When Blocked Grandparent Visits Hurt Children

Existing Iowa grandparent visitation law is posted at https://www.legis.iowa.gov/docs/code/600c.pdf. A PDF copy of this document is posted at www.Saltshaker.US/IowaGrandparents.pdf

Cases:
Troxel v. Granville, 530 U.S. 57 (2000)
Joe and Lois SANTI, Appellants, v. Mike and Heather SANTI, Appellees. No. 00-0181. (2001)

For my analysis of these cases see www.Saltshaker.US/Grandparent-Troxel.pdf www.Saltshaker.US/Grandparent-Santi.pdf

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Current law lets grandparents ask a judge for help visiting their grandchildren when a parent is unwilling, but only if one parent is dead and the surviving parent is a child abuser. This paragraph removes the requirement that one parent be dead:

Waiting for a parent to die.

Iowa 600C.1

Grandparent and great-grandparent visitation.

1. The grandparent or great-grandparent of a minor child may petition the court for grandchild or great-grandchild visitation. ~~when the parent of the minor child, who is the child of the grandparent or the grandchild of the great-grandparent, is deceased.~~

Discussion: Neither *Santi* nor *Troxel* say one parent has to die before grandparents can go to court. I can't imagine that anyone lobbied for it. So I can only guess where that came from.

Maybe it came from reading the "Conclusion" of Santi out of context, which would seem to say a judge can't overrule an "intact family". Which would leave open court involvement in single parent families, although the precedent didn't say anything about one parent having to be deceased, which rules out relief where there is divorce, and where the father is unknown. The *Troxel* decision was *about* a mom whose husband, the son of the petitioning grandparents, had died, but the decision didn't suggest that was some kind of requirement.

Anyway, here is Santi's "Conclusion" out of context:

> "We are convinced that fostering close relations between grandparents and grandchildren is not a sufficiently compelling state interest to justify court-ordered visitation over the joint objection of married parents in an intact nuclear family."

Conclusions summarize. They don't contain all the details and nuances of the material that precedes them. If we read the context we find

the court saying a judge CAN take a case when "parents", plural, "were **unfit to make the visitation decision".**

> The district court wisely...reasoned that it should not assume a parens patrie role without a threshold finding that the parents were **unfit to make the visitation decision** confronting them.
>
> ...But, unlike the other subsections of section 598.35 which contemplate some breakdown between parents before a judge is authorized to make a difficult choice for them, section 598.35(7) permits the court to usurp that judgment over the joint decision of **two fit parents.** In other words, rather than narrowly tailoring the statute to serve the needs of children with disputing parents, the legislature has broadly swept even **fit parents and intact families** under the court's wing.

Basing its reasoning on Troxel, Santi modifies its concluding statement by saying the presumption that parental decisions will benefit their children means the decisions of "fit parents":

> We believe the analysis is unnecessary because of the historic presumption that **fit parents' decisions will benefit their children, not harm them.** See Troxel, 530 U.S. at 68.

Forced to accuse. Iowa law makes grandparents, seeking a visitation order with their grandchildren, prove the parents – their children – are abusive. Not just slightly abusive, but to an extent that would seem to justify termination of parental rights. Grandparents want to heal their families, not drive them farther apart. They want to visit their grandchildren, not have the government take them where their parents can't visit them either. *Santi* requires a finding that the parent/parents are "unfit to make the visitation decision, so we must leave that in, but we can remove its implication of broad inability to make wise parental decisions. And we can replace the 7 horrible accusations grandparents are invited to make, with six *positive* criteria for grandparent visits which address every reasonable parental concern.

Iowa 600C.1 Grandparent and great-grandparent visitation.

c. That the presumption that the parent's (or parents') decision to block grandparent contact is in the best interests of the child ~~that the parent who is being asked to temporarily relinquish care, custody, and control of the child to provide visitation, is fit to make the decision regarding visitation~~ ~~is~~ has been overcome by demonstrating ~~one~~ that all of the following exist or at least there is no reason to doubt they exist:

(1) The parent (or parents) is (are) unfit to make such decision, which shall not be construed to imply unfitness to make any other parenting decision.

~~(2) The parent's judgment has been impaired and the relative benefit to the child of granting visitation greatly outweighs any effect on the parent-child relationship. Impaired judgment of a parent may be evidenced by any of, but not limited to, the following:~~

~~(a) Neglect of the child.~~

~~(b) Abuse of the child.~~

~~(c) Violence toward the child.~~

~~(d) Indifference or absence of feeling toward the child.~~

~~(e) Demonstrated unwillingness and inability to promote the emotional and physical well-being of the child.~~
~~(f) Drug abuse.~~
~~(g) A diagnosis of mental illness.~~
(2) That no reason consistent with the facts can be proved for barring reasonable visitation,
(3) That the grandparent(s) are willing to accommodate all reasonable concerns expressed by the parent(s),
(4) That visitation can be structured in a way to minimize the child's exposure to conflicts between the adults.

