

SURVEY OF ILLINOIS LAW: GRANDPARENT VISITATION

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I. INTRODUCTION

As of October of 2007, in Illinois, there were 213,465 children reported to be living in grandparent-headed households, and of those children, over half of them were living with their grandparents without either parent present.¹ In addition, 103,717 grandparents reported that they were the primary caregiver for grandchildren who are living with them.² Almost ten years prior, in 1999, in Illinois, there were 165,897 children reported to be living in grandparent-headed households.³ In almost ten years, the number of children living in grandparent-headed households in Illinois more than doubled.

As a result of this increased participation in the care of their grandchildren, grandparents often form substantial relationships with their grandchildren, well beyond that of the traditional grandparent-grandchild relationship.⁴ Not only grandparents, but other family members and unrelated caregivers are assuming primary care for children. In response to this demographic shift in the American family, state legislatures have enacted third-party (non-biological parent) visitation statutes, including laws that acknowledge grandparents' rights to petition the courts for visitation in certain

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1. Illinois GrandFacts: A State Fact Sheet for Grandparents and Other Relatives Raising Children, (AARP Foundation, The Brookdale Foundation Group, Case Family Programs, Child Welfare League of America, Children's Defense Fund, and Generations United), October, 2007, at 1. 119,676 of the 213,465 reported that the children were living in grandparent-headed households without either parent present. *Id.*

2. *Id.*

3. U.S. Census Bureau, *Children Under 18 Living In Their Grandparents' Household, by State: 1990 Census*, issued July 1, 1999, available at <http://www.census.gov/population/socdemo/grandparents/gp-1.txt> (last visited Mar. 17, 2009).

4. Rebecca J. O'Neill, *Grandparents Raising Grandchildren in Illinois—Establishing the Right to a Continuing Relationship Through Visitation, Custody, and Guardianship in 2007: Where We've Been, Where We Are, and Where We Need To Go*, 38 LOY. U. CHI. L.J. 733 (2007).

circumstances. At the time this article was written, every state has enacted a grandparent visitation statute, including the State of Illinois.⁵ This article will examine the current Illinois Grandparent Visitation Statute, discuss its history, examine the case law interpreting the current statute, and discuss the future of third-party visitation in Illinois.

II. HISTORY OF GRANDPARENT VISITATION LAW IN ILLINOIS

Before there was an Illinois Grandparent Visitation Statute, as early as the 1940's, Illinois Courts recognized a common-law right to grandparent visitation when "special circumstances" existed.⁶ Such "special circumstances" included granting the paternal grandparents visitation because the father of the grandchild was inducted into the armed forces and could not visit with the minor child;⁷ granting the paternal grandparents visitation because the father was killed during World War II, and because in the father's will, he had appointed the paternal grandparents as trustees to a fund for the child;⁸ and granting the maternal grandparents visitation after the mother died and because the minor child had a very close relationship with his maternal grandparents and saw them on a daily basis prior to the mother's death.⁹

In 1981, the common law right to grandparent visitation was superceded by the enactment of the Illinois Grandparent Visitation Statute, 750 ILCS 5/607.¹⁰ Several courts have recognized that the enactment of a grandparent visitation statute in Illinois, as well as other grandparent visitation statutes across the country, came in response to the changes in the American family.¹¹ As the number of single-parent households became more prevalent, so did closer and substantial relationships between grandparents and their grandchildren because they were being called on to assist in these households.¹² In response to the changing American family, and in the interest of serving the welfare of children, state legislatures felt compelled to enact

5. Although, every state has at some point enacted a statute under which grandparents can seek visitation with their grandchildren, many of these statutes have been amended or may have been ruled unconstitutional as applied or facially unconstitutional.

6. See *Chodzko v. Chodzko*, 66 Ill.2d 28, 360 N.E.2d 60 (1976).

7. *Solomon v. Solomon*, 319 Ill.App. 618, 622, 49 N.E.2d 807, 808 (1943).

8. *Lucchesi v. Lucchesi*, 330 Ill.App. 506, 511-12, 71 N.E.2d 920, 922 (1st Dist. 1947).

9. *Chodzko*, 66 Ill.2d at 34, 360 N.E.2d at 63; *Boyles v. Boyles*, 14 Ill. App. 3d 602, 302 N.E.2d 199 (3d Dist. 1973).

10. *Lulay v. Lulay*, 193 Ill.2d 455, 465, 739 N.E.2d 521, 527 (2000).

11. See *id.*; *Troxel v. Granville*, 530 U.S. 57 (2000).

12. See *Lulay*, 193 Ill.2d at 476, 739 N.E.2d at 532; *Troxel*, 530 U.S. at 63.

grandparent visitation statutes to protect children's relationships with their grandparents.¹³

When the Illinois Legislature enacted the Illinois Grandparent Visitation Statute, it was not trying to change the common law, rather it was trying to codify and expand the common law.¹⁴ The then enacted Illinois Grandparent Visitation Statute provided grandparent visitation rights, if it was determined that it would be "in the best interests and welfare of the child."¹⁵ Initially, the Illinois Grandparent Visitation Statute was "construed as recognizing a grandparent's right to seek visitation after the parents divorced."¹⁶ The Illinois Grandparent Visitation Statute was later amended to include that grandparents could seek visitation if the grandparent's own child had deceased; or when a grandchild was adopted by a step-parent, either after the death or termination of parental rights of the other parent.¹⁷

III. UNITED STATES SUPREME COURT CASE—*TROXEL V. GRANVILLE*

Almost twenty years after the enactment of the original Illinois Grandparent Visitation Statute, in 2000, the United States Supreme Court ruled on the constitutionality of a visitation statute in Washington State relating to grandparent visitation.¹⁸ In that case, the United States Supreme Court struck down the Washington State Visitation Statute, holding it unconstitutional, because it was "breathhtakingly broad."¹⁹

In *Troxel*, a father and a mother, never married, had two daughters together. After the parents' relationship ended in June 1991, the father lived with his parents and regularly brought his two daughters to visit with the paternal grandparents.²⁰ Almost two years later the father committed suicide.²¹ After the father's death, the paternal grandparents continued to see their granddaughters on a regular basis, but after almost six months the mother sought to limit the paternal grandparents' visitation "to one short visit per month."²² The paternal grandparents petitioned the court under the

13. See *Id.*; *Troxel*, 530 U.S. at 64.

14. *West v. West*, 294 Ill. App. 3d 356, 363, 689 N.E.2d 1215, 1220 (5th Dist. 1998).

