reflect these varying approaches, arriving at surprisingly different results in their applications of Troxel.

IV. The West Virginia Supreme Court Applies Troxel to Its Grandparent Visitation Statute

With its refusal to articulate a standard of review and its fact-based reasoning, the Supreme Court's decision in Troxel left state courts with precious little guidance. Since the Troxel decision, several states, including West Virginia, have had the opportunity to apply its reasoning to challenges of grandparent visitation statutes. West Virginia addressed the question in State ex rel. Brandon L. v. Moats. In this case, the West Virginia Supreme Court of Appeals found that the Grandparent Visitation Act does not violate a parent's substantive due process right of liberty to exercise care, custody, and control of his or her children without undue interference from the state.

A. Facts and Procedural Background of Brandon L.

Brandon L., like Troxel, involved a visitation petition by paternal grandparents following a stepparent adoption. In this case, Carol Jo L. and

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106 Troxel, 530 U.S. at 88 (Stevens, J., dissenting).
107 Id. at 92 (Scalia, J., dissenting).
108 See id. (Scalia, J., dissenting).
109 Id. at 93 (Scalia, J., dissenting).
110 The disparity in lower court approaches will be explored infra Part V.
111 See infra Part V (discussing how other states have applied Troxel to their grandparent visitation statutes).
112 551 S.E.2d 674 (W. Va. 2001).
113 Id. at 685.
David Allen C., birth parents of Alexander David, divorced in 1998. Carol L. was awarded sole care, custody and control of Alexander, and David Allen C. was awarded visitation rights. In accordance with the divorce order, David Allen’s visitation rights were exercised under the supervision of Linda K, his mother (the child’s paternal grandmother). In February 2000, Carol Jo L. remarried, and her new husband legally adopted the child in May of 2000. After the adoption, Carol L. (the mother) sent Linda K. (grandmother) a letter informing her that she no longer had grandparent’s rights and could no longer visit Alexander. The grandparents filed an action in circuit court on May 23, 2000 seeking visitation rights. The parents then entered a motion to dismiss, claiming that the grandparents did not have standing under the Grandparent Visitation Act. Consequently, the family law master recommended dismissal on those grounds. Afterward, the grandparents sought review of this recommended disposition before the circuit court. The circuit court rejected the family law master’s recommendation and recommitted the matter to the family law master for an evidentiary hearing to determine whether visitation should be granted. The case reached the West Virginia Supreme Court when the parents sought a writ of prohibition to prevent the matter from proceeding to the evidentiary hearing.

B. Discussion of Brandon L.

In its majority opinion, authored by Justice Albright, the West Virginia Supreme Court addressed two broad topics: standing and the constitutionality of the statute. It found that the grandparents had standing to sue and that the

\[^{114}\text{Id. at 676.}\]
\[^{115}\text{Id.}\]
\[^{116}\text{Id.}\]
\[^{117}\text{Id.}\]
\[^{118}\text{Id. at 677. David Allen C. (the biological father) “is purportedly opposed to contact between his son and Respondents because he ‘doesn’t want [Alexander David] to turn out like . . . [he did.]’” Id. at 677 n.7.}\]
\[^{119}\text{Brandon L., 551 S.E.2d at 677.}\]
\[^{120}\text{Id.}\]
\[^{121}\text{Id.}\]
\[^{122}\text{Id.}\]
\[^{123}\text{Id.}\]
\[^{124}\text{Id. at 676.}\]
\[^{125}\text{Id. at 676-88.}\]
statute was not invalidated by *Troxel.* As an initial matter, the court addressed the appropriate standard of review for a writ of prohibition. The parents contended that the grandparents had no standing to seek visitation rights and that the lower court had no jurisdiction to hear this matter. Alternatively, the parents asserted that the Act was unconstitutional on its face and as applied to them. For both of these contentions, the court found that a writ of prohibition was procedurally appropriate.

