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McMahan: Grandparent Visitation Rights in South Carolina in the Wake of Tr

GRANDPARENT VISITATION RIGHTS IN SOUTH CAROLINA IN THE WAKE OF *TROXEL V.* *GRANVILLE*

I. INTRODUCTION

In the early twentieth century, the South Carolina Supreme Court recognized that grandparents have a right to visitation with their grandchildren under certain circumstances.¹ In 1981 the South Carolina General Assembly formalized the right of grandparents to petition for visitation with their grandchildren by enacting a statute giving the family court the power to award such rights.² Like South Carolina, every state now has a statute allowing courts to award visitation to a child's grandparents under various circumstances.³ Long before the United States Supreme Court considered the question in its last term, some scholars argued that legislatures must limit statutes allowing grandparent visitation to protect the constitutional rights of the child's parents.⁴

In *Troxel v. Granville*⁵ the United States Supreme Court held that a Washington statute allowing grandparents to petition for visitation rights with their grandchildren unconstitutionally infringed upon the due process rights of the child's parents.⁶ In light of the Supreme Court's ruling, state legislatures should re-examine their grandparent visitation statutes to ensure they are constitutional.

Part II of this Comment examines the United States Supreme Court's decision in *Troxel v. Granville*. Part III addresses *Cabral v. Cabral*⁷ and *Brice v. Brice*,⁸ two state court decisions outside of South Carolina, in which the courts scrutinize their grandparent visitation statutes using the test from *Troxel*.

1. See *Gill v. Walker*, 113 S.C. 39, 42, 100 S.E. 894, 894 (1919) (affirming the circuit court's grant of custody to the child's aunt, provided "the grandparents . . . of the child . . . have reasonable opportunity to visit [the child] and have [the child] visit and be with them on proper occasions and at reasonable intervals"); *Douglass v. Merriman*, 163 S.C. 210, 212-13, 161 S.E. 452, 453 (1931) (upholding the award of custody to the child's father provided the order "should have contained a provision allowing the grandparents to see the little boy involved and to permit him to visit them at reasonable intervals").

2. See 1981 S.C. Acts 85 (originally codified at S.C. CODE ANN. § 20-7-420(18) (Law Co-op. 1976)). Two years later, the General Assembly amended the grandparent visitation statute. 1983 S.C. Acts 140 (codified as S.C. CODE ANN. § 20-7-420(33) (Law. Co-op. 1976)). The statute was amended to its current form in 1994. 1994 S.C. Acts 429 (codified as S.C. CODE ANN. § 20-7-420(33) (Law. Co-op. 1976 & Supp. 1999)).

3. *Troxel v. Granville*, 530 U.S. 57, 74 (2000).

4. See Judith L. Shandling, Note, *The Constitutional Constraints on Grandparents' Visitation Statutes*, 86 COLUM. L. REV. 118, 118 (1986).

5. 530 U.S. 57 (2000).

6. *Id.* at 72-73.

7. *Cabral v. Cabral (In re G.P.C.)*, 28 S.W.3d 357 (Mo. Ct. App. 2000).

8. 754 A.2d 1132 (Md. Ct. Spec. App. 2000).

Part IV analyzes the South Carolina law regarding grandparents' visitation rights and compares it to the guidelines set forth in *Troxel* and applied in *Cabral* and *Brice*. This Comment concludes that the South Carolina law regarding grandparents' visitation rights is constitutional under the Supreme Court ruling in *Troxel v. Granville*.

II. BACKGROUND

A. *Facts and Procedural History of Troxel v. Granville*

Troxel v. Granville involved two children born out of wedlock to Tommie Granville and Brad Troxel.⁹ After Brad's relationship with Tommie ended in June 1991, Brad moved in with his parents.¹⁰ The custody decree awarded Brad visitation with his children on weekends, during which time he often brought the children to his parents' house.¹¹

In 1993, Brad killed himself.¹² For the first five months after his death, Brad's parents continued to see their grandchildren fairly often.¹³ In October 1993, Tommie restricted them to only one visit with her children per month.¹⁴ The Troxels rejected this limitation, and Tommie declined to let them see their grandchildren for the next two months.¹⁵

The Troxels filed suit asking the Washington Superior Court to award them visitation rights with their grandchildren.¹⁶ The Washington statute on which the Troxels based their claim provided: "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"¹⁷

The Troxels sought two weekends of visitation per month and two weeks of visitation per summer with their grandchildren.¹⁸ Tommie preferred a more

9. *Troxel v. Granville*, 530 U.S. 57, 60 (2000); *In re Smith*, 969 P.2d 21, 23 (Wash. 1998) (en banc). Tommie Granville married Kelly Wynn during the appeal of the trial court's order in the case, and she became Tommie Wynn. *See id.* at 23; *In re Troxel*, 940 P.2d 698, 698 (Wash. Ct. App. 1997).

10. *Troxel*, 530 U.S. at 60.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at 60-61.

15. *In re Troxel*, 940 P.2d at 699.

16. *Troxel*, 530 U.S. at 61.

17. WASH. REV. CODE ANN. § 26.10.160(3) (West 1997). The Troxels originally petitioned under two statutes, Sections 26.09.240 and 26.10.16013. *Troxel*, 530 U.S. at 61. Section 26.09.240 was simply a parallel provision in the Washington code, which the legislature amended to limit third-party petitions for visitation to those instances where a parent has begun a custody action. *In re Troxel*, 940 P.2d at 700. As a result of the amendment, the Supreme Court considered only § 26.10.160(3) in its ruling. *Troxel*, 530 U.S. at 61.

