Legislative Analysis

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GRANDPARENTING TIME REVISIONS

Senate Bill 727 (Substitute H-2)
Sponsor: Sen. Alan Sanborn
House Committee: Judiciary
Senate Committee: Senior Citizens and Veterans Affairs

First Analysis (3-25-04)

BRIEF SUMMARY: The bill would establish criteria under which a grandparent could petition for visits with a grandchild.

FISCAL IMPACT: The bill would have an indeterminate fiscal impact on state and local governments.

THE APPARENT PROBLEM:

A recent Michigan Supreme Court ruling held that Michigan's law regarding a grandparent's right to petition for visits with a grandchild is unconstitutional. For several decades, a grandparent could seek an order for grandparenting time under very narrow circumstances (generally speaking, when a custody dispute was pending before a court or the grandparent's son or daughter had died), and the custodial parent either limited or ended visitation between the grandparent and child. The result of the recent ruling was that over 20 years of grandparent visitation orders were rendered unenforceable. Many more actions still pending before state courts are in limbo while the courts wait to see how the legislature will respond.

The demise of the state grandparenting time statute began in 2000 when the U.S. Supreme Court ruled that a Washington statute pertaining to third party visitation rights was unconstitutional as applied to a case in which grandparents, after the death of their son, brought an action against the mother of their granddaughters for increased visitation time. In Troxel v Granville, 530 US ___ (2000), the court opined that the entry of the visitation order in that case "was an unconstitutional infringement on Granville's fundamental right to make decisions concerning the care, custody, and control of her two daughters."

The Troxel court did not, contrary to early media reports, strike down the Washington law or any other state nonparental visitation law. Indeed, Justice O'Connor, writing for the majority, stated that the court "would be hesitant to hold that specific nonparental visitation statutes violate the Due Process Clause as a *per se* matter" because many of these cases are adjudicated by the state courts on a case-by-case basis. Justice O'Connor agreed with Justice Kennedy, who wrote the dissenting opinion, that "the constitutionality of any standard for awarding visitation turns on the specific manner in which the standard is applied".

Though the majority of states either declined to review or amend their grandparenting rights laws after the Troxel decision was rendered (all 50 states have some type of grandparenting rights statute), six states, including Michigan, did scrutinize their laws. Last summer, in DeRose v DeRose, No. 121246 (July 31, 2003), the Michigan Supreme Court relied on an analysis of the Troxel decision to declare Michigan's grandparenting time law unconstitutional because it failed "to require that a trial court accord deference to the decisions of fit parents regarding grandparenting visitation". In DeRose, the mother of the child in question denied visitation to the child's paternal grandmother after the child's father was convicted of sexually molesting the child's stepsister.

Justice Weaver, in a concurring opinion, acknowledged the importance of the grandparent visitation statute and urged the legislature to correct the statute's constitutional deficiencies. In particular, she identified three flaws: 1) the statute failed to provide a presumption that a fit parent acts in the best interest of his or her child; 2) the statute failed to give any special weight or deference to the fit parent's decision regarding grandparent visitation; and 3) the statute failed to clearly place the burden in the proceedings on the petitioners rather than the parents.

Legislation has therefore been introduced to revise the grandparenting time law to correct the constitutional deficiencies identified by the state supreme court.

THE CONTENT OF THE BILL:

The bill would amend provisions in the Child Custody Act of 1970 relating to grandparent visitation, now referred to as "grandparenting time".

Senate Bill 727 would amend the grandparenting time provisions of the Child Custody Act of 1970. Under the act, a grandparent may seek an order for grandparenting time of his or her grandchild only if a child custody dispute regarding that child is pending before the court. In addition, if a natural parent of a child is deceased, a parent of the deceased parent may commence an action for parenting time. Furthermore, the act states that a stepparent adoption under the Adoption Code does not terminate the right of a parent of a deceased parent to commence an action for grandparenting time.

The bill would delete the above provisions and allow a child's grandparent to seek an order for grandparenting time under any of the following circumstances:

- An action for divorce, separate maintenance, or annulment involving the child's parents was pending.
- The child's parents were divorced, separated under a separate maintenance judgment, or had had their marriage annulled.
- The child's parent (who is a child of the grandparent) was deceased.

- The child's parents were never married; they are not residing in the same household; and the father established paternity by completing an acknowledgement of parentage under the Acknowledgment of Parentage Act, by an order of filiation entered under the Paternity Act, or by a court determination that he was the child's father.

- With certain exceptions, legal custody of the child has been granted to a person other than the child's parent, or the child is placed outside of, and does not reside in, the home of a parent. (The exceptions pertain to a new provision that would be added by the bill which states that adoption of a child or the placement of a child for adoption under the Adoption Code would terminate the right of a grandparent to commence an action for grandparenting time with that child, unless the child was adopted by a stepparent.)

- The grandparent, within one year of petitioning for grandparenting time, provided an established custodial environment, regardless of whether or not the grandparent had custody under a court order.

The bill would specify that a court could not permit the parent of a father who had never been married to the child's mother to seek an order for grandparenting time unless the father had acknowledged parentage under the Acknowledgment of Parentage Act, entered an order of filiation under the Paternity Act, or been determined to be the father by a court. In addition, the parent of a putative father could not seek grandparenting time unless the putative father had provided substantial and regular support or care in accordance with his ability to provide the support or care.

The bill would define "grandparent" as a natural or adoptive parent of a child's natural or adoptive parent. "Parent" would mean the natural or adoptive parent of a child.

Under the act, a grandparent seeking a grandparenting time order *may* commence an action by filing a complaint or a motion for order to show cause in the circuit court in the county in which the child resides. However, if a dispute is pending, a grandparent is required to file a motion for an order to show cause. Under Senate Bill 727, a grandparent seeking a grandparenting time order would be required to file a motion in the circuit court in the county where the court has continuing jurisdiction, or to file a complaint in the circuit for the county where the child resides, if the local circuit court does not have continuing jurisdiction over the child.

The act requires that, in addition to a complaint or motion, the grandparent file an affidavit stating the facts in support of the request for grandparenting time. The bill would retain the provision that permits a party having legal custody of the child to submit an opposing affidavit, and that requires that a hearing be held if the court or either party requests one. A provision requiring the court to enter an order for grandparenting time only upon a finding that such time is in the child's best interests, if a hearing is not held, would be deleted.

The bill would add that in making a determination for grandparenting time, there would be a rebuttable presumption in favor of a fit parent's actions and decisions regarding grandparenting time. The grandparent filing the complaint would carry the burden to prove by a preponderance of the evidence that the presumption was rebutted by addressing factors listed in the bill. The court would have to give a fit parent's position deference when making its decision. If two fit parents signed an affidavit stating that they both opposed an order for grandparenting time, the court would have to dismiss the complaint or motion.

In determining if the presumption were rebutted, the court would have to consider all of the following:

- The love, affection, and other emotional ties existing between the grandparent and child.
- The length and quality of the prior relationship between the child and grandparent, the role performed by the grandparent, and existing emotional ties of the child to the grandparent.
- The grandparent's moral fitness.
- The grandparent's mental and physical health.
- The child's reasonable preference, if the court considered the child to be of sufficient age to express a preference.
- The effect on the child of hostility between the grandparent and the parent of the child.
- The willingness of the grandparent, except in the case of abuse or neglect, to encourage a close relationship between the child and the parent or parents of the child.
- Any history of physical, emotional, or sexual abuse or neglect of any child by the grandparent.
- Whether the child would be harmed by granting grandparenting time or harmed by not granting it.
- Whether the parent's objections to, or lack of an offer of, grandparenting time were related to the child.
- Any other factor relevