Grandparents: Don't Give Up!

by William B. Smith

How far the courts will go to enforce grandparents' ***statutory visitation rights*** has been much in the news.

On June 5, 1998, the Supreme Court of Virginia, in *Williams v. Williams*[1], upheld a court of appeals decision that denied paternal grandparents' visitation with their granddaughter that was opposed by both of the child's parents. In May of 1999, the Court of Appeals of Virginia, in *Dotson v. Hylton*[2], affirmed the Circuit Court of Tazewell County by granting the paternal grandmother visitation with her granddaughter. This was favored by the child's father, but was objected to by the mother. Then, just this past June, (exactly two years after the *Williams* decision), the United States Supreme Court, in *Troxel v. Granville*[3], affirmed a Washington State Supreme Court holding that denied the paternal grandparents' petition for visitation with their grandchildren under the Washington statute.

In its July-August 2000 bulletin, AARP described the *Troxel* decision as "limiting" grandparents' visitation rights. The July 2, 2000 issue of *The New York Times* more accurately commented that the Supreme Court held that the Washington State law went "too far in permitting a judge to order grandparents' visiting rights over a mother's objection."

Virginia grandparents need to closely analyze the Virginia statute providing for grandparents' visitation in light of the *Williams, Dotson* and *Troxel* cases. Grandparents must look at the facts of their individual cases and compare them with these cases.

In the *Williams* case, the son of the petitioners and father of the child (who was born in 1991), and the child's mother were husband and wife. The family lived together in Montgomery County, Virginia. The paternal grandparents resided in Blacksburg, not far from the parents' home. The parents and grandparents maintained regular contact until February 1994, when the parents announced to the grandparents that they were withdrawing from the child's previous relationship with the grandparents.

The grandparents filed a petition seeking visitation with their granddaughter, and the Montgomery County Circuit Court held in their favor. It found that the child would benefit from contact with the grandparents, and that their visitation would not interfere with the child's health or emotional development. It said that visitation would be a minimal intrusion into the family unit; that the grandparents obviously love the child and have the ability to adequately care for her; and that the child's best interest would be served by having visitation with her grandparents.

The Court of Appeals of Virginia[4] found that there was no constitutional problem with the Virginia grandparent visitation statute. Recognizing that the right of parents in raising their child is a fundamental right protected by the Fourteenth Amendment, the court said that state interference with this fundamental right must be justified by a compelling state interest and that to constitute a compelling state interest, the state's interference with the parents' rights must protect the child's health or welfare.

The court of appeals then interpreted Code Section 20-124.2(B). It said that the language in the statute that a court "shall give due regard to the primacy of the parent-child relationship," evinces the General Assembly's intent to require the court to find that a denial of non-parent visitation would be detrimental to the child's welfare before the court may interfere with the constitutionally protected parental rights.[5]"

The court of appeals said, "For the constitutional requirement to be satisfied before visitation can be ordered over the objection of the child's parents, a court must find an actual harm to the child's health or welfare without such visitation. A court reaches consideration of the 'best interests' standard in determining visitation only after it finds harm if visitation is not ordered."[6]

The Supreme Court of Virginia agreed with the court of appeals, holding that there was no constitutional infirmity in the applicable statutes and with the court's interpretation thereof and affirmed.[7]

In the *Dotson* case, the father of the child—the son of the petitioning grandparents—and the mother were divorced in November 1995, when their daughter was four years old. The divorce decree granted joint legal custody, with physical custody to the mother and reasonable visitation to the father. In March of 1998, the father was sentenced to ten years in the penitentiary, and the mother moved for sole custody. The father did not object to full custody to the mother, but requested reasonable visitation for himself and for his mother. The child's mother objected to visitation during the father's incarceration, or by the grandmother. The trial court permitted the grandmother to intervene and petition for visitation.

After an *ore tenus* hearing, the trial court granted sole custody of the child to the mother, finding that the denial of visitation with the father and grandmother would not be in the best interest of the child. The court permitted the father visitation outside the jail and by letters and telephone calls after transfer to the penitentiary. It granted the grandmother visitation one Saturday per month, finding by clear and convincing evidence it was in the best interests of the child.

The mother of the child contended on appeal to the Court of Appeals of Virginia that under the holding in *Williams*, the trial court could not interfere with her constitutional right to raise her daughter by granting visitation to grandparents against her wishes, unless the state has a compelling interest. She agreed that a detriment to the child's welfare would constitute a compelling interest, but, without proof of this, the state could not intervene through its courts. The court of appeals rejected this argument, saying that the case was not controlled by *Williams*, because in *Williams* the family was intact, and both parents objected to visitation by the grandparents, noting that when only one parent objects to a grandparent's visitation and the other parent requests it (as it were in the case before it), the trial court is not required to follow the standard set out in *Williams*. The court agreed with the lower court that the grandmother in this case had shown clear and convincing evidence that visitation with her was in the best interests of the child, as required by the statute.

