

Grandparents' visitation rights: the constitutionality of New York's Domestic Relations Law section 72 after Troxel v. Granville.

Albany Law Review - September 22, 2001

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Word count: 20002.

[citation details](#)

I. INTRODUCTION

Today, grandparents are increasingly involved in all areas of their grandchildren's lives. (1) However, unlike parents, grandparents have no common law right to visit their grandchildren. In response to this problem, over the last thirty years each state has enacted some form of statute enabling a grandparent to petition the courts for mandated visitation with their grandchildren. (2) At first glance, it would seem preposterous to deny grandchildren the benefit of a relationship with their grandparents. However, only upon further investigation of the competing interests involved--including those of the parents, the grandparents, the states, and the children--can one fully appreciate the difficult task courts face when asked to compel scheduled visitations against the wishes of one or more of the parties involved.

In June 2000, the Supreme Court decided *Troxel v. Granville*, (3) and declared a Washington State non-parental visitation statute unconstitutional as applied in that case. (4) The Court found that the lower court had improperly failed to lend weight to decisions that had been made by a fit custodial parent. (5) In the final analysis, the Court's plurality decision in *Troxel* was extremely narrow and left many questions unanswered. In contrast, the New York Court of Appeals has not yet analyzed the constitutionality of New York's grandparent visitation statute as it applies to a fit parent. This article will analyze New York State's grandparent visitation statute, Domestic Relations Law (DRL) section 72, (6) in light of the Supreme Court's decision in *Troxel*. Part II will discuss the procedural history of *Troxel* and its ultimate disposition by the Supreme Court. (7) Part III will examine several New York cases--some decided before and some after the enactment of New York's grandparent visitation statute and its subsequent amendments. (8) Part IV will discuss New York cases decided since the Supreme Court's decision. (9) Finally, Part V will explore the future of DRL section 72 in light of these recent cases and will address precisely those questions that remain unanswered after *Troxel*. (10)

II. TROXEL V. GRANVILLE

A. Procedural History

On June 5, 2000, the Supreme Court handed down its decision in *Troxel v. Granville*. At issue was a Washington State nonparental visitation statute which provided that "[a]ny person may petition the court for visitation rights at any time ... [and t]he court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances." (11)

The petitioners in the case were paternal grandparents, Jenifer and Gary Troxel. (12) Their son, Brad Troxel, and respondent, Tommie Granville, were involved in a relationship that ended in June 1991. (13) Although they never married, the couple had two children. (14) After Brad and Tommie separated, the children lived with their mother and regularly visited with their father on the weekends. (15) In May 1993, Brad Troxel committed suicide, after which the children continued to visit with the petitioners. (16)

In October 1993, Tommie Granville informed the Troxels that she wished to limit their visitation with her daughters "to one short visit per month." (17) Subsequently, in December 1993, the Troxels petitioned for the right to visit their grandchildren on a regular basis. (18) The trial court granted the Troxels' visitation request for "one weekend per month, one week in the summer, and four hours on the birthday of each of the Troxels." (19)

On appeal, Granville challenged the Troxels' standing as well as the constitutionality of the visitation statute. (20) The appellate court held that the Troxels lacked standing, resulting in the court reversing the visitation decree and dismissing the visitation petition. (21) In reaching its result, the appellate court looked to a "parallel" state visitation statute (22) that had been amended to provide that third parties could only petition for visitation once a custody proceeding had been commenced by one of the parents. (23) The court decided that when the Washington State legislature amended this statute, it had unintentionally "overlooked" the nonparental statute, but, nevertheless had intended "that a custody proceeding be in effect before third parties could petition for visitation" under either statute. (24)

Reviewing this decision, the Washington Supreme Court, held that the Troxels did have standing and that the appellate court had improperly ignored the plain language of the statute, which clearly permitted any person to petition the court for visitation. (25) As to the constitutional challenge, however, the court looked to a long line of Supreme Court cases seemingly mandating a finding that the statute, on its face, was an unconstitutional infringement of the parents' right to make decisions regarding the care and custody of their children. (26)

In overruling the statute, the court identified three major problems. First, the statute failed to require a threshold determination of "harm to the child." (27) In other words, parental autonomy is regarded as a fundamental liberty interest, which the state may intrude upon only when it has a compelling interest, such as preventing substantial harm to a child. (28) The court found that Washington State's visitation statute impermissibly permitted the state to interfere with the fundamental rights of parents without having to establish any compelling interest. (29)

Second, the statute failed to take into account whether the third parties seeking compelled visitation had a "substantial relationship with the child." (30) Third, the statute failed to mandate that a court consider what the parents' reasons were for refusing such visitation. (31)

B. The United States Supreme Court Decision

The Supreme Court granted certiorari (32) and, in a plurality opinion written by Justice O'Connor, the Court affirmed the Washington Supreme Court's decision to invalidate Washington's non-parental visitation statute. (33) The wording of the opinion, however, indicates that the statute was only invalid "as applied [to Tommie Granville]." (34)

Of the various aspects of the plurality opinion, the most disappointing is its failure to clearly articulate an applicable standard. (35) Although the Washington Supreme Court had declared the statute to "impermissibly interfere with a parent's fundamental interest in the care, custody and companionship of the child," (36) the Supreme Court did not scrutinize the statute itself, but rather the trial judge's application of the statute and failure to defer to a fit custodial parent's decisions. (37) The Court refused outright to consider the constitutional question that was decided by the Washington Supreme Court:

"[W]hether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation." (38)

The Court criticized Washington's non-parental visitation statute for being "breathhtakingly broad" (39) because, according to the language, any person could challenge any decision a parent makes regarding visitation of their children at any time. (40) In effect, the statute authorized the state to impermissibly infringe on parents' fundamental due process right to raise their children and make decisions concerning them. (41) This right, the Court noted, "is perhaps the oldest of the fundamental liberty interests recognized by this Court" (42) and cannot be infringed upon by a state simply because the state disagrees with the manner in which that liberty is exercised. (43) The crux of the Court's analysis is not, however, focused on the fact that the State interfered with Tommie Granville's parental decision. Rather, what the Court scrutinized was its failure to apply a presumption in favor of a fit parent's decision, when it did intervene. (44) Tommie Granville's fitness as a parent was never questioned, yet still no special weight was lent by the trial court to her parental decisions; (45) nor was any weight given to the fact that Tommie Granville did not deny visitation altogether, but, rather, merely sought to limit it. (46) The Supreme Court criticized the trial court for ignoring the traditional presumption that fit parents will act in the best interests of their children, (47) citing previous decisions that recognized how "natural bonds of affection lead parents to act in the best interests of their children." (48) In effect, the trial court had established a presumption in favor of grandparent visitation, thereby requiring Tommie Granville to affirmatively prove the notion that visitation would not be in the best interests of her children. (49)

The Court's plurality opinion refused to define the "precise scope of the parental due process right in the visitation context." (50) The only guidance provided to lower courts was that they "must accord at least some special weight to [a] parent's own determination[s]" when faced with a situation where a fit parent's decisions are under review. (51) In making this decision, however, the Court has failed to provide any guidance on how to assess the validity of the visitation statutes themselves. It is clear, from this case that a grandparent visitation statute must, in some form, protect the fundamental rights of parental decision-making; however it is unclear how states should meet this challenge or accomplish this feat.

Justice Thomas, in his concurrence, was the only Justice to state what standard should be applied. (52) According to Justice Thomas, since a fundamental right is at issue, the statute should be strictly scrutinized. (53) Additionally, he argued that the state "lacks even a legitimate governmental interest--to say nothing of a compelling one--in second-guessing a fit parent's decision regarding visitation with third parties." (54)

Justice Souter, on the other hand, explained in his concurrence that the statute was unconstitutional and that the reasons the Washington Supreme Court relied on to invalidate the statute were sound and should remain undisturbed. (55) He believed that the Court should have upheld the lower court's decision based solely on the statute's unconstitutionally broad language. (56) Therefore, he concluded, there was no reason to consider, "whether harm is required or ... the precise scope of the parent's right or its necessary protections." (57)

Justices Stevens, Scalia, and Kennedy each wrote separate dissenting opinions. (58) Justice Stevens, noted that the Court should not have granted certiorari because, he believed, there was no reason to review a state supreme court decision "that merely require[d] the state legislature to draft a better statute." (59) In light of the Washington Supreme Court's failure to consider whether the trial court properly applied the statute to Tommie Granville, (60) Justice Stevens was critical of the plurality for reviewing the case on an "as applied" basis before the state courts had had a chance to do so. (61) Justice Stevens believed, and Justice Kennedy agreed, that the proper role of the Court would have been to correct any defects in the Washington Supreme Court's analysis and to remand the case for further review. (62)

Justice Scalia, alternatively, reminds us that it is improper for judges to make laws absent any enumerated right set forth in the Constitution.

Consequently, while I would think it entirely compatible with the commitment to representative democracy set forth in the founding documents to argue, in legislative chambers or in electoral campaigns, that the State has no power to interfere with parents' authority over the rearing of their children, I do not believe that the power which the Constitution confers upon ... a judge entitles [them] to deny legal effect to laws that ... infringe upon what is [considered an] unenumerated right. (63)

Accordingly, Justice Scalia adamantly refused to extend any constitutional rights to parents beyond what was already been established in caselaw. (64)

III. NEW YORK STATE'S GRANDPARENT VISITATION STATUTE: DOMESTIC RELATIONS LAW SECTION 72

A. Pre-Grandparent Visitation Statute

A 1936 New York case, *People ex rel. Sisson v. Sisson*, (65) helped establish the court's function when it faced issues regarding parental rights. (66) In its decision, the New York Court of Appeals stressed that, in most cases, it is improper for the state to interfere with the parents' right to decide what is best for their children (67) unless the child's welfare is at risk. (68) Consequently, where the lower court had denied the father joint custody of his daughter, the Court of Appeals reversed the ruling, holding that the state should not be involved in such matters unless "moral, mental, and physical conditions are so bad as seriously to affect the health or morals of children." (69)

This concept of "parents natural right to decide matters for their children" was apparent in early grandparent visitation cases. (70) It was this natural right that impeded the few attempts grandparents made to obtain court ordered visitation of their grandchildren. In 1950, for instance, the New York State Supreme Court, Appellate Division, Fourth Department, in *Noll v. Noll*, (71) faced a grandparent's petition for visitation for the first time in New York's judicial history. The Fourth Department sought guidance from an 1894 Louisiana case, *Succession of Reiss*, (72) which was the first case in the United States to entertain the issue of grandparents' visitation rights. In *Reiss*, the Louisiana court held that "the obligation ... to visit grandparents is moral, and not legal," and it is not the judge's place to play "arbitrator between the grandparents and [parents]." (73) The *Noll* court ultimately held that once the father died, the mother retained all decision-making authority, including decisions regarding the paternal grandparents' access to the grandchildren. (74) Thus, the paternal grandparents' failure to assert any rights in a timely manner while their son was alive effectively caused any rights that they may have had to

die with him. (75) Consequently, the grandparents' rights were found to be not `only secondary to the parents' rights, but also dependent on the parent's--their own child's--rights that they ceased to exist once their child died. (76) Therefore, if a parent denies a grandparent access to a grandchild, that decision is final and binding, leaving the grandparent without judicial recourse for intervention.

Later, in *People ex rel. Cox*, (77) the court held that even when both parents are still alive, courts are without the power to award the grandparents mandated visitation against the wishes of the custodial parent. (78) In *Cox*, the parents were legally separated and the court had to decide whether it could legally permit the grandparents to visit their grandchild against the wishes of a fit custodial parent. (79) Visitation was viewed as a temporary deprivation of custody by the court. (80) In this respect, a grandparent seeking visitation was indistinguishable in the eyes of the law from anyone else seeking to deprive parents of their natural custodial rights. (81) Accordingly, for grandparents to be granted visitation by judicial intervention, they bore the burden of proving that the child's welfare was in danger under the parent's custody. (82)

B. The Evolution of New York's Grandparent Visitation Statute

In 1966, New York enacted DRL section 72 (83) to allow grandparents a procedural mechanism to visit with their grandchildren after their own child had died. (84) In each of the early grandparent visitation cases cited above, the judges reiterated that, despite their sympathy for the petitioning grandparents and the judge's inclination to grant visitation, the solemn reality was that the court's hands were tied. (85) The statute was likely enacted in response to the lack of remedial power courts had in cases where grandparents sought judicial intervention after losing their own child. (86)

The original statute provided for very limited grandparent visitation. (87) Only when their own child had died could grandparents petition the court for visitation rights. (88) Thus, grandparents had no independent rights to visit with their grandchildren outside of this very narrow and specific factual context.

In 1975, the legislature amended the statute, thereby expanding visitation rights for grandparents. (89) Deleting the previous language that gave standing only to grandparents whose own child had died, the legislature broadened the statute by giving grandparents standing to petition for visitation "where circumstances show that conditions exist which equity would see fit to intervene." (90) The most recent version of DRL section 72 reads in pertinent part as follows:

Where either or both of the parents of a minor child, residing within this state, is or are deceased, or where circumstances show that conditions exist which equity would see fit to intervene, a grandparent or the grandparents of such child may [petition] to the supreme court ... or may [petition] to the family court ... and on the return thereof, the court, by order, after due notice to the parent or any other person or party having the care, custody, and control of such child, ... may make such directions as the best interest of the child may require, for visitation rights for such grandparent or grandparents in respect to such child. (91)

This new language greatly expands court discretion in awarding grandparent visitation rights, (92) and confers upon grandparents standing to petition for visitation in two situations. First, if either or both of the parents are dead, the grandparent is granted automatic standing to petition the court for custody. (93) If, however, the parents (or whoever has custody of the child) are alive, the grandparent must demonstrate that

equitable circumstances exist that make it proper for the court to intercede. (94) Once standing has been established, the court must then determine whether it is in the child's best interests to visit with the grandparent. (95)

Through or with the 1975 amendment, the legislature effectively shifted the focus of the statute from grandparents' rights to the rights of the children involved. (96) This amendment acknowledged the wide array of circumstances, aside from the death of the parent, where a grandparent may need the state's aid to ensure visitation with his or her grandchild. (97) The 1975 amendment thus liberalized the law, granting all grandparents the right to seek standing, independent of the status of the parents. (98)

C. Applications of Domestic Relations Law Section 72 in New York State Caselaw

The 1975 amendment had a profound effect on grandparent visitation rights in New York State. (99) The natural right of parents to make decisions regarding the care, custody, and control of their children evolved into a secondary consideration. (100) The New York Court of Appeals stated that even with constitutional protection, "parents are not totally free to act as they please." (101) The court held that "in determining whether a State's interference with the family relationship is proper, the action will not be reviewed under exacting scrutiny, but according to a less rigorous standard of whether there is a 'reasonable relation to any end within the competency of the State.'" (102)

Whether grandparents will be awarded visitation is completely within the discretion of the court. It seems there are very few areas where the courts have refused to extend this right. New York State courts, for instance, have agreed to entertain grandparent visitation petitions in various circumstances, (103) including: when one of the child's parents is dead; (104) when the child is adopted; (105) when the child is in the care of social services or foster care; (106) when the "nuclear" family is intact; (107) and, in some instances, where the grandparents' own rights as parents have been terminated. (108)

1. Adoption

Examining the application of DRL section 72 in the adoption context illustrates how this statute has evolved and, ultimately how it has affected the lives of virtually every type of family. (109) Indeed, it was the unequal treatment judges historically have applied to adoptive parents--awarding grandparent visitation rights--that laid the foundation for grandparents to petition for visitation rights even where the family remained "intact." (110)

The first cases to entertain the idea of biological grandparents obtaining court-ordered visitation with their later adopted grandchildren occurred well before the 1975 amendment of DRL section 72. (111) At the time, courts were reluctant to allow natural grandparents standing for visitation rights with an adopted child. Courts relied heavily on the finality of the adoption as well as the termination of the legal relationships between the adopted child and the natural family. (112) Adoption was seen as "a proceeding which seeks to establish permanent, as distinguished from temporary, relationships." (113) Courts respected this finality because of the underlying fear that allowing biological grandparents to intrude in the adoptive relationship may ultimately deter adoptions. (114) The societal values of having adopted children assimilated into their adoptive families and the finality of adoptions seemed easy to apply when the natural family and the adoptive family were "strangers." Soon, however, courts were faced with a different and more complex kind of adoption scenario: the stepparent adoption, where one of the parents has died or has renounced (either voluntarily or involuntarily) his or her parental

rights. (115) This new scenario forced the courts to reevaluate their understanding of DRL section 72. (116) In grappling with interpretations of the statute in this context, the Fourth Department noted that the statutory language permitted grandparents to petition "any[one] having custody of the grandchild." (117) For guidance in reaching a proper interpretation, the court looked to a pair of California probate cases (118) for assistance and ultimately held that an adopted person may not be cut off from his or her natural family. (119)

One California case, *Zook v. Zook*, (120) dealt with a situation where a biological paternal grandmother provided in her will for her two grandchildren, who had been adopted by their stepfather. (121) The lower court declared that such a disposition should be taxed just as if the adopted children were strangers. (122) The California Supreme Court recognized the social value of substituting the adoptive parent for the natural parent but nevertheless found that "the law should not and cannot ignore the fact that an adopted person may not in many respects be cut off from his natural family." (123)

In 1981, the New York Court of Appeals, in *New York ex rel. Sibley v. Sheppard*, (124) considered the constitutionality of DRL section 72 as applied to an adoption case wherein both parents had died and the paternal grandparents had adopted the grandchild. (125) Later, the maternal grandparents commenced an action by writ of habeas corpus pursuant to DRL section 72, seeking visitation rights with their grandchild. (126)

The court began its analysis by looking to the relevant statutes set forth in the Domestic Relations Law in order to assess whether section 72 was intended to apply to the adoption setting. (127) The court pointed out that in the year when section 72 was enacted, DRL section 117 was also amended. (128) The 1966 amendment to DRL section 117 specifically provided that "an adopted child retained any interest he or she might have under the will or inter vivos instrument of any member of the natural family." (129) The court interpreted this language as an obvious indication that the legislature did not intend to exclude the adoption setting from the purview of DRL section 72. (130)

The court then turned to the question of whether DRL section 72 impermissibly interferes with an adoptive parent's constitutional right to raise a child free from governmental intrusion. (131) While not lending much weight to the parents' determinations, the court did explain that there are certain inherent limitations of DRL section 72 in favor of parents. (132) First, DRL section 72 does not automatically confer visitation rights. (133) Second, DRL section 72 does not include the power to decide "how and where the child shall be educated, what religious training shall be imposed, what hours the child may keep, or with what friends the child may associate." (134) The court applied a "less rigorous standard" when determining if the state interference had a "reasonable relation to any end within the competency of the State" (135) and ultimately held that DRL section 72 is constitutional in the adoption setting because the statute requires the state to act in the best interests of the child. (136) The state maintains its supervisory role over a "child's best interest" regardless of whether that child has been adopted. (137) Protection of such an interest is "unquestionably a proper exercise of the [state's] police power." (138) Furthermore, permitting natural grandparents to petition a court for visitation rights is "reasonably related to the goal of protecting the best interest[s] of the child." (139)

2. Expansion of the Grandparents' Rights

After the 1975 amendment, courts began to move away from the idea that DRL section 72 was merely a procedural mechanism for grandparents. (140) Instead, the focus shifted

to the humanistic purpose behind the statute, (141) which New York courts have interpreted as a "means to preserve a beneficial relationship ... consistent with th[e] child's best interest." (142) In fact, it is not only the grandparents' right to visitation that is so worthy of preservation, but also the child's right to know his or her grandparent. (143) This judicial sentiment for the grandparent-grandchild relationship has had drastic effects on New York case law. (144) The "humanitarian intent" of the legislature soon became more important in the courts' determination to award visitation than the parents' or even the children's own wishes. (145) For example, in *Ehrlich v. Ressler*, (146) a father opposed forced visitation, arguing that his "teenage children were too busy with their other activities to visit with their grandparents." (147) After a subsequent in camera discussion with the children, the family court denied visitation based on the children's wishes. (148) The appellate court, however, reversed this finding, remanded for a new hearing, (149) and instructed the family court to re-consider the petition in light of the statutory intent and the "the needs of the children affected." (150)

Virtually any decision a parent made regarding how much time they allowed their child to spend with their grandparent could be questioned and scrutinized by a court. (151) In effect, it was the parents who carried the burden of showing that visitation would not benefit the child, yet no weight was given to what the parents themselves thought was in their child's best interests. (152) Courts repeatedly insisted that mere animosity between the parties, without more, was simply not enough to justify denying a petition for visitation. (153) The New York Court of Appeals affirmed this notion in *Layton v. Foster*. (154)

In *Layton*, the mother did not want the biological paternal grandparents to visit with her child because she did not want the child to learn that her new husband was not the child's biological father. (155) The court held that this situation posed "a problem inherent in the legislative policy itself and absent evidence of exacerbation of the problem by the grandparents" there was no reason to deny them visitation with their grandchild. (156) The expansion of grandparents' rights began to appear in many aspects of everyday parental decision-making. A good illustration is provided in *Shadders v. Brock*, (157) where, pursuant to a divorce decree, the child's grandparents exercised visitation each year--usually by taking an out-of-state trip--every year for six years. (158) Due to various school and family problems, the mother sought to discipline the child and to reinforce her authority as primary custodian by canceling the child's annual excursion with her grandparents. (159) Consequently, the grandparents petitioned the court for an order of contempt for the mother's expressed intention to violate the prior visitation order, which permitted the child to take the "special trip" with her grandparents. (160)

The court ultimately held that a child's right to visitation with a grandparent "may not be denied by a parent as a means of punishment or discipline to the child." (161) The court then went on to ask the question: "But what of the parental rights to discipline and exercise legitimate, lawful and necessary authority over a child?" (162) The court answered its own inquiry by asserting that the mother retained authority over the child's internal affairs "for fifty weeks a year," and that the court did not intend to "interfere with such authority." (163)

a. Equitable Circumstances

Until 1991, situations in which a court determined that equitable circumstances existed, thereby warranting its intrusion, were generally limited to situations arising from

adoptions, divorces, and any other disruptions to the family. (164) In 1991, the New York Court of Appeals handed down the landmark decision *Emanuel S v. Joseph E.*, (165) which allowed grandparents standing to petition for visitation with their grandchildren even when the "nuclear" family remained intact. (166) The court emphasized the impact of the 1975 amendment to section 72 to include all grandparents, not just those who have lost their own children. (167) Not only did the decision represent a huge milestone for grandparents' rights, but also, and perhaps more importantly, the court finally provided an analytical framework for lower courts to follow when determining whether grandparents who seek visitation have the requisite standing based on the existence of equitable circumstances. (168)

In *Emanuel S.*, the relationship between the maternal grandparents and the mother had deteriorated so much that the mother refused to allow the grandparents any access to her newborn child. (169) After conducting extensive factual findings, the family court awarded the maternal grandparents limited visitation on the basis that it was in the best interests of the child. (170) The family court noted that the animosity between the parties was not a sufficient basis for denying such visitation and, further, that the best interest of children in intact families should be measured by the same basic criteria as in "non-intact families." (171) The appellate court reversed, emphasizing that DRL section 72 precludes grandparents from seeking visitation where the natural parents refuse and no parental responsibility has been forfeited. (172) The court noted that these factors should have been established before the family court considered what was in the best interests of the child. (173) The Court of Appeals agreed that the family court had failed to consider whether the grandparents had standing or whether equitable circumstances existed to warrant intervention, (174) but disagreed with the appellate court's criterion for establishing equitable circumstances. (175) Consequently, the Court of Appeals reversed the appellate court decision and remanded the case to the family court for a reevaluation of whether the grandparents had standing to petition based on the factors established by the high court. (176)

This case was the first time the New York Court of Appeals set forth the factors that should be considered when assessing whether an equitable situation exists that would justify state intervention. (177) Among these factors are: (1) the "[strength of the family and] the nature and basis of the parents' objection to visitation"; (178) (2) the "nature and extent of the grandparent-grandchild relationship"; (179) and (3) whether the grandparents have a "sufficient existing relationship with [the child or have at least made] a sufficient effort to establish one." (180) The burden rests with the grandparents to do what is reasonable under the circumstances to establish ties with their grandchild. (181) In accordance with *Emanuel S.*, all of the criteria listed above must be given equal weight by a trial court deciding grandparent visitation standing. (182)

The court in *Emanuel*, however, fell short of providing direction as to how to apply the factors provided in deciding what constitutes a sufficient relationship or a sufficient effort to establish one. The court instead noted that evidence as to whether such a relationship exists or whether reasonable efforts have been made to establish such a relationship will vary in each case. (183) Subsequently, in order to assess the existence of equitable circumstances, courts have constructed a framework for determining what constitutes "sufficient existing relationship" and "sufficient effort." (184) This framework measures

these considerations against the parents' reasons for objecting to visitation or for frustrating the relationship. (185)

Under *Emanuel S.*, for a court to determine if a grandparent has standing, a sufficient relationship with the child or sufficient efforts must be established. (186) This determination is made through examining "what the [grandparents] could reasonably have ... done under the circumstances." (187) The court must then also consider the reasons underlying the grandparents' efforts, whether the efforts were immediate and concerted, and whether there were time lapses between such efforts and why. (188) A good illustration of this analysis is presented in *Luma v. Kawalchuk*. (189)

In *Luma*, the Third Department affirmed the family court's denial of standing because the maternal grandparents failed to make a sufficient effort to maintain a relationship with their grandchildren after they were denied visitation privileges by the parents. (190) The court emphasized that the grandparents failed to send the children greeting cards or presents, and that the grandparents never attempted to call the children. (191)

Furthermore, the grandparents did not even visit the grandchildren at the parent's home when given the opportunity to do so. (192) The court balanced this lack of effort against the parents' legitimate reasons for terminating visitation and ultimately concluded that a denial of standing was warranted. (193)

In assessing whether grandparents have standing, a court may also look to the grandparents' actions both before and after the parent denies visitation. (194) *C.M. v. M.M.* (195) provides a compelling illustration of how a court will scrutinize grandparent idleness. The case considered the paternal grandmother's response to her son's domestic violence as a factor when deciding grandparent visitation issues. (196) The court recounted undisputed testimony revealing that the grandmother's son had repeatedly battered his wife (the respondent) during their marriage, and that their child was frequently a witness to this violent abuse. (197) Consequently, the court found that the grandmother lacked standing because, *inter alia*, she had knowledge of the abuse yet she took no measure to protect the child. (198) Furthermore, the grandmother had no relationship with the child, nor were any attempts made to establish one. (199)

b. Best Interests

Once a grandparent has successfully established standing, the court must determine whether visitation would be in the child's best interests. There is no set analysis for courts to follow in making this determination. (200) The term "best interests" is extremely vague and is completely governed by judicial discretion. (201) In determining best interests, it is the court's "duty" to look at the totality of the circumstances and the effects such visitation would have on all the parties involved through an "enlightened, objective, and independent evaluation." (202)

Essentially the same considerations applied by a court in an "equitable circumstances" analysis are equally applicable to a best interests determination. For example, consistent with the issue of standing, a court may grant visitation based on a child's best interests due to the existence of a sufficient grandparent-grandchild relationship, (203) its extent being a key consideration. (204)

The best interests determination allows the court to engage in a balancing test. This determination is relevant when considering the parents', and sometimes even the children's objections. When examining the child's desires, a determinative factor has been

the foreseeable effect such mandated visitation would have on the child's psychological well-being. (205)

When weighing the parents' objections to visitation, it is clear that animosity between the parties will not in of itself be enough to support a finding that visitation is not in the best interests. (206) Courts have found, however, that denial of visitation is appropriate when animosity is "coupled with family dysfunction." (207) This reasoning is set forth in *Smith v. Jones*, (208) wherein the family court denied the maternal grandmother visitation because visitation would be detrimental to the children's relationship with their father, the custodial parent. (209)

In *Smith*, John and Paula Jones were married with two children, when, about five months after the birth of their second child, Paula mysteriously disappeared. (210) After her disappearance, John refused the maternal grandmother access to the children because she openly accused him of causing Paula's disappearance and he feared that she would "convey such feelings to the children if allowed visitation." (211) The investigation of the disappearance was still open and John had neither been charged with any crimes, nor had his fitness as a parent been challenged. (212)

The court first acknowledged that the disappearance of Paula constituted equitable circumstances, but that the accusations of John's involvement were not sufficient to deny the petitioner standing. (213) When evaluating the best interests of the children, the court first distinguished between the "considerations" for grandparent visitation and the rights of natural parents. (214) The distinction here is important, because it explains why a court would grant a parent visitation in circumstances in which it would deny visitation to grandparents. (215) With natural parents, there is an eternal bond which demands a "strong presumption that visitation should take place." (216) The courts must look to the long-term effects, with the general understanding that to deny visitation to a natural parent may be detrimental to the child's psychological welfare. (217) With grandparents, however, there is no natural right; and while the grandparent-grandchild relationships may be important, the court must evaluate the immediate effects visitation will have on the child. (218)

The *Smith* court ultimately denied the maternal grandmother visitation because it found that it would be detrimental to the children. (219) The court's main concern was the real risk that the grandmother would convey her strong feelings about the father to the children. (220) The court feared that such communications would be detrimental to the parent-child relationship and would result in undermining the father's ability to raise his children. (221) In making its determination, the court explicitly rejected the recommendations of the independent evaluators and the law guardian because they failed to lend sufficient weight to the father's role and responsibilities as the primary caretaker. (222)

As with the equitable circumstances determination, courts may also scrutinize the grandparents' actions (as well as inactions) towards the grandchildren. (223) In *Richard YY v. Sue ZZ*, (224) the subject child, Derek, had been involved in three separate incidents of inappropriate sexual contact with two other boys "who frequently spent time at [the paternal grandfather's] residence." (225) When the grandfather became aware of the situation he did not inform the parents because "he did not believe that the children had done anything `that bad.'" (226) Rather, he simply spanked the boys and separated them, vowing to keep "'a little better eye' on them." (227) The Third Department denied

the paternal grandfather visitation because of his "inadequate response to [the] situation." (228)

c. Who is a "Grandparent" under section 72?

Grandparents have no common law right to visitation; consequently, their rights are purely creatures of statute. (229) Since these rights are in "derogation of the Common Law," they should be "strictly construed,"(230) which the courts have done by narrowly classifying who qualifies as a grandparent under the statute. (231) New York courts have taken a "strict constructionist" approach by declining to extend visitation rights under the statute to step-grandparents (232) and great-grandparents, (233) that has subsequently left many "out of the loop." Absent any legislation that might include these classes within the ambit of DRL section 72, a court must apply the common law. Consequently, step-grandparents, great grandparents, and other distant relatives may only interfere with the familial decisions if the parents are declared unfit. (234)

Ascertaining who classifies as a grandparent presents a problem when the grandparents have had their own rights as parents terminated. Generally, the problem arises in situations where the children of grandparents have had their parental rights terminated, for whatever reason, and the grandparent seeks to maintain contact with the grandchild. (235) The caselaw, however, is unclear as to whether the termination of an individual's parental rights should act as an absolute bar to standing for the petition of visitation rights under DRL section 72. (236)

In 1995, the Third Department held "[w]hen petitioner's parental rights to her own daughter [the children's mother] were severed, any familial connection to her daughter or the daughter's progeny was also severed." (237) Thus, a person whose parental rights had been terminated would not be considered a grandparent within the ambit of DRL section 72.

One year later, however, the same court set forth a slightly different approach in *Clarabelle K. v. Christman*. (238) Instead of automatically denying standing to the petitioning grandmother, the court evaluated whether equitable circumstances existed that warranted its intervention. (239) The court ultimately held that the "grandmother" lacked standing, not because she did not fall within the definition of a grandparent, (240) but because of her inability to understand that the loss of her parental rights was due to the improper treatment of her own children. (241) Moreover, the grandmother's refusal to take any steps to improve her own parenting skills was evident because she failed to recognize and intervene when her daughter acted inappropriately towards her own children. (242)

In 1998, the Second Department took the analysis one step further in *Ann M.C. v. Orange County Department of Social Services*. (243) The court held that termination of parental rights does not act as an "absolute bar" for standing to petition the court for grandparent visitation. (244) Although this case was one of "first impression" in the Second Department, the court looked to two prior Third Department cases considering this issue. (245) The Second Department, however, found the facts in *Ann M.C.* distinguishable from the cases previously heard by the Third Department. (246)

For example, when the Second Department compared *Ann M.C.* to *Catherine JJ*--wherein the parental rights over the child had been permanently terminated, and there was an underlying concern that the grandparent would interfere with the finality of such a situation (247)--the court distinguished the case at bar on the basis that the parental rights

of Elizabeth [the child's mother] had been only "temporarily suspended." (248) The court also noted that in *Clarabelle K.*, the grandparent petitioner was not conferred standing because of demonstrated immaturity and "poor judgment." (249) Again, these factors were distinguishable from the case at bar since the grandmother, in *Ann M.C.*, had been successful in improving herself. (250) The court declared that the correct analytical approach in these situations would be to consider all relevant circumstances, "including the fact of and the reason for the termination of [the] parental rights." (251)

IV. NEW YORK CASELAW AFTER TROXEL

Since the *Troxel* decision, the controversy over New York's grandparent visitation statute has grown. Some believe that grandparents are not in any danger of losing their rights and that the statute will be safe from constitutional challenge. (252) After the *Troxel* decision lower courts in New York entertained several pleas to declare DRL section 72 unconstitutional, both on its face and as applied; however the courts' holdings in these cases have been inconsistent with each other and will remain so until the Court of Appeals decides the matter. (253) On October 26, 2000, just four months after the *Troxel* decision, the New York Supreme Court of Kings County, in *Hertz v. Hertz*, (254) held that DRL section 72 was unconstitutional. (255)

In *Hertz*, the petitioner grandfather was seeking visitation rights with his fifteen grandchildren despite the adamant opposition of all of the parents involved. (256) According to the court, the Washington state statute in *Troxel* was deemed unconstitutional as applied to *Tommie Granville* because it failed to accord any special weight to a fit parent's determination of what was in the child's best interests, thus leaving the decision solely to the discretion of the court. (257) The judge went on to analogize by stating "[s]imilarly, Domestic Relations Law [section] 72 contains no requirement that a Court accord a parent's decision any presumption of validity and permits the Court to impose its own best interests standard." (258) Although the Washington statute was so broad as to allow anyone to petition for visitation rights, whereas the New York statute only allows grandparents to petition for visitation, this variation in the laws was not deemed determinative, because the *Troxel* case was decided as applied to grandparents seeking visitation rights. (259) In concluding that the *Hertz* case was controlled by *Troxel*, the court noted that the parents in the present case exemplify individuals "whose Fourteenth Amendment rights the Supreme Court seeks to protect." (260) Consequently, the court held that DRL section 72 impermissibly intruded into the parents' fundamental due process rights to make independent decisions concerning the parenting of their children. (261)

In both *Smolen v. Smolen* (262) and *Fitzpatrick v. Youngs*, (263) the judges acknowledged that the statute--both on its face and as applied--adequately safeguards parental rights. (264) First, the requisite two-step analysis required in each case prevents any broad application of the statute. (265) Second, only grandparents may petition for visitation rights, as opposed to Washington's statute which allowed anyone to petition. (266) Third, once the petitioning grandparents has established standing, courts apply an analytical framework that adequately considers the parents' objections. (267)

V. CONCLUSION: THE FATE OF SECTION 72

The Supreme Court has left many questions unanswered. What standard should be applied when the state is involved? When can the state overrule a fit parent's decision regarding the care, custody, and control of their child? How do we determine what is in

the best interests of the child? Should it be proven that the child would be harmed if there is visitation, or that the child will be harmed if there is no visitation? Who has the burden of proving or disproving such harm? In fact, the only direction the Court provides is that a judge must lend weight to a fit parent's decisions. (268) But, it is unclear what sort of deference protection the language of the statute must provide to such decisions.

The fate of DRL section 72 is uncertain at best. The Hertz case undoubtedly will be appealed and perhaps overturned. Whatever the outcome, it is clear that the statute has inherent flaws that should be amended to ensure the rights of all parties involved are protected adequately.

First, any decision made by a parent can be questioned and brought before a court. Many supporters defend this aspect of the statute because, in practice, it is difficult for grandparents to overcome the current threshold requirement of standing, and, even if they do, the best interests determination affords little guarantee of success. (269) But, the question still remains: What rights do the parents or even the children have in these situations? (270) Should we allow parents to be summoned into court because they are not allowing children to spend time (or in some cases "enough" time) with their grandparents? (271)

Second, the statute treats parents and the respective grandparents differently based on their circumstances. In effect, a widow or widower has less rights than a divorced parent, while the grandparents have more rights in the former situation than the latter.

Grandparents who petition a widow or widower are granted automatic standing and go directly to a best interests hearing. On the other hand, grandparents whose children are divorced must first prove that equitable circumstances exist before a best interests determination can be made.

It is important to understand that if a parent has denied grandparents access to his or her child, there may be compelling reasons for doing so. Deciding the validity of the reason is another issue; however, the focus should be on whether--and under what circumstances--we want the State to ascertain the validity of such determinations.

There will probably always be some form of statutory grandparent visitation rights, and rightly so. After all, there are many cases where the grandparent and the grandchildren share a meaningful relationship, and for whatever reason, they are precluded from seeing each other. This is easily perceived in the stepparent adoption scenarios. Contrasting the situation in Hertz, is it right for a grandfather to be allowed to petition against the wishes of three of his children and their spouses for access to his fifteen grandchildren? One must pause and realize that if all three sets of parents are adamantly opposed, there must be some reason for it. Of course, the grandfather was unable to obtain a court order for visitation, but should he have been permitted to question the parents' judgments in the first place? The question remains--Where do we draw the line? The challenge now and in the future will be to find ways to adequately protect the interests and rights of all the parties involved.

