

Grandparents' Rights In Texas

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I. Introduction

The right (if there is one) of a grandparent to have a relationship with his or her grandchild has been complex under Texas law. A natural tension arises when grandparents disagree with their grandchildren's parents about how the grandchildren should be raised. Further, when a grandchild's parent dies, the parents of the deceased parent often are placed in an awkward position, especially when their former son-in-law or daughter-in-law remarries and even more so if the new spouse adopts the children. On other occasions, grandparents attempt to retain ties with their grandchildren despite termination of their child's parental rights to their grandchildren. These situations require courts to decide what relationships are in a child's best interest, not only as between parents, as in the case of divorce, but among members of a child's extended family after traumatic events have occurred that significantly affect a child's life.

In the midst of this opaque legal environment, on June 5, 2000, the United States Supreme Court decided *Troxel v. Granville*, 530 U.S. 57 (2000). *Troxel* addressed what rights grandparents have to maintain a relationship with their grandchildren after their child dies and over the surviving parent's objection. The decision in *Troxel* - consisting of a plurality opinion, two concurrences and three dissents - cast an already unclear area of the law into utter confusion.

Troxel is now nearly six years old. Texas courts have had the opportunity to digest *Troxel's* various opinions and to consider its impact on Texas law. Although courts in many other states struck down grandparents' rights statutes as unconstitutional under *Troxel*, by 2004, Texas intermediate courts found the Texas grandparents' rights statute to be facially constitutional under *Troxel*, albeit via differing rationales and then only with the judicial attachment of non-statutory pleading and proof requirements. In response to *Troxel*, the Texas legislature substantially amended the grandparents' rights statute during its 2005 regular session, but whether those statutory changes themselves will meet *Troxel's* requirements is open to question. Finally, in a per curiam opinion, the Texas Supreme Court considered *Troxel* in *In re: Mays-Hooper*, 2006 Tex. LEXIS 256 (Apr. 7, 2006) (orig. proceeding), although the Court did little more than reiterate *Troxel's* requirements. Nevertheless, it appears that at last, grandparents' rights are being clarified in Texas.

The purpose of this article is to distill from *Troxel*, the Texas grandparents' rights statute and the post-*Troxel* caselaw what now appears to be settled in the law. To reach that conclusion, this article first overviews *Troxel*. The article then reviews Texas child custody and visitation statutes to highlight what the statutes permit and require. Following this section, the article examines Texas court cases decided since *Troxel*. From this examination, it will be seen that the Texas grandparents' rights statute has been held constitutional, but post-*Troxel* procedure requires certain pleading and proof requirements not found in the statute. The article then considers the recent statutory changes to the Texas Family Code regarding grandparent access and to what extent those changes comply with *Troxel's* requirements.

The article concludes with a bulleted summary of the requirements for a successful grandparents' rights suit in Texas, taking into account Texas statutes, *Troxel's* holdings, Texas caselaw subsequent to *Troxel*, and the recent amendments to the grandparents' rights statute. The Appendix sets forth the current grandparents' rights statute.

II. *Troxel v. Granville*

Troxel v. Granville, 530 U.S. 57 (2000), involved the efforts of paternal grandparents to obtain visitation with their grandchildren after their son had died. The children's mother, Ms. Granville, did not prohibit all visitation but sought to restrict the frequency and location of visitation to terms not acceptable to the Troxels.

The Troxels filed suit to obtain visitation with their grandchildren under Washington State's visitation statute. That statute permitted "any person" to petition a court for visitation rights to a child. The trial court was at liberty to grant visitation rights if the trial court concluded merely that visitation would be in a child's best interest. The *Troxel* trial judge granted the Troxels less visitation than they sought but more than Ms. Granville had offered. Ms. Granville appealed and, ultimately, the dispute arrived at the United States Supreme Court.

The Supreme Court summarized prior decisions establishing that parents enjoy a fundamental right "to make decisions concerning the care, custody, and control of their children." 530 U.S. at 66. The Court ruled that the Washington statute, as it had been applied, violated Ms. Granville's fundamental rights. There were two problems with the statute: First, it failed to recognize "any presumption of validity or weight whatsoever" to a parent's decision to curtail visitation with a child, according no deference to "a parent's decision that visitation would not be in the child's best interest." *Id.* at 67. Second, the Troxels neither alleged nor proved that Ms. Granville was an unfit parent. "That aspect of the case is important, for there is a presumption that fit parents act in the best interests of their children." *Id.* at 68. Instead, the trial judge had substituted his own view of what would be in the best interest of the children for that of Ms. Granville, an action the Supreme Court found constitutionally impermissible.

Although *Troxel* involved visitation with grandchildren, not the obtaining of custody by grandparents, the principles of *Troxel* apply to custody decisions because granting custody to a grandparent constitutes an even greater interference with a parent's right to determine what relationships are in a child's best interest.

III. Texas Parent-Child Definitions and Terminology

Before examining *Troxel's* application to Texas law more closely, it is necessary to define what we mean by terms such as "conservator" and "possession of" or "access to" a child. In a

nutshell, conservatorship means approximately what other states call custody, and possession of or access to a child means what others call visitation. Grandparent access, as shall be seen, occupies a unique niche in Texas law.