18. *Id.*

modest visitation schedule of one day a month.¹⁹ The trial court compromised, awarding the Troxels visitation one weekend every month, one week each summer, and a small period of time on the birthday of each grandparent.²⁰ Tommie Granville appealed the order.²¹

The Washington Court of Appeals found the Troxels lacked standing to pursue visitation rights because Washington law permits a third party to petition for visitation rights only in a pending custody proceeding.²² As a result of this finding, the court of appeals had no reason to decide whether the Washington statute violated the constitutional rights of Tommie Granville.²³ Upon request by the Troxels, the Washington Supreme Court agreed to review the decision reached by the court of appeals.²⁴

The Washington Supreme Court modified the decision of the appeals court, holding the Troxels had standing to seek visitation rights under Washington law.²⁵ As a result, the supreme court further held that the Washington statute unconstitutionally infringed upon Tommie Granville's constitutional right to rear her children.²⁶ The Washington Supreme Court faulted the statute for failing to require courts to find that a child would be subject to harm if they deny visitation petitions.²⁷ In their belief, the statute needed more than the simple "best interests of the child" standard to provide sufficient protection of parents' rights.²⁸ The Washington court further criticized the statute for failing to provide other provisions to protect a parent against groundless petitions for visitation.²⁹ The court felt that the statute should have included provisions forcing the party requesting visitation to show a strong bond with the child and should require courts to consider the parents' reasons for opposing the visitation.³⁰

19. *Id.*

20. *Id.*

21. *Id.*

22. *In re Troxel*, 940 P.2d at 701.

23. *Id.*

24. *In re Smith*, 969 P.2d 21, 24 (Wash. 1998) (en banc).

25. *In re Smith*, 969 P.2d at 27.

26. *Id.* at 27-31. The United States Supreme Court Justices disagreed on whether the Washington Supreme Court had found the statute was unconstitutional facially or as applied. The plurality interpreted the Washington Supreme Court decision as a ruling that the statute was unconstitutional as applied. *See Troxel*, 530 U.S. at 75. Justices Thomas and Scalia felt it unnecessary to address the issue in their opinions. *See id.* at 80 (Thomas, J., concurring), 91-93 (Scalia, J., dissenting). The remaining three Justices felt the Washington Supreme Court invalidated the statute on its face. *Id.* at 75 (Souter, J., concurring), 81 (Stevens, J., dissenting), 94 (Kennedy, J., dissenting).

27. *In re Smith*, 969 P.2d at 30.

28. *Id.*

29. *Id.* at 31.

30. *Id.*

B. *The United States Supreme Court's Analysis in Troxel v. Granville*

In a plurality opinion, the United States Supreme Court affirmed the decision of the Washington Supreme Court.³¹ The plurality held the Washington statute, as applied to Tommie Granville, violated the Due Process Clause of the Fourteenth Amendment.³² The Due Process Clause provides: “[N]or shall any State deprive any person of life, liberty, or property, without due process of law.”³³ At issue concerning grandparent visitation is the parents’ “liberty” to make decisions regarding who the child sees.³⁴ In 1923, the Supreme Court first recognized that the Due Process Clause protects a parent’s right to “bring up children.”³⁵ The plurality in *Troxel*, relying on a long line of cases beginning with *Meyer v. Nebraska*, concluded: “In light of this extensive precedent, it 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.”³⁶

The Supreme Court specifically identified two defects in the Washington statute which caused the statute, in this instance, to violate the Due Process Clause.³⁷ The first defect, the extreme breadth of the statute, allowed any third party to question in court a parent’s decision concerning who may see their child.³⁸ More fundamentally, the Washington statute placed the parent’s decision on equal footing with the opinion of a third party because the statute required that the court give the parent’s decision no greater weight than anyone else’s decision.³⁹ In fact, the Supreme Court criticized the trial judge in the case for placing the burden of proof on Ms. Granville, thereby giving greater weight to the grandparents’ petition, rather than Ms. Granville’s decision as a fit parent.⁴⁰

The Court also discussed the Troxels’ failure to allege that Ms. Granville was unfit to raise her children.⁴¹ Since the Troxels conceded Ms. Granville was a fit parent, the trial court should have presumed that her decisions served the best interests of her children.⁴² While the Supreme Court found Ms. Granville’s fitness important, the Constitution does not require a court to find a parent unfit before granting visitation to a third party.⁴³ When a fit parent opposes a third-party petition for visitation, the court must give at least some deference to the

31. *Troxel v. Granville*, 530 U.S. 57, 75 (2000).

32. *Id.*

33. U.S. CONST. amend. XIV, § 1.

34. *Troxel*, 530 U.S. at 65.

35. 262 U.S. 390, 399 (1923).

36. *Troxel*, 530 U.S. at 66.

37. *Id.* at 67, 71.

38. *Id.* at 67.

39. *Id.*

40. *Id.* at 69.

41. *Id.* at 68.

42. *Troxel*, 530 U.S. at 68.