#4 is from Illinois law.

(5) That the petitioner is a fit and proper person to have visitation rights with the grandchild;
(6) That the petitioner has repeatedly attempted to visit his or her grandchild during the thirty (30) days immediately preceding the date the petition was filed and was not allowed to visit the grandchild during the thirty (30) day period as a direct result of the actions of either, or both, parents of the grandchild;
(7) That there is no other way the petitioner is able to visit his or her grandchild than through court intervention.

5, 6, and 7 are from Rhode Island law.(See Appendix C, Forced to Accuse)

What we propose striking involves accusations of substantial harm to children, which *Santi* explicitly said it would not require. Parental "unfitness to make the visitiation decision" is required by Santi, although we mitigate its implication of broad unfitness to make other parenting decisions.

> Joe and Lois rightly argue that the district court here, unlike the plurality in Troxel, rested its decision on the conclusion that substantive due process **requires a finding of SUBSTANTIAL harm** to the child before grandparent visitation may be ordered over the parents' opposition. **The court in Troxel declined to reach that question and, on our de novo review, so do we.** We believe the analysis is unnecessary because of the historic presumption that **fit parents' decisions will benefit their children, not harm them.** See Troxel, 530 U.S. at 68, 120 S.Ct. at 2061, 147 L.Ed.2d at 58.

"Parental unfitness to make the visitation decision" was not defined in the precedents in a way that would tell anyone how to prove that it exists. Our bill proposes that "unfitness" does not consist only of causing negative direct harms like child abuse and neglect in existing law; in fact, "substantial harm", which courts don't require, is *caused* by pressuring grandparents to allege abuse in order to see their grandchildren. "Unfitness to make the visitation decision", our bill submits, also consists in denying grandparent contact when every reason to deny it has been addressed.

Best Interests of the Grandchildren.

Previous Iowa law said grandparents should see their grandchildren when that is "in the best interests of the children". The courts said that gives judges too much freedom to usurp parental authority according to their own values. So in addition to telling judges to consider "the best interests of the children", there should be a presumption that parents are ordinarily the best judges of their children's best interests.

We all thought judges already knew that, but the Supreme Court judges say no, they need that spelled out in the law. So we spell it out. But we also rely on what the courts have said about grandparent contact being, ordinarily, in the best interests of the children.

Iowa 600C.1 Grandparent and great-grandparent visitation.

2. The court shall consider a ~~fit~~ parent's objections to granting visitation under this section, and especially the unanimous objection of both parents, if living with the child. A rebuttable presumption arises that a ~~fit~~ parent's reasonable decision to deny visitation to a grandparent or great-grandparent is in the best interest of a minor child. But contact between grandparents and grandchildren is in the best interests of children, provided it does not undermine the authority of parents over their children or alienate parents from children. *(Additions are condensed from Illinois law)*

Santi quotes:

> We believe that section 598.35(7) is fundamentally flawed, not because it fails to require a showing of harm, but because it does not require a threshold finding of parental unfitness before proceeding to the best interest analysis.
>
> Turning to the Iowa statute before us, we note that while it does not suffer from the patently unconstitutional scope of the Washington statute, it nevertheless fails to accord fit parents the presumption deemed so fundamental in Troxel. Section 598.35(7) places the best interest decision squarely in the hands of a judge without first according primacy to the parents' own estimation of their child's best interests. Without a threshold finding of unfitness, the statute effectively substitutes sentimentality for constitutionality. It exalts the socially desirable goal [not "best interests of the child"?] of grandparent-grandchild bonding over the constitutionally recognized right of parents to decide with whom their children will associate.

This paragraph sounds grim, but all it is asking is a stated presumption in favor of parents, in the law. We support that.

Mediation. Should Iowa law encourage mediation as an alternative to a court trial that is less hostile, less expensive, and less destructive of the family resources upon which grandchildren depend?