(1) "[I]n 1998, approximately 4 million children lived in the household of their grandparents, representing 5.6 percent of all children under 18." *Troxel v. Granville*, 530 U.S. 57, 64 (2000) (plurality opinion) (citing U.S. DEP'T. OF COMMERCE, BUREAU OF CENSUS, CURRENT POPULATION REPORTS, MARITAL STATUS AND LIVING ARRANGEMENTS: MARCH 1998 (UPDATE) 1 (1998)).

(2) All fifty states have statutes that provide for some form of grandparent visitation. See ALA. CODE [section] 30-3-4 (1998 & Supp. 2000); ALASKA STAT. [section] 25.24.150 (a) (Michie 2000 & Supp. 2001); ARIZ. REV. STAT. ANN. [section] 25-409 (West 1956 & Supp. 2000); ARK. CODE ANN. [section] 9-13-103 (Michie 1998); CAL. FAM. CODE [section] 3103 (West 1994 & Supp. 2001); COLO. REV. STAT. [section] 19-1-117 (2000); CONN. GEN. STAT. ANN. [section] 46b-59 (West 1958 & Supp. 2001); DEL. CODE ANN. tit. 10, [section] 1031(7) (1999); FLA. STAT. ANN. [section] 752.01 (West 1997 & Supp. 2001); GA. CODE ANN. [section] 19-7-3 (1999 & Supp. 2001); HAW. REV. STAT. [section] 571-46.3 (1993 & Supp. 2000); IDAHO CODE [section] 32-719 (Michie 1996); 750 ILL. COMP. STAT. ANN. 5/607-(b)(1) (West 1999 & Supp. 2001); IND. CODE ANN. [section] 31-17-5-1 (Michie 1997 & Supp. 2000); IOWA CODE ANN. [section] 598.35 (West 1996 & Supp. 2001); KAN. STAT. ANN [section] 60-1616(b) (1994 & Supp. 2000); KY. REV. STAT. ANN. [section] 405.021 (Michie 1999); LA. REV. STAT. ANN. [section] 9:344 (West 2000 & Supp. 2001); LA. CIV. CODE ANN. art. 136.B (West 1999 & Supp. 2001); ME. REV. STAT. ANN. tit. 19-A, [section] 1803 (West 1998); MD. CODE ANN., FAM. LAW [section] 9-102 (1999 & Supp. 2000); MASS. ANN. LAWS ch. 119, [section] 39D (Law. Co-op 1994 & Supp. 2001); MICH. COMP. LAWS [section] 722.27b (2001 & Supp. 2001); MINN. STAT. ANN. [section] 257.022 (West 1998 & Supp. 2001); MISS. CODE ANN. [section] 93-16-1 (1999 & Supp. 2000); MO. ANN. STAT. [section] 452.402 (West 1997 & Supp. 2001); MONT. CODE ANN. [section] 40-9-102 (1999); NEB. REV. STAT. [section] 43-1802 (1998); NEV. REV. STAT. ANN. [section] 125C.050 (Michie Supp. 1999); N.H. REV. STAT. ANN. [section] 458:17-d (1995 & Supp. 2000); N.J. STAT. ANN. [section] 9:2-7.1 (West 1993 & Supp. 2001); N.M. STAT. ANN. [section] 40-9-2 (Michie 1978); N.Y. DOM. REL. LAW [section] 72 (McKinney 1999); N.C. GEN. STAT. [section] 50-13.2(b1) (1999); N.D. CENT. CODE [section] 14-09-05.1 (1997 & Supp. 1999); OHIO REV. CODE ANN. [section] 3109.051(B)(1) (Anderson 2000 & Supp. 2000); OKLA. STAT. ANN. tit. 10, [section] 5 (West 1998 & Supp. 2001); OR. REV. STAT. [section] 109.121 (1999); 23 PA. CONS. STAT. ANN. [section] 5301 (West 1991 & Supp. 2001); R.I. GEN. LAWS [section] 15-5-24.1-.3 (1956); S.C. CODE ANN. [section] 20-7-420(33) (Law. Co-op. 1976 & West Supp. 2000); S.D. CODIFIED LAWS [section] 25-4-52.-54. (Michie 1999 & Supp. 2001); TENN. CODE ANN. [section] 36-6-302 (1996 & Supp. 2000); TEX. FAM. CODE ANN. [section] 153.433 (Vernon 1996 & Supp. 2001); UTAH CODE ANN. [section] 30-5-2 (1998 & Supp. 2000); VT. STAT. ANN. tit. 15, [section] 1011 (1989 & Supp. 2000); VA. CODE ANN. [section] 20-124.1 (Michie 2000); WASH. REV. CODE ANN. [section] 26.09.240 (West 1997); W. VA. CODE ANN. [section] 48-2B-1-3 (Michie 1999 & Supp. 2000); WIS. STAT. ANN. [section] 767.245 (West 1993 & Supp. 2000); WYO. STAT. ANN. [section] 20-2-202 (Michie 2001). See also Laura W. Morgan, *What is a Family? Implications of New Trends in Grandparent Visitation Law*, *DIVORCE LITIG.*, June 2000, at 110.

States are also required to provide full faith and credit to other states' determinations of visitation, making visitation orders enforceable across state lines. 28 U.S.C. [section] 1738(a) (1994 & Supp. V 1995-2000).

(3) 530 U.S. 57 (2000) (plurality opinion), reh'g granted sub. nom., *Smith v. Stillwell-Smith*, 950 P.2d 478 (Wash. 1998), modified, *In re Troxel*, 954 P.2d 289 (Wash. Ct. App. 1998), amended by *In re Troxel*, 971 P.2d 56 (Wash Ct. App. 1998), remanded to *In re*

Smith, 969 P.2d 21 (Wash. 1998), cert. granted, *Troxel v. Granville*, 527 U.S. 1069 (1999).

(4) *Id.* at 73.

(5) *Id.* at 72.

(6) N.Y. DOM. REL. LAW [section] 72 (McKinney 1999).

(7) See *infra* notes 11-64 and accompanying text.

(8) See *infra* notes 65-251 and accompanying text.

(9) See *infra* notes 252-271 and accompanying text.

(10) See *infra* notes 268-271 and accompanying text.

(11) WASH. REV. CODE ANN. [section] 26.10.160(3) (West 1997) (emphasis added), discussed in *Troxel v. Granville*, 530 U.S. 57, 60 (2000).

(12) *Troxel*, 530 U.S. at 60.

(13) *In re Troxel*, 940 P.2d 698, 698 (Wash. Ct. App. 1997).

(14) *Id.* at 698-99.

(15) *Id.* at 699.

(16) *Id.*

(17) *Id.*

(18) *Id.* The grandparents sought "two weekends of overnight visitation per month and two weeks of visitation during the summer," while the mother was seeking an order to limit their visitation to "one day ... each month with no overnight stay." *Id.*

(19) *Id.*

(20) *Id.* at 698. The children's mother argued that the grandparents lacked standing because "there was no pending custody proceeding at the time of the grandparents' petition [and because] her husband Kelly Wynn had adopted [the children]." *Id.*

(21) *Id.* at 701 (refusing to rule on the constitutionality of the statute since the grandparents lacked standing).

(22) *Id.* at 700.

(23) *Id.* The Court looked at Washington's statute which stated, in pertinent part, that a "person other than a parent may not petition for visitation under this section unless the child's parent or parents have commenced an action under this chapter." *Id.* (quoting WASH. REV. CODE ANN. [section] 26.09.240 (1) (West 1997)).

(24) *In re Troxel*, 940 P.2d at 700-01 (emphasis added). The court first held that in light of both statutes, a visitation petition "must be either contemporaneous with or preceded by a proceeding for child custody." *Id.* at 701 (emphasis added). The court later amended this holding to state "a petition for visitation under RCW 26.10.160(3) must be contemporaneous with a proceeding for child custody." *In re Troxel*, 971 P.2d 56, 56-57 (Wash. Ct. App. 1998) (emphasis added).

(25) *In re Smith*, 969 P.2d 21, 24 (Wash. 1998). In overruling the appellate court's interpretation, the Washington Supreme Court stated that a "court cannot read into a statute that which it may believe the legislature has omitted, be it an intentional or inadvertent omission." *Id.* at 26 (quoting *Auto. Drivers & Demonstrators Union Local 882 v. Dep't of Retire Sys.*, 598 P.2d 379, 382-83 (1979)).

(26) See *id.* at 27-31 (citing *Santosky v. Kramer*, 45 U.S. 745, 753 (1982); *Wisconsin v. Yoder* 406 U.S. 205, 235-36 (1972); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Pierce v. Soc'y of Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)).

(27) *Id.* at 30. In further detail, the court stated that:

[t]here is no threshold requirement of a finding of harm to the child as a result of the discontinuation of visitation [and s]hort of preventing harm to the child, the standard of "best interest of the child" is insufficient to serve as a compelling state interest overruling a parent's fundamental rights.... To suggest otherwise would [give the state] the authority to break up stable families.

Id.

(28) See *id.* at 28 (noting that privacy rights implicit in the Constitution apply to a parent's right to rear their children without state interference); see also *id.* at 30 (citing *Hawk v. Hawk*, 855 S.W.2d 573, 580 (Tenn. 1993) quoting Kathleen S. Bean, *Grandparent Visitation: Can the Parent Refuse?*, 24 U. Louisville J. Fam. L. 393, 441 (1985-86)). Bean states:

For the state to delegate to the parents the authority to raise the child as the parents see fit, except when the state thinks another choice would be better, is to give the parents no authority at all. "You may do whatever you choose, so long as it is what I would choose also" does not constitute a delegation of authority.

Id.

(29) *Id.* at 30. The Washington Supreme Court noted that "[i]t is clear from Supreme Court precedent that some harm [must] threaten[] the child's welfare before the state may constitutionally interfere with a parent's right to rear his or her child" and concluded that "in contrast, this case presents no such compelling interest of the state." *Id.* at 29, 30.

(30) *Id.* at 31.

(31) *Id.*

(32) *Troxel v. Granville*, 527 U.S. 1069 (U.S. Sept. 28, 1999) (No. 99-138).

(33) *Troxel v. Granville*, 530 U.S. 57, 75 (2000). Chief Justice Rehnquist, Justice Ginsburg, and Justice Breyer joined in Justice O'Connor's plurality opinion. *Id.* at 60. While Justices Souter and Thomas filed individual concurring opinions, *id.* at 75-80, and 80, Justices Stevens, Scalia and Kennedy filed separate dissenting opinions. *Id.* at 80-91, 91-93, and 93-102.

(34) see *id.* at 72-73 (noting that the *Troxel* case involved "nothing more than a simple disagreement between the Washington Superior Court and [Tommie] Granville concerning her children's best interests").

(35) See *infra* notes 50-57 and accompanying text (discussing the plurality and concurring opinions on the standard).

(36) *Smith*, 969 P.2d at 31 (quoting *In re Welfare of Sumey*, 621 P.2d 108, 110 (1980) (en banc)).

(37) See *Troxel*, 530 U.S. at 69 (emphasizing that "[t]he problem here is not that the [trial court] intervened, but that when it did so, it gave no special weight at all to [Tommie] Granville's determination of her daughters' best interests").

(38) *Id.* at 73. In furtherance of this point, the Court emphasized that "the constitutionality of any standard for awarding visitation turns" on how it is applied in a particular case. *Id.*

(39) *Id.* at 67.

(40) *Id.* "Thus, in practical effect, ... a court can disregard and overturn any decision by a fit custodial parent concerning visitation ... based solely on the judge's determination of

the child's best interests." Id. The Court further reinforces this point by stating that "[s]hould the judge disagree with the parent's estimation of the child's best interests, the judge's view necessarily prevails." Id.

(41) See id. at 71 (noting that "[t]he Superior Court gave no weight to Granville's having assented to visitation even before the filing of any visitation petition ... [and] instead rejected Granville's proposal and settled on a middle ground").

(42) Id. at 65-66. The Court cites landmark decisions effectuating this liberty interest. Id. (citing *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399, 401 (1923)).

(43) Id. at 68-69. "[I]f a parent adequately cares for his or her children (i.e., is fit) there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning [his children]. Id.

(44) See id. at 67 (emphasizing that the statute left the decision of what was in the child's best interests "solely in the hands of the judge," thus enabling the court to "disregard and overturn any decision by a fit custodial parent concerning visitation").