The parent of a child has many rights and duties. *See* Tex. Fam. Code § 151.001(a) (rights and duties listed). When parents divorce, the court is supposed to appoint at least one person to exercise these rights and undertake these duties. Tex. Fam. Code § 153.005. That person is called the child's "Managing Conservator" or often the "Sole Managing Conservator." *See* Tex. Fam. Code § 101.019 (managing conservatorship defined). Normally at least one of the parents is appointed a Managing Conservator:

[U]nless the court finds that appointment of the parent or parents would not be in the best interest of the child because the appointment would significantly impair the child's physical health or emotional development, a parent shall be appointed sole managing conservator or both parents shall be appointed as joint managing conservators of the child.

Tex. Fam. Code § 153.131(a).

Section 153.132 of the Texas Family Code describes the rights and duties of a parent appointed Sole Managing Conservator:

- (1) the right to designate the primary residence of the child;
- (2) the right to consent to medical, dental, and surgical treatment involving invasive procedures;
- (3) the right to consent to psychiatric and psychological treatment;
- (4) the right to receive and give receipt for periodic payments for the support of the child and to hold or disburse these funds for the benefit of the child;
- (5) the right to represent the child in legal action and to make other decisions of substantial legal significance concerning the child;
- (6) the right to consent to marriage and to enlistment in the armed forces of the United States;
- (7) the right to make decisions concerning the child's education;
- (8) the right to the services and earnings of the child; and

(9) except when a guardian of the child's estate or a guardian or attorney ad litem has been appointed for the child, the right to act as an agent of the child in relation to the child's estate if the child's action is required by a state, the United States, or a foreign government.

The Texas legislature has recognized that public policy should "assure that children will have frequent and continuing contact with parents who have shown the ability to act in the best interest of the child." Tex. Fam. Code § 153.001(a)(1). For that reason, a presumption exists that upon divorce, both parents should be appointed Managing Conservators. Tex. Fam. Code § 153.131(b). When thus appointed, parents are called "Joint Managing Conservators."

The Texas Family Code defines "Joint Managing Conservatorship" to mean "the sharing of the rights and duties of a parent by two parties, ordinarily the parents, even if the exclusive right to make certain decisions may be awarded to one party." Tex. Fam. Code § 101.016. Usually, Joint Managing Conservators share all the rights and duties of a Sole Managing Conservator, but either by agreement or court order, one parent can be given the sole power to exercise certain powers such as choosing where the child will attend school. *See* Tex. Fam. Code §§ 153.133 (JMC by agreement) & 153.134 (JMC by court order).

King Solomon notwithstanding (1 Kings 3:16-27), it is impossible to split a child in two for any purpose, let alone for purposes of determining where the child will live. On occasion, parents will agree to innovative residency provisions such as exchanging the child each week so that the child lives with each parent for a week at a time ("week on/week off") or having the child live full-time in a residence where the parents live for alternating weeks ("nesting"). When true Joint Managing Conservatorship exists, the child's residence is the only difference in parental rights and duties between the parents with respect to the child although of course the residency provision will affect the amount of child support paid.

Often only one parent is appointed Sole Managing Conservator. When only one parent is appointed Sole Managing Conservator, the court is supposed to appoint the child's other parent Possessory Conservator "unless it finds that the appointment is not in the best interest of the child and that parental possession or access would endanger the physical or emotional welfare of the child." Tex. Fam. Code § 153.191. According to Tex. Fam. Code § 153.192(a), unless limited by the court, a Possessory Conservator has the following rights and duties:

- (1) to receive information from any other conservator of the child concerning the health, education, and welfare of the child;
- (2) to confer with the other parent to the extent possible before making a decision concerning the health, education, and welfare of the child;

- (3) of access to medical, dental, psychological, and educational records of the child;
- (4) to consult with a physician, dentist, or psychologist of the child;
- (5) to consult with school officials concerning the child's welfare and educational status, including school activities;
- (6) to attend school activities;
- (7) to be designated on the child's records as a person to be notified in case of an emergency;
- (8) to consent to medical, dental, and surgical treatment during an emergency involving an immediate danger to the health and safety of the child; and
- (9) to manage the estate of the child to the extent the estate has been created by the parent or the parent's family.

Tex. Fam. Code § 153.073. If a parent is appointed neither a Managing nor a Possessory Conservator, the court still may require that parent to perform other parental duties such as pay child support. Tex. Fam. Code § 153.075.

When a parent is appointed a Joint Managing Conservator, but the child lives primarily with the other parent, or when a parent is appointed a Possessory Conservator, then the parent is granted court-ordered rights to "possession of" or "access to" the child. Tex. Fam. Code §§ 153.137 & 153.192(b). Possession of or access to a child is commonly called visitation.