15. *Wickham v. Byrne*, 199 Ill.2d 309, 315, 769 N.E.2d 1, 5 (2002); 750 ILL. COMP. STAT. 5/607 (1981).

16. *Lulay*, 193 Ill.2d at 465, 739 N.E.2d at 527.

17. *Id.* at 465, 739 N.E.2d at 527.

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

19. *Id.* at 67.

20. *Id.* at 60.

21. *Id.*

22. *Id.* at 61.

Washington State Visitation Statute for more visitation time with their granddaughters.²³ The Washington Superior Court, after hearing the case and against the mother's wishes, "entered a visitation decree ordering visitation one weekend per month, one week during the summer, and four hours on both of the petitioning grandparents' birthdays," because the Washington Superior Court determined that it would be in the children's best interest.²⁴ The Washington Superior Court stated that the "children would be benefited from spending quality time with the Petitioners, provided that that time is balanced with time with the childrens' [*sic*] nuclear family. The court finds that the childrens' [*sic*] best interests are served by spending time with their mother and stepfather's other six children."²⁵ On appeal, the Washington Court of Appeals reversed the holding because it found that the grandparents, as non-parents, lacked standing to seek visitation with the children because there was no custody case pending.²⁶ The Washington State Supreme Court affirmed the appellate court's ruling, but instead held that the Washington State Visitation Statute "unconstitutionally" infringed upon a parent's fundamental and liberty interest to "rear their children."²⁷

The Washington State Visitation Statute provided in part, "any person may petition the court for visitation rights at any time,' and the court may grant such visitation rights whenever 'visitation may serve the best interest of the child.'"²⁸ The United States Supreme Court found that the language of the statute permitted "any third party seeking visitation to subject any decision by a parent concerning visitation of the parent's children to state-court review," without "any presumption of validity or any weight" given to the parent's decision.²⁹ The United States Supreme Court recognized that a fit parent has a fundamental right to the care, custody and control of his or her children, and this includes the right to make decisions regarding grandparent visitation.³⁰ In addition, the United States Supreme Court held that "if a fit parent's decision of the kind at issue here becomes subject to judicial review, the court must accord at least some special weight to the parent's own determination," and because the Washington State Visitation Statute failed to give such "special

23. *Id.*

24. *Id.*

25. *Id.* at 62.

26. *Id.*

27. *Id.* at 63.

28. *Id.* at 67 (quoting WASH. REV. CODE § 26.10.160(3) (1987)).

29. *Id.*

30. *Id.* at 65.

weight,” the United States Supreme Court ruled that the Washington State Visitation Statute was unconstitutional.³¹

IV. ILLINOIS CASES AFTER *TROXEL–LULAY V. LULAY* AND *WICKHAM V. BYRNE*

The result of the United States Supreme Court’s holding in *Troxel v. Granville* caused a rippling effect across the country and dramatically changed the laws of grandparent visitation, as state courts and legislatures tried to comport their laws with the holding of *Troxel*.³² Here in Illinois, only five months after the United States Supreme Court ruled on *Troxel*, the Illinois Supreme Court heard a case concerning grandparent visitation and denied the grandparent visitation.³³

In *Lulay v. Lulay*, the Illinois Supreme Court held two main things: (1) that the Illinois Grandparent Visitation Statute permitted a grandparent to seek visitation where the grandparent’s own child is the parent objecting to the grandparent visitation; and (2) that grandparent visitation must be denied, where two fit parents, divorced and sharing joint custody of the grandchild(ren), object to the grandparent visitation.³⁴ In *Lulay*, the paternal grandmother sought visitation after both parents, divorced and sharing joint custody of their children, objected to the paternal grandmother visiting with the children.³⁵ The Illinois Supreme Court recognized “that the State has a compelling interest in the welfare of minors under certain circumstances,” but found that “maintaining the relationship between a grandparent and her grandchildren where the children’s parents are divorced yet stand united in their parental decision that the children should not visit with the grandparent,” was not a sufficient compelling interest to justify the court’s intervention and to justify the court granting the paternal grandmother visitation with her grandchildren over the parents’ objections.³⁶ The Illinois Supreme Court, ultimately, held that the Illinois Grandparent Visitation Statute, as applied to the facts of *Lulay*, unconstitutionally infringed on the parents’ “fundamental liberty interest in raising their children.”³⁷

Less than two years after the holdings of *Troxel* and *Lulay*, the Illinois Supreme Court struck down the Illinois Grandparent Visitation Statute as

31. *Id.* at 70.

32. *Id.* at 57.

33. *Lulay v. Lulay*, 193 Ill.2d 455, 739 N.E.2d 521 (2000).

34. *Id.* at 459, 739 N.E.2d at 524.

35. *Id.* at 478, 739 N.E.2d at 533.

36. *Id.* at 478–79, 739 N.E.2d at 533–34.

37. *Id.* at 479, 739 N.E.2d at 534.

unconstitutional in *Wickham v. Byrne*.³⁸ In *Wickham*, two cases were consolidated for review—*Wickham v. Byrne* and *Langman v. Langman*.³⁹ In the *Wickham* matter, the father and mother had been married and had one child from that marriage.⁴⁰ The mother later died, and in her last will and testament, the mother stated her desire for her child to have “frequent visitation” with her mother, the maternal grandmother.⁴¹ The father agreed to “maintain the relationship” between the maternal grandmother and the grandchild.⁴² However, the father refused to allow the maternal grandmother to have unsupervised and overnight visitation with the grandchild, and when he did so refuse, the maternal grandmother petitioned the court for unsupervised and overnight visitation with her grandchild.⁴³

In the *Langman* matter, the father and mother had been married, and had two children from that marriage.⁴⁴ The father later died, but prior to his death, the father assured the paternal grandparents that they could continue to see their grandchildren “two to three times a month.”⁴⁵ After the father’s death, the paternal grandparents continued to see their grandchildren by babysitting them once a week.⁴⁶ However, when the paternal grandparents requested overnight visitation from the mother and the mother refused, the paternal grandparents petitioned the court seeking more grandparent visitation time.⁴⁷

In both of the aforementioned matters, the surviving parent did not outright refuse visitation, but sought to limit the kind of visitation the grandparents were seeking. Also, in both matters, the grandparents sought visitation by petitioning the court pursuant to the Illinois Grandparent Visitation Statute.

In ruling on these two consolidated cases, the Illinois Supreme Court struck down the Illinois Grandparent Visitation Statute as facially unconstitutional because the Illinois Supreme Court found that the statute directly contravened “the traditional presumption that parents are fit and act in the best interests of their children,” and the statute permitted “the ‘State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a ‘better’ decision could be made.’”⁴⁸

38. *Wickham v. Byrne*, 199 Ill.2d 309, 769 N.E.2d 1 (2002).

39. *Id.* at 310, 769 N.E.2d at 1.

40. *Id.*

41. *Id.* at 310–11, 769 N.E.2d at 1.

42. *Id.* at 311, 769 N.E.2d at 2.

43. *Id.*

44. *Id.* at 312, 769 N.E.2d at 3.

45. *Id.*

46. *Id.*

47. *Id.* at 312–13, 769 N.E.2d at 3.

48. *Id.* at 320, 769 N.E.2d at 7–8.

The Illinois Supreme Court found that like the Washington State Visitation Statute in *Troxel*, the Illinois Grandparent Visitation Statute placed “the parent on equal footing with the party seeking visitation rights,” and found that the statute exposed “the decision of a fit parent to the unfettered value judgment of a judge and the intrusive micro-managing of the state.”⁴⁹

The Illinois Supreme Court continued to make note that the “holding does not disregard the value of a meaningful relationship between a grandparent and a grandchild.”⁵⁰ However, the Illinois Supreme Court continued to state that where family conflicts arise, it

has no place in the courtroom. This is true even where the intrusion is made in good conscience, such as the request for visitation to preserve the child’s only connection to a deceased parent’s family. Parents have the constitutionally protected latitude to raise their children as they decide, even if these decisions are perceived by some to be for arbitrary or wrong reasons. The presumption that parents act in their children’s best interest prevents the court from second guessing parents’ visitation decisions.⁵¹

V. A NEW ILLINOIS GRANDPARENT VISITATION STATUTE

As a result of the very pro-parent *Wickham* decision, Illinois was left without a valid grandparent visitation statute. Almost three years after the *Wickham* decision, on January 1, 2005, the Illinois Legislature amended the old Illinois Grandparent Visitation Statute, ultimately creating a brand new grandparent visitation statute.⁵²

The major changes to the 2005 amended Illinois Grandparent Visitation Statute were the following:

1. The requirement that in order for a grandparent or a great-grandparent to petition the court, there must be, “an unreasonable denial of visitation by a parent.”⁵³ This change was added because the United States Supreme Court in *Troxel* found the fact that the mother never sought to terminate visitation entirely as a significant fact that needed to be taken into consideration.⁵⁴ In addition, in its decision, the United States Supreme Court recognized that other states had expressly provided in their statutes

49. *Id.*

50. *Id.* at 321, 769 N.E.2d at 8.

51. *Id.* at 321–22, 769 N.E.2d at 8.

52. 750 ILL. COMP. STAT. 5/607(a–5)(1) (amended 2005).

53. *Id.*

54. *Troxel v. Granville*, 530 U.S. 57, 71 (2000).

that courts may not award visitation, unless a parent has denied (or unreasonably denied) visitation to a concerned third-party.⁵⁵

2. The requirement that if two parents are divorced, that at least one parent does not object to the visitation.⁵⁶ This language was added to the new Illinois Grandparent Visitation Statute because of the Illinois Supreme Court's holding in *Lulay*.⁵⁷
3. The creation of "a rebuttable presumption that a fit parent's actions and decisions regarding grandparent, great-grandparent, or sibling visitation are not harmful to the child's mental, physical, or emotional health."⁵⁸
4. That "the burden is on the party filing a petition under this Section to prove that the parent's actions and decisions regarding visitation times are harmful to the child's mental, physical or emotional health."⁵⁹
5. A list of factors that the court shall consider in determining whether to grant grandparent or great-grandparent visitation.⁶⁰
6. That the court "may order visitation rights for the grandparent, great-grandparent, or sibling that include reasonable access without requiring overnight or possessory visitation."⁶¹
7. The addition that "unless by stipulation of the parties, no motion to modify a grandparent, great-grandparent, or sibling visitation order may be made earlier than 2 years after the date the order was filed, unless the court permits it to be made on the basis of affidavits that there is a reason to believe the child's present environment may endanger seriously the child's mental, physical, or emotional health."⁶²

55. *Id.*

56. 750 ILL. COMP. STAT. 5/607(a-5)(1)(B) (amended 2005).

57. *Lulay v. Lulay*, 193 Ill.2d 455, 479, 739 N.E.2d 521, 534 (2000).

58. 750 ILL. COMP. STAT. 5/607 (amended 2005).

59. *Id.*

60. The factors are: (A) the preference of the child if the child is determined to be of sufficient maturity to express a preference; (B) the mental and physical health of the child; (C) the mental and physical health of the grandparent, great-grandparent, or sibling; (D) the length and quality of the prior relationship between the child and the grandparent, great-grandparent, or sibling; (E) the good faith of the party filing the petition; (F) the good faith of the person denying visitation; (G) the quantity of the visitation time requested and the potential adverse impact that visitation would have on the child's customary activities; (H) whether the child resided with the petitioner for at least 6 consecutive months with or without the current custodian present; (I) whether the petitioner had frequent or regular contact or visitation with the child for at least 12 consecutive months; (J) any other fact that establishes that the loss of the relationship between the petitioner and the child is likely to harm the child's mental, physical, or emotional health; and (K) whether the grandparent, great-grandparent, or sibling was a primary caretaker of the child for a period of not less than 6 consecutive months. 750 ILL. COMP. STAT. 5/607(a-5)(4) (amended 2005).

61. 750 ILL. COMP. STAT. 5/607(a-5)(5) (amended 2005) (emphasis added).

62. 750 ILL. COMP. STAT. 5/607(a-7)(1) (amended 2005).

8. That the court cannot “modify an order that grants visitation to a grandparent, great-grandparent, or sibling unless it finds by clear and convincing evidence, upon the basis of facts that have arisen since the prior visitation order or that were unknown to the court at the time of entry of the prior visitation, that a change has occurred in the circumstances of the child or his or her custodian, and that the modification is necessary to protect the mental, physical, or emotional health of the child.” In addition, the court must state its reasoning for modifying or terminating visitation.⁶³
9. That a parent may always seek to modify visitation upon “changed circumstances when necessary to promote the child’s best interest.”⁶⁴
10. The inclusion of that nothing in the Illinois Grandparent Visitation Statute would “apply to a child in whose interests a petition under Section 2–13 of the Juvenile Court Act is pending.”⁶⁵
11. That attorney fees and costs of litigation can be assessed against a party seeking to modify a visitation order, “if the court finds that the modification action is vexatious and constitutes harassment.”⁶⁶

VI. AMENDING THE NEW ILLINOIS GRANDPARENT VISITATION STATUTE, AGAIN

Two years after the Illinois Legislature amended the Illinois Grandparent Visitation Statute in 2005 to comport with the holdings of *Troxel*, *Wickham*, and *Lulay*, the Illinois Legislature again amended the Illinois Grandparent Visitation Statute in 2007. The following is a list of the changes to the Illinois Grandparent Visitation Statute, and is the current statute in-effect as of present date in the State of Illinois:

1. The child that the grandparents or great-grandparents are seeking visitation with, must be one year old or older.⁶⁷ The Illinois Legislature added this requirement because it found it unlikely that a grandparent or great-grandparent could develop the type of substantial relationship to warrant court-ordered visitation with a newborn child.⁶⁸

63. 750 ILL. COMP. STAT. 5/607(a-7)(2) (amended 2005).

64. 750 ILL. COMP. STAT. 5/607(c) (amended 2005).

65. 750 ILL. COMP. STAT. 5/607(a-3) (amended 2005).

66. *Id.*

67. 750 ILL. COMP. STAT. 5/607 (amended 2007).

68. New Amendments to the Illinois Grandparent Visitation Statute, <http://www.gflawoffice.com/articleDetail.php?ID=70> (Dec. 7, 2006).

2. The grandparents and/or great-grandparents “have standing to file a petition for visitation rights in a pending dissolution proceeding or any other proceeding that involves custody or visitation issues, requesting visitation in accordance with” the Illinois Grandparent Visitation Statute.⁶⁹ This change was made to expedite matters involving children because sometimes, litigation can take years to complete, and a child may be harmed by having to wait until the dissolution proceeding is completed to continue his or her relationship with his or her grandparents.⁷⁰
3. The petition for visitation must be filed in the county in which the child resides.⁷¹
4. There are no grandparent visitation rights, where “a petition is pending under Section 2–13 of the Juvenile Court Act of 1987 [705 ILCS 405/2–13]⁷² or a petition to adopt an unrelated child is pending under the Adoption Act.”⁷³
5. Grandparent visitation does not apply to a child whose interests in a petition to adopt an unrelated child is pending under the Adoption Act.⁷⁴ This means that if the child is being adopted by a relative or a step-parent, the grandparent or great-grandparent will still maintain standing to seek grandparent visitation rights under the statute.
6. Instead of requiring the one year period for incompetency of a parent, death of a parent, or an imprisoned parent, before being able to petition the court, a grandparent need only prove that (1) “a parent of the child is incompetent as a matter of law;”⁷⁵ (2) “the child’s other parent is deceased or has been missing for at least 3 months;”⁷⁶ or “a parent has been incarcerated in jail or prison during the 3 month period preceding the filing of the petition.”⁷⁷
7. The 2007 amended statute removed that if the child’s parents were legally separated, that they had to have been legally separated for a “3 month period prior to the filing of the petition.”⁷⁸

69. 750 ILL. COMP. STAT. 5/607 (amended 2007).

70. New Amendments to the Illinois Grandparent Visitation Statute, <http://www.gflawoffice.com/articleDetail.php?ID=70> (Dec. 7, 2006).

71. 750 ILL. COMP. STAT. 5/607 (amended 2007).

72. In abuse, neglect or dependency cases in Juvenile Court. 705 ILL. COMP. STAT. 405/2–13 (2008).

73. 750 ILL. COMP. STAT. 5/607(a–3) (amended 2007).

74. *Id.*

75. 750 ILL. COMP. STAT. 5/607(a–5)(1)(A–10) (amended 2007).

76. 750 ILL. COMP. STAT. 5/607(a–5)(1)(A–5) (amended 2007).

77. 750 ILL. COMP. STAT. 5/607(a–5)(1)(A–15) (amended 2007).

78. 750 ILL. COMP. STAT. 5/607(a–5)(1)(B) (amended 2005).

8. A grandparent of a parent whose parental rights have been terminated, other than by a Juvenile Court and except in the cases of adoption, may no longer seek grandparent visitation under this statute.⁷⁹
9. Any visitation rights granted prior the filing of a petition for adoption will terminate “upon the entry of an order terminating parental rights or granting the adoption of the child, whichever is earlier.”⁸⁰
10. The addition of a factor to consider in whether to grant grandparent visitation: “[W]hether the grandparent, great-grandparent, or sibling was a primary caretaker of the child for a period of not less than 6 consecutive months.”⁸¹
11. That a “child’s parent may always petition to modify visitation upon changed circumstances when necessary to promote the child’s best interest.”⁸²

VII. WHO CAN PETITION THE COURT FOR GRANDPARENT VISITATION

The Illinois Grandparent Visitation Statute, as of present day, permits a grandparent to petition the court if two conditions are met. First, there must be an unreasonable denial of visitation.⁸³ Second, one of the following situations must exist: (a) the child’s other parent is deceased or has been missing for at least three months;⁸⁴ (b) a parent of the child is incompetent as a matter of law;⁸⁵ (c) a parent has been incarcerated in jail or prison for three months prior to the filing of the petition;⁸⁶ (d) if the mother and father are divorced or have been legally separated from each other or there is a pending divorce or other court proceeding involving the grandchild, and at least one parent does not object to the grandparent visitation;⁸⁷ (e) the child is born out of wedlock, the parents are not living together, and the petitioner is a maternal grandparent or great-grandparent;⁸⁸ (f) the child is born out of wedlock, the

79. “For the purposes of this Section a parent is considered to be missing if the parent’s location has not been determined and the parent has been reported as missing to a law enforcement agency.” 750 ILL. COMP. STAT. 5/607(a-5)(1)(C) (amended 2005).

80. 750 ILL. COMP. STAT. 5/607(a-5)(2) (amended 2007).

81. 750 ILL. COMP. STAT. 5/607(a-5)(4)(K) (amended 2007).

82. 750 ILL. COMP. STAT. 5/607(a-7)(2) (amended 2007) and deletes 750 ILL. COMP. STAT. 5/607(a-7)(3)(c) (amended 2007).

83. 750 ILL. COMP. STAT. 5/607(a-5)(1) (amended 2007).

84. 750 ILL. COMP. STAT. 5/607(a-5)(1)(A-5) (amended 2007).

85. 750 ILL. COMP. STAT. 5/607(a-5)(1)(A-10) (amended 2007).

86. 750 ILL. COMP. STAT. 5/607(a-5)(1)(A-15) (amended 2007).

87. 750 ILL. COMP. STAT. 5/607(a-5)(1)(B) (amended 2007).

88. 750 ILL. COMP. STAT. 5/607(a-5)(1)(D) (amended 2007).

parents are not living together, and the petitioner is a paternal grandparent or great-grandparent, and paternity was established by a court of competent jurisdiction.⁸⁹

VIII. NOTABLE CASES SINCE THE 2007 AMENDMENTS TO THE ILLINOIS GRANDPARENT VISITATION STATUTE

Since 2007, and the amendments to the Illinois Grandparent Visitation Statute, there have been only four notable cases concerning the Illinois Grandparent Visitation Statute. In 2007, three cases were heard by the Illinois Supreme Court concerning grandparents petitioning the Illinois courts for visitation with their grandchildren: *Mulay v. Mulay*,⁹⁰ *Felzak v. Hruby*,⁹¹ and *Flynn v. Henkel*.⁹²

In *Mulay v. Mulay*, the father and mother were married, and had two children from that marriage.⁹³ The father was killed, and before and after the father's death, the paternal grandparents visited and helped care for their grandchildren on a nearly daily basis.⁹⁴ About two years later, the mother "began to limit the time the grandparents were permitted to spend with their grandchildren," and eventually, the mother, through her boyfriend, told the paternal grandparents that they were no longer welcome to come to the grandchildren's home and that the paternal grandparents could only see the grandchildren at T-ball games.⁹⁵

The paternal grandparents petitioned the court for visitation, and the mother moved to dismiss the case based upon constitutional and non-constitutional grounds.⁹⁶ The mother alleged that the Illinois Grandparent Visitation Statute was unconstitutional because it "interfered with the mother's fundamental liberty interest as a fit parent in the care, custody, and control of her children and was unconstitutionally vague."⁹⁷ The mother also alleged "that the petition was inadequate as a matter of law because it contained conclusory allegations unsupported by specific facts and did not allege that the

89. 750 ILL. COMP. STAT. 5/607(a-5)(1)(E) (amended 2007).

90. *Mulay v. Mulay*, 225 Ill.2d 601, 870 N.E.2d 328 (2007).

91. *Felzak v. Hruby*, 226 Ill.2d 382, 876 N.E.2d 650 (2007).

92. *Flynn v. Henkel*, 227 Ill.2d 176, 880 N.E.2d 166 (2007).

93. *Mulay*, 225 Ill.2d at 603, 870 N.E.2d at 329.

94. *Mulay v. Mulay*, 225 Ill.2d 601, 603, 870 N.E.2d 328, 329 (2007).

95. *Id.* at 603, 870 N.E.2d at 329.

96. *Id.* at 604, 870 N.E.2d at 329.

97. *Id.*

mother was an unfit parent or that her visitation decisions were harmful to the children's physical, mental, or emotional health."⁹⁸

The trial court granted the mother's motion to dismiss based on constitutional grounds, without considering non-constitutional grounds the mother asserted.⁹⁹ The trial court found that the statutory factors used to determine whether a grandparent should be granted or denied grandparent visitation "were not sufficiently narrow and deferential to a parent's superior rights to pass constitutional muster."¹⁰⁰ "The court also criticized the statute's failure to consider parental visitation preferences and the parent's physical and mental health, stating that parental health affected the ability to make daily decisions, 'i.e. fitness.'"¹⁰¹ "Based on this analysis, the trial court believed that the revised statute contained some of the same flaws as outlined in *Wickham*."¹⁰² Lastly, the trial court "stated that the statutory requirement that the denial of visitation be 'unreasonable, even if it is not harmful,' was 'vague.'"¹⁰³

The Illinois Supreme Court held that the case should have and must first be determined on non-constitutional grounds before considering any constitutional grounds.¹⁰⁴ Because the trial court failed to consider the mother's motion to dismiss based upon her non-constitutional grounds, the Illinois Supreme Court remanded the case back to the trial court for proper consideration of the mother's non-constitutional grounds for dismissing the case.¹⁰⁵ In other words, the Illinois Supreme Court held that the Illinois Supreme Court could only consider the constitutional issues, "when the case may not be decided on constitutional grounds."¹⁰⁶

In *Felzak v. Hruby*, the father and the mother were married and had three children together.¹⁰⁷ The mother passed away, and the father later remarried, and his new wife adopted the three children.¹⁰⁸ After the step-mother's adoption of the children, the maternal grandmother sought visitation with the grandchildren claiming that she had been denied visitation after the father remarried.¹⁰⁹

98. *Id.* at 605, 870 N.E.2d at 329.

99. *Id.* at 605-06, 870 N.E.2d at 330.

100. *Id.*

101. *Id.*

102. *Id.* at 606, 870 N.E.2d at 330.

103. *Id.*

104. *Id.* at 611, 870 N.E.2d at 333.

105. *Id.* at 611, 870 N.E.2d at 333.

106. *Id.*

107. *Felzak v. Hruby*, 226 Ill.2d 382, 384, 876 N.E.2d 650, 653 (2007).

108. *Id.*

109. *Id.*

In the circuit court, the parties were referred “to a psychologist for conciliation counseling.”¹¹⁰ The psychologist recommended that the maternal grandmother be permitted to visit with her grandchildren.¹¹¹ As a result of the psychologist’s recommendation, the parties entered an agreed order granting the maternal grandmother visitation with the grandchildren.¹¹² Approximately four months later, the maternal grandmother returned to court and filed a “Petition for Further Conciliation and Other Relief,” in which the maternal grandmother alleged that she had not visited with two of her grandchildren, and sought more visitation time with the remaining grandchild.¹¹³ Again, the parties entered an agreed order granting the maternal grandmother more time with the remaining grandchild, and the maternal grandmother agreed to withdraw her petition.¹¹⁴ Almost ten years later, the maternal grandmother sought to enforce the second agreed order because she was being denied her visitation with the remaining grandchild.¹¹⁵ As a result of the maternal grandmother’s petition to enforce the second agreed order, the parties litigated for over two more years and eventually the case ended up in the Illinois Supreme Court.¹¹⁶ By the time the case was before the Illinois Supreme Court, the grandchild at concern reached majority age and the issue became moot because the father and the step-mother could no longer compel the grandchild to visit with the maternal grandmother.¹¹⁷

In *Flynn v. Henkel*, the father and mother were never married, never lived together and had one child together.¹¹⁸ After the grandchild was born, the paternal grandmother visited the grandchild once a week for a few weeks and then twice a month.¹¹⁹ At that time, the father had been imprisoned and once he was released the mother told the paternal grandmother that she would only continue visits if the paternal grandmother did not allow the father to see the child.¹²⁰ The paternal grandmother agreed to abide by the mother’s wishes.¹²¹ Later, the father petitioned the court for visitation with the child and the mother began to deny the paternal grandmother visitation with the child.¹²² As

110. *Id.* at 385, 876 N.E.2d at 653.

111. *Id.*

112. *Id.*

113. *Id.* at 385–86, 876 N.E.2d at 654.

114. *Id.* at 386, 876 N.E.2d at 654.

115. *Id.*

116. *Id.* at 390, 876 N.E.2d at 656.

117. *Id.* at 391, 876 N.E.2d at 657.

118. *Flynn v. Henkel*, 227 Ill.2d 176, 177, 880 N.E.2d 166 (2000).

119. *Id.*

120. *Id.* at 178, 880 N.E.2d at 167.

121. *Id.*

122. *Id.* at 179, 880 N.E.2d at 167.

a result of the father's petition to the court for visitation, he was granted supervised visitation, and the paternal grandmother was only allowed to visit with the child when the father was visiting with the child.¹²³ Eventually, the father relocated to California, and when he did so, the paternal grandmother requested visitation with the child.¹²⁴ The mother refused visitation and the paternal grandmother sought visitation and after a hearing the trial court granted the paternal grandmother visitation.¹²⁵

The trial court granted the paternal grandmother visitation because it found that the denial of visitation was harmful to the child.¹²⁶ The trial court stated that the "harm in this case is not something that you can put in the sense of a direct emotional harm. It's a direct denial of an opportunity that every grandparent according to this statute is entitled to."¹²⁷

On appeal, the appellate court affirmed the trial court's decision stating that the harm from the denial of visitation can be inferred from the paternal grandmother's love for the child.¹²⁸ The appellate court found that the paternal grandmother had tried to be involved with the child, even before he was born; and once she had found out that the child was born, she visited the child every night.¹²⁹ The appellate court found that the child "would be harmed by never knowing a grandparent who loved him and who did not undermine the child's relationship with his mother."¹³⁰

The Illinois Supreme Court reversed the appellate court's decision, finding that the kind of "harm" that the trial court and the appellate court had indicated was present in this case, was not sufficient enough to rebut the presumption that a fit parent's decision to deny or limit visitation was in the child's best interests.¹³¹ The Illinois Supreme Court stated, "neither denial of an opportunity for grandparent visitation, as the trial court found, nor a child 'never knowing a grandparent who loved him and who did not undermine the child's relationship with his mother,' as the appellate court held is "harm" that will rebut the presumption stated in [S]ection 607(a-5)(3) that a fit parent's denial of grandparent's visitation is not harmful to the child's mental, physical, or emotional health."¹³² The Illinois Supreme Court found that the mother's

123. *Id.* at 179, 880 N.E.2d at 167-68.

124. *Id.* at 168, 880 N.E.2d at 179.

125. *Id.*

126. *Id.* at 179, 880 N.E.2d at 168.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 180, 880 N.E.2d at 168.

131. *Id.* at 184, 880 N.E.2d at 171.

132. *Id.*

decision to deny grandparent visitation was not harmful to the child's mental, physical, or emotional health.¹³³

In 2008, there was only one significant case regarding grandparent visitation heard by an Illinois Appellate Court.¹³⁴ In *In Re Pfalzgraf*, the father and mother were divorced, and the mother was the custodial parent.¹³⁵ The paternal grandparents petitioned the court for visitation, stating that the father did not object to their visitation, and requesting that their visitation time occur during the mother's time with the child, so as not to diminish the father's visitation time with the child.¹³⁶ The mother agreed with granting the paternal grandparents visitation time with the child, but she did not want the grandparents' visitation time to diminish her time with the child.¹³⁷ The trial court agreed with the mother, and granted the grandparents visitation time during the father's visitation, and stated that the grandparents' visitation "shall not diminish the time during which the Mother currently has the minor child."¹³⁸

In granting the paternal grandparents' visitation, the trial court interpreted a provision of the Illinois Grandparent Visitation Statute to mean that, "the parent who is unrelated to the party requesting visitation rights does not have to give up their time with the child to allow [grandparent] visitation."¹³⁹ The appellate court found that "given the language's plain and ordinary meaning, the directive only precludes a court from granting grandparent visitation that diminishes the *unrelated* parent's *visitation* time."¹⁴⁰ Thus, the appellate court found that in the present case, because the paternal grandparents were related to the father, the person having *visitation* time, that the provision was inapplicable to the case.

However, the appellate court continued to uphold the trial court's decision based upon the fact that the paternal grandparents had not even attempted to rebut the presumption that the mother's decision to not allow the grandparents' visitation time to diminish her time with the child was harmful to the child's mental, physical, or emotional health.¹⁴¹

133. *Flynn*, 227 Ill.2d at 185, 880 N.E.2d at 171.

134. *In Re Pfalzgraf*, 378 Ill. App. 3d 1107, 882 N.E.2d 719 (5th Dist. 2008).

135. *Id.* at 1108, 882 N.E.2d at 720.

136. *Id.* at 1107, 882 N.E.2d at 720.

137. *Id.*

138. *Id.*

139. *Id.* at 1109, 882 N.E.2d at 721. Said provision provides, "The visitation of the grandparent ***must not diminish the visitation of the parent who is not related to the grandparent *** seeking visitation."
750 ILL. COMP. STAT. 5/607(a-5)(1)(B)(West 2006).

140. *Pfalzgraf*, 378 Ill. App. 3d at 1109, 882 N.E.2d at 721.

141. *Id.* at 1110, 882 N.E.2d at 722.

In summary, the four discussed cases state that (1) a grandparent visitation case must first be determined on non-constitutional grounds before a court can consider the case on constitutional grounds;¹⁴² (2) that the burden rests on the grandparent to prove that the parent's decision regarding visitation is harmful to the child's mental, physical or emotional health;¹⁴³ (3) that the grandparents' visitation cannot diminish an *unrelated* parent's visitation (versus custody) time;¹⁴⁴ and (4) that the denial of the opportunity to have a loving grandparent-grandchild relationship is not the kind of "harm" that is sufficient to rebut the presumption outlined in the Illinois Grandparent Visitation Statute.¹⁴⁵

IX. PRIOR PROPOSED LEGISLATION

As of present date, there does not appear to be any pending legislation before the Illinois' House of Representatives or the Illinois' Senate concerning grandparent visitation. However, in 2007, the following proposals were considered, but not added to the Illinois Grandparent Visitation Statute: A proposal allowing grandparents or great-grandparents to petition for visitation via electronic communication (i.e., e-mail, telephone, video conference, instant messaging,¹⁴⁶ and only requiring that a denial of visitation has occurred, versus an "unreasonable" denial of visitation.¹⁴⁷

X. THE EFFECT OF PRIOR VISITATION ORDERS WHEN THE ILLINOIS GRANDPARENT VISITATION STATUTE IS FOUND TO BE UNCONSTITUTIONAL

The Illinois Grandparent Visitation Statute is constantly being constitutionally attacked, with the main basis being that it impedes on the parent's fundamental right to the care, custody, and control of their children. What we have learned in the past from the effect of *Wickham v. Byrne*, when the Illinois Supreme Court ruled the Illinois Grandparent Visitation Statute unconstitutional, is how the courts may treat previous court orders and/or agreed orders entered by the court, when the Illinois Grandparent Visitation Statute had been declared constitutional.¹⁴⁸

142. *Mulay v. Mulay*, 225 Ill.2d 601, 870 N.E.2d 328 (2007).

143. *Pfalzgraf*, 378 Ill. App. 3d at 1107, 882 N.E.2d at 719.

144. *Id.*

145. *Flynn v. Henkel*, 227 Ill.2d 176, 880 N.E.2d 166 (2007).

146. H.B. 4220, 95th Gen. Assem., Reg. Sess. (2007).

147. H.B. 3010, 95th Gen. Assem., Reg. Sess. (2007).

148. *Wickham v. Byrne*, 199 Ill.2d 309, 309, 769 N.E.2d 1, 1 (2002), 750 ILL. COMP. STAT. 5/607 (1981).