43. *See id.* at 69.

decision of the parent.⁴⁴ In such a case, special factors must warrant the state's interference before a court grants visitation rights to a non-parent.⁴⁵

The second defect in the Washington statute, as applied in this case, also concerned the trial court's failure to give weight to Ms. Granville's decision.⁴⁶ Ms. Granville sought only to limit the number of visits the Troxels had with her children, not prevent them from visiting entirely.⁴⁷ The Supreme Court criticized the trial court for failing to give any special consideration to Ms. Granville's decision to allow the Troxels to have some visitation, although not as much visitation as the Troxels wanted.⁴⁸ The Supreme Court noted that many other states allow a court to award visitation rights to grandparents only if a child's parent refuses to let them visit with the child.⁴⁹ Tommie Granville allowed her children's grandparents to visit with the children; she merely disagreed with the grandparents as to how much visitation would be reasonable, and the Washington court failed to take her opinion into account when awarding visitation to the Troxels.⁵⁰

Because *Troxel* is a plurality opinion, the rationale behind the concurring and dissenting opinions is particularly important. The Justices disagreed over whether the Washington Supreme Court found the statute facially invalid or unconstitutional as applied.⁵¹ This and other disagreements caused the justices to file six separate opinions in the case.⁵²

In his concurring opinion, Justice Souter stated his belief that the Washington statute violated the Constitution simply because it allowed the court to award visitation to anyone at any point in time.⁵³ The overwhelming breadth of the statute permitted visitation even if a strong bond with the child justifying the visitation was not present.⁵⁴ Because this flaw rendered the statute unconstitutional in Justice Souter's view, he did not decide whether a non-parent must show that harm to the child would result if the court denied visitation rights.⁵⁵

In his concurrence, Justice Thomas was even more protective of parental prerogatives. He agreed with the plurality that parents have a "fundamental

44. *See id.* at 70.

45. *See id.* at 68.

46. *Id.* at 71.

47. *Id.*

48. *See Troxel*, 530 U.S. at 71.

49. *Id.*

50. *Id.*

51. *See supra* note 26.

52. The plurality issued the court's opinion. *Troxel v. Granville*, 530 U.S. 57, 60 (2000). Two Justices wrote concurring opinions. *Id.* at 75 (Souter, J., concurring), 80 (Thomas, J., concurring). Three justices wrote dissenting opinions. *Id.* (Stevens, J., dissenting), 91 (Scalia, J., dissenting), 93 (Kennedy, J., dissenting).

53. *Id.* at 76-77 (Souter, J., concurring).

54. *See id.* at 77.

55. *Id.*

right . . . to direct the upbringing of their children.”⁵⁶ He allowed for government intervention only if a state showed a compelling interest, rather than merely a legitimate one.⁵⁷ In his opinion, the Washington trial court premised its intervention on an illegitimate interest.⁵⁸

Justice Stevens reasoned that the Washington Supreme Court improperly invalidated the grandparent visitation statute on its face.⁵⁹ He suggested that a court may grant visitation rights to a third party without violating the Constitution by showing that visitation is in the child’s best interest.⁶⁰ Since the Constitution permits some grants of visitation under the best interests standard, Justice Stevens believed that the statute was facially valid.⁶¹ Although he agreed with the plurality’s view that a court should presume a fit parent’s decision concerning visitation to be in the best interests of the child, he emphasized that a third party may overcome that presumption.⁶² Justice Stevens further opined that a court should not require a non-parent to show potential harm to the child before granting the non-parent visitation rights.⁶³ Justice Stevens stated that courts need to stress the child’s interests in a visitation petition, specifically the child’s interest in maintaining a relationship with persons to whom the child is close.⁶⁴

Like Justice Stevens, Justice Kennedy stated that third parties need not necessarily show harm to the child in order for the statute to pass constitutional muster.⁶⁵ Justice Kennedy further found that whether the best interest standard should govern depends upon the relationship the third party has with the child.⁶⁶ Thus, the best interests standard is appropriate if, for example, the third party at one time acted as the child’s parent.⁶⁷ Because the best interests standard is appropriate in certain cases, Justice Kennedy would have refrained from totally rejecting the standard.⁶⁸

Justice Scalia found that the right of parents to rear their children falls short of being a fundamental right constitutionally protected from state interference.⁶⁹ In his view, the right to rear children is merely reserved to the people through the Ninth Amendment.⁷⁰ Justice Scalia concluded that consequently, a state

56. *Id.* at 80 (Thomas, J., concurring).

57. *Id.*

58. *Troxel*, 530 U.S. at 80.

59. *Id.* at 81 (Stevens, J., dissenting).

60. *Id.*

61. *Id.* at 85.

62. *Id.* at 89-90 (Stevens, J., dissenting).

63. *Id.* at 85.

64. *Troxel*, 530 U.S. at 88.

65. *Id.* at 94 (Kennedy, J., dissenting); *see id.* at 85 (Stevens, J., dissenting).

66. *Id.* at 100-01 (Kennedy, J., dissenting).

67. *Id.*

68. *Id.* at 101.

69. *Id.* at 91-92 (Scalia, J., dissenting).

70. *Troxel*, 530 U.S. at 91-92. “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” U.S. CONST. amend. IX.

legislature has the power to pass a law preventing interference with a parent's right to make decisions concerning their child's upbringing, but the federal courts lack the power to create such a right.⁷¹

In analyzing the constitutionality of the South Carolina grandparent visitation statute, it is important to keep certain factors in mind. First, only four Justices signed the Court's opinion in *Troxel*, underscoring the wide disagreement among them regarding grandparent visitation.⁷² Second, the plurality expressly refused to set forth a test to determine the constitutionality of granting visitation rights to grandparents.⁷³ The Court also declined to decide whether a court must base an award of visitation to a third party upon potential harm to the child in the absence of visitation.⁷⁴ Finally, the plurality held that the Washington statute was unconstitutional *as applied* to Ms. Granville.⁷⁵ For that reason, the Constitutionality of a grandparent visitation statute depends greatly upon the particular facts of a case.