Visitation is governed by the Standard Possession Order. *See* Tex. Fam. Code §§ 153.311 to .317. The Standard Possession Order states that unless the former spouses agree otherwise, the visitation provisions in the Standard Possession Order will apply. In general terms, the Standard Possession Order provides that the children live with one parent, but the other parent gets the kids on the first, third and (if there is one) the fifth weekends of each month during the school year, as well as every Thursday evening during the school year. In addition, the noncustodial parent gets the kids for several weeks in the summer, on Mother's/Father's Day, and for part of each child's birthday. Major holidays (such as Thanksgiving and Winter and Spring breaks) are either split or alternated each year.

As a practical matter, upon divorce, grandparents have contact with their grandchildren during the time set aside to their respective children who are the grandchildren's parents. *E.g.*, *Deweese v. Crawford*, 520 S.W.2d 522 (Tex. App. - Houston [14th Dist.] 1975, writ ref'd

n.r.e.), *overruled on other grounds, Cherne Industries, Inc. v. Magallanes*, 763 S.W.2d 768 (Tex. 1989). Nevertheless, the Texas Family Code allows grandparents to petition the court for access to their grandchildren in their own right, and without appointment as either a Managing or a Possessory Conservator. Tex. Fam. Code § 153.432. This relief typically is called “grandparent access.”

IV. Grandparents’ Rights

A grandparents’ rights suit in Texas can be explained coherently only when analyzed in terms of what the grandparents seek to accomplish. Accordingly, the article examines grandparents’ rights in light of the relief sought - in other words, whether the grandparents seek managing or possessory conservatorship (and the rights and duties that accompany those types of conservatorship) or merely access to their grandchildren without conservatorship.

An integral part of any inquiry into grandparents’ rights is the issue of grandparents’ standing to assert what rights they might have. In any court case, a party must show that he or she has standing to prosecute a suit, must meet the procedural requirements for suit, and must make a convincing evidentiary showing. In a Texas family law case, and especially in grandparents’ rights cases, the Family Code’s provisions governing standing and the substantive rights acquired once standing has been achieved are inextricably linked. The discussion of grandparents’ rights that follows includes, of necessity, a discussion of grandparent standing.

A. A Cautionary Note

Before studying either grandparent standing or substantive grandparents’ rights, it is important to highlight how much the law has changed in this area. An attorney researching grandparents’ rights will find many outdated cases, some of which are flatly wrong under today’s law.

By way of example, prior to its amendment in 1999, one of the standing statutes, Tex. Fam. Code § 102.004, began by stating that “An original suit requesting managing conservatorship may be filed by a grandparent” rather than today’s “In addition to the general standing to file suit provided by Section 102.003, a grandparent may file an original suit requesting managing conservatorship” Interpreting the general and the grandparent standing statutes (what are now, respectively, Tex. Fam. Code §§ 102.003 & .004) prior to their 1995 recodification, the El Paso Court of Appeals held that the grandparent statute “preempted” the general standing statute. *Tope v. Kaminski*, 793 S.W.2d 315, 317 (Tex. App. - El Paso 1990, writ dismissed). In 1999 the legislature amended the statute to make it clear that a grandparent could acquire standing either under the general standing statute or the grandparent standing statute. Nevertheless, in 2004, the San Antonio Court of Appeals still considered this an open question. Without noting the revised (from 1999) language of Tex. Fam. Code § 102.004 or citing *Tope*, the

court observed:

We recognize that § 102.004 of the Texas Family Code specifically addresses standing for grandparents. The father, however, cites no authority and we have found no cases that hold a grandparent could not also qualify as “a person” for purposes of standing under § 102.003(a)(9).

In re: C.M.V., 136 S.W.3d 280, 285 n.2 (Tex. App. - San Antonio 2004, no pet.). A recent case considered grandparent standing based on both the general standing statute (Tex. Fam. Code § 102.003) and the grandparent standing statute (Tex. Fam. Code § 102.004) without comment. *In re: A.L.S.*, 2006 Tex. App. LEXIS 332 (Tex. App. - Beaumont Jan. 13, 2006, n.p.h.) (Memorandum Opinion).

Similarly, Tex. Fam. Code § 102.004(a)(1) requires that a “child’s present circumstances would significantly impair the child’s physical health or emotional well-being.” Prior to the 2005 amendments to the Texas Family Code, the test was whether a “child’s present environment presents a serious question concerning the child’s physical health or welfare.” Before that, the test had been whether there was a “serious and immediate question concerning the child’s welfare.” *See, e.g., Jacobs v. Balew*, 765 S.W.2d 532, 533 (Tex. App. - Beaumont 1989, no writ). *See Doncer v. Dickerson*, 81 S.W.3d 349 (Tex. App. - El Paso 2002, no pet.) (traces legislative history of standing statutes from 1973 through 1999).

The substantive provisions of the Texas grandparents’ rights statutes suffer from a similar problem although the legislative history has not been so tortured as has the law of standing when applied to grandparents. *See, e.g., Cowett v. Brine*, 704 S.W.2d 832 (Tex. App. - Texarkana 1985, writ dism’d w.o.j.) (tracks legislative history of grandparent visitation statute from time “first proposed” in 1973 through the “chaos” of the 1985 legislative sessions which resulted in three versions of what was then Tex. Fam. Code Ann. § 14.03(e), two of which concerned grandparents). As previously noted, the 2005 Texas legislature extensively amended the grandparents’ rights statute.