There are two main cases concerning this situation: *In re M.M.D.*¹⁴⁹ and *Beurksen v. Graff*.¹⁵⁰ In *In re M.M.D.*, the mother and father were never married, and the mother died giving birth to the child.¹⁵¹ After the mother's death, the maternal grandparents petitioned the court and were appointed temporary guardians of the child, and were awarded temporary custody of the child, pending the proceeding regarding the maternal grandparents becoming the permanent guardians of the child.¹⁵² Several months later, the father petitioned the court to establish paternity.¹⁵³ When the child was over two years old, the parties agreed that the father was indeed, the father, and the father was granted visitation with the child.¹⁵⁴ When the child was almost four years old, the father petitioned the court to obtain custody of the child, and to terminate the maternal grandparents' guardianship of the child.¹⁵⁵ Eventually, the parties agreed to terminate the maternal grandparents' guardianship and to give custody of the child to the father, and the father agreed that the maternal grandparents could have "specific and detailed visitation rights, telephone access to the child, information about the child's education and medical care, and authorization to speak with the child's teachers, school personnel, counselors and physicians regarding her progress and circumstances."¹⁵⁶

After the Illinois Supreme Court struck down the Illinois Grandparent Visitation Statute in *Wickham v. Byrne*, the father petitioned the court to modify the parties' agreement, or alternatively, to terminate the agreement because he claimed that the agreement was based upon an invalidated law, even though the agreement had not invoked the provisions of the Illinois Grandparent Visitation Statute.¹⁵⁷

The Illinois Supreme Court stated, "[T]he need to shield parental decisionmaking from second-guessing by the state is not implicated in the case before us today. The order regarding grandparent visitation at issue here was not imposed by the court against the parent's wishes. It was entered pursuant to an agreement negotiated between," the father and the maternal grandparents, and was therefore, a consent decree.¹⁵⁸

149. *In re M.M.D.*, 213 Ill.2d 105, 820 N.E.2d 392 (2004).

150. *Beurksen v. Graff*, 351 Ill. App. 3d 148, 149, 813 N.E.2d 1018, 1019 (1st Dist. 2004).

151. *M.M.D.*, 213 Ill.2d at 105, 820 N.E.2d at 392.

152. *Id.* at 107, 820 N.E.2d at 395.

153. *Id.*

154. *Id.*

155. *Id.* at 108, 820 N.E.2d at 395.

156. *Id.* at 108-09, 820 N.E.2d at 395-96.

157. *Id.* at 110-11, 820 N.E.2d at 397.

158. *Id.* at 114, 820 N.E.2d at 398.

The Illinois Supreme Court continued on to determine the case based upon the principles of consent decrees, and found that the agreement was valid and enforceable because it did not fall into the exception where a consent decree may be void because it is contrary to public policy.¹⁵⁹ In finding that the parties' agreement was not contrary to public policy, the Illinois Supreme Court stated, "[G]randparents often play a uniquely positive role in a child's upbringing. For a parent to permit visitation between the child and the child's grandparents is a time-honored, often cherished aspect of family life. In no sense can such arrangements be regarded as 'manifestly injurious to the public welfare.' Moreover, there is nothing in the record before us to suggest that the agreement at issue here was anything but beneficial for everyone concerned at the time it was adopted."¹⁶⁰ The Illinois Supreme Court upheld the parties' agreement, and found it to be valid and enforceable.¹⁶¹

However, the Illinois Supreme Court did not consider the father's claim to modify the agreement because the circuit court never considered the father's claim, and as such, the Illinois Supreme Court directed the circuit court to "adhere to the principles" of *Wickham v. Byrne* in determining whether to modify the agreement.¹⁶²

In *Beurksen v. Graff*, a grandmother had petitioned the court for overnight visitation, and the court granted the grandmother overnight visitation and summer visitation.¹⁶³ After the Illinois Supreme Court struck down the Illinois Grandparent Visitation Statute in *Wickham v. Byrne*, the mother sought to void the order because it had been based upon an invalidated statute.¹⁶⁴ The trial court vacated the order, and the appellate court affirmed stating "the parties' visitation order is invalid as it is based on an unconstitutional statute."¹⁶⁵

In reading these two cases, if the Illinois Grandparent Visitation Statute is later invalidated, it appears that if a grandparent and a parent can reach an agreement regarding visitation and have it entered by the court, the court will uphold the visitation order based upon consent decree principles;¹⁶⁶ however, if the court order granting visitation was pursuant to the Illinois Grandparent

159. *Id.* at 114–16, 820 N.E.2d at 399–400.

160. *Id.* at 115, 820 N.E.2d at 399 (quoting *Schumann-Heink v. Folsom*, 328 Ill. 321, 330, 159 N.E.2d 250 (1927)).

161. *Id.* at 115, 820 N.E.2d at 400.

162. *Id.* at 118, 820 N.E.2d at 401.

163. *Beurksen v. Graff*, 351 Ill. App. 3d 148, 149, 813 N.E.2d 1018, 1019 (1st Dist. 2004).

164. *Id.*

165. *Id.* at 151, 813 N.E.2d at 1021.

166. *In re M.M.D.*, 213 Ill.2d 105, 820 N.E.2d 391 (2004).

Visitation Statute and against the wishes of the parent(s), the court order will be vacated because it is based upon an unconstitutional statute.¹⁶⁷

XI. CONCLUSION

The constitutionality of the Illinois Grandparent Visitation Statute remains unsettled and subject to change as the Illinois courts and Illinois legislature work to find a constitutional balance between complying with the holdings of *Troxel* and *Wickham*, and the state's right to interfere with a parent's fundamental right, in the interest of protecting the health, safety, and welfare of children.

167. *Beurksen*, 351 Ill. App. 3d at 148, 813 N.E.2d at 1018.