Iowa Grandparents seek this addition to Iowa law, which is taken from, but altered from, SF2247, which passed the Iowa Senate in 2018 by 47-0:

New subsection: If a party objects to the petition filed under this section, the court shall stay the proceedings and refer the parties to mediation. If an agreement is reached through mediation, the parties shall file the signed agreement with the court for approval, and the court shall dismiss the petition. If an agreement is not reached through mediation, the parties shall proceed to a hearing on the petition unless the petition is otherwise dismissed or withdrawn. The costs of mediation provided under this subsection shall be ~~borne by the petitioner~~. split between the parties, or as directed by a judge in the interest of encouraging cooperation. The qualifications for mediators shall be those established by the Supreme Court pursuant to 598.7(5).

(598.7(5) reads: "The qualifications shall include but are not limited to the ethical standards to be observed by mediators. The qualifications shall not include a requirement that the mediator be licensed to practice any particular profession.")

A serious concern of Troxel was how the costs of litigation harm families.

When a judge sees one party especially responsible for disharmony, the judge should have the freedom to discourage that immature behavior with court costs.

Finding of Facts

Much of the concerns of *Santi* and *Troxel* were about the overly vague guidance for judges in phrases like "best interests of the children". The majorities thought the phrase was too undefined and were worried that the phrase gave judges too much license to usurp the role of parents, although a dissent pointed to many examples of definitions of the standard throughout the state's laws.

Findings of facts can give judges the guidance desired by the two cases regarding the broad principles articulated in the cases.

Findings of facts are not only reactive, supplying the guidance for judges demanded by the cases, but they can be proactive, articulating Legitimate State Interests which restrain, by the least restrictive means possible, the fundamental right of parents to raise their children.

And by establishing facts. When

legislatures "find" facts, courts *accept* those findings that are not "clearly erroneous".[1]

All these paragraphs acknowledge and agree with concerns articulated in *Santi* and *Troxel* but assembles them in a way which clarifies the need for grandparent contact. Except the final paragraph, which justifies dispensing with the requirement that grandparents accuse parents of abuse.

Iowa 600C.1 Grandparent and great-grandparent visitation.

New Section, Finding of Facts:

1. The legal rights of parents partly arise from the experience of centuries that parents' child-rearing decisions and actions are closer to the best interests of children than those of government.

Parents love their children, for whom they have sacrificed many of their own interests and in whom they have invested their lives, more than government agents and courts.

Parents who have provided for their children since birth understand intimately the individual needs of their children and are ready to reorient their lives to meet them, more than government agents and courts who by comparison barely know the children and are limited by laws to one-size-fits-all solutions.

The Iowa legislature also finds that "In an ideal world, parents might always seek to cultivate the bonds between grandparents and their grandchildren" as the Iowa

1 " It is well settled that American courts possess power to review the constitutionality of legislative enactments. But this power of judicial review does not inherently include the power to examine underlying legislative findings of fact informing policy decisions... legislative action can be defeated if its constitutionality is dependent upon facts later determined to be erroneous or fundamentally changed. - "Revising Judicial Review of Legislative Findings of Scientific and Medical 'Fact'; a Modified Due Process Approach", by Kate T. Spelman, 64 N.Y.U. Ann. Surv. Am. L. 837 (2008-2009)

"In Ragland Inv. Co. v. Commissioner, 435 F.2d 118 (6th Cir. 1970), the court stated that on appeal, the court will not disturb findings of fact unless they are clearly erroneous. - "Clearly Erroneous Standard", USLegal.com

"Clearly erroneous adj: being or containing a finding of fact that is not supported by substantial or competent evidence or by reasonable inferences findings of fact...shall not be set aside unless clearly erroneous — Federal Rules of Civil Procedure Rule 52(a)

"...the existence of facts supporting the legislative judgment is to be presumed...not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators....the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist. ...But by their very nature such inquiries, where the legislative judgment is drawn in question, must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it." U.S. v. Carolene Products, 304 U.S. 144, 152 (1938)

Supreme Court stated in Santi v. Santi, 633 N.W.2d. 312, 316 (Iowa 2001). In other words, the influence of grandparents is generally in the best interests of children.

But not always, and parents may generally be more trusted to discern that line than government agents and courts. But for cases where unreasonable denial of grandparent visitation is ongoing and egregious, court relief should exist.

But with this warning to both parents and grandparents: learn to get along. You may dispute that you love each other, but you love each other more than your government loves you. You can resolve your differences more agreeably than your government can. Set an example for your children how to reason with each other even when you disagree. Keeping government out of your family differences will leave you a lot more money to spend on your children and grandchildren.

The legislature finds that litigants will strengthen family bonds, which is in the best interests of children, by emphasizing what they can contribute to the children; law should not require grandparents to prove parental unfitness – to start a family war – to see their grandchildren.

Miscellaneous

3. The court may grant visitation and electronic communication to the grandparent or great-grandparent under this section that includes reasonable access with or without requiring overnight or possessory visitation, if the court finds all of the following by ~~clear and convincing~~ preponderance of evidence:

> E*xplanation: Illinois law is the source of the phrase, "that includes reasonable access with or without requiring overnight or possessory visitation", and the phrase "and electronic communication".*
>
> *There is never likely to be "clear and convincing evidence" about anything involving family squabbles.*
>
> *"Preponderance of evidence", meaning if the judge thinks 51% of the evidence points one way and only 49% the other, that is enough, is the standard in divorce cases and child abuse cases. "Clear and convincing evidence" of an irreversible marriage breakdown is actually the standard a divorce petition must meet before the divorce is granted, but courts have made a mockery of the requirement, granting divorce automatically without even allowing, much less requiring, any evidence at all.*

b. The grandparent or great-grandparent has established a substantial relationship or has made significant reasonable efforts to establish a relationship with the child prior to the filing of the petition.

This phrase is from SF 281 which the 2018 considered.

4. In determining the best interest of the child, the court shall consider all of the following:

a. The prior interaction and interrelationships of the child with the child's parents, siblings, and other persons related by consanguinity or affinity, compared to the child's relationship with the grandparent or great-grandparent.

b. The geographical location of the grandparent's or great-grandparent's residence and the distance between the grandparent's or great-grandparent's residence and the child's residence, if visitation would require the parent to provide part of the transportation.

c. The child's and parent's available time, including but not limited to the parent's employment schedule, the child's school schedule, the amount of time that will be available for the child to spend with siblings, and the child's and the parent's holiday and vacation schedules. For example, willingness of grandparents to care for the children when they would otherwise be sent to day care is a presumption in favor of visitation.

d. The age of the child.

e. If the court has interviewed the child in chambers as provided in this section regarding the wishes and concerns of the child as to visitation by the grandparent or great-grandparent or as to a specific visitation schedule, the wishes and concerns of the child, as expressed to the court.

f. The health and safety of the child.

g. The ~~mental and~~ physical health of all parties.

Explanation: making mental health a matter for a court ruling requires involvement by psychiatrists, which not only raises the costs of relief beyond many budgets but involves the opinions of people known to have the strongest influence over a case even though they spend the least time with the parties.

Also, psychiatrists are Mandatory Reporters – required by law to turn in a child abuse report if they even mildly suspect the possibility of abuse, which causes further danger, especially in a situation tense enough to require court involvement, that a grandparent's application for relief will turn into permanent separation of the children from not only the grandparents but the parents and often the siblings.

h. Whether the grandparent or great-grandparent previously has been convicted of or pleaded guilty to any criminal offense involving any act that resulted in a child being an abused child or a neglected child; whether the grandparent or great-grandparent previously has been convicted of or pleaded guilty to a crime involving a victim who at the time of the commission of the offense was a member of the family or household that is the subject of the current proceeding; and whether there is reason to believe that the grandparent or great-grandparent has acted in a manner resulting in a child having ever been found to be an abused child or a neglected child.

i. The wishes and concerns of the child's parent, as expressed by the parent to the court.

j. Perjury (lies, false testimony) aimed at discrediting the other party shall be considered by the Court as evidence of lack of commitment to the best interests of the child.

k. Wanton abuse of the extended family bonds by either party shall be considered by the Court as evidence of lack of commitment to the best interests of the child.

j. Any other factor in the best interest of the child.

5. For the purposes of this section, *"substantial relationship"* includes but is not limited to any of the following:

a. The child has lived with the grandparent or great-grandparent for at least six months.

b. The grandparent or great-grandparent has voluntarily and in good faith supported the child financially in whole or in part and/or has been the primary caretaker of the child for a period of not less than six months within or near the 24-month period immediately preceding the commencement of the proceeding.

c. The grandparent or great-grandparent has had frequent and regular contact or visitation including occasional overnight visitation with the child for a period of not less than one year.

(Underlined phrases are from Illinois law.)

6. If the court interviews any child concerning the child's wishes and concerns regarding parenting time or visitation, the interview shall be conducted in chambers, and only the child, the child's attorney, the judge, any necessary court personnel, and, in the judge's discretion, the attorney of the parent shall be permitted to be present in the chambers during the interview. A person shall not obtain or attempt to obtain from a child a written or recorded statement or affidavit setting forth the wishes and concerns of the child regarding parenting time or visitation. The court shall not in addition appoint a guardian ad litem for the child.