B. Managing Conservatorship

A grandparent who seeks appointment as a managing conservator may acquire standing in one of two ways. First, a grandparent may rely on the general rule for standing in suits affecting the parent-child relationship, codified at Tex. Fam. Code § 102.003, entitled “General Standing to File Suit.” The provisions of this statute pertinent to grandparents state:

An original suit may be filed at any time by:

...;

(9) a person, other than a foster parent, who has had actual care, control, and possession of the child for at least six months ending not more than 90 days preceding the date of the filing of the petition;

...;

(11) a person with whom the child and the child's guardian, managing conservator, or parent have resided for at least six months ending not more than 90 days preceding the date of the filing of the petition if the child's guardian, managing conservator, or parent is deceased at the time of the filing of the petition;

Tex. Fam. Code § 102.003.

The Texas Family Code also contains a special grandparent standing provision that allows a grandparent to seek managing conservatorship of a grandchild:

(a) In addition to the general standing to file suit provided by Section 102.003, a grandparent may file an original suit requesting managing conservatorship if there is satisfactory proof to the court that:

(1) the order requested is necessary because the child's present circumstances would significantly impair the child's physical health or emotional development; or

(2) both parents, the surviving parent, or the managing conservator or custodian either filed the petition or consented to the suit.

Tex. Fam. Code § 102.004.

C. Possessory Conservatorship

A grandparent may seek possessory conservatorship over a grandchild under the general standing statute, Tex. Fam. Code § 102.003, just as the grandparent may seek managing conservatorship under that statute. However, the grandparent standing statute, Tex. Fam. Code § 102.004, permits grandparents to seek possessory conservatorship only by intervention, not by original suit:

An original suit requesting possessory conservatorship may not be filed by a grandparent or other person. However, the court may grant a grandparent or other person deemed by the court to have had substantial past contact with the child leave to intervene

in a pending suit filed by a person authorized to do so under this subchapter if there is satisfactory proof to the court that appointment of a parent as a sole managing conservator or both parents as joint managing conservators would significantly impair the child's physical health or emotional development.

Tex. Fam. Code § 102.004(b).

Why is it that a grandparent may seek possessory conservatorship by intervention but not by original suit? The Austin Court of Appeals has explained that the statute's intent is that except in an emergency, grandparents ought not to be permitted to disrupt a child's life by initiating a suit for possessory conservatorship unless the child's life already is disrupted by a suit to determine who will have managing conservatorship of the child.

The Texas Family Code recognizes various interests a grandparent has in a grandchild, but at the same time it restricts the grandparent's right to initiate litigation involving the child. For example, a grandparent may bring suit seeking modification of the child's conservatorship if he had been a party affected by the prior order. He may initiate a suit for managing conservatorship under limited circumstances to protect the child or intervene in a proceeding to seek possessory rights. . . . While the statutory scheme assures that grandparents may not be entitled to disrupt the child's family life and initiate suits for managing conservatorship except in limited circumstances, once the child's best interest is before the court and being litigated, the trial court has discretion to determine that intervention by grandparents may enhance the trial court's ability to adjudicate what is in the best interest of the child.

McCord v. Watts, 777 S.W.2d 809, 812 (Tex. App. - Austin 1989, no writ) (citations omitted).
See In re: Pensom, 126 S.W.3d 251 (Tex. App. - San Antonio 2003, orig. proceeding).

D. Possession of or Access to Grandchildren

The final way in which a grandparent might obtain rights to visit with a grandchild is through the grandparent access statute. This statute grants grandparents access rights without appointing the grandparents either a managing or a possessory conservator over a grandchild.

The standing part of this statute, Tex. Fam. Code § 153.432, reads:

(a) A biological or adoptive grandparent may request possession of or access to a grandchild by filing:

(1) an original suit; or

(2) a suit for modification as provided by Chapter 156.

(b) A grandparent may request possession of or access to a grandchild in a suit filed for the sole purpose of requesting the relief, without regard to whether the appointment of a managing conservator is an issue in the suit.

The standards by which the court is to decide whether grandparent access should be granted are set forth in the following section, Tex. Fam. Code § 153.433:

The court shall order reasonable possession of or access to a grandchild by a grandparent if:

(1) at the time the relief is requested, at least one biological or adoptive parent of the child has not had that parent's parental rights terminated;

(2) the grandparent requesting possession of or access to the child overcomes the presumption that a parent acts in the best interest of the parent's child by proving by a preponderance of the evidence that denial of possession of or access to the child would significantly impair the child's physical health or emotional well-being; and

(3) the grandparent requesting possession of or access to the child is a parent of a parent of the child and that parent of the child:

(A) has been incarcerated in jail or prison during the three-month period preceding the filing of the petition;

(B) has been found by a court to be incompetent;

(C) is dead; or

(D) does not have actual or court-ordered possession of or access to the child.

