



# Members Only

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## Grandparent Visitation Rights in Ohio

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In Ohio, a grandparent may be granted visitation rights by a court if the grandchild's mother is unmarried or the parents are divorced, separated, or deceased. The court can grant visitation rights after considering all relevant factors, including those specified in statute, if it determines that visitation is in the best interest of the child. The United States Supreme Court recently held that a Washington grandparent visitation statute was unconstitutional as applied in a particular case, because it infringed on the fundamental right of a parent to make decisions concerning the care, custody, and control of his or her child. That decision may have important implications for Ohio because of similarities in the statutes of the two states.

### ***Grandparent visitation: when granted***

Historically, grandparents had no legal right of access to their grandchildren, and parents had complete authority to grant or deny the privilege of visitation. (*In re Whitaker* (1988), 36 Ohio St.3d 213.) Ohio courts have held that grandparents have no constitutional right of association with their grandchildren. (*In re Schmidt* (1986), 25 Ohio St.3d 331.) Therefore, if grandparents are to have visitation rights, they must be provided for by statute. Ohio has authorized grandparent companionship or visitation rights by statute in three situations: (1) when married parents terminate marriage or separate, (2) when a parent of the child is deceased, and (3) when the child is born to an unmarried woman. In such cases, a court may order reasonable visitation if it is in the best interest of the child. In the absence of an event that disrupts an intact family, the Ohio Supreme Court has declined to permit courts to order grandparent visitation. (*In re Gibson* (1991), 61 Ohio St.3d 168.)

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*Grandparents have no constitutional right to visitation with their grandchildren.*



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*If a child's parents have their marriage terminated or are unmarried, or a parent dies, grandparents may ask the court to grant them visitation.*

***When married parents terminate marriage or separate***

A court can grant reasonable visitation rights to a grandparent in a proceeding for divorce, dissolution of marriage, legal separation, annulment, or child support if the grandparent files a motion seeking visitation rights and the court determines that the grandparent has an interest in the welfare of the child and granting visitation rights is in the best interest of the child. The motion may be filed while the proceeding is pending or after a decree or final order is issued. In making its decision, the court is required to consider certain factors. (Revised Code § 3109.051(B).)

***When a parent dies***

When a child's parent dies, a parent of the deceased parent can file a complaint for visitation rights in the court of common pleas of the county in which the child resides. After considering certain factors, the court may order reasonable visitation if it determines that visitation is in the child's best interest. (R.C. 3109.11.)

***When the child's mother is unmarried***

If a child's mother was unmarried when the child was born, the court of common pleas in the county in which the child resides may grant visitation rights to the maternal grandparents. If the father of the child acknowledges

the child and the acknowledgment has become final, or if he is found in a parentage action to be the child's father, the court may also grant visitation rights to the paternal grandparents.<sup>1</sup> (R.C. 3109.12.) The relatives of the father cannot be granted visitation rights until paternity is established (*In re Martin* (1994), 68 Ohio St.3d 250).

To obtain visitation rights, the grandparents must file a complaint requesting them, and the court must determine, after considering certain factors, that they are in the child's best interest. The court's authority to order visitation when a child is born to an unmarried woman continues even if the child's parents subsequently marry and establish paternity of the child. (*Stout v. Kline*, 1997 Ohio App. LEXIS 1947 (Ohio Ct. App., Richland Co. unreported, Mar. 28, 1997).)

***After a child is adopted***

The marriage or remarriage of a child's parent does not affect the court's authority to grant or modify grandparent visitation rights. (R.C. 3109.051(E), 3109.11, and 3109.12.) But the Ohio Supreme Court has held that a provision of Ohio law providing that a final decree of adoption terminates all legal relationships between the adopted person and the adopted person's relatives has the effect of terminating grandparent visitation rights on adoption, regardless of whether the child is adopted by

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*Grandparent visitation rights are generally terminated by adoption.*



strangers, relatives, or a stepparent. (R.C. 3107.15(A); *In re Martin* (1994), 68 Ohio St.3d 250; *Sweeney v. Sweeney* (1994), 71 Ohio St.3d 169; *In re Adoption of Ridenour* (1991), 61 Ohio St.3d 319.)

Ohio law does not terminate the relationship between a child and the family of the biological parent whose status is not changed by a stepparent adoption. Grandparents whose child retains parental rights after a stepparent adoption remain entitled to seek visitation. (*Moore v. Strassel*, No. 97CA32, 1998 Ohio App. LEXIS 883 (4th Dist. Ct. App. Feb. 26, 1998).)

***With abused, neglected, or dependent children***

The Revised Code does not expressly provide for grandparent visitation when a child is alleged or adjudicated by the juvenile court to be an abused, neglected, or dependent child. However, the Ohio Department of Job and Family Services has adopted a rule that requires a public children services agency (PCSA) or private child placing agency (PCPA) to arrange for such visitation in certain circumstances. When a child is in temporary custody, the PCSA or PCPA must make arrangements for family members to have the opportunity to visit or communicate with the child, if it is in the child's best interest. (O.A.C. 5101:2-42-92(D).) The rule is silent regarding grandparent visitation in situations in which

permanent custody of a child is granted to a PCSA or PCPA, a child is placed in a planned permanent living arrangement, legal custody is given to the person other than the child's parents, or a child is placed in protective supervision. It is unlikely that a court would conclude that grandparents have a right to visitation in abuse, neglect, or dependency cases, however, because the Ohio Supreme Court has held that if grandparents are to have visitation rights, they must be provided for in statute. (*In re Martin* (1994), 68 Ohio St.3d 250.)