1. Standing

In its analysis, the supreme court first discussed the issue of standing and concluded that the grandparents did have standing to sue under the Grandparent Visitation Act. The parents argued that West Virginia Code section 48-2B-9 governed the issue of standing. This statute, entitled “Effect of remarriage or adoption on visitation for grandparents,” states in pertinent part: “If a child who is subject to a visitation order under this article is later adopted, the order for grandparent visitation is automatically vacated when the order for adoption is entered, unless the adopting parent is a stepparent, grandparent or other relative of the child.” However, the court concluded that this section did not address standing, and instead pointed to section 48-2B-3, which allows a grandparent to apply to the circuit court for an order granting visitation with a grandchild. Further, the court cited section 48-2B-4(b), which governs procedures to be used when the visitation petition is not included as part of another proceeding (such as a divorce or legal separation). Additionally, the court noted that section 48-2B-4(c) contains procedures that apply when a petition is filed under section 48-2B-4(b). These procedural requirements stipulate that

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126 *Brandon L.*, 551 S.E.2d at 676-88.
127 *See id.* at 677.
128 *Id.*
129 *Id.*
130 *See id.* With respect to the jurisdictional challenge, the court cited to *Hoover v. Berger*, 483 S.E.2d 12 (W. Va. 1996), which states that “[p]rohibition lies only to restrain inferior courts from proceeding in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers . . .” (quotation omitted). For the constitutional challenge, *State ex. rel. Wilmoth v. Gustke*, 373 S.E.2d 484, 484 n.1 (W. Va. 1988) governed: “[p]rohibition may be used as a means to test the constitutionality of a statute.”
131 *See Brandon L.*, 551 S.E.2d at 677.
132 *Id.* at 677-78. For the purposes of discussing the court opinion, this comment will refer to the domestic relations law before it was recodified under W. VA. CODE § 48-10-101 to -1201 (2002).
133 *Id.* at 678.
134 *See id.* at 678-79. This section has been recodified as W. VA. CODE § 48-10-402 (2002).
when such a petition is filed, "the matter shall be styled 'In re grandparent visitation of petitioner's(s') name(s)." Additionally, section 48-2B-4(d) provides for the appointment of a guardian *ad litem* for the child "to assist the court in determining the best interests of the child regarding grandparent visitation." The court read these inclusions as evidence that the legislature intended that grandparents could seek visitation even if no other domestic relations proceeding was pending.

The parents also asserted that the state's adoption statute precluded the grandparents' standing. In support of this argument, the parents raised section 48-4-11, which provides that upon the entry of an adoption order

any person previously entitled to parental rights, any parent or parents by any previous legal adoption, and the lineal or collateral kindred of any such person, parent or parents, except any such person or parent who is the husband or wife of the petitioner for adoption, shall be divested of all legal rights.

However, the court disregarded this provision, finding that section 48-2B-1 of the Grandparent Visitation Act makes it clear that it is the exclusive legislation regarding grandparent visitation. The court also reasoned that section 48-4-11, which was enacted in 1882 "was not written with concern for the correlative divestment of a grandparent's rights to visitation." Finally, the court pointed out that because the legislature had twice amended the Grandparent Visitation Act (which was first enacted in 1980) since the last amendments to this section of the adoption statute were made in 1984, it did not perceive any conflict between the statutes.

Furthermore, the court cited the reasoning used in *In re Nearhoof*, a case that directly addressed the issue of whether the adoption statutes and the grandparent act were in contradiction. The *Nearhoof* court asserted:

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135 *Brandon L.*, 551 S.E.2d at 678.

136 *Id.*

137 *See id.* at 680.

138 *Id.*; see W. VA. CODE § 48-4-11 (1984).

139 *Brandon L.*, 551 S.E.2d at 680 ("[I]t is the express intent of the Legislature that the provisions for grandparent visitation that are set forth in this article are exclusive." (quoting W. VA. CODE § 48-2B-1 (1998) (current version at § 48-10-102 (2001)).

140 *Id.* at 681.

141 *See id.*

142 359 S.E.2d 587 (W. Va. 1987). *In re Nearhoof* relied heavily on an emotional argument similar in tenor to the "primordial bond" other commentators have attributed to the grandparent-grandchild relationship.
It is a biological fact that grandparents are bound to their grandchildren by the unbreakable links of heredity. It is common human experience that the concern and interest grandparents take in the welfare of their grandchildren far exceeds anything explicable in purely biological terms. A very special relationship often arises and continues between grandparents and grandchildren. . . . Visits with a grandparent are often a precious part of a child's experience and there are benefits which devolve upon the grandchild from the relationship with his grandparents which he cannot derive from any other relationship. Neither the Legislature nor this Court is blind to human truths which grandparents and grandchildren have always known.  

In *Nearhoof*, the court held that "rather than being in conflict, the adoption and grandparent statutes had the same underlying objective: 'To provide substitute parental relationships for children who have been deprived of the benefits of a healthy relationship with one or both natural parents.'" Following precedent, the court held that the legislature did not intend for these statutes to be in conflict and found that the grandparents did have standing. Accordingly, in *Brandon L.*, the court denied the parents' challenge to the grandparents' standing.

2. Constitutionality of the Grandparent Visitation Act

The petitioners claimed that the act was unconstitutional both on its face and as applied, in light of *Troxel v. Granville*. To address this claim, the court first reviewed *Troxel*. It examined the Supreme Court's analysis of the Washington statute invalidated in *Troxel* and found that, in comparison, West Virginia's statute was sufficiently narrowly drawn to pass constitutional muster. As the court pointed out, the United States Supreme Court did not conclude that the Washington statute was unconstitutional on its face, but only as it applied to the facts of that particular case. Nor did the Supreme Court find all nonparental visitation statutes *per se* invalid. Therefore, West Virginia's grandparent

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143 *Id.* at 592 (quoting Mimkon v. Ford, 332 A.2d 199, 204-05 (N.J. 1975)).
144 *Brandon L.*, 551 S.E.2d at 681 (quoting *Nearhoof*, 359 S.E.2d at 591).
145 *See id.* at 681-82.
146 530 U.S. 57 (2002). Because of the procedural posture of this case, the court only addressed the facial challenge.
147 *See Brandon L.*, 551 S.E.2d at 683.
148 *See id.* at 684.
149 *See id.*
visitation statute was held to be constitutional primarily because it was better drafted than Washington's statute.\textsuperscript{150}

The court differentiated West Virginia's statute from Washington's "simplistic and broadly-worded two-sentence statute," noting that West Virginia's law does not allow "any person" to petition for visitation, but rather, only grandparents may petition for visitation.\textsuperscript{151} Moreover, the statute requires an affirmative determination that such visitation "would not substantially interfere with the parent-child relationship."\textsuperscript{152} The Brandon L. court also found it important that the West Virginia statute lists twelve specific and one general factor to help the trial court determine whether visitation should be granted, in addition to the threshold requirements that visitation is in the best interests of the child and does not substantially interfere with the parent-child relationship.\textsuperscript{153}

\begin{itemize}
\item \textsuperscript{150} See id. at 684-85.
\item \textsuperscript{151} Id. at 684. (quoting Troxel, 530 U.S. at 57).
\item \textsuperscript{152} Id.
\item \textsuperscript{153} See id. at 684-85. The "[f]actors to be considered in making a determination as to a grant of visitation to a grandparent" are as follows:
\begin{itemize}
\item (1) The age of the child;
\item (2) The relationship between the child and the grandparent;
\item (3) The relationship between each of the child's parents or the person with whom the child is residing and the grandparent;
\item (4) The time which has elapsed since the child last had contact with the grandparent;
\item (5) The effect that such visitation will have on the relationship between the child and the child's parents or the person with whom the child is residing;
\item (6) If the parents are divorced or separated, the custody and visitation arrangement which exists between the parents with regard to the child;
\item (7) The time available to the child and his or her parents, giving consideration to such matters as each parent's employment schedule, the child's schedule for home, school and community activities, and the child's and parents' holiday and vacation schedule;
\item (8) The good faith of the grandparent in filing the motion or petition;
\item (9) Any history of physical, emotional or sexual abuse or neglect being performed, assisted or condoned by the grandparent;
\item (10) Whether the child has, in the past, resided with the grandparent for a significant period or periods of time, with or without the child's parent or parents;
\item (11) Whether the grandparent has, in the past, been a significant caretaker for the child, regardless of whether the child resided inside or outside of the grandparent's residence;
\item (12) The preference of the parents with regard to the requested visitation; and
\item (13) Any other factor relevant to the best interests of the child.
\end{itemize}
\end{itemize}

The court emphasized that one of the listed factors is "the preference of the parents with regard to the requested visitation." This factor is notable because the lack of consideration of parental preference was one of the significant faults that the Troxel Court found in the Washington statute. The parents argued that the delineation of the factors suggested that the legislature intended for each of them to be given equal weight, but the court found no support for this argument. Although the procedural stance of the case did not afford the opportunity to determine the amount of weight that should be attached to the parental preference factor, the court suggested that in light of the Troxel decision, "the court must accord at least some special weight to the parent's own determination."

The court also found that West Virginia's statute addressed almost every concern raised by Troxel. Many of these concerns were alleviated by the two-prong standard of best interests and lack of substantial interference with the parent-child relationship. Because the Act requires a consideration of parental preference and an initial determination that the visitation will not detrimentally affect the parent-child relationship, the court asserted that the "constitutional deficiencies presented by the Washington statute are not present here." To further establish the facial constitutionality of the statute, the court continued to discuss its potential applications. First, the court examined the statutory burden of proof requirements and the factor of "whether there has been an established relationship between the child and his/her relative prior to the subject litigation." Although recognizing that the legislative purpose of grandparent visitation statutes is to "ensure the welfare of the children . . . by protecting the relationships those children form with . . . third parties' such as grandparents," the court stated that the grandparents bear the burden of proving that visitation will be in the best interest of the child and will not substantially interfere with the parent-child relationship. In the statute, the legislature included a burden of proof standard requiring proof by a preponderance of the evidence that the requested visitation is in the best interest of the child. As the

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154 Brandon L., 551 S.E.2d at 685 (referring to factor 12).
155 Troxel, 530 U.S. at 68-69.
156 Brandon L., 551 S.E.2d at 685.
157 Id. (quoting Troxel, 530 U.S. at 70).
159 Brandon L., 551 S.E.2d at 686.
161 Brandon L., 551 S.E.2d at 686 (quoting Troxel, 530 U.S. at 64); see W. Va. Code § 48-2B-5(a).
162 See Brandon L., 551 S.E.2d at 685. The statute provides that if the parent through which the grandparent is related to the child does not have or share custody or has visitation privileges, then the grandparent will be awarded visitation if a preponderance of the evidence shows that
court conceded, this burden will be difficult to meet where adoptions have preceded the visitation petition and even more difficult in the absence of an established relationship between the grandparents and the children. Thus, the court suggested that the grandparent’s burden of proving that visitation will be in the best interests of the child renders the act merely a small intrusion on parent’s liberty interest in the custody, care, and control of their children.

Second, the supreme court reframed the meaning of section 48-10-501, which states that “[t]he circuit court shall grant reasonable visitation to a grandparent upon a finding that visitation would be in the best interests of the child and would not substantially interfere with the parent-child relationship.” In this regard, the court placed special emphasis on the significance of any interference with the parent-child relationship. The court expressed that it would be preferable for adults involved in visitation disputes to make agreements without the intervention of the courts; however, it recognized that voluntary agreements are not always possible. The court further clarified that the statute under consideration provides a comprehensive and fair means by which the best interests of the children and the relationships with their respective parents or grandparents can be protected from harm resulting either from the inconsiderate or excessive demands of grandparents or the obstinate or unreasonable and insignificant objections of parents, any of which may, on occasion, be driven more by emotion than pursuit of proper interests of the children and their parents.

Recognizing these considerations, the supreme court urged lower courts to be attentive to the need for careful and complete findings of fact and conclusions of law when ruling on actions brought under the Act. In so doing, the court expanded the meaning of “substantial” so that this test will only be met by interferences that the trial court determines to be serious, rather than inconsequential. The court found that this dual-pronged statutory scheme “constitutes a
workable means by which the legitimate interests of the children in maintaining a viable relationship with their grandparents and the liberty interests of parents relative to the care, custody, and control of their children can be effectively examined, protected, and promoted.\textsuperscript{169}

In summary, the majority held that West Virginia's visitation statute passes constitutional muster because it permits only grandparents to petition for visitation and because the Act requires the trial court to undertake a two-prong analysis that examines the best interests of the child and the protection of the parent-child relationship from substantial interference.\textsuperscript{170} The court stressed that if either prong of that two-prong test is not satisfied, then the petition for grandparent visitation fails.\textsuperscript{171} According to the court, because the statute requires an initial determination that visitation will not detrimentally affect the parent-child relationship and because parental preference is considered, the constitutional problems found in \textit{Troxel} are not present in West Virginia's statute.\textsuperscript{172} Therefore, West Virginia's grandparent visitation act was deemed constitutional in light of the holding in \textit{Troxel}.\textsuperscript{173}

Justice Davis submitted a vigorous dissent in which she expressed concern about the effects the majority opinion would have on adoption law in the state.\textsuperscript{174} Previously, adoptions were considered a complete divestiture of an adoptee's former familial and legal ties, but the majority's decision allowed a legal relationship to survive an adoption by letting grandparents petition for visitation of their former grandchildren.\textsuperscript{175} Justice Davis also expressed concern about the security and finality of adoptions.\textsuperscript{176} Additionally, Justice Davis asserted that the opinion should only be applied prospectively because it was a departure from prior precedent and applying it retroactively would not provide enough notice.\textsuperscript{177}

\textsuperscript{169} \textit{Id.} at 687.

\textsuperscript{170} See \textit{Brandon L.}, 551 S.E.2d at 687.

\textsuperscript{171} \textit{Id.} at 687-88.

\textsuperscript{172} The court does not address an as-applied challenge because of the procedural phase of the case.

\textsuperscript{173} See \textit{W. Va. Grandparents Lose Battle}, \textit{CHARLESTON GAZETTE}, Jan. 30, 2002, at 2D (reporting that the grandparent's visitation petition in this case after remand was denied).

\textsuperscript{174} See \textit{Brandon L.}, 551 S.E.2d at 688-92 (Davis, J., dissenting). Justice Maynard joined in the dissenting opinion.

\textsuperscript{175} \textit{Id.} at 688 (Davis, J., dissenting).

\textsuperscript{176} \textit{Id.} at 688-91 (Davis, J., dissenting).

\textsuperscript{177} \textit{Id.} at 688-92 (Davis, J., dissenting). A full discussion of the implications of this case to adoption in West Virginia, while merited by this decision, is beyond the scope of this comment. \textit{But see id.} at 687 n.21 ("We simply do not foresee either the end of adoptions or a consequential rash of ensuing litigation from grandparents seeking visitation rights as a result of this opinion.").
V. **Troxel’s Overall Effect on Grandparent Visitation Statutes**

In the mid-1990s some commentators claimed that nonparental visitation statutes had seen their high point, but the United States Supreme Court breathed new life into these statutes with its holding in *Troxel v. Granville*. The Court had the perfect opportunity to declare that all nonparental visitation statutes impermissibly interfered with the parent’s fundamental liberty interest in the custody, care, and control of their children, but it declined to do so. Furthermore, the Court did not articulate a standard of review, leaving state courts struggling to follow *Troxel’s* precedent. Instead, the Court showed a preference for case-by-case analysis in the area of parental rights.

Since the *Troxel* decision, several other states besides West Virginia have applied the Court’s reasoning to their own statutes. Some states have asserted that grandparent visitation rights are a minimal intrusion on parental rights and have applied a rational basis standard of review. For instance, the Missouri Court of Appeals upheld Missouri’s grandparent visitation statute on the basis that the intrusion on parental rights is “miniscule.” That court found it notable that the United States Supreme Court did not declare nonparental visitation statutes *per se* violative of the Due Process Clause. As to the appropriate standard of review, the Missouri court defended the use of the less demanding “minimal intrusion” standard of review by asserting that *Troxel* did not compel the use of strict scrutiny and that, in fact, “the plurality in *Troxel* scarcely mentions the appropriate standard of review for such cases.” Additionally, the court found Missouri’s statute to be constitutional in comparison to the statute invalidated in *Troxel*. The court pointed to the “differences in facts, statutory language, and precedent, combined with the unanswered questions of *Troxel*, [which] lead this court to conclude that the application of Missouri’s grandparent visitation statute in this case was constitutional and that the statute itself remains viable post-*Troxel*.” Thus, Missouri’s grandparent visitation

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179 See Culley, supra note 9, at 246-47.

180 See White, supra note 68, at 109.

181 See Cabral v. Cabral, 28 S.W.3d 357 (Mo. Ct. App. 2000); see also Galjour v. Harris, 795 So. 2d 350 (La. 2001); White, supra note 68, at 112.

182 See Cabral, 28 S.W.3d at 365.

183 See id. at 363.

184 See id. at 365-66.

185 See id. at 366.
statute was upheld on two main grounds: (1) it satisfied a rational basis/minimal intrusion test, and (2) it was better drafted than Washington’s statute.186

Similarly, the Arizona Court of Appeals upheld Arizona’s grandparent visitation statute on the grounds that it required the court to give weight to the parent’s visitation decisions.187 The Arizona court also declined to use strict scrutiny because Troxel did not require its use, and instead used a rational basis standard of review.188 Indeed, many other jurisdictions have taken advantage of the considerable latitude afforded by the United States Supreme Court in Troxel to uphold their states’ statutes on the basis that they were more narrowly tailored than Washington’s, pointing out that Troxel did not find nonparental visitation statutes facially invalid.189 These courts conclude that under the traditional best interests test, parental rights are not absolute.

Conversely, several states have declared their grandparent visitation statutes unconstitutional in the aftermath of Troxel.190 For instance, in Santi v. Santi,191 the Supreme Court of Iowa followed the reasoning of Troxel and expressly applied strict scrutiny to its statute.192 The court concluded that the stat-

186 See White, supra note 68, at 111-13.
188 Id. at 106.
189 See, e.g., Jackson, 18 P.3d at 100; In re Marriage of Harris, 112 Cal. Rptr. 2d 127 (Cal. Ct. App. 2001) (upholding statute on the basis that it is more narrow than Washington’s), petition for review granted, 37 P.3d 379 (Cal. 2002); Zeman v. Stanford, 789 So. 2d 798 (Miss. 2001) (upholding its grandparent visitation statute on the grounds that it was more narrowly drawn than Washington’s in Troxel); Currey v. Currey, 650 N.W.2d 273 (S.D. 2002) (upholding its grandparent visitation statute on grounds that it is not overbroad like Washington’s statute); Lilley v. Lilley, 43 S.W.3d 703 (Tex. 2001) (upholding statute more narrowly tailored than Washington’s statute); see also Rideout v. Riendeau, 761 A.2d 291 (Me. 2000) (applying strict scrutiny, grandparent visitation statute upheld because government has compelling interest and statute is narrowly drawn).
191 633 N.W.2d 312 (Iowa 2001).
192 Id. at 318.
ute was unconstitutional because it did not require the presumption that “fit” parents act in their child’s best interests. The court explained that, “[w]ithout a threshold finding of unfitness, the statute effectively substitutes sentimentality for constitutionality. It exalts the socially desirable goal of grandparent-grandchild bonding over the constitutionally recognized right of parents to decide with whom their children will associate.”

In Illinois, a grandparent visitation statute was invalidated on different constitutional grounds. The Supreme Court of Illinois held that the burden of litigating claims under Illinois’s grandparent visitation statute results in an unconstitutional infringement on parental substantive due process. The court asserted that,

[t]he parents must presumably hire attorneys, and then present evidence and defend their decision regarding the visitation before a trial court. The parents’ authority over their children is necessarily diminished by this procedure. This can only be characterized as a significant interference with parents’ fundamental right to make decisions regarding the upbringing of their children.

Interestingly, the *Troxel* plurality opinion, as well as Justice Kennedy’s dissent, introduced this constitutional theory. According to Justice O’Connor, “the burden of litigating a domestic relations proceeding can itself be ‘so disruptive of the parent-child relationship that the constitutional right of a custodial parent to make certain basic determinations for the child’s welfare becomes implicated.’” The Court recognized that Granville’s litigation costs were “without a doubt already substantial,” and therefore, to avoid any further burdens on her parental rights, ordered, without remand, that entry of the visitation order would be unconstitutional. Thus, the United States Supreme Court acknowledged that the costs associated with litigating against grandparent visitation statutes could be considered an impermissible infringement on parental rights.

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193 See id. at 321.
194 Id. at 320; see also Brooks v. Parkerson, 454 S.E.2d 769, 773 (Ga. 1995) (finding Georgia’s grandparent visitation statute unconstitutional, noting that “there is insufficient evidence that supports the proposition that grandparents’ visitation with their grandchildren always promotes the children’s health or welfare”).
195 See Lukay, 739 N.E.2d at 521.
196 Id. at 531-32.
198 Id.
199 Id.
Taken as a whole, the cases decided after *Troxel* seem to indicate that constitutional analysis of nonparent visitation statutes largely depends on the standard of review applied and the scope of parental rights accorded by a given court. These post-*Troxel* decisions demonstrate that within the analysis of *Troxel*, courts may justifiably interpret their grandparent visitation statutes to be either constitutional or unconstitutional. Through its fragmented opinion in *Troxel*, the Supreme Court has created a safe harbor for state courts to interpret their statutes broadly to give special weight to parental preference as to visitation. However, *Troxel* also left room for states to invalidate their statutes on constitutional grounds, depending on the scope courts give to parental liberty interests and whether the court adheres to the sentimental view of the role of grandparents in children's lives.

Applying the former approach, the West Virginia Supreme Court upheld its statute, emphasizing the importance of parental preference as one of the factors a court must consider in determining whether to grant visitation. The court noted that the placement of this factor did not necessarily suggest that it should be weighed equally with the other factors—implying that it could be given more weight:

[R]ather than making new law, we have merely interpreted the act's existing provisions in light of the pronouncements made by the United States Supreme Court in *Troxel*. And, as discussed in full above, we have found West Virginia's act to be well within the constitutional concerns addressed in *Troxel*, given the act's specific identification of parental preference as a factor which directly impacts on the issue of visitation.

Although the *Brandon L.* court did not articulate a rational basis standard, its emphasis on the burden of proof requirement found in West Virginia's statute seems similar to the "minimal intrusion" analysis found in other jurisdictions. According to the Supreme Court of Appeals, in West Virginia, there is a presumption that "fit" parents act in the best interests of their children because grandparents must prove that visitation is in the best interests of the child by a preponderance of the evidence. In so doing, the court recast the meaning of the statute in order to find it constitutional. This approach is authorized by *Troxel*, which, with its failure to define the scope of parental rights, created the opportunity for courts to redefine their own statutes so that they could be

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200 See White, supra note 68, at 114; see also Brandon L., 551 S.E.2d at 685.


202 Id.

203 See id. at 685; see also Cabral v. Cabral, 28 S.W.3d 357 (Mo. Ct. App. 2000).

204 See W. VA. CODE § 48-10-702(a) (2002) ("the grandparent shall be granted visitation if a preponderance of the evidence shows that visitation is in the best interests of the child").
deemed constitutional. Essentially, the *Troxel* analysis calls for a comparison between the statute in question and Washington’s poorly worded, broad statute. Therefore, West Virginia’s grandparent visitation statute and many others have been found facially constitutional in light of the pronouncements in *Troxel*.

VI. CONCLUSION

Sociological changes in the United States, such as the increase in the divorce rate, have altered and highlighted the role of grandparents in our society in the last several decades. Advances in medicine and health awareness along with increases in wealth have created a society in which Americans live longer and healthier lives. All of these changes have led to the increasing power of the “elderly lobby” to influence the creation of senior-centered legislation such as grandparent visitation statutes. These statutes alter the common law, which favored parental autonomy and provided grandparents with no legal right to visit their grandchildren. Today, every state in the Union has passed grandparent visitation legislation. These statutes have come under scrutiny since the decision in *Troxel v. Granville*, which found Washington’s nonparental visitation statute unconstitutional because of its breadth and failure to accord any special weight to parental preference. Unfortunately, however, *Troxel*’s plurality opinion offers little guidance to lower courts. Instead, state courts are left to make decisions based more on subjective ideas about parental rights and the value of grandparents to children than on specific judicial interpretations of law. With this backdrop, the West Virginia Supreme Court, like several other state courts, recently found its own grandparent visitation statute to be constitutional.

The future of the West Virginia grandparent visitation statute seems safe for the foreseeable future. With *Troxel*, the United States Supreme Court had the opportunity to hold all nonparental visitation statutes unconstitutional, but it declined to do so. Since West Virginia’s statute is much more narrowly tailored than the statute invalidated in *Troxel*, it will likely withstand any arguments of unconstitutionality, especially since other jurisdictions have similarly upheld their own statutes.

West Virginia’s grandparent visitation statute is different from Washington’s in several key aspects. As interpreted by the Supreme Court of Appeals, West Virginia’s statute begins with the rebuttable presumption that “fit” parents act in their children’s best interests. In addition, the statute requires a two-prong showing that visitation will be in the best interests of the

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206 In the case of grandparents seeking visitation of grandchildren they are related to through a child who has custody or visitation rights, this presumption is rebuttable by clear and convincing evidence; if the grandparent is related to the grandchild through a child who has no custody or visitation rights, then the grandparent need only prove that visitation would be in the best interests of the child by a preponderance of the evidence. W. VA. CODE § 48-10-702 (2001).
child and will not substantially interfere with the parent-child relationship. The statute also lists twelve specific and one general factor for the court to consider in determining whether to grant visitation, one of which is parental preference. The West Virginia Supreme Court has suggested that this factor may be given greater weight than the other listed factors. As the court claims, most of the problems identified in Troxel are ameliorated in the West Virginia statute.

However, several arguments can be made that West Virginia’s grandparent visitation statute is unconstitutional, even given the imprecise language of Troxel. For instance, West Virginia’s statute still does not require an initial finding of harm or potential harm. Arguably, this finding is needed because the Washington Supreme Court asserted that the Constitution required such a finding of harm and in its review in Troxel, the United States Supreme Court did not contradict this conclusion. Additionally, the West Virginia Supreme Court could have found that the burden of litigating against a visitation petition was an impermissible burden on parental rights, as suggested by the Troxel plurality.

Generally, grandparent visitation statutes also raise line-drawing problems. Is there any meaningful difference between grandparents asserting visitation rights than aunts, uncles, or older siblings seeking rights to visit children with whom they have family ties? Moreover, are these family connections much different in character than the relationships developed by close family friends, neighbors, or stepparents? Significantly, some states, unlike West Virginia, do not allow visitation petitions of children in intact families, but the West Virginia Supreme Court did not address this issue in its opinion. Finally, and perhaps most importantly, many would maintain that any nonparental visitation statute impermissibly intrudes on a fit parent’s fundamental interest in the care, custody, and control of her children and that states do not have a compelling interest justifying interference with parental rights.

Until the United States Supreme Court clarifies the appropriate standard of review, nonparental visitation statutes will continue to be held valid under a

208 See supra note 153 and accompanying text (listing the factors set forth in the statute).
210 Id.
211 Troxel, 530 U.S. at 63.
212 Id. at 75.
213 King v. King, 828 S.W.2d 630, 635 (Ky. 1992) (Lambert, J., dissenting).
214 See, e.g., Troxel, 530 U.S. at 91 (Scalia, J., dissenting) ("[A] right of parents to direct the upbringing of their children is among the 'unalienable Rights' with which the Declaration of Independence proclaims 'all Men . . . are endowed by their Creator.'"); see also id. at 80 (Thomas, J., concurring); id. at 78-79 (Souter, J., concurring); King, 828 S.W.2d at 634 (Lambert, J. dissenting) ("[M]ere improvement in quality of life is not a compelling state interest and is insufficient to justify invasion of constitutional rights.").
minimal intrusion (or rational basis) analysis.\textsuperscript{215} In comparison to Washington’s extraordinarily broad visitation statute, almost any other visitation statute can be found more narrowly tailored. Conversely, nonparental visitation statutes will also continue to be invalidated under Troxel’s analysis in jurisdictions that construe their statutes narrowly. As long as state courts have the latitude to manipulate their statutes to give parental preference some special weight, they can likely save their states’ visitation statutes from pitfalls that befell Washington’s visitation statute. Under that approach, West Virginia’s statute was held facially constitutional in light of Troxel’s fractured opinion and vague constitutional analysis, which created a safe harbor for grandparent visitation statutes across the nation.

\textit{Kristina Thomas Whiteaker*}

\textsuperscript{215} \textit{See} 70 U.S.L.W. 3263 (2001) (noting that the U.S. Supreme Court denied certiorari in Jackson v. Tangreen, 18 P.3d 100 (Ariz. 2000), which held Arizona’s grandparent visitation statute was more narrowly drawn than the Washington visitation statute in Troxel and that it is reasonably related to furthering the state’s legitimate interest in enabling children to become responsible adults by fostering relationships with grandparents).

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