V. *Troxel Comes to Texas*

As earlier noted, *Troxel v. Granville* requires a grandparents' rights statute to recognize a "presumption of validity" of a parent's decision to curtail visitation with a grandchild and to allege and prove that the grandchild's parent is unfit. Although some of Texas' statutory provisions incorporate elements such as the ones demanded by the *Troxel* Court, others contain no such elements. The next section of this article is devoted to exploring how the Texas courts have held Texas grandparents' rights statutes to be constitutional despite omissions of *Troxel's* elements by judicially engrafting those elements onto the statutes.

The Austin Court of Appeals was first Texas court to grapple with how *Troxel* affected the Texas grandparents' rights statute. The Austin Court decided a pair of decisions on that subject in 2001. In its first opinion, *Lilley v. Lilley*, 43 S.W.3d 703 (Tex. App. - Austin 2001, no pet.), the trial court granted the paternal grandfather visitation with his granddaughter over the objection of his daughter-in-law after his son had committed suicide. After a final hearing, the mother appealed, challenging the factual sufficiency of the evidence underlying the visitation order and claiming that it violated her due process rights under *Troxel*. The Austin Court overruled both the sufficiency issue and the *Troxel* argument, noting that the mother had "stated multiple times that she believed it would be in [the child's] best interest to have a relationship with her grandfather." *Id.* at 713. The Austin Court found the grandparent visitation statute not to be unconstitutional on its face or as applied in this case.

In the second case considered by the Austin Court in 2001, *Sailor v. Phillips*, 2001 Tex. App. LEXIS 7492 (Tex. App. - Austin Nov. 8, 2001, no pet.), a case that remains unpublished, the trial court ordered that the paternal grandmother have the right to visit with her grandchildren after termination of the paternal rights of her son and adoption by the mother's new husband. The trial court ordered telephonic contact with the grandmother plus one week of visitation each summer and three days at Christmastime. The Austin Court distinguished the case before it from *Troxel*:

Sailor's decision to sever her boys' contact with Phillips critically distinguishes this case from *Troxel*. Rather than offer some visitation as the mother in *Troxel* did, Sailor prohibited all contact between the boys and their grandmother for more than two years before Phillips filed this suit.

Id., at 14. The Court held:

We conclude that the district court did not, by determining that the boys' best interest was served by letting their grandmother speak with them on the telephone monthly and host them for ten days annually, impermissibly strip their mother of her constitutional rights.

Id., at 14-15.

In 2002, the El Paso Court of Appeals considered *Troxel's* application to grandparent visitation in *Roby v. Adams*, 68 S.W.3d 822 (Tex. App. - El Paso 2002, pet. denied). In that case, the paternal grandparents sought visitation with their grandchildren after the death of their daughter. The son-in-law initially permitted contact but reduced it and ultimately refused contact with the grandparents. The El Paso Court reversed the trial court's decision to allow grandparent access in light of *Troxel*. The Court noted that the grandparents had neither alleged that the father

was an unfit parent nor introduced evidence to that effect. *Id.* at 827. The court distinguished *Lilley v. Lilley*, 43 S.W.3d 703 (Tex. App. - Austin 2001, no pet.), on the ground that the child's mother had taken inconsistent positions whether the grandparents should have access to her child. Moreover, said the Court,

the holding in *Lilley* appears to place the burden of persuasion upon the parent to prove the best interest of the child. This goes against the presumption so strongly enunciated in *Troxel*, that a fit parent acts in the best interest of his or her child. A grandparent seeking access under TEX.FAM.CODE ANN. § 153.433 has the burden to overcome the presumption that a fit parent acts in the best interest of the parent's child in order to establish the "best interest of the child" prong of the statute.

Id. at 828.

The Dallas Court of Appeals held the grandparents' rights statute neither unconstitutional on its face nor as applied to a father, who had agreed to access by his ex-wife's parents after the ex-wife died, when the grandparents sued to maintain contact with their grandchildren while the father sought to change their access schedule. The trial court gave "some special weight to the parent's own determination" in modifying access per *Troxel*, said the Dallas Court, but it was not required to terminate the grandparents' access. *In re: C.P.J.*, 129 S.W.3d 573 (Tex. App. - Dallas 2003, pet. denied).

The San Antonio Court of Appeals has been most influential in addressing the constitutionality of the grandparents' rights statute. The Court first spoke in *In re: Pensom*, 126 S.W.3d 251 (Tex. App. - San Antonio 2003, orig. proceeding). In that case the maternal grandmother sought visitation with her grandchildren following the divorce of the children's parents and the subsequent death of the children's mother. After a thoughtful discussion of *Troxel*, the San Antonio Court ruled:

As *Troxel* makes clear, the trial court must accord significant weight to a fit parent's decision about the third parties with whom his or her child should associate. Accordingly, we hold that in order to satisfy the "best interest of the child" prong of the Grandparent Access Statute, a grandparent must overcome the presumption that a fit parent acts in the best interest of his or her child. To overcome this presumption, a grandparent has the burden to prove, by a preponderance of the evidence, either that the parent is not fit, or that denial of access by the grandparent would significantly impair the child's physical health or emotional well-being.

Id. at 256. The San Antonio Court of Appeals reiterated its analysis in *In re: Keller*, 2005 Tex. App. LEXIS 10735 (Tex. App. - San Antonio Sept. 14, 2005) (orig. proceeding) (released for publication). In that case, a widowed parent prevailed against the paternal grandfather when he

“affirmatively disavowed” any contention that the mother was an unfit parent. The mother “testified unequivocally that she did not believe it was in [the child’s] best interest to have contact with the [paternal grandparents].” *Id.* at 6. Thus *Troxel*’s requirement that a parent be shown to be unfit had not been met.

The Waco Court of Appeals, in a split 2005 decision, cited its fellow courts of appeals in holding the grandparents’ rights statute constitutional. *In re: B.R.S.*, 166 S.W.3d 373 (Tex. App. - Waco 2005, no pet.). Chief Justice Gray dissented on the ground that the statute is facially unconstitutional because its words do not include the judicially engrafted requirements without which the statute would fail to pass constitutional muster.

The most recent holding on Texas’ grandparents’ rights statute comes from the Texas Supreme Court, but it is a per curiam opinion decided under the pre-2005 grandparents’ rights statute, and the opinion’s sole rationale is that the facts of the case were indistinguishable from *Troxel*. *In re: Mays-Hooper*, 2006 Tex. LEXIS 256 (Apr. 7, 2006) (orig. proceeding) (per curiam). In *Mays-Hooper*, a trial court granted certain periods of possession to the child’s paternal grandmother after the death of the child’s father. At trial, the mother testified to “differences about church attendance, what to say about [the father’s] death, and alleged inattention by her mother-in-law.” *Id.* at 4.

The Texas Supreme Court granted the mother’s petition for writ of mandamus. Summarizing *Troxel*, the Supreme Court stated:

A plurality of four justices found the visitation statute in *Troxel* unconstitutional as applied, pointing to three factors: (1) the child’s mother was not unfit, (2) her decisions about grandparent access were given no deference, and (3) she was willing to allow some visitation.

Id. at 2. The Texas Supreme Court went on to note that Justices Souter and Thomas concurred in the *Troxel* judgment for different reasons, and the three dissenters articulated differing rationales for their dissents. The Texas Supreme Court held:

We need not sort out all the opinions in *Troxel*; because the facts here are virtually the same, the judgment must be the same too. In this case (as in *Troxel*) there was no evidence that the child’s mother was unfit, no evidence that the boy’s health or emotional well-being would suffer if the court deferred to her decisions, and no evidence that she intended to exclude [the maternal grandmother’s] access completely.

Id. at 3. As to the differences about church attendance, how to speak of the child’s father and the mother-in-law’s alleged inattention, the Court again invoked *Troxel*: “So long as 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.” *Id.* at 4 (quoting *Troxel*, 530 U.S. at 68).

To summarize, Texas court of appeals cases revealed two threads of thought. In the first thread, exemplified by *Roby v. Adams*, 68 S.W.3d 822 (Tex. App. - El Paso 2002, pet. denied), the courts adhered to *Troxel’s* direction that grandparents may not interfere with a fit parent’s decisions regarding the parent’s children. In the second thread, to some degree invoked by the other post-*Troxel* court of appeals opinions discussed above, the courts relaxed this requirement when they found grandparent visitation to be in the grandchild’s best interest. These threads united with *In re: Pensom*, 126 S.W.3d 251 (Tex. App. - San Antonio 2003, orig. proceeding), in which the San Antonio Court adopted an either/or analysis: A grandparent seeking access to a grandchild must prove “either that the parent is not fit, or that denial of access by the grandparent would significantly impair the child’s physical health or emotional well-being.” *Id.* at 256.

When the Texas Supreme Court decided *In re: Mays-Hooper*, 2006 Tex. LEXIS 256 (Apr. 7, 2006) (orig. proceeding), the Court affirmed the view set forth in *Roby* and rejected *Pensom’s* either/or test, even though it cited neither opinion. But by quoting *Troxel* to the effect that so long as a parent is fit, the State should not interfere with that parent’s decisions, the Court rejected *Pensom’s* formulation that even a fit parent’s decisions could be overridden if a court found that denying a grandparent access would significantly impair the child’s physical health or emotional well-being.

The Texas Supreme Court made two additional cryptic points important to grandparent access cases. First, the Court quoted *Troxel’s* test for what a fit parent is: One who “adequately cares for his or her children.” 2006 Tex. LEXIS 256, at 4 (quoting *Troxel*, 530 U.S. at 68). Second, in comparing the case to *Troxel*, the Court noted that the mother “was willing to allow some visitation,” *id.* at 2, and that there was “no evidence that she intended to exclude [the maternal grandmother’s] access completely.” *Id.* at 3. Thus the Court has suggested that, as in *Sailor v. Phillips*, 2001 Tex. App. LEXIS 7492 (Tex. App. - Austin Nov. 8, 2001, no pet.), an important piece of evidence in a grandparent visitation case is whether the parent has allowed the grandparent some access or has cut off visitation completely.