***Factors the court must consider in granting visitation***

Before issuing an order concerning grandparent visitation, the court must consider any agreement made by the parties pursuant to court-ordered mediation and all other relevant factors, including certain factors specified in statute. These factors include:

- The child's wishes and concerns, if the court has interviewed the child in chambers;
- The child's prior interaction and relationship with the grandparents;
- The location of the grandparents' residence and the distance between it and the child's residence;
- The child's age;

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*Rules governing temporary custody of abused, neglected, or dependent children encourage visitation between children in foster care and their families.*

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*A court issuing a visitation order must consider all relevant factors.*



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*At the request of a person denied visitation, the court must state its findings and conclusions.*

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*The United States Supreme Court recently held that a Washington grandparent visitation statute resulted in an unconstitutional infringement on parental rights.*

- The child's health and safety;
- The mental and physical health of all parties.

The court may interview the child in chambers to determine the child's wishes and concerns. The only persons that may be present are the child, the child's attorney, the judge, necessary court personnel, and, in the judge's discretion, the parents' attorneys. (R.C. 3109.051(C) and (D).)<sup>2</sup>

If the court denies the grandparents' motion for visitation rights and the grandparents file a written request for findings of fact and conclusions of law, the court must state in writing those findings of fact and conclusions of law (R.C. 3109.051, 3109.11, and 3109.12).

### ***Enforcement through contempt proceedings***

Any person with visitation rights or subject to a visitation order may bring an action for contempt for another person's failure to comply with, or interference with, the order. A court may impose a fine, a term of imprisonment, or both on a person found guilty of contempt. The penalty for a first offense is a maximum fine of \$250, imprisonment of not more than 30 days, or both; for a second offense \$500, 60 days, or both; and for a third or subsequent offense \$1,000, 90 days, or both. The court also must require the person to pay all court costs and the reasonable attorney's fees of the other party and

may award compensatory visitation if it is in the best interest of the child. (R.C. 2705.031(B)(2), 2705.05(A)(1) to (3), and 3109.051(K).)

### ***Troxel v. Granville***

*Troxel* is a recently decided United States Supreme Court case that focuses on the application of a Washington statute that allows courts to award visitation rights to grandparents and others. (*Troxel v. Granville*, No. 99-138, \_\_\_ U.S. \_\_\_, 120 S. Ct. 2054, 147 L.Ed.2d 49 (June 5, 2000).) In *Troxel*, the children's mother attempted to place limits on the amount of grandparent visitation after their father's death. The paternal grandparents then petitioned for visitation rights.

A combination of factors led the Court to decide that the statute as applied was too broad and was an unconstitutional infringement of the Due Process Clause of the Fourteenth Amendment to the United States Constitution, which protects a parent's fundamental right to make decisions concerning the care, custody, and control of the parent's children.<sup>3</sup> The Court considered the most important factor to be that the parent's decision regarding grandparent visitation was not given a presumption of validity or any special weight, even though there is a presumption that fit parents act in their child's best interest. The Due Process Clause does not permit a state



to infringe on the fundamental right of a parent to make childrearing decisions simply because a judge believes a better decision could be made. The Court also objected to the trial court placing on the parent the burden of disproving that visitation was in the child's best interest. Finally, the Supreme Court was concerned that the trial court gave no weight to the fact that the children's mother agreed to visitation and had tried only to limit the number of the visits.

***Impact of Troxel on state grandparent visitation statutes***

All 50 states have enacted statutes that provide for grandparent visitation. The narrow holding in *Troxel* was directed at the application of the Washington statute to the facts of that particular case. The Court specifically declined to consider whether the Due Process Clause requires all non-parental visitation statutes to include a showing of harm or potential harm to the child before visitation is granted. But, based on the concerns the Court raised in *Troxel*, that case may have implications for existing grandparent visitation statutes.<sup>4</sup>

Washington's statute is unusually broad in that it does not require a disruptive event in the family that triggers visitation. Most states, including Ohio, do not permit visitation unless the child's parents are unmarried, divorced, or one of them has died. One concern the Court

raised in *Troxel* was the lack of a requirement that the parent have refused visitation before court proceedings for visitation are initiated. Several states include such a requirement in their statutes, but Ohio does not. Washington's statute permits any person to seek visitation. Similarly, in a domestic relations proceeding, Ohio authorizes courts to award visitation to any person. Ohio law is more restrictive in cases in which a child's parent has died or the child's mother was unmarried when the child was born.

In light of *Troxel*, it is significant that Ohio does not require courts to consider the parents' wishes concerning visitation. Presumably, the parent's wishes would be relevant to the court's decision and the court would be required to consider them. The trial court's lack of deference to parental decisionmaking seemed to be the Court's primary reason for determining that Washington's statute as applied was unconstitutional. Because the Supreme Court reserved the issue of the scope of parental due process rights in the visitation context for another day, it is difficult to say whether existing statutes that provide for grandparent visitation would pass constitutional muster. But Justice O'Connor's opinion suggests that Ohio's position could be strengthened by requiring that visitation be refused before an action may be filed and by explicitly providing for a measure of deference to parental decisionmaking in visitation matters.

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*The Supreme Court's decision in Troxel has implications for the Ohio statute.*



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## **Endnotes**

- 1 Acknowledgment means that the biological mother and father have signed an affidavit acknowledging that the child is the child of the man who signed the acknowledgment.
- 2 The statute does not authorize the court to permit the grandparents' attorney to be present for the interview.
- 3 The decision is notable in that it consists of six separate opinions: the plurality opinion authored by Justice O'Connor, separate concurrences by Justices Souter and Thomas, and separate dissents by Justices Stevens, Scalia, and Kennedy.
- 4 At least one state appellate court since *Troxel* has held, based on that case, that its statute as applied violated a parent's due process right to make decisions concerning the care, custody, and control of the parent's child. *Brice v. Brice*, No. 1987, 2000 Md. App. LEXIS 124 (July 5, 2000).



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