(45) See id. at 68-69.

(46) See id. at 71 (referring to *In re Troxel*, 940 P.2d 698, 699 (Wash. Ct. App. 1997)).

"[T]he Troxels requested two weekends per month and two full weeks in the summer, Granville asked the Superior Court to order only one day of visitation per month (with no overnight stay) and participation in the Granville family's holiday celebrations." Id.

(47) See id. at 69-70 (noting that "[t]he decisional framework employed by the Superior Court directly contravened the traditional presumption that a fit parent will act in the best interest of his or her child").

(48) Id. at 68 (quoting *Parham v. J.R.*, 442 U.S. 584, 602 (1979)).

(49) See id. at 69 (noting that the judge's award of visitation rested in part on the fact that there had not been a showing that visitation would not be in the children's best interests).

(50) Id. at 73. The Court explained its refusal to define the extent of this due process right by stating that "the constitutionality of any standard for awarding visitation turns on the specific manner in which that standard is applied and that the constitutional protections in this area are best `elaborated with care.'" Id.

(51) Id. at 70.

(52) Id. at 80 (Thomas, J., concurring). Justices Souter and Thomas provided the only concurrences. Id. at 75-80.

(53) Id. (Thomas J., concurring).

(54) Id. (Thomas J., concurring).

(55) Id. at 75-77 (Souter J., concurring) "[T]he decision of the Supreme Court of Washington ... is consistent with this Court's prior cases addressing the substantive interests at stake." Id. at 75.

(56) See id. at 76-77 (Souter J., concurring) (reasoning that "because the state statute authorizes any person at any time to request (and a judge to award) visitation rights, subject only to the State's particular best-interests standard, the state statute sweeps too broadly and is unconstitutional on its face").

(57) Id. at 77 (Souter J., concurring).

(58) See id. at 80-102 (Stevens, J., Scalia, J., and Kennedy, J., dissenting) (expressing how their reasoning and their conclusion differs from that of the plurality).

(59) *Id.* at 80-81 (Stevens J., dissenting).

(60) See *id.* at 81 (Stevens J., dissenting) (reiterating that "the State Supreme Court broadly held that WASH. REV. CODE [section] 26.10.160(3) (Supp. 1996) was invalid on its face under the Federal Constitution").

(61) See *id.* at 81-82 (Stevens J., dissenting) (noting that the "task of reviewing a trial court's application of a state statute to the particular facts of a case is one that should be performed in the first instance by the state appellate courts").

(62) See *id.* at 84, 85, 94-95 (Stevens, J., and Kennedy, J., dissenting) (explaining the flaws in the state supreme court's reasoning, including the misapplication of federal law in declaring the statute should require a threshold finding of harm to the child or else be held invalid).

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

(64) See *id.* at 92 (Scalia J., dissenting) (footnote omitted) (stating that, historically, there have been only three holdings based on the unenumerated parental right to "direct the upbringing of their children" and that "[he would not] extend the theory upon which [these cases] rested to this new context").

(65) N.E.2d 660 (N.Y. 1936).

(66) See *id.* at 661 (stating that courts should only intervene in the upbringing of children when "the health or welfare of the child is in danger").

(67) See *id.* (noting that "[t]he vast majority of matters concerning the upbringing of children must be left to the conscience, patience, and self-restraint of father and mother").

(68) See *id.* (recognizing the difficulties that would arise if the courts attempted to instruct parents on how to raise their children).

(69) *Id.*

(70) See, e.g., *People ex rel Cox*, 124 N.Y.S.2d 511, 516 (Sup. Ct. 1953) (noting that "[b]y natural law, statute and case law, the right to custody is in the parents as against the whole world, but only where the parents have not forfeited that right by conduct which makes them unfit to enjoy its privilege").

(71) 98 N.Y.S.2d 938 (App. Div. 1950).

(72) 15 So. 151 (La. 1894).

(73) *Id.* at 152.

(74) See *id.* at 940-41.

(75) See *id.* at 940. "By the husband's death, the sole authority and will is in the mother. The father's will is no longer in existence. The authority and will of the father cannot, by any means, and certainly not by a court be transferred to the grandparents." *Id.*

(76) *Id.*

(77) 124 N.Y.S.2d 511 (Sup. Ct. 1953).

(78) See *id.* at 516 (acknowledging that "grandparents ... must sometimes pay the heavy penalty wrought by the lack of domestic harmony and tranquility between parents"). In this case, the father took the child away--without the consent of the mother--to reside with his parents. *Id.* at 513. The mother obtained a court order directing the return of her child and awarding her sole custody and control of the child, which the father adamantly refused to obey. *Id.* In fact, it was not until a year later that the mother finally retrieved her child, during which time the child had been secretly residing out of state with the paternal grandparents. *Id.*

(79) *Id.* at 514. The mother, by taking the child with her to New York, had not abandoned her "paramount right to custody." *Id.* at 513-14.

(80) See *id.* at 515 (stating that grandparent visitation is tantamount to custody and would thus deny the mother her natural and court ordered right to custody of her child); see also *People ex rel. Hacker v. Strongson*, 141 N.Y.S.2d 859, 860 (Sup. Ct. 1955) (stressing that "[v]isitation is a form of custody, and custody is a legal right which properly belongs to the parents only"); *Noll*, 98 N.Y.S.2d at 940 (criticizing the theory that "visitation is custody for a limited time" because it interferes with the "complete custody" of the fit parents).

(81) See *People ex rel. Cox*, 124 N.Y.S.2d at 514-15 (recognizing that New York's jurisdiction to regulate custody of infants originates from the state's duty to protect the "incompetent or helpless," and noting that anyone may petition a court on behalf of an infant who is in need of protection).

(82) See *In re Boses*, 105 N.Y.S.2d 569, 569-70 (App. Div. 1951) (concluding that simply demonstrating the desirability of having a child visit with his or her grandparents will not meet this burden).

(83) Act of June 21, 1966, ch. 631, [section] 72, 1966 N.Y.Laws 766, 766 (codified as amended at N.Y. DOM. REL. LAW [section] 72).

(84) See *Lo Presti v. Lo Presti*, 355 N.E.2d 372, 375 (N.Y. 1976) (noting that Domestic Relations Law (DRL) section 72 does not confer on grandparents "an absolute or automatic right of visitation," but rather it gives grandparents a "procedural vehicle through which [they] might assert that visitation of [a] child ... is warranted").

(85) See, for example, Justice Ward's opinion in *People ex rel. Cox*, 124 N.Y.S.2d at 516, where he stated: "Reluctant as I am to deny these grandparents their natural desire, to enjoy a normal association with their grandchild, and thus brighten their declining years, I must deny this motion and dismiss this writ." *Id.*

(86) See, e.g., *Scranton v. Hutter*, 339 N.Y.S.2d 708, 709-10 (App. Div. 1973) ("How tragic it must be when grandparents lose their only child and not be able to visit the child or children of their deceased child because there is no law enacted by the legislature to give them at least the opportunity to apply to the Court for this right.") (quoting Noah Goldstein, Assemblyman's Memoranda on Grandparents Visitation Rights, A.I. 264, reprinted in 1966 NEW YORK STATE LEGISLATIVE ANNUAL, 14, 15 (1966)).

(87) See Act of June 21, 1966 [section] 72. Reading in pertinent part as follows:

"Where either or both of the parents of a minor child ... is or are deceased, a grandparent or the grandparents of such child, who is or are the parents of such deceased parent or parents, may apply to the [S]upreme [C]ourt ... for visitation rights for such grandparent or grandparents in respect to such child."

Id. (emphasis added).

(88) See, e.g., *New York ex rel. Levine v. Rado*, 283 N.Y.S.2d 483, 485-86 (Sup. Ct. 1967) (citing DRL section 72 and holding that the maternal grandmother lacked standing under the statute because her child was still alive when she petitioned the court for visitation rights).

(89) See Act of July 8, 1975, ch. 431, sec. 1, [section] 72, 1975 N.Y. Laws 620, 620 (current version at N.Y. DOM. REL. LAW [section] 72).

(90) *Id.*

(91) N.Y. DOM, REL. LAW [section] 72 (McKinney 1999). It is important to note here that for the purposes of this article, it is insignificant whether a grandparent visitation case was commenced and decided in a New York Family Court as opposed to a state supreme court, or vice versa. Both courts have concurrent jurisdiction to decide visitation as long as it is not incidental to a matrimonial proceeding, whereby the supreme court would have exclusive jurisdiction. See N.Y. Const. art. VI, [section] 7 (a), [section] 13 (b) and (c).

(92) See, e.g., *Frances E. v. Peter E.*, 479 N.Y.S.2d 319, 322-23 (Fam. Ct. 1984) (construing the 1975 amendment to allow courts to exercise their discretion on a case-by-case basis when dealing with grandparent visitation issues).

(93) See *Emanuel S. v. Joseph E.*, 577 N.E.2d 27, 29 (N.Y. 1991) (recognizing the "humanitarian concern" of children being able to maintain visitation with their grandparents, as a foundation upon which the amended statute rests); Leon E. Giuffreda, Senator's Memoranda on Grandparents, Visitations Rights, S. 613-A, reprinted in 1975 NEW YORK STATE LEGISLATIVE ANNUAL, 50, 51 (1975) (indicating that a motivating factor in amending DRL section 72 was to protect children from neglect and child abuse).

(94) See *infra* notes 165-199 and accompanying text (exploring the different factors courts have taken into account in assessing whether equitable circumstances exist that would allow the courts to intervene).

(95) See *infra* notes 200-228 and accompanying text (setting forth the analysis courts have applied in assessing whether visitation with a grandparent(s) is in a child's best interests).

(96) See *Frances E.*, 479 N.Y.S.2d at 322 (noting that prior to DRL section 72's amendment in 1975, the statute "improperly focus[ed] only on the grandparent's right to visit," whereas now the statute reads as instructing the courts not to "ignore the child's rights to know his grandparent").

(97) See Giuffreda, *supra* note 94, at 51 ("There appears to be a variety of potential situations where the utilization of such a resource could be of invaluable consequence to the children and ultimately the society.") (emphasis added).

(98) But cf. *Emanuel S.*, 577 N.E.2d at 29-30 (noting, however, that the "equitable circumstances provision" of the statute does not grant a grandparent automatic standing to seek visitation--standing is to be conferred at the court's discretion only after examining the relevant facts). In recognizing that there is no common law right for court ordered grandparental visitation, courts have "strictly construed" the language of the statute. See, e.g., *Anthony L. v. Seymour S.*, 492 N.Y.S.2d 705, 706 (Fam. Ct. 1985); see also *infra* notes 232-236 and accompanying text (noting that courts have done this by narrowly defining "grandparents" as it appears in DRL section 72). This strict construction has translated into an across the board denial of court ordered visitations to people such as step-grandparents, great-grandparents, and other distant relatives who do not come under the precise definition of "grandparent." See *infra* notes 231-236 and accompanying text (explaining the courts' refusal to extend DRL section 72 to categories of people who the legislature did not specifically provide rights to). This paper, however, will not address the many instances where third parties other than grandparents have petitioned the courts for mandated visitation rights.

(99) See *infra* notes 140-163 and accompanying text (analyzing the judicial expansion of grandparent rights in accordance with the "humanitarian" intent of the statute).

(100) See *infra* notes 145-163 and accompanying text (setting forth illustrations of courts substituting their own assessment of what is best for the child without giving any weight to the parent's reasons for denying visitation).

(101) *New York ex rel. Sibley v. Sheppard*, 429 N.E.2d 1049, 1052 (N.Y. 1981) (suggesting that important concerns for the well-being and safety of a child can trump parents' constitutional right to raise their children as they see fit).

(102) *Id.*

(103) See *Frances E. v. Peter E.*, 479 N.Y.S.2d 319, 323 (Fam. Ct. 1984) (noting that, with respect to grandparents' right to visitation, "[i]t appears clear that the legislative intent was to give the court discretion `in a variety of situations'" to entertain petitions) (citation omitted). It is important to note here that when the court entertains grandparent visitation petitions in these situations, unlike in the *Troxel* case, any visitation is usually against the will of the "fit parent."

(104) *Noll v. Noll*, 98 N.Y.S.2d 938, 939 (App. Div. 1950).

(105) *Sibley*, 429 N.E.2d at 1053.

(106) *Id.*

(107) *Emanuel S. v. Joseph E.*, 577 N.E.2d 27, 29 (N.Y. 1991).

(108) *Ann. M.C. v. Orange County Dep't of Soc. Servs.*, 682 N.Y.S.2d 62, 63 (App. Div. 1998).