While the *Troxel* holding by the United States Supreme Court may appear to be a troublesome barrier to grandparents' visitation in any state, a closer reading of the reasons for the decision clearly limits its application. The Washington State statute granted "any person" the right to petition for visitation rights "at any time" and authorized such visitation whenever "visitation may serve the best interest of the child." It contained no guidelines and provided the court with no standards upon which to determine "best interest" of the child. The Supreme Court called the statute "breathtakingly broad," but made it obvious that it did not intend to hold all grandparent visitation statutes unconstitutional, saying, " . . . because much state court adjudication in this context occurs on a case-by-case basis, we would be hesitant to hold that specific nonparental visitation statutes violate the Due Process Clause as a *per se* matter," noting that all 50 states have statutes providing for grandparent visitation in some form.[8]

The facts in this case also limit its application. The grandparents had not been denied any visitation by the mother (the father was deceased), but the mother was not agreeable to the *extent* of visitation sought by the grandparents. The son of the grandparents and the mother of the two grandchildren were never married and ended their relationship in 1991. The son lived with his parents—the petitioners—and regularly brought his daughters to his parents' home for weekend visitation. The father committed suicide in May 1993. Although the paternal grandparents continued to see the children on a regular basis thereafter, in 1993 the mother informed the grandparents that she wanted to limit visitation to one short visit per month.

The grandparents then filed their petition to obtain visitation rights, requesting two weekends of overnight visitation and two weeks each summer. The mother asked the court to order visitation for only one day per month, but not overnight.

The trial court found in favor of the grandparents and made the following written findings of fact and conclusions of law:

> "The petitioners are part of a large, central, loving family, all located in this area, and the petitioners can provide opportunities for the children in the areas of cousins and music.
>
> " . . . the Court took into consideration all factors regarding the best interest of the children and considered all the testimony before it. The children would be benefited from spending quality time with the petitioners, provided that that time is balanced with time with the children's nuclear family."[9]

When the case reached the Washington Supreme Court, it agreed with the court of appeals' conclusion (with four justices dissenting), but rested its case on the federal Constitution, holding that the Washington statute unconstitutionally infringes on the fundamental right of parents to rear their children. The court found that the Constitution prohibits a state from interfering with the right of parents to rear their children, except to prevent actual or potential harm to the child, and the statute requires no threshold showing of harm. The court said that the statute "sweeps too broadly," by allowing "any person" to petition for visitation "at any time," with the only requirement being that the visitation serve the interest of the child. The court said that it was "not within the province of the State to make significant decisions concerning the custody of child merely because it could make a 'better' decision."[10]

The United States Supreme Court granted certiorari and (with three justices dissenting), it held that the Washington statute, as applied to the facts of the case, violated the mother's due process right to make decisions concerning the care, custody, and control of her daughters and affirmed.[11]

Virginia Code Section 20-124.1 specifically names grandparents as persons with a "legitimate interest" in custody and visitation.

Virginia Code Section 20-124.1 specifically names grandparents as persons with a "legitimate interest" in custody and visitation. Section 20-124.2 requires the court to "give primary consideration to the best interests of the child," and sets a higher standard of proof for persons other than parents, by providing that: "the Court shall give due regard to the primacy of the parent/child relationship but may upon a showing *by clear and convincing evidence* that the best interests of the child would be served thereby award custody and/or visitation to any other person with a legitimate interest." (Italics added.)

Section 20-124.3 of the Virginia Code sets out the statutory factors, which the court shall consider in determining custody and visitation matters:

1. the age and physical and mental condition of the child, giving due consideration to the positive involvement with the child's life, the ability to accurately assess and meet the emotional, intellectual and physical needs of the child;

2. the age and physical and mental condition of each parent;

3. the relationship existing between each parent and each child, giving due consideration to the positive involvement with the child's life, the ability to accurately assess and meet the emotional, intellectual and physical needs of the child;

4. the needs of the child, giving due consideration to other important relationships of the child, including, but not limited to, siblings, peers and extended family members;

5. the role that each parent has played and will play in the future, in the upbringing and care of the child;

6. the propensity of each parent to actively support the child's contact and relationship with the other parent, including whether a parent has unreasonably denied the other parent access to or visitation with the child;

7. the relative willingness and demonstrated ability of each parent to maintain a close and continuing relationship with the child; and the ability of each parent to cooperate in and resolve disputes regarding matters affecting the child;

8. the reasonable preference of the child, if the court deems the child to be of reasonable intelligence, understanding, age and experience to express such a preference;

9. any history of family abuse as that term is defined in Section 16.1-228; and

10. such other factors as the court deems necessary and proper to the determination..

The court of appeals in the *Dotson* case found the following facts sufficient to meet the statutory standard of proof: "When the couple was married, they lived with the grandmother, and the child spent substantial time with her. After the separation, the child continued to spend time with her grandmother during her father's visitation. The grandmother lived in a three-bedroom house with her adult son and daughter. The child was familiar with the father's extended family, and there was no evidence of abuse or that the grandmother's home was unfit. The mother admitted that the grandmother was mentally, physically and morally fit and able to care for the child."[12]

In these times of marital instability and unforeseen family developments, grandparents who care for and feel a responsibility to their grandchildren should anticipate the possibility that events may call for them to become involved, or continue and expand their involvement with their grandchildren.

Factors that would therefore be of critical importance in any grandparents' visitation case are: the relationship between the grandparents and the child while the parents were still together; the time spent by the grandparents with the child after the separation or loss of one parent; the facilities available to the grandparent for visitation; the extent of the child's relationship with his or her extended family; the lack of any evidence of abuse by the grandparent; and the mental, physical and moral fitness and ability of the grandparent to care for the child during visitation and any evidence that the grandchild benefited from being with the grandparents.

In these times of marital instability and unforeseen family developments, grandparents who care for and feel a responsibility to their grandchildren should anticipate the possibility that events may call for them to become involved, or continue and expand their involvement with their grandchildren. Indeed, the United States Supreme Court in the *Troxel* case recognized this concept and expanded upon it:

> "The demographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household. While many children may have two married parents and grandparents who visit regularly, many other children are raised in single-parent households. In 1996, children living with only one parent accounted for 28 percent of all children under age 18 in the United States. (U.S. Dept. of Commerce, Bureau of Census, Current Population Reports, 1997 Population Profile of the United States 27 (1998).) Understandably, in these single-parent households, persons outside the nuclear family are called upon with increasing frequency to assist in the everyday tasks of child rearing. In many cases, grandparents play an important role. For example, in 1998, approximately 4 million

children, or 5.6 percent of all children under age 18, lived in the household of the grandparents. (U.S. Dept. of Commerce, Bureau of Census, Current Population Reports, Marital Status and Living Arrangements: March 1998 (Update), p. *i* (1998).)

"The nationwide enactment of nonparental visitation statutes is assuredly due, in some part, to the states' recognition of these changing realities of the American family. Because grandparents and other relatives undertake duties of a parental nature in many households, states have sought to ensure the welfare of the children therein by protecting the relationships those children form with such third parties. The states' nonparental visitation statutes are further supported by a recognition, which varies from state to state, that children should have the opportunity to benefit from relationships with statutorily specified persons—for example, their grandparents."[13]

It is important that the grandparents develop a strong bond with the grandparents' adult child's partner, (who would presumably be the one to oppose visitation in the event of a conflict) before any grandchildren are born. From the time that the adult child has formed a relationship that appears to be of some permanency, the parents' efforts should include communication on a regular basis, joint participation in birthday and holiday celebrations and activities of common interest; expressed interest in the couple's goals and activities; and encouragement and appreciation of the couple's plans and accomplishments.

With the advent of a grandchild, the contributions of the grandparents to the lives of the grandchild and its parents increase. During the grandchild's formative years, the grandparents have the opportunity to not only spend quality time with their grandchildren, but to ease the burden of the mother and father by freeing them up to enjoy other aspects of their relationship while the grandparents provide childcare.

Participation by grandparents in their grandchildren's lives should begin long before any issue about visitation develops. As soon as a grandchild is born, they should welcome any opportunity to become involved in the lives of the grandchild and parents. This includes not only spending time with the grandchildren, but becoming involved in the grandchildren's activities and showing the grandchild that by their actions they have much to offer. This would include an appreciation of family history, opportunities to spend time in a different residential setting, a different manner of approach, and, above all, a sense of love and affection.

The goal should be to build a bond with the grandchildren and both of their parents, so that the relationship will survive anything that puts the grandchild's family at risk, including the disruption of the family unit by illness, death of a parent, or divorce. Psychologists, psychiatrists, social workers and other family therapists agree on what goes into structuring such a relationship: demonstrating love and affection; providing role models to the grandchild; understanding and appreciating the grandchild's interests (which may not be the same as the grandparents' interests); participating in and encouraging activities that recognize and develop these interests; passing on to the grandchild matters of family history, and sharing of family, cultural and social events.[14]

During divorce proceedings, the grandparents' contribution to the lives of the grandchildren is most needed. At this time, grandchildren may feel insecure, confused, rejected, sad, angry and depressed. Grandparents can help children through this difficult time by striving to establish, with the parents, specific visitation with the children. This accomplishment, and the visitation activities during the period of separation, will contribute to the structure of visitation.