VI. Recent Legislation

In its 2005 session, the Texas legislature considered two bills regarding grandparent access. For the most part, the first bill, H.B. 260, simply conformed the language of the statutes affecting grandparent access to other sections of the Texas Family Code. For example, in Tex. Fam. Code § 102.004(a)(1), H.B. 260 replaced the previous “the child’s present environment presents a serious question concerning the child’s physical health or welfare” with “the child’s present circumstances would significantly impair the child’s physical health or emotional development.” Further, H.B. 260 augmented “access” wherever it appeared in Tex. Fam. Code §

102.004 and §§ 153.432 to .434 with the phrase “possession of or” so that the grandparent provisions are consistent with the rest of the Family Code that refers to “possession of or access to” a child.

In one respect, H.B. 260 addressed the standing statute for grandparents, Tex. Fam. Code § 102.004. H.B. 260 amended § 102.004(b) by adding the underlined language:

(b) An original suit requesting possessory conservatorship may not be filed by a grandparent or other person. However, the court may grant a grandparent or other person deemed by the court to have had substantial past contact with the child leave to intervene in a pending suit filed by a person authorized to do so under this subchapter if there is satisfactory proof to the court that appointment of a parent as a sole managing conservator or both parents as joint managing conservators would significantly impair the child’s physical health or emotional development.

The addition of this language is consistent with both *Troxel* and *Mays-Hooper* because it would require a preliminary showing of “unfitness” - although the word “fit” is not part of the statute - for a grandparent to proceed by intervention.

The second bill to address grandparent access, H.B. 261, was substantially modified prior to passage. This bill, entitled “AN ACT relating to possession of or access to a grandchild,” also included the “possession of or” language of H.B. 260, but H.B. 261 went on to address issues raised by *Troxel*. The heart of the bill would have added a new subsection (2) to Tex. Fam. Code § 153.433 that:

the grandparent requesting possession of or access to the child overcomes the presumption that a fit parent acts in the best interest of the parent's child by proving by a preponderance of the evidence that:

(A) the parent is not fit; or

(B) denial of possession of or access to the child would significantly impair the child’s physical health or emotional well-being;

This language was very nearly a quote of the “either/or” language of *In re: Pensom*, 126 S.W.3d 251 (Tex. App. - San Antonio 2003, orig. proceeding), discussed above. However, to the extent that permitting grandparent access would have rested solely on the “significant impairment” clause, the proposed amendment might well have proved unconstitutional under *Troxel* because it would have permitted grandparent access even when the parent was fit. If *Troxel* clearly states anything, it is that to obtain visitation with a grandchild over the objection of a parent, a grandparent must plead and prove that the parent is unfit. *Troxel*, 530 U.S. at 68.

The legislature amended this language prior to passing H.B. 261. The amended language reads:

[T]he grandparent requesting possession of or access to the child overcomes the presumption that a parent acts in the best interest of the parent's child by proving by a preponderance of the evidence that denial of possession of or access to the child would significantly impair the child's physical health or emotional well-being.

Tex. Fam. Code § 153.433(2). Although this statute does not explicitly set forth that a parent is entitled to a presumption that the parent acts in the best interest of the parent's child (*Troxel*, 530 U.S. at 68), it does state that this presumption will be overcome by proving that denial of access would "significantly impair the child's physical health or emotional well-being." Given that *Mays-Hooper* quotes *Troxel's* definition of a fit parent as one who "adequately cares for his or her children," 2006 Tex. LEXIS 256, at 4 (quoting *Troxel*, 530 U.S. at 68), the overcoming of the presumption that a fit parent acts in a child's best interest by showing significant impairment of the child's physical health or emotional well-being if no access were allowed is consistent with both *Mays-Hooper* and *Troxel*.

Although the focus in this article has been on whether the Texas grandparents' rights statute complies with *Troxel*, H.B. 261 also amended the threshold requirements for a grandparent to seek access under the grandparents' right statute. As amended, Tex. Fam. Code § 153.433(3) requires a grandparent to show that the grandparent's child who is the parent of the grandchild

- (A) has been incarcerated in jail or prison during the three-month period preceding the filing of the petition;
- (B) has been found by a court to be incompetent;
- (C) is dead; or
- (D) does not have actual or court-ordered possession of or access to the child.

Conspicuously missing from this amended statute is the language of former Tex. Fam. Code § 153.433(2)(B), which permitted grandparent access when "the parents of the child are divorced or have been living apart for the three-month period preceding the filing of the petition or a suit for dissolution of the parents' marriage is pending." The omission of this language in the amended statute, which is consistent with *Troxel*, doubtless will operate to curtail the number of grandparents' rights suits filed in the future.