III. APPLICATION OF THE *TROXEL* TEST

In *Cabral v. Cabral* the Missouri Court of Appeals applied the analysis from *Troxel* in its opinion upholding the constitutionality of its own state statute permitting grandparent visitation rights.⁷⁶ In *Brice v. Brice*, the Maryland Court of Special Appeals also applied the *Troxel* analysis to its state grandparent visitation statute, but found its statute (as applied) violated the due process rights of the child's mother.⁷⁷ Viewing the South Carolina statute through the analysis used by these two courts suggests that the South Carolina grandparent visitation statute would be held constitutional.

A. *Missouri*—*Cabral v. Cabral*

In *Cabral* the parents of the child involved denied the grandparents any opportunity to see their grandchild after the child turned six months old.⁷⁸ Upon the grandparents' petition for visitation, the trial court awarded them one brief period of visitation with the child every three months.⁷⁹ The court allowed the parents to be present while the grandparents exercised their visitation rights.⁸⁰ The child's parents appealed this award and challenged the constitutionality of

71. *Troxel*, 530 U.S. at 91-92 (Scalia, J., dissenting).

72. Chief Justice Rehnquist, Justice Ginsburg, and Justice Breyer joined Justice O'Connor's plurality opinion. *Id.* at 60.

73. *Id.* at 73.

74. *Id.*

75. *Id.*

76. See *Cabral v. Cabral* (*In re G.P.C.*), 28 S.W.3d 357, 360 (Mo. Ct. App. 2000).

77. See *Brice v. Brice*, 754 A.2d 1132, 1133 (Md. Ct. Spec. App. 2000).

78. *Cabral*, 28 S.W.3d at 360.

79. *Id.* at 361.

80. *Id.*

the Missouri statute under which the grandparents petitioned for visitation rights with their grandchild.⁸¹

The Missouri statute allows the court to award grandparent visitation rights in limited cases.⁸² Courts have the power to award visitation rights to grandparents where the child's parents divorce, a family member adopts the child, the parents preclude the grandparents from visiting the child,⁸³ or when visitation is in the "best interests of the child."⁸⁴ The Missouri Court of Appeals found this statute constitutional under *Troxel* because it is more restrictive than Washington's statute and provides more protections for the parents' due process rights.⁸⁵

The Missouri Court of Appeals noted that the first difference between the two statutes involved the limitations on the face of the Missouri statute that were not on the face of the Washington statute.⁸⁶ While the Washington statute allows the court to award anyone visitation with the child, the Missouri statute allows only grandparents to petition for visitation.⁸⁷ The Missouri Court of Appeals further emphasized that courts may not award visitation under its statute unless the parents deny visitation to the grandparents,⁸⁸ whereas the Washington statute allowed the person desiring visitation rights to petition for those rights at any time.⁸⁹

The Missouri Court of Appeals also noted that under its statute, unlike under the Washington statute, the judge lacks the sole power to determine a child's best interests.⁹⁰ The Missouri statute instead allows the judge to select a guardian ad litem to help determine the best interests of the child.⁹¹

The final difference between *Cabral* and *Troxel* noted by the Missouri Court of Appeals concerns the actual award of visitation granted by the trial

81. *Id.* at 360.

82. *See* MO. ANN. STAT. § 452.402 (Supp. 2000).

83. *Id.* § 452.402.1. When one parent dies, a court has the power to award grandparent visitation when the surviving parent denies the grandparent "reasonable visitation rights." *Id.* When both parents are living, the court has the power to award grandparent visitation only if the parents have "unreasonably denied visitation with the child for a period exceeding ninety days." *Id.*

84. *Id.* § 452.402.2.

85. *Cabral*, 28 S.W.3d at 364.

86. *Id.*

87. *Id.*

88. *Id.* Courts also have the power to award visitation when the parents divorce or a relative adopts the child. *See* MO. ANN. STAT. § 452.402 (1), (4) (Supp. 2000). However, those subsections are not at issue in *Cabral*. *See Cabral*, 28 S.W.3d at 362.

89. *See* WASH. REV. CODE ANN. § 26.10.160(3) (West 1997).

90. *Cabral*, 28 S.W.3d at 364.

91. *Id.*; *see* MO. ANN. STAT. § 452.402.3 (Supp. 2000). However, this argument may be of limited effect, because the *Troxel* decision does not indicate that the judge made a determination of the best interests of the children. The Washington Code allows the judge to appoint an attorney to protect a child's interest in a visitation action. *See* WASH. REV. CODE ANN. § 26.10.070 (West 1997).

courts.⁹² The Missouri trial court granted a much more modest visitation award than the Washington court awarded in *Troxel*.⁹³ The court, with this analysis, refrained from setting a specific constitutional standard, but instead emphasized that the specific award granted by the trial court is a factor in determining whether the award is constitutional.⁹⁴

B. Maryland—Brice v. Brice

In *Brice* the parents of the child's deceased father brought a petition for court-ordered visitation rights with the child.⁹⁵ The Maryland grandparent visitation statute permitted the court to award reasonable amounts of visitation to grandparents if doing so is "in the best interests of the child."⁹⁶ Although the child's mother allowed the grandparents to see the child, the grandparents wanted more visitation time.⁹⁷ The child's mother created a visitation schedule for the grandparents, but she opposed any court-ordered visitation rights.⁹⁸ Agreeing that the mother's visitation schedule gave the grandparents adequate time to see the child, the trial court adopted the schedule as court-ordered periods of visitation against the mother's wishes.⁹⁹ The Maryland Court of Special Appeals agreed to hear an appeal of the decision.¹⁰⁰

The Maryland Court of Special Appeals used the analysis in *Troxel* to find that the Maryland grandparent visitation statute, as applied to the facts of *Brice*, unconstitutionally infringed upon the due process rights of the child's mother.¹⁰¹ The Maryland Court of Special Appeals found that its statute offered more protection to a child's parents than the extremely broad statute at issue in *Troxel*.¹⁰² However, the limited protections offered by the Maryland statute did too little to protect the constitutional right of the child's mother to rear her child in this case.¹⁰³ The Maryland statute allowed only grandparents to petition for visitation.¹⁰⁴ Other than that one limitation, the Maryland statute offered no

92. See *Cabral*, 28 S.W.3d at 364.

93. See *id.* (comparing the two visitation awards: the award in *Troxel* included one weekend every month and one week during the summer, while the award in *Cabral* was for only two hours every three months).

94. See *id.* at 364-65.

95. *Brice v. Brice*, 754 A.2d 1132, 1133 (Md. Ct. Spec. App. 2000).

96. MD. CODE ANN., FAM. LAW § 9-102 (1999).

97. *Brice*, 754 A.2d at 1133-34.

98. *Id.*

99. *Id.* at 1134.

100. *Id.*

101. See *id.* at 1136.

102. *Id.* at 1136.

103. See *Brice*, 754 A.2d at 1136.

104. *Id.*

more protection than the Washington statute.¹⁰⁵ The Maryland Court of Special Appeals believed that merely limiting a visitation statute to grandparents does too little to protect a parent's due process rights under the ruling from *Troxel*, especially since the Supreme Court found the Washington statute unconstitutional *as applied to grandparents*.¹⁰⁶ Had Washington's statute been limited to grandparents, it still would have infringed upon the parent's due process rights under the ruling in *Troxel*.¹⁰⁷

In finding the Maryland statute unconstitutional as applied in *Brice*, the Maryland Court of Special Appeals relied heavily on the parents allowing some visitation to the grandparents.¹⁰⁸ The court also noted that the grandparents did not question the mother's ability as a parent.¹⁰⁹ As noted in *Troxel*, a court should give special weight to the decisions a parent makes with regards to the child if the court finds the parent is fit.¹¹⁰

IV. THE SOUTH CAROLINA GRANDPARENT VISITATION STATUTE AND CASE LAW UNDER *TROXEL* ANALYSIS

South Carolina originally enacted a statute providing for grandparent visitation in 1981.¹¹¹ South Carolina's current law provides more detail and guidance for the courts than the first statute that the legislature passed.¹¹² The current version of the South Carolina grandparent visitation statute provides:

The family court shall have exclusive jurisdiction: To order periods of visitation for the grandparents of a minor child where either

105. Compare MD. CODE ANN., FAM. LAW § 9-102 (1999) (allowing a court to grant "reasonable visitation" to grandparents if "in the best interests of the child," but imposing no other restrictions) with WASH. REV. CODE ANN. § 26.10.160(3) (West 1997) (allowing the court to award visitation to "any person when visitation may serve the best interest of the child").

106. *Brice v. Brice*, 754 A.2d 1132, 1136 (Md. Ct. Spec. App. 2000).

107. *See id.*

108. *See id.*

109. *Id.*

110. *Troxel v. Granville*, 530 U.S. 57, 67-68 (2000).

111. *See supra* note 2 and accompanying text.

112. Before its amendment in 1994, the South Carolina visitation statute gave the family court the power "[t]o order periods of visitation for the grandparents of the child." S.C. CODE ANN. § 20-7-420(33) (Law. Co-op. 1976). The family court had the power to decide whether to award visitation to grandparents depending upon the facts of the case and the child's particular situation. 13 S.C. JUR. *Divorce* § 36 (1992). The language of the former statute provided little guidance for the courts to protect the constitutional rights of parents. In the decision from *Troxel*, the Supreme Court recognized that courts decide to award grandparent visitation based upon the particular facts in each case. *Troxel v. Granville*, 530 U.S. 57, 73 (2000). Even though the former South Carolina statute failed to provide specific protection of the parents' constitutional rights, the statute may have still been constitutional. The constitutionality of the statute depends upon how the court interprets the statute and how much restraint the court uses in awarding visitation rights to grandparents. *See id.* at 67 (implying the Washington courts had the chance to read the statute in a more restrictive manner, and such a reading may have kept the statute within the limits of the Constitution).

or both parents of the minor child is or are deceased, or are divorced, or are living separate and apart in different habitats regardless of the existence of a court order or agreement, and upon written finding that the visitation rights would be in the best interests of the child and would not interfere with the parent/child relationship. In determining whether to order visitation for the grandparents, the court shall consider the nature of the relationship between the child and his grandparents prior to the filing of the petition or complaint.¹¹³

Because courts have published few opinions dealing with the new version of the statute, case law under the old statute helps further explain when South Carolina courts have awarded visitation rights to a child's grandparents.¹¹⁴

The plurality in *Troxel* was particularly concerned with the ability of anyone to petition for visitation without the court giving special weight to a parent's decision to oppose visitation.¹¹⁵ The South Carolina statute allows only grandparents to petition for visitation,¹¹⁶ as opposed to allowing "any person" to petition for visitation.¹¹⁷ This restriction alone narrows the breadth of the South Carolina statute considerably. However, because the Supreme Court invalidated the Washington statute *as applied to grandparents*, this limitation fails to ensure the constitutionality of the South Carolina statute.¹¹⁸

The South Carolina statute is further limited because it allows courts to grant visitation rights to grandparents only where one of the child's parents has passed away, the parents are divorced, or they are living apart.¹¹⁹ The Washington statute at issue in *Troxel* contained no such limitation.¹²⁰ The South Carolina Supreme Court limited the situations where courts may award grandparent visitation even before the South Carolina legislature enacted the amended statute because it required visitation rights for grandparents to be derivative and refused to grant visitation where the parent (the child of the grandparent petitioner) enjoyed the privilege of visitation with the child.¹²¹ The

113. S.C. CODE ANN. § 20-7-420(33) (Supp. 1999).

114. Since the 1994 amendment, only one published South Carolina appellate decision has cited section 20-7-420(33). See *Dodge v. Dodge*, 332 S.C. 401, 415-16, 505 S.E.2d 344, 351 (Ct. App. 1998).

115. See *Troxel*, 530 U.S. at 67.

116. S.C. CODE ANN. § 20-7-420(33) (Supp. 1999).

117. See WASH. REV. CODE ANN. § 26.10.160(3) (West 1997).

118. See *Brice v. Brice*, 754 A.2d 1132, 1136 (Md. Ct. Spec. App. 2000) (noting Maryland's visitation statute only protects grandparents, but the minor limitation is not enough for the court to uphold the statute, as applied, against a constitutional challenge because the Supreme Court in *Troxel* held Washington's statute unconstitutional as applied, and *Troxel* involved a petition by grandparents for visitation rights).

119. S.C. CODE ANN. § 20-7-420(33) (Supp. 1999).

120. See WASH. REV. CODE ANN. § 29.10.160(3) (West 1997).

121. See *Brown v. Earnhardt*, 302 S.C. 374, 377, 396 S.E.2d 358, 360 (1990) (approving the view that grandparent visitation rights derive from the rights of the parent to visitation and stating courts should rarely grant grandparent visitation rights where that parent has visitation

South Carolina Court of Appeals has continued to apply this restriction, even after the legislature enacted the amended statute.¹²²

The South Carolina statute requires proof that “visitation rights would be in the best interests of the child.”¹²³ Even before the legislature amended the statute, the South Carolina Supreme Court upheld use of the “best interests of the child” standard to determine whether a court should award grandparents visitation rights with their grandchild.¹²⁴

Scholars have recognized the difficulty in applying the best interests standard in the context of grandparent visitation and have argued that the best interests standard imposes few limitations on judges.¹²⁵ Because the decision to award visitation rights to a grandparent typically results in less serious repercussions for the child than visitation awards to parents,¹²⁶ courts have difficulty concluding that an award or denial of visitation rights will serve the child’s best interest.¹²⁷ Further, a judge faces the problem of determining what standards (specifically, what area of the child’s life and what period of time) to use to determine the child’s best interest.¹²⁸

The South Carolina statute requires written proof that the visitation serves the “best interests of the child.”¹²⁹ In comparison to the statute at issue in *Troxel*, the South Carolina Statute differs only in this requirement. The Supreme Court in *Troxel* declined to criticize all uses of the best interests standard in grandparent visitation cases; rather, the Court criticized using the best interest standard without evaluating other factors to protect the due process rights of the child’s parent, specifically the weight of a fit parent’s decision and

rights).

122. See *Dodge v. Dodge*, 332 S.C. 401, 416-17, 505 S.E.2d 344, 352 (Ct. App. 1998) (re-affirming the requirement of *Brown* that grandparent visitation rights be derivative in most cases, even after the 1994 amendment to the grandparent visitation statute).

123. S.C. CODE ANN. § 20-7-420(33) (Supp. 1999).

124. *Chavis v. Witt*, 285 S.C. 77, 80, 328 S.E.2d 74, 75 (1985). The South Carolina Supreme Court later distinguished this case, but in doing so it still applied the best interest standard to determine the grandparents’ right to visitation, although it found such an award was not in the child’s best interest in the case before the court. *Brown v. Earnhardt*, 302 S.C. 374, 376-78, 396 S.E.2d 358, 359-60 (1990).

125. See, e.g., Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 260-61 (1975) (describing the difficulty in applying the best interest standard in any case); Shandling, *supra* note 4, at 123 (arguing the best interests of the child are unclear in the context of grandparent visitation, and the best interest standard imposes few limitations on judges).

126. Shandling, *supra* note 4, at 123.

127. *Id.*

128. Mnookin, *supra* note 125, at 260-61 (arguing that the judge must decide between advancing the child’s long-term or short-term interest, along with whether to focus on the child’s happiness, spiritual life, economic well-being, or any number of other possibilities, any of which may be in some form the child’s best interest).