Grandparents should try to negotiate specific visitation in separation agreements. To make these agreements enforceable in the name of the grandparents, the separation agreement should provide that the parties agree that the grandparents may file an intervening petition in the divorce proceedings, and be awarded visitation rights by the final decree, or separate decree in the same proceeding.

If visitation cannot be agreed to, mediation is the most obvious and most desirable next step. The reasons that mediation has such widespread and increasing appeal have particular application to grandparents' visitation rights disputes:

- the participants have an established relationship that can be preserved and improved more than they then would be in adversarial litigation;
- mediation is a voluntary and consensual process that is controlled by the participants;
- there is less stress and disruption of lives in mediation;
- the proceedings are private and confidential;
- time and expense are saved;
- studies show that agreements are reached in mediation in 85% of the cases;
- participants are more prone to comply with agreements that they have fashioned themselves.

There are probably more mediators in family law than there are in any other legal specialty. Mediators come from all walks of professional life and include lawyers, psychologists, psychiatrists and social workers. The mediation process requires informing the participants that their agreement will be made part of any court proceedings, and, therefore, will become judicially enforceable.

Virginia Code Section 20-124.4 follows the Section of the Code that sets out the facts the court must consider in determining "best interest of a child," for purposes of visitation. It provides as follows:

> "In any appropriate case the court shall refer the parents or person with a legitimate interest to a dispute resolution evaluation session to be conducted at no cost to the parties and in accordance with the procedures set out in Chapter 20.2 of Title 8.01(§8.01-576.4 et seq.). In assessing the appropriateness of a referral, the court shall ascertain upon motion of a party whether there is a history of family abuse. If an agreement is not reached or any issue through further mediation as agreed to by the parties, prior to the return date set by the court pursuant to §8.01-576.5, the court shall proceed with a hearing on any unresolved issue, unless a continuance has been granted by the court. (1994, c. 769.)"

Thus, in those cases in which the parties will not agree to mediation, the court is *required* to refer the grandparents and others to a free dispute resolution evaluation session. Many disputants change their minds at the evaluation session and agree to proceed.

If a grandparent visitation agreement has not been reached, either by negotiation or mediation, a grandparent—if he or she has not already done so—should consult a lawyer experienced in family law. After hearing from the grandparents, the lawyer should be able to evaluate the grandparents' position and make a recommendation. The grandparents may elect to file a petition in their own name for visitation. The attorney then should be able to measure the grandparents' chances of success and tell them how much it will cost.

Grandparents should learn more about grandparenting and the legal issues by joining grandparent support groups, researching on the Internet and at the local library. Many references are available to help a grandparent be better prepared to pursue his or her rights.[15]

The *Troxel* and *Williams* cases say that the grandparent has a greater challenge if both parents in the grandchild's intact family (or the sole surviving parent) are opposed to visitation. The grandparents must establish that the grandchild's health or welfare would be harmed if visitation were denied. Admittedly, this may be difficult. The strength of the relationship between the grandparents and grandchild existing before visitation is refused would be critical.

In cases where the family is not intact, and only one parent opposes visitation, the challenge is less daunting, and the grandparent can win visitation by showing by clear and convincing evidence it would be in the best interests of the child.[16]

For the sake of their grandchildren, grandparents should not forfeit their visitation claims because of discouragement, indifference and inaction. They should recognize that they have something that can contribute to their grandchildren's lives and that they can then receive from them immeasurable joy, satisfaction and happiness. ⚖

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Endnotes

1 501 S.E. 2d 417 (1998)

2 513 S.E. 2d 901 (1999). The Supreme Court of Virginia denied the mother's Petition for Appeal on October 26, 1999.

3 68 U.S.L.W. 4458 (2000)

4 485 S.E. 2d 651 (1997)

5 485 S.E. 2d 651, 654

6 *Ibid*

7 501 S.E. 2d 417, 418

8 68 U.S.L.W. 4458, 4462

9 68 U.S.L.W. 4458, 4459

10 68 U.S.L.W. 4458, 4459

11 The opinion cited the *Williams* case at 68 U.S.L.W. 4458, 4462

12 513 S.E. 2d 901, 904

13 68 U.S.L.W. 4458, 4459-4460

14 *See AARP Bulletin*, July-August 2000, p.3. Obviously, the grandparent should take care to have these efforts not come off as interference with or intrusion upon the grandchild or his or her parents.

15 See, for example, Cohen, Joan Shrager "Helping Your Grandchildren Through Their Grandparents' Divorce" Walker and Company, New York (1994). This excellent work has references to grandparents' networking sources and an extensive bibliography of applicable books and articles.

16 The cases discussed do not address the situation where the parents are not together and both oppose visitation. In such cases, the grandparents should argue that the reasoning in the *Dotson* case should apply.