(109) See *infra* notes 140-199 and accompanying text (setting forth different circumstances where grandparents have been granted standing to petition for visitation despite parental or even the child's opposition).

(110) See *Emanuel S.*, 577 N.E.2d at 29 (finding no language in the 1975 amendment explicitly or implicitly precluding a grandparent from petitioning the court for visitation solely because the child resides in an intact nuclear family).

(111) See, e.g., *New York ex rel. Herman v. Lebovits*, 322 N.Y.S.2d 123 (Sup. Ct. New York Co. 1971).

(112) See *id.* at 125 (ruling that upon an adoption by the father's second wife, the legal relationship between the maternal grandfather and the child had been terminated).

(113) *New York ex rel. Levine v. Rado*, 283 N.Y.S.2d 483, 485-86 (Sup. Ct. 1967) (dismissing a writ of habeas corpus brought by a maternal grandmother seeking to obtain visitation privileges with a child who had been adopted by a paternal aunt and her husband).

(114) See *Lebovits*, 322 N.Y.S.2d at 125 (denying the biological grandparents visitation rights and concluding "that the right of visitation afforded a grandparent by DRL section 72 does not survive the subsequent adoption of the child"); *Levine*, 283 N.Y.S.2d at 486 (noting that "if Section 72 were construed so as to authorize paternal or maternal grandparents to seek custodial or visitation privileges from adoptive parents ... such a construction would work as a strong deterrent from adoption").

(115) See, e.g., *Scranton v. Hutter*, 339 N.Y.S.2d 708, 710 (App. Div. 1973) (emphasizing that the tragedy for grandparents who have lost a child to death is not only the loss of their own child but the exclusion from their grandchild's life as well); *Catherine JJ v. Charlotte II*, 628 N.Y.S.2d 826, 827 (App. Div. 1995) (affirming the dismissal of a grandmother's petition for visitation because her "parental rights to her own daughter [the

mother to her grandchildren] were severed"). The courts have had more difficulty handling the question of whether grandparents should have visitation rights when either their own or their child's parental rights were terminated. See *infra* notes 229-251 and accompanying text (illustrating the conflicting caselaw regarding termination of parental rights and whether the grandparents fit into the definition of a "grandparent" in light of proceedings to terminate parental rights).

(116) See *Scranton*, 339 N.Y.S.2d at 710 (declaring the implicit intention of DRL section 72 was to give grandparents a recognized right or recourse, which is not automatically nullified because of adoption); see also *New York ex tel. Wilder v. Spence-Chapin Servs.*, 403 N.Y.S.2d 454, 455 (Sup. Ct. 1978) (stating that the clear intention of the statute "is to provide a means to preserve a beneficial relationship between a grandchild and grandparent").

(117) See *Scranton*, 339 N.Y.S.2d at 710 (indicating that had the legislature intended to exempt adoption they would have so stated).

(118) *Id.* at 710-11 (citing *Zook v. Zook*, 399 P.2d 53 (Cal. 1965) and *Roquemore v. Roquemore*, 275 Cal. App.2d 912 (1969)).

(119) See *id.* at 711 (stating "that an adoption does not preclude the natural grandparents from applying for a writ of habeas corpus to obtain visitation rights under [DRL section 72]").

(120) 399 P.2d 53 (Cal. 1965).

(121) *Id.* at 54.

(122) See *id.* at 55 (rejecting the notion that an adopted child may not succeed the estate of a natural parent or relative after adoption).

(123) See *id.* at 56 (stipulating further that "[i]f affection and regard remains between members of a natural family, the law should not in the name of consistency undertake to thwart the expression of those feelings when the encouragement thereof does not hinder the adoptive relationships"). But see *Geri v. Fanto*, 361 N.Y.S.2d 984, 989 (Fam. Ct. 1974) (advising the legislature to seriously consider repealing DRL section 72 because of the statute's fatal catch-22: "If affection and regard remains between members of the family" then it might be in the best interests of the child to have visitation, however, there would be no need to invoke DRL section 72 unless "the relationship between parents and grandparents is a hostile one").

(124) 429 N.E.2d 1049 (N.Y. 1981).

(125) *Id.* at 1049-50.

(126) *Id.* at 1050.

(127) See *id.* (noting that "[o]n its face [DRL section 72] encompasses the situation where the child has been adopted").

(128) *Id.* at 1051; N.Y. DOM. REL. LAW [section] 117 (McKinney 1999). Section 117 sets forth the "[e]ffects of adoption." [section] 117.

(129) See *Sheppard*, 429 N.E.2d at 1051 (noting the purpose of the section "is to facilitate maintenance of family ties between grandparents and grandchildren" including the situation where a parent has died, which is "frequently found in the adoption setting").

(130) See *id.* (pointing out that DRL section 72 allows a grandparent to petition "against any person who has custody" of the child and further emphasizing that "[n]othing in that section excludes custody obtained through adoption").

(131) See *id.* at 1052 (looking to U.S. Supreme Court cases to acknowledge that parent's have fundamental rights but noting that these "rights of parenthood are [not] beyond limitation" (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944))).

(132) See *id.* at 1053.

(133) See *id.*

(134) *Id.*

(135) *Id.* at 1052.

(136) See *id.* at 1053 (stating that "[t]he court may do nothing more than execute the Legislature's determination that, under appropriate circumstances, an adoptive child's best interest will be served by continued visits with its natural grandparents").

(137) *Id.* Adoption is a "creature of statute ... [rooted in] the State's concern for the best interest of the child" and the state's interest in that child perseveres after the adoption is finalized. *Id.* at 1052-53. "Completion of the adoption process does not oust the state of all power to continue its supervision of the child's best interest." *Id.* at 1053.

(138) *Id.* (focusing on the fact that the grandparents had established a relationship with the grandchild and, in light of the loss of the natural parents, allowing visitation would not unconstitutionally interfere with the rights of the adoptive parents).

(139) *Id.* at 1053. Interestingly enough, the court does not consider what the "parents" deem are the best interests of the child, but instead focuses on the fact that the maternal grandparents "may also provide the natural warmth, interest[,] and support that will alleviate the child's misery." *Id.* at 1052.

(140) See, e.g., *Lo Presti v. Lo Presti*, 355 N.E.2d 372, 375 (N.Y. 1976) (stating the purpose of the amended statute was to "establish a procedural vehicle through which grandparents might assert that visitation [with their grandchildren] ... is warranted").

(141) See *Emanuel S. v. Joseph E.*, 577 N.E.2d 27, 29 (N.Y. 1991) (noting how several courts have recognized that the underlying theme of the amended DRL section 72 "rests on the humanitarian concern that a relationship with a grandparent is often beneficial to the child"); see also *Frances E. v. Peter E.*, 479 N.Y.S.2d 319, 323 (Fam. Ct. 1984) (commenting on how the courts no longer focus on "the right of the grandparent, but on the benefits to the child from visitation with a grandparent" because of the invaluable benefits which cannot "derive from any other relationship"); *Vacula v. Blume*, 384 N.Y.S.2d 208, 208 (App. Div. 1976) ("Visits with a grandparent are often a precious part of a child's experience and there are benefits which devolve upon the grandchild from the relationship with his grandparents' which he cannot derive from any other relationship.").

(142) *People ex rel. Wilder v. Spence-Chapin Servs.*, 403 N.Y.S.2d 454, 455 (Sup. Ct. 1978).

(143) See *Frances E.*, 479 N.Y.S.2d at 322 (discussing the improper focus of grandparent visitation statutes on derivative rights of grandparents, rather than on children's rights).

(144) See *infra* notes 151-163 and accompanying text (discussing the various pitfalls in the practical application of the law and illustrating the effects that the expansion of grandparent's visitation rights has had on the law).

(145) See, e.g., *Frances E.*, 479 N.Y.S.2d at 322 (holding that the grandparents' rights of visitation with their grandchildren do not derive from their child's rights but are separate rights based on equity).

(146) 391 N.Y.S.2d 152 (App. Div. 1977) (mem.).

(147) *Id.* at 152.

(148) *Id.* at 152-53 (finding that each child expressed their preoccupation and desire not to feel obligated to visit with their grandparents).

(149) *Id.* at 153.

(150) *Id.* (emphasis added). But see *Geri v. Fanto* 361 N.Y.S.2d 984, 988-89 (Fam. Ct. 1974) (questioning vigorously whether DRL section 72 really protects the best interests of children by stating "could it possibly be in the best interest of the children to compel their mother and father to observe a visitation regime imposed by the court when they, the custodial parents, are opposed to it").

(151) See, e.g., *Ehrlich*, 391 N.Y.S.2d at 152-53 (illustrating that even a parent's decision, at the behest of his children, not to allow visitation is subject to the court's scrutiny).

(152) See *Lyng v. Lyng*, 490 N.Y.S.2d 940, 941 (App. Div. 1985) (mem.) (awarding the paternal grandparents visitation against the wishes of the mother because "there is nothing in the record to indicate that visitation ... would not be beneficial to [the child]"); *Johansen v. Johansen*, 464 N.Y.S.2d 301, 303 (App. Div. 1983) (mem.) (affirming the family court's award of grandparent visitation--despite the fact that the grandparents had not seen their grandchild in four years--because no statute exists to lessen grandparents' rights, even where there has been a lack of contact with the grandchildren). But see *Apker v. Malchak*, 490 N.Y.S.2d 923, 925 (App. Div. 1985) (affirming the family court's denial of visitation rights where the grandparents had not seen their grandchildren in more than nine years, which evidenced the lack of any meaningful grandchild-grandparent relationship).

(153) See *Apker*, 490 N.Y.S.2d at 925 (holding the existence of animosity between the parties was not dispositive, even though the animosity arose for many reasons, among them a dispute over a \$15,000 loan from the grandparents to the parents as well as the tragic death of the parent's child "several months after birth when he choked on a toy given to him by the grandparents"); *Johansen*, 464 N.Y.S.2d at 303 ("In determining the best interest of the child ... the existence of animosity between the parent and the grandparents is [not] a proper reason for denial of visitation."); *Lachow v. Barasch*, 394 N.Y.S.2d 284, 284 (App. Div. 1977) (mem.) (declaring that the family court abused its discretion when it denied the maternal grandmother's petition because of the animosity between the father and the maternal grandmother); see also *Vacula v. Blume*, 384 N.Y.S.2d 208, 208 (App. Div. 1976) (declaring that not only was animosity between the parties an improper basis for denying visitation but it was equally inappropriate to use as a "yardstick" for measuring best interests).

(154) 460 N.E.2d 1351, 1352 (N.Y. 1984) (mem.) (disregarding the family court judge's finding that the animosity between the child's parents and grandparents was a basis for terminating visitation because it had no bearing on the child's "emotional or physical well-being").

(155) *Id.* In effect, they did not want the child to learn that he had three sets of grandparents. *Id.*

(156) *Id.*

(157) 420 N.Y.S.2d 697 (Fam. Ct. 1979).

(158) *Id.* at 698-99.

(160) *Id.* at 698.

(160) *Id.*

(161) *Id.* at 700. The court determined the child's best interests by examining whether she and her paternal grandparents had "established a secure, continued and long-term relationship with meaningful affection and regard." *Id.* at 699.

(162) *Id.* at 699-700.

(163) *Id.* at 700. The court also noted that a parents' structuring of visitation privileges can be dealt with through outside agencies or the court itself, as opposed to an outright denial of visitation. *Id.*

(164) See *supra* notes 83-163 and accompanying text (discussing the history of DRL section 72 and its application to New York case law).

(165) 577 N.E.2d 27 (N.Y. 1991), *rev'g*, 560 N.Y.S.2d 211 (App. Div. 1990), appeal granted by 571 N.E.2d 79 (N.Y. 1991).

(166) See *id.* at 29 (finding "nothing in the statutory language or legislative history foreclos[es the grandparents] solely on the grounds that the grandchild resides with fit parents in an intact nuclear family").

(167) See *id.* (recognizing that the rights of grandparents to petition for visitation were no longer "dependent upon the status of the parents").

(168) See *id.* at 29-30 (stating that DRL section 72 does not confer automatic standing and that factors such as the nature of the parent's objections to visitation and the extent of the child's relationship with the grandparent's must be calculated in determining the best interests of the child). "Equity" is defined as "the application of the dictates of conscience or the principles of natural justice to the settlement of controversies. It is a system of jurisprudence and a body of rules and doctrines serving to supplement and remedy the limitations and inflexibility of the common law." 55 N.Y. JUR. 2D Equity [section] 1 (1986).

(169) Emanuel S., 577 N.E.2d. at 28.