129. S.C. CODE ANN. § 20-7-420(33) (Supp. 1999).

the requirement that the grandparents show special factors to justify the grant of visitation.¹³⁰

The Missouri Court of Appeals has noted that Missouri's statute limits the trial judge's power by providing for the appointment of a guardian ad litem to help determine the child's best interests.¹³¹ The South Carolina provision, like the Missouri statute, gives the family court the power to appoint a guardian ad litem to protect a child's interests,¹³² for example, when there is a possibility visitation could cause harm to the child.¹³³

The South Carolina statute does not specifically assign weight or presumptive validity to a parent's decision to oppose visitation.¹³⁴ In the context of child custody, the South Carolina Supreme Court recognizes that courts should presume custody of a child should be given to the natural parents, and anyone wishing to oppose giving custody to the child's natural parent must submit sufficient evidence to overcome this presumption.¹³⁵ The same rules of law underlie visitation rights and custody rights.¹³⁶ Although South Carolina decisions fail to specifically mention the presumption of validity given to a fit parent's decision, family courts favor parents in custody cases.¹³⁷ Since visitation derives from the same rules of law as custody cases,¹³⁸ South Carolina courts may apply the presumption in favor of a parent's decision regarding visitation, although appellate decisions fail to clearly express this presumption in the context of grandparent visitation.¹³⁹

Unlike Washington law, the South Carolina law on grandparent visitation requires "special factors" to warrant the grant of visitation rights to grandparents.¹⁴⁰ In addition to the statute's restrictions,¹⁴¹ South Carolina courts

130. *Troxel v. Granville*, 530 U.S. 57, 68-69 (2000).

131. *Cabral v. Cabral* (*In re G.P.C.*), 28 S.W.3d 357, 364 (Mo. Ct. App. 2000); see MO. ANN. STAT. § 452.402.3 (West 1997 & Supp. 2000).

132. See S.C. CODE ANN. § 20-7-420(37) (Law. Co-op. 1976 & Supp. 1999); 21 S.C. JUR. *Children and Families* § 118 (1993).

133. 21 S.C. JUR. *Children and Families* § 118 (1993).

134. See S.C. CODE ANN. § 20-7-420(33) (Supp. 1999).

135. *Cook v. Cobb*, 271 S.C. 136, 140, 245 S.E.2d 612, 614 (1978) (stating courts recognize a rebuttable presumption that children should be returned to parents in custody disputes); *Dodge v. Dodge*, 332 S.C. 401, 415, 505 S.E.2d 344, 351 (Ct. App. 1998) (overturning an award of joint custody between the natural father and the grandparents where "insufficient weight was given to the strong presumption favoring the return of custody to the father"); *Sanders v. Emery*, 317 S.C. 230, 233, 452 S.E.2d 636, 638 (Ct. App. 1994) (overturning the family court's decision because "insufficient weight was given to the strong presumption favoring the return of custody to the home of fit biological parents").

136. 59 AM. JUR. 2D *Parent & Child* § 36 (1987).

137. See *Cook*, 271 S.C. at 140, 245 S.E.2d at 614; *Dodge*, 332 S.C. at 415, 505 S.E.2d at 351; *Sanders*, 317 S.C. at 233, 452 S.E.2d at 638.

138. 59 AM. JUR. 2D *Parent & Child* § 36 (1987).

139. See *supra* notes 134-39 and accompanying text.

140. See *Brown v. Earnhardt*, 302 S.C. 374, 377, 396 S.E.2d 358, 360 (1990) (finding grandparents may not gain visitation rights while the child's parents have such rights "absent a showing of exceptional circumstances"); *Horton v. Vaughn*, 309 S.C. 383, 388, 423 S.E.2d 543, 545-46 (Ct. App. 1992) (overturning a family court's award of grandparent visitation because

explicitly require “special circumstances” to support a grant of visitation to grandparents.¹⁴² Although the courts fail to describe exactly what constitutes “special circumstances,”¹⁴³ presumably the courts must find something more to grant visitation rights to grandparents than to grant such rights to a child’s parent. This requirement serves to further protect parents from infringement of their due process rights.

The South Carolina statute fails to require a showing of potential harm to the child in order to grant visitation rights to grandparents.¹⁴⁴ Since the Supreme Court stopped short of requiring such a showing in *Troxel*,¹⁴⁵ the absence of such a provision from the South Carolina statute does not cause it to unconstitutionally infringe on the due process rights of parents.

In *Troxel*, the Supreme Court expressed concern that the Washington court failed to consider the fact that the Troxels’ relationship with their grandchildren was not in danger of being destroyed if the petition were denied.¹⁴⁶ While the South Carolina grandparent visitation statute fails to specifically require a threat to the child’s relationship with the grandparents to exist in order to award visitation,¹⁴⁷ South Carolina courts account for whether a denial of their petition for visitation would destroy the grandparents’ relationship with their grandchildren.¹⁴⁸ In considering this when deciding whether to award visitation rights to grandparents, the South Carolina courts address the second concern from *Troxel*. Since the constitutionality of a grandparent visitation statute

the record contained no “special circumstances warranting court-ordered visitation rights to the Paternal Grandmother”) (*overruled on other grounds by* Joiner v. Rivas, 342 S.C. 102, 110, 536 S.E.2d 372, 376 (2000) (overruling cases “requiring strict construction of TPR [termination of parental rights] statutes”).

141. The statute allows courts to grant visitation to grandparents only where one parent dies or the parents are divorced or living apart, after considering “the nature of the relationship between the child and his grandparents.” S.C. CODE ANN. § 20-7-420(33) (Supp. 1999).

142. *Brown*, 302 S.C. at 377, 396 S.E.2d at 360 (finding no “exceptional circumstances”); *Horton*, 309 S.C. at 388, 423 S.E.2d at 545-46 (finding no “special circumstances”).