VII. Summary of the Law

Taking into account the Texas grandparents' statute, *Troxel*, Texas caselaw and pending legislative changes, Texas law as it affects grandparents' rights can be summarized as follows:

Managing Conservatorship

A grandparent may seek managing conservatorship of a grandchild by original suit or intervention if one or more of these circumstances exist:

1. The grandparent has had actual care, control, and possession of the child for at least six months ending not more than 90 days preceding the date of the filing of the petition. Tex. Fam. Code § 102.003(9). OR
2. The child and the child's guardian, managing conservator, or parent have resided with the grandparent for at least six months ending not more than 90 days preceding the date of the filing of the petition if the child's guardian, managing conservator, or parent is deceased at the time of the filing of the petition. Tex. Fam. Code § 102.003(11). OR
3. The grandchild's present circumstances would significantly impair the grandchild's physical health or emotional development. Tex. Fam. Code § 102.004(a)(1). OR
4. Both the grandchild's parents, the surviving parent, or the managing conservator or custodian either filed the petition or consented to the suit. Tex. Fam. Code § 102.004(a)(2).

Possessory Conservatorship

A grandparent may seek possessory conservatorship of a grandchild by original suit or intervention if one or more of these circumstances exist:

1. The grandparent has had actual care, control, and possession of the child for at least six months ending not more than 90 days preceding the date of the filing of the petition. Tex. Fam. Code § 102.003(9). OR
2. The child and the child's guardian, managing conservator, or parent have resided with the grandparent for at least six months ending not more than 90 days preceding the date of the filing of the petition if the child's guardian, managing conservator, or parent is deceased at the time of the filing of the petition. Tex. Fam. Code § 102.003(11).

A grandparent may seek possessory conservatorship of a grandchild by intervention under Tex. Fam. Code § 102.004(b) if:

1. The grandparent has had substantial past contact with the child. AND
2. The grandparent makes satisfactory proof to the court that appointment of a parent as a sole managing conservator or both parents as joint managing conservators would significantly impair the grandchild's physical health or emotional development.

Grandparent Access

A grandparent may seek access to a grandchild by original suit or intervention if all three numbered circumstances exist plus one or more of the lettered circumstances exist:

1. At the time the relief is requested, at least one biological or adoptive parent of the child has not had that parent's parental rights terminated. Tex. Fam. Code § 153.433(1). AND
2. The grandparent requesting access to the grandchild proves that denial of access to the grandchild would significantly impair the grandchild's physical health or emotional well-being. Tex. Fam. Code § 153.433(2). AND
3. The grandparent requesting access to the grandchild is a parent of a parent of the grandchild. Tex. Fam. Code § 153.433(3). AND
 - A. The parent has been incarcerated in jail or prison during the three-month period preceding the filing of the petition. Tex. Fam. Code § 153.433(3)(A). OR
 - B. The parent has been found by a court to be incompetent. Tex. Fam. Code § 153.433(3)(B). OR
 - C. The parent is dead. Tex. Fam. Code § 153.433(3)(C). OR
 - D. The parent does not have actual or court-ordered possession of or access to the child. Tex. Fam. Code § 153.433(3)(D).

Appendix: Texas Family Code Subchapter H (§§ 153.431 to .434)

SUBCHAPTER H. RIGHTS OF GRANDPARENT, AUNT, OR UNCLE

Sec. 153.431. APPOINTMENT OF GRANDPARENT, AUNT, OR UNCLE AS MANAGING CONSERVATOR.

If both of the parents of a child are deceased, the court may consider appointment of a parent, sister, or brother of a deceased parent as a managing conservator of the child, but that consideration does not alter or diminish the discretionary power of the court.

Sec. 153.432. SUIT FOR POSSESSION OR ACCESS BY GRANDPARENT.

(a) A biological or adoptive grandparent may request possession of or access to a grandchild by filing:

- (1) an original suit; or
- (2) a suit for modification as provided by Chapter 156.

(b) A grandparent may request possession of or access to a grandchild in a suit filed for the sole purpose of requesting the relief, without regard to whether the appointment of a managing conservator is an issue in the suit.

Sec. 153.433. POSSESSION OF OR ACCESS TO GRANDCHILD.

The court shall order reasonable possession of or access to a grandchild by a grandparent if:

- (1) at the time the relief is requested, at least one biological or adoptive parent of the child has not had that parent's parental rights terminated;
- (2) the grandparent requesting possession of or access to the child overcomes the presumption that a parent acts in the best interest of the parent's child by proving by a preponderance of the evidence that denial of possession of or access to the child would significantly impair the child's physical health or emotional well-being; and
- (3) the grandparent requesting possession of or access to the child is a parent of a parent of the child and that parent of the child:
 - (A) has been incarcerated in jail or prison during the three-month period preceding the filing of the petition;
 - (B) has been found by a court to be incompetent;
 - (C) is dead; or
 - (D) does not have actual or court-ordered possession of or access to the child.

Sec. 153.434. LIMITATION ON RIGHT TO REQUEST POSSESSION OR ACCESS.

A biological or adoptive grandparent may not request possession of or access to a grandchild if:

(1) each of the biological parents of the grandchild has:

(A) died;

(B) had the person's parental rights terminated; or

(C) executed an affidavit of waiver of interest in child or an affidavit of relinquishment of parental rights under Chapter 161 and the affidavit designates an authorized agency, licensed child-placing agency, or person other than the child's stepparent as the managing conservator of the child; and

(2) the grandchild has been adopted, or is the subject of a pending suit for adoption, by a person other than the child's stepparent.