

Grandparent Visitation Law Tested by Troubled Times

By Tracey Coates

Over the past several decades, more and more grandparents have traded in their retirement plans – some voluntarily and others by necessity – and taken on the role of primary caretakers of their grandchildren. As a result of higher divorce rates, the increased drug and alcohol addiction of younger parents and a troubled economy, grandparents are, with greater frequency, interacting with their grandchildren on a daily or at least a much more frequent basis.

So, what happens when a parent decides for whatever reason to alter these relationships, decrease the frequency of the interactions or even eliminate visitation completely? Do grandparents have a legal right to spend time with their grandchildren? The simple answer to this complicated question is: Maybe.

All 50 states have a grandparent visitation statute providing for grandparent visitation in limited circumstances. In 1984, Maryland enacted its Grandparent Visitation Act, Family Law § 9-102, affording grandparents reasonable visitation *if* the court found it to be in the best interests of the child. This generally meant that grandparents, absent a showing that visits with the child would have a harmful or detrimental affect, would be granted an order of visitation.

For more than 20 years, Maryland courts upheld this “reasonable visitation” standard until the Court of Appeals imposed a threshold requirement necessitating grandparents to first prove (1) parental unfitness or (2) exceptional circumstances, before a court would consider an award of visitation to a grandparent. *Koshko v. Haining*, 398 Md. 404 (2007).

As recognized by both the United States Supreme Court and the Maryland Courts, parents are invested with the fundamental right to make decisions concerning the care, custody and control of their children. *Koshko*, 398 Md. at 422-423. Unlike parents, grandparents do not enjoy a “constitutionally recognized liberty interest in visitation with their grandchildren. Rather, whatever right they may have to such visitation is solely of statutory origin implemented through judicial order.” *Id.* at 423.

The ruling in *Koshko* arose out of a string of Maryland cases, whose precedent shaped the Court's constitutional analysis of its grandparent visitation statute. It relied in part on the landmark decision in *Troxel v. Granville*, in which the U.S. Supreme Court struck down a Washington state grandparent visitation statute because it unconstitutionally infringed upon a mother's fundamental right to direct and control the upbringing of her children, where there was no evidence that she was an unfit parent or that she intended to completely deny visitation to the paternal grandparents. 530 U.S. 57, 75 (2000). The *Troxel* opinion has become the starting point for all succeeding discussions of grandparental rights, despite its somewhat ambiguous ruling that resulted in a plurality opinion rationalizing the invalidity of Washington's grandparent visitation statute.

Unlike the ruling in *Troxel*, the Court of Appeals in *Koshko* did not invalidate the grandparent visitation statute, Maryland Family Law § 9-102, deciding instead to construe the statute to comply with due process and the principles of *Troxel*. The Court, in order “to preserve fundamental parental liberty interests, we now apply a gloss to the Maryland grandparent visitation statute requiring a threshold showing of either parental unfitness or exceptional circumstances indicating that the lack of grandparental visitation has a significant deleterious effect upon the children who are the subject of the petition.” *Koshko*, 398 at 441.

Once the threshold requirements of parental unfitness or exceptional circumstances are met, a court must then apply the “best interest of a child” standard, considering other relevant factors and circumstances including but not exhaustive of the following:

1. The nature and stability of the child's relationships with the parents
2. The nature and substantiality of the relationship between the child and the grandparent, taking into account frequency of contact, regularity of contact and amount of time spent together

3. The potential benefits and detriments to the child in granting the visitation order
4. The effect, if any, grandparental visitation would have on the child's attachment to its nuclear family
5. The physical and emotional health of the adults involved
6. The stability of the child's living and schooling arrangements.

Maryland's current case law confirms that parents, unlike grandparents, enjoy a constitutionally recognized liberty interest in raising their children. In the legal vernacular, that is a rebuttable presumption favoring parental decision that is difficult to overcome.