143. *See Brown*, 302 S.C. at 377-78, 396 S.E.2d at 360 (noting the court finds “no exceptional circumstance in this case warranting court-ordered visitation rights to the grandparents,” though not defining what constitutes an “exceptional circumstance”); *Horton*, 309 S.C. at 388, 423 S.E.2d at 545-46 (finding no “special circumstances warranting court-ordered visitation” in the family court record, but failing to explain what it considers a “special circumstance”).

144. *See* S.C. CODE ANN. § 20-7-420(33) (Supp. 1999).

145. The plurality in *Troxel* specifically refused to decide the issue. *Troxel v. Granville*, 530 U.S. 57, 73 (2000). Justices Stevens and Kennedy specifically concluded that the Constitution does not require such a showing. *Id.* at 85 (Stevens, J., dissenting), 94 (Kennedy, J., dissenting).

146. *See id.* at 71.

147. *See* § 20-7-420(33).

148. *See Brown v. Earnhardt*, 302 S.C. 374, 376, 396 S.E.2d 358, 360 (1990) (noting that denying the grandparents’ petition for visitation rights would not destroy their relationship with the child); *Chavis v. Witt*, 285 S.C. 77, 79, 328 S.E.2d 74, 75 (1985) (“[W]hen a parent dies, the relationship of the grandparents to the child of the deceased person is not obliterated.”).

depends upon how broadly the state courts interpret the statute,¹⁴⁹ the statute's omission of a requirement that the grandparent-grandchild relationship be in danger does not affect its constitutionality. The courts account for this factor in applying the statute, thereby avoiding infringement upon the due process rights of parents.

In order to protect a parent from excessive grants of visitation rights to grandparents, the South Carolina statute requires a "written finding that the visitation rights . . . would not interfere with the parent/child relationship" to justify a grant of visitation to grandparents.¹⁵⁰ This portion of the statute offers parents a great deal of protection. The South Carolina Supreme Court directs lower courts to show caution in granting visitation rights to grandparents because of the potential strain on the child's time.¹⁵¹ Thus, the South Carolina courts implicitly give deference to parents in visitation cases, although they fail to specifically require lower courts to give such a presumption to the parent's decisions.¹⁵² The legislature, in codifying a protection for the parental relationship against intrusion by grandparent visitation rights, further protects a parent's liberty to rear their children.¹⁵³

The current version of the South Carolina grandparent visitation statute also requires the family court to take into account the strength of the relationship between the grandparents and the child with whom they wish to secure court-ordered visitation rights.¹⁵⁴ Justice Stevens, in his dissent in *Troxel*, expressed his concern for protecting a child's desire to continue seeing those people with whom the child has developed strong bonds.¹⁵⁵ By requiring a court to consider whether the petitioner has a strong relationship with the child, the South Carolina grandparent visitation statute addresses this concern. Requiring this consideration protects the child's parent from intrusion where the grandparents have a minimal relationship with their grandchild, but it also protects a child's well-developed relationship with her grandparents.

V. CONCLUSION

The United States Supreme Court's decision in *Troxel v. Granville* falls short of invalidating the South Carolina grandparent visitation statute.

149. See *Troxel*, 530 U.S. at 67.

150. § 20-7-420(33).

151. See *Brown*, 302 S.C. at 376-78, 396 S.E.2d at 360.

152. See *id.*

153. See § 20-7-420(33) (requiring that visitation awarded to grandparents not "interfere with the parent/child relationship").

154. *Id.* ("[T]he court shall consider the nature of the relationship between the child and his grandparent.").

155. *Troxel v. Granville*, 530 U.S. 57, 88 (2000) (Stevens, J., dissenting). The Washington Supreme Court also criticized the Washington statute for failing to require the persons requesting visitation to show they have a strong bond with the child. See *In re Smith*, 969 P.2d 21, 31 (Wash. 1998) (en banc).

Certainly, *Troxel* gives limited recognition that grandparent visitation laws may infringe upon parental rights to decide who may visit with their child and when. So long as the South Carolina courts continue to grant visitation rights to grandparents only in limited circumstances, the granting of such visitation is perfectly constitutional. The current South Carolina grandparent visitation statute codifies many of these protections to help courts in their struggle to award visitation rights to grandparents in certain limited instances while avoiding infringement upon the due process rights of the child's parents.

Importantly, neither the South Carolina statute nor case law explicitly states that courts should give special weight to the decisions made by a fit parent permitting, denying, or limiting opportunities for grandparents to visit with the child. The limitations the South Carolina statute and courts impose provide enough protection to prevent unconstitutional infringement of the due process rights of a child's parent in most cases. In light of the Supreme Court's decision in *Troxel*, courts should explicitly give special weight to the decisions made by a competent parent concerning visitation. The court has the power to overrule the parent's decision, but only after the grandparents overcome the burden of proving the court should award visitation.

If the South Carolina courts explicitly give special weight to a competent parent's decision concerning visitation with the child and continue to apply the limitations of past grandparent visitation petitions, their rulings will not infringe upon the due process right of the child's parent to rear the child, as set forth in *Troxel v. Granville*.

South Carolina courts cautiously award visitation rights to grandparents. By showing caution, the courts protect the due process rights of the child's parents. The South Carolina statute provides extensive protection for the due process rights of a child's parents. While the Supreme Court may declare a broad and expansive statute, made expansive by the language of the statute or by broad interpretation by the court, unconstitutional, the South Carolina statute faces no such danger. South Carolina law regarding grandparent visitation rights contains sufficient safeguards to pass the constitutional test provided by *Troxel* and protects the due process rights of parents while permitting courts to award visitation rights to grandparents.

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