(170) *Id.* The family court awarded the maternal grandparents visitation consisting of "six hours on the second Sunday of every month." *Id.*

(171) *Id.*

(172) See Emanuel S. v. Joseph E., 560 N.Y.S.2d 211, 213-14 (App. Div. 1990) (explaining that the "Legislature never intended to allow judicial scrutiny of a parental value judgment in the circumstances--or lack thereof--existent here").

(173) See *id.* at 214 (concluding that "a petition for an order authorizing visitation pursuant to Domestic Relations Law [section] 72 must demonstrate the existence of some circumstance or condition, such as untoward disruption of an established grandparent-grandchild relationship"); Emanuel S., 577 N.E.2d at 30. (declaring that equitable circumstances require grandparents to first show the existence of a condition such as improper interference with an established grandparent-grandchild relationship before the court will engage in a best-interests determination).

(174) See Emanuel S., 577 N.E.2d at 30. The court suggested that it will be impossible for grandparents to establish standing unless they can demonstrate to the court their attachment and devotion to their grandchild. See *id.* at 30. Standing can be effectuated when "circumstances show that conditions exist which equity would see fit to intervene." This is accomplished through the "equitable circumstances" clause of DRL section 72, which permits grandparents the right to seek standing for visitation of their grandchild, regardless of the status of the parents. See *id.*

(175) See *id.* at 29 (finding that the appellate court construed the statute too narrowly, allowing standing "only in cases where there was `a change in the status of the nuclear family, or interference with a `derivative' right, or some abdication of parental responsibility") (quoting *Emanuel S. v. Joseph E.*, 560 N.Y.S.2d 211, 214 (App. Div. 1990)).

(176) *Id.* at 30.

(177) See *id.* at 29-30.

(178) *Id.* at 30.

(179) *Id.* (noting that a grandparent's mere assertions of love and affection are not enough to warrant state intervention).

(180) See *id.* This is not a rigid requirement; however, the court goes on to note that "what is required of grandparents must always be measured against what they could reasonably have done under the circumstances." *Id.*

(181) See *id.* (noting further that "[i]f the grandparents have done nothing to foster a relationship or demonstrate their attachment to the grandchild ... then they will be unable to establish that conditions exist where `equity would see fit to intervene").

(182) See, e.g., *Agusta v. Carouso*, 617 N.Y.S.2d 189, 190 (App. Div. 1994) (mem.) (holding that a trial court cannot make a determination of standing based solely on whether a grandparent-grandchild relationship existed, and that reasonable efforts towards establishing such a relationship must also be considered).

(183) *Emanuel S.*, 577 N.E.2d at 30.

(184) See *id.*; *infra* notes 186-193 and accompanying text.

(185) See *Seymour S. v. Glen S.*, 592 N.Y.S.2d 410, 411 (App. Div. 1993) (mem.) (finding that a grandparent had no standing to seek visitation where the grandparent had not had contact with his granddaughter for five years); see also *Doe v. Smith*, 595 N.Y.S.2d 624, 626-27 (Fam. Ct. 1993) (refusing to extend standing to maternal grandfather due in part to the total estrangement between the grandfather and his own daughters evidenced by one daughter's declaration of strong opposition to visitation, in that if the court allowed her father to visit with her child she would not have any more children).

(186) *Emanuel S.*, 577 N.E.2d at 30.

(187) *Id.*

(188) See *Agusta v. Carouso*, 617 N.Y.S.2d 189, 190 (App. Div. 1994) (holding that the trial court's refusal to grant standing was unwarranted in light of the fact that the grandfather had done everything he reasonably could to maintain a relationship with the children since learning of their birth through his continual efforts such as writing letters, sending gifts, telephoning, attempting visits, and even enlisting the assistance of intermediaries).

(189) 658 N.Y.S.2d 744 (App. Div. 1997).

(190) *Id.* at 745-46 (noting that the trial court improperly "dwelt on [the parent's] reasons for terminating [the grandparent's] visitation and did not discuss whether [the grandparents] attempted to maintain their relationship with their grandchildren").

(191) *Id.* at 746.

(192) *Id.*

(193) *Id.* See discussion *infra* note 196.

(194) See, e.g., *Kaywonne M. v. Gwendolyn M.*, 619 N.Y.S.2d 279, 280 (App. Div. 1994) (mem.) (denying visitation where for five years no obstacles stood in the way of the grandparents' visitation attempts); *Seymour S. v. Glen S.*, 592 N.Y.S.2d 410, 411 (App. Div. 1992) (denying a grandparent visitation where evidence showed the grandfather had not seen his granddaughter since she was two weeks old).

(195) 672 N.Y.S.2d 1012 (Fam. Ct. 1998).

(196) See *id.* at 1013-116 (providing an explicit and graphic history of the petitioner's son's acts of violence). It should be noted that there are many cases dealing with the situation where it is the grandparent who has perpetrated the violence. See, e.g., *Luma v. Kawalchuk*, 658 N.Y.S.2d 744 (App. Div. 1997) (noting that the petitioner-grandfather was violent and that he abused his wife and struck his girlfriend). *C.M. v. M.M.*, 672 N.Y.S.2d 1012 (Fam Ct. 1998), is unique because it examines the grandparent's apathy towards the abuse that her son was perpetrating on her daughter-in-law as a factor to be weighed by the court in determining visitation. *Id.* at 1013.

(197) *C.M.*, 672 N.Y.S.2d at 1015. Both the mother and the child entered into therapy after the husband was arrested in January 1997 and it was at that point that the mother denied the grandmother access to the child. *Id.*

(198) See *id.* at 1018 (stating that the grandmother's "failure to protect th[e] mother was also a failure to protect her grandchild). At trial it was shown that after the grandmother saw the child's mother with two black eyes and clumps of hair missing, the grandmother told the mother to wear a hat and make-up so that no one would "think anything." *Id.* at 1015. Furthermore, the court noted that "[o]n no occasion did petitioner ask respondent if she or the child were safe" and only attempted to see her grandchild an average of five times a year for four years. *Id.* at 1014-15.

(199) [T]he petitioner did not make enough of an effort to spend time with the child from the time that the child was forced to move from petitioner's home, nor did she endeavor to effectuate their return. She did not try to convince her husband not to turn them out of the home abruptly. She did not try to help them to find suitable living quarters. She did not offer them money. She did not visit with or telephone the child on a regular basis. She did not have an involvement in this child's life. She did not offer this child time to be with her. She did not spend many holidays or vacation periods with the child. She did not write often to the child. She did not send the child birthday cards, or give the child birthday presents and Christmas gifts regularly. She did not give the child any money, nor did she offer the child and mother a place to live after her son was arrested. She did not provide grandmotherly nurturance and guidance. She did not provide the child with physical or emotional protection.

Id. at 1017.

(200) See *Eschbach v. Eschbach*, 436 N.E.2d 1260, 1262 (N.Y. 1982) (acknowledging that "there are no absolutes in making [best interests] determinations; rather, there are policies designed not to bind the courts, but to guide them in determining what is in the best interests of the child").

(201) See, e.g., George L. Blum, Annotation, Grandparents' Visitation Rights Where Child's Parents Are Deceased, Or Where Status Of Parents Is Unspecified, 69 A.L.R.5th 1, 28 (1999) (explaining that court's often resort to expert testimony--including psychological reports--in ascertaining whether visitation rights are in the best interests of the child).

(202) Ehrlich v. Ressler, 391 N.Y.S.2d 152, 153 (App. Div. 1977) (mem.) (finding the trial judge acted inappropriately in denying the grandparents visitation based solely on statements the children had made in an informal off-the-record meeting which rendered the judge's decision unreviewable). See supra notes 146-51 and accompanying text.

(203) See, e.g., Ziarno v. Ziarno, 726 N.Y.S.2d 820, 821 (App. Div. 2001) (noting that the requirements for a finding of equitable circumstances "essentially indistinguishable" from those necessary for a finding of best interests). The appellate division also found that the grandparent had made no genuine attempt to establish a close relationship within the first five years of the child's life. Id. at 822; see also Kenyon v. Kenyon, 674 N.Y.S.2d 455, 456 (App. Div. 1998) (granting the maternal grandparents visitation with their grandchild against the mother's wishes because it was clear that the grandparents had "substantial ongoing contact with their grandchild from his birth" which consisted of "car[ing] for him virtually day and night for approximately a year due to [mother's] illness ... frequent camping trips, and regularly exchanged birthday and greeting cards").

(204) See, e.g., Rita VV v. Anna WW, 619 N.Y.S.2d 218, 221 (App. Div. 1994) (denying the maternal grandparents visitation because they had made no effort to establish a relationship with the child). In fact, the "child was rejected by her maternal grandfather due to her Puerto Rican heritage." Id. at 221-22. The court focused on the fact that it was the maternal grandparents who not only encouraged the mother to give the child up for adoption but they also refused to allow the mother and child into their home. Id. at 221. See also 2 JOAN M. KRAUSKOPE ET.AL., ELDER LAW: ADVOCACY FOR THE AGING [section] 25.17 (2d ed. 1993).

(205) See Wenskoski v. Wenskoski, 699 N.Y.S.2d 150, 151-52 (App. Div. 1999) (finding denial of the paternal grandmother's petition for visitation proper where the grandchild felt stress around the grandmother due to the grandmother's disparaging remarks about his mother and the grandmother's approval of his father's extramarital affair); see also Grant v. Richardson, 697 N.Y.S.2d 17, 18 (App. Div. 1999) (mem.) (affirming the family court's denial of the maternal grandmother's petition based on the stress the grandmother caused the children by telling them that the man they knew as their father was not their real father, and the woman who was caring for them after their parents' deaths was nothing more than a foster parent who did not really care about them).

(206) See, e.g., Gloria R. v. Alfred R., 618 N.Y.S.2d 24, 24 (App. Div. 1994) (mem.) (explaining that animosity is to be presumed in such situations).

(207) See id. (denying visitation because of the "deep rooted animosity and the significant degrees of family dysfunction"). The level of "family dysfunction" led the court to believe that the parties "were incapable of preventing their feelings toward one another from infecting any visitation." Id.

(208) 587 N.Y.S.2d 506 (Fam. Ct. 1992).

(209) See id. at 509 (holding visitation to be detrimental to the children in a two significant ways "first, [that visitation] would directly interfere with the parental relationship and confuse the children in their relationship and feelings for their father; and, second, it would create great difficulty ... in his efforts to properly raise the children").

(210) Id.

(211) Id. at 508.

(212) Id. at 507-08.

(213) Id. at 508.

(214) See id. (stating that "[g]randparent visitation is a creature of statute; the parent-child relationship however precedes government itself and has been described as an 'intrinsic human right'").

(215) See id. (explaining that the "problems" that may be associated with parental visitation are "dealt with" because of the long-term objective of maintaining the strong bond between parent and child and that no such objective exists between grandparents and grandchildren).

(216) See id. (relying on the ruling in *Nacson v. Nacson*, 560 N.Y.S.2d 792, 792-93 (App. Div. 1990) (mem.), by declaring that "a complete denial of visitation between a child and a natural parent is a drastic measure").

(217) See id.

(218) See id. (indicating that such a determination is "much more objective and 'now' oriented" prompting the question whether such visitation would be beneficial to the child presently).

(219) See supra note 209 and accompanying text.

(220) See *Smith*, 587 N.Y.S.2d at 509. The court distinguished this case from a "mere animosity between [the parties]" situation due to the mother's accusations combined with the danger that such feelings would be conveyed to the children. Id.

(221) See id. (stating "there is a danger ... in undermining the relationship already so vulnerable due to the disappearance of the mother").

(222) See id. (basing the decision on the testimony of an expert witness who opined that given the special circumstances of Paula's disappearance, "Court ordered visitation would add great stress to the loss of his wife ... [and] placing such stress on him would impact directly on the children and would adversely affect his ability to address their needs").

(223) See, e.g., *Coulter v. Barber*, 632 N.Y.S.2d 270, 271 (App. Div. 3d Dep't 1995) (denying the maternal grandparents visitation because of the grandfather's outright refusal to accept any responsibility for the role he has played in the deteriorating of the relationship between the parents and the grandparents). The maternal grandfather repeatedly criticized the grandchildren as well as the parents' parental skills, which greatly contributed to family stress and discord. Id. See also *Rose V. v. Comm'r of Soc. Servs.*, 566 N.Y.S.2d 43, 43 (App. Div. 1st Dep't 1991) (denying grandmother visitation because it was not in child's best interests due to her "psychological problems" and "continued non-compliance with court orders" including repeated "interfere[nce] with ... lawful custody," "illegally removing [the grandchild] from this county," and acting in an "inappropriate and insensitive fashion toward the child when allowed visitation").

(224) 673 N.Y.S.2d 219 (App. Div. 3d Dep't 1998).

(225) Id. at 220 (explaining that an investigation had taken place after Derek made an "inappropriate sexual remark" to his stepfather). The investigation revealed that Derek, who was six years old at the time, had been involved in three separate incidents "of inappropriate sexual contact" with two boys who were thirteen years old and nine years old. Id.

(226) Id. at 221.

(227) Id.

(228) Id. The court lent weight to the testimony of the child's therapist who claimed visitation would not be in the child's best interests. Id.

(229) See Anne Marie Jackson, Comment, *The Coming of Age of Grandparent Visitation Rights*, 43 AM. U. L. REV. 563, 573-76 (providing reasons why judges have denied grandparents common law visitation rights, which in combination with societal changes has forced state legislatures to "[enact] grandparent visitation statutes"); supra notes 68-109 and accompanying text (tracing the development of this right over the years).

(230) *Anthony L. v. Seymour S.*, 492 N.Y.S.2d 705, 700 (Fam. Ct. 1985).

(231) See *Gross v. Siegman*, 642 N.Y.S.2d 44, 45 (App. Div. 1996) (mem.) (refusing to grant visitation to a the petitioner who was "not the biological grand[father] of the children with whom ... visitation [was sought] and [the petitioner] is not a legal grandparent by virtue of adoption").

(232) See, e.g., *id.* at 45 (refusing to extend visitation rights to step-grandparents); *Hantman v. Heller*, 624 N.Y.S.2d 64, 65 (App. Div. 1995) (mem.) (refusing to extend visitation rights to step-grandparents); *Anthony L.*, 492 N.Y.S.2d at 706 (holding "that step-grandparents do not fall within the implementing statute"). Each case held that the step-grandparent was not the biological grandparent or the legal grandparent by virtue of adoption. These cases each represent an outright refusal to expand the definition of a grandparent absent legislative action.

(233) See, e.g., *People ex rel. Antonini*, 646 N.Y.S.2d 703, 704 (App. Div. 1996) (mem.) (stating that the "statutory provision does not expressly confer any rights upon great-grandparents, ... [and so] the petitioners lacked standing to commence this proceeding"); *David M. v. Lisa M.*, 615 N.Y.S.2d 783, 784 (App. Div. 1994) (noting that "a great-grandparent--is not governed by [DRL section 72], the terms of which must be strictly construed"). Both cases point out the fact that the legislatures have not opted, for whatever reason, to enact legislation permitting distant relatives to assert visitation rights.

(234) See *David M.*, 615 N.Y.S.2d. at 784 (noting that "if the fitness of a parent is not questioned, interference with that parent's right to limit those with whom his or her child associates is only justified upon a showing of `some compelling state purpose which furthers the child's best interests'" (quoting *Ronald FF v. Cindy GG*, 511 N.E.2d 75 (1987))).

(235) See, e.g., *Catherine "JJ" v. Charlotte "JJ"*, 628 N.Y.S.2d 826, 827 (App. Div. 3d Dep't 1995) (mem.) (noting that in situations where parents abandon any connection with their child, the grandparents lose the vital family connection needed to petition for visitation).

(236) See, e.g., *Ann M.C. v. Orange County Dep't of Soc. Servs.*, 682 N.Y.S.2d 62, 66 (App. Div. 2d Dep't 1998) (noting that "the fact of the termination of parental rights [is] but one consideration; it [is] not a dispositive threshold factor"); *Clarabelle K. v. Christman*, 639 N.Y.S.2d 578, 579 (App. Div. 3d Dep't 1996) (finding "[t]he circumstances here do not warrant conferring standing upon petitioner"). But see *Catherine "JJ"*, 628 N.Y.S.2d at 827 (stating "that petitioner had no basis in law to either [seek] custody or visitation with the children in that her relationship to them was abrogated when she lost her own parental rights to her own child, the children's mother").

(237) *Catherine "JJ"*, 628 N.Y.S.2d at 827.

(238) 639 N.Y.S.2d 578 (App. Div. 3d Dep't 1996).

(239) See *id.* at 579 ("[I]n sum, taking into account all relevant circumstances, including the fact of, and the basis for, petitioner's loss of her parental rights, it cannot be said that this is a situation in which equity should intervene to permit petitioner to seek

visitation." The dilemma posed in this case arose from the fact that despite the loss of her parental rights on grounds of abuse and neglect, the grandmother had maintained "contact with her daughter" as well as the children. *Id.* at 578-79. "The Law Guardian [had] declined to address the question of standing" and instead recommended "limited supervised visitation with both children." *Id.* at 579.

(240) The majority failed to even consider whether petitioner could be considered a grandmother under DRL section 72, rather it is the concurring opinion that sets forth this analysis. *Id.* at 579-80 (Peters J., concurring).

(241) *Id.* at 579.

(242) *Id.* (noting further that the nature of petitioner's relationship with her grandchildren failed to demonstrate that the grandchildren would be harmed by a lack of contact with their grandmother).

(243) 682 N.Y.S.2d 62 (App. Div. 2d Dep't 1998).

(244) *Id.* at 63. The court concluded that there is no controlling statute or case law that "unequivocally holds that the termination of a grandparent's parental rights over a child irrevocably precludes that grandparent from seeking grandparental visitation." *Id.* at 64.

(245) *Id.* at 65-66 (citing Catherine "JJ" v. Charlotte "II", 620 N.Y.S.2d 826 (App. Div. 3d Dep't 1995); Clarabelle K. v. Christman, 639 N.Y.S.2d 578 (App. Div. 3d Dep't 1996)); see *supra* notes 237-242 and accompanying text.

(246) Ann M.C. 682 N.Y.S.2d at 65-66.

(247) *Id.* at 66 (indicating that the court's decision was "influenced by the fact that the grandchildren had been surrendered for adoption" and the court may have perceived grandparent visitation as intrusive upon the relationship of the children and their adoptive family).

(248) *Id.* The court placed great emphasis on the fact that the child could very well be returned to his mother at any time and that the mother has, herself, chosen to reestablish a parent-child relationship with her own mother, the petitioner. *Id.*

(249) *Id.* Instead of automatically denying standing, the Third Department had assessed the situation in light of all the relevant facts. *Id.*

(250) See *id.* at 63 (noting that the grandmother had been sober for seven years, was working towards her General Equivalence Diploma, and had improved her parenting skills by providing adequate child care services for a friend, thus leading the court to conclude that she "has made genuine progress towards turning her life around").

(251) *Id.* at 66.

(252) See Gerald Wallace, *The Big Legal Picture: Grandparents Parenting Grandchildren: A New Family Paradigm*, N.Y.S.B.A. ELDER LAW ATT'Y, Summer 2000, at 10, 17-18 (noting that New York's grandparent visitation statute is clearly safeguarded because "[the state's] courts have coupled this threshold test with a strong reluctance to order visitation that is destructive to the parent-child relationship, [and therefore,] the statute, as usually applied, offers little opportunity for constitutional challenge). For a good website on grandparent rights go to <http://www.divorcesource.com/info/grandparents/rights.shtml> (last visited Sept. 3, 2001).

(253) See, e.g., *Levy v. Levy*, N.Y.L.J., Mar. 22, 2001, at 28 (Sup. Ct. Kings County 2001) (holding DRL section 72 unconstitutional under the clear dictates of *Troxel* that fit parents be given a level of deference, a condition precedent to granting visit, absent in DRL section 72); *Patricia B. v. Janice J.S.*, N.Y.L.J., Jan. 18, 2001, at 33 (Fam. Ct.

Monroe County 2001) (holding DRL section 72 constitutional as applied in this case because of the longstanding grandparent-grandchild relationship (exactly the kind of relationship the legislature sought to protect) and that such protection is within the legislature's power because it is reasonably related to the goals of protecting the child's best interests); *Smolen v. Smolen*, 713 N.Y.S.2d 903, 905-06 (Fam. Ct. Onondaga County 2000) (holding DRL section 72 constitutional based on the practices of New York courts when analyzing a petition to give adequate weight to the parents' objections); *Fitzpatrick v. Youngs*, 717 N.Y.S.2d 503, 506 (Fam. Ct. Jefferson County 2000) (holding DRL section 72 constitutional because not only does the language explicitly contain the pool of people who may petition, but also, in light of the Supreme Court's analysis, when the statute is applied, courts have lent considerable weight to the objections of the parents). But see *Hertz v. Hertz*, 717 N.Y.S.2d 497, 500 (Sup. Ct. Kings County 2000) (holding DRL section 72 unconstitutional on its face for its failure to instruct courts to lend considerable weight to the parents' rights).

(254) 717 N.Y.S.2d 497 (Sup. Ct. Kings County 2000).

(255) See *id.* at 500. (recognizing the Supreme Court's observation that determining the constitutionality of a standard for awarding visitation is fact intensive, resting on "the specific manner in which that standard is applied"). The New York Court of Appeals had previously considered the constitutionality of section 72 as applied to the adoption setting in *People ex rel. Sibley v. Sheppard*, 429 N.E.2d 1049 (N.Y. 1981) (upholding the trial court's ruling that if authorized by a court, a child's natural grandparent has visitation rights, even if the child is adopted, and notwithstanding the objection of the child's adoptive parents). The Court of Appeals explicitly refused to answer the constitutional question in *Emanuel S. v. Joseph E.*, 577 N.E.2d 27, 30 (N.Y. 1991) (asserting that the only issue before the court was whether grandparents had standing to petition the court for visitation rights).

(256) See *Hertz*, 717 N.Y.S.2d at 499 (noting that the petitioner grandfather had not charged any of the respondents with being unfit parents).

(257) *Id.* at 499-500 (illustrating the differences between the facts in *Troxel* and the facts in the instant case). (258) *Id.* at 500.

(259) *Id.* (reiterating the notion that the Supreme Court's decision in *Troxel* is controlling despite the factual differences between the two cases).

(260) *Id.* at 499.

(261) *Id.* at 500.

(262) 713 N.Y.S.2d 903 (Fam. Ct. Onondaga County 2000).

(263) 717 N.Y.S.2d 503 (Fam. Ct. Jefferson County 2000).

(264) See *Smolen*, 713 N.Y.S.2d at 905-06 (declaring that although the statute doesn't "explicitly defer to the judgment of the custodial parent concerning a child's best interests ... [section] 72 has generally been interpreted to require substantial deference to the authority of parents"); *Fitzpatrick*, 717 N.Y.S.2d at 506 (stating that by placing the burden of proof on the petitioning grandparents, decisions made by a child's parents about his or her care and custody have been granted some significance).

(265) See *Fitzpatrick*, 717 N.Y.S.2d at 505 (noting the New York Court's careful construction of the statute, as evidenced by the narrow category of people allowed to petition the court under the umbrella of section 72).

(266) See *id.* at 506 (noting that the relationship requirement was not present in the Washington non-parental visitation statute in which the broad language of its standing requirement allowed anyone to petition the court).

(267) See *Smolen*, 713 N.Y.S.2d at 906 (recognizing that New York courts rarely award grandparental visitation because of the deference given to familial autonomy by the courts).

(268) See *Troxel v. Granville*, 530 U.S. 57, 70 (2000) (conceding that the decision whether a child's continued relationship with his or her grandparent would be in that child's best interests is best left to the parents).

(269) See generally *Wallace*, *supra* note 252 (analyzing the rights of grandparents from all aspects of the legal system including articles written by grandparents, elder law practitioners, legislators, and even social workers).

(270) In the *Troxel* decision, Justice Stevens was the only one who recognized that another interest besides the state's, the parents', and the grandparents' was at stake--that of the child. He criticized the court for treating the children as if they were chattel. *Troxel*, 530 U.S. at 88-89 (Stevens J., dissenting).

(271) There are many organizations urging states to amend and even repeal grandparent visitation statutes. Currently, members of these organizations--such as the New York Chapter of the Coalition for the Restoration of Parents Rights--are sharing their stories and mobilizing behind legislation to change the law. See, e.g., Coalition for the Restoration of Parental Rights, N.Y. Chapter, New York State Official Website, at http://parentsrights.com/New_York/ (last visited Sept. 3, 2001) (providing countless stories from the many parents affected by DRL section 72) (on file with Albany Law Review).

Robyn L. Ginsberg, J.D. Candidate, 2002, Albany Law School of Union University. In loving memory of my grandfather, the Honorable Morris Jacobson. I would like to thank my family whose unconditional love and support continues to inspire me. To Adam, all my love, respect, and devotion.

Citation Details

Title: Grandparents' visitation rights: the constitutionality of New York's Domestic Relations Law section 72 after *Troxel v. Granville*.

Author: Robyn L. Ginsberg

Publication: *Albany Law Review* (Refereed)

Date: September 22, 2001

Publisher: Albany Law School

Volume: 65 **Issue:** 1 **Page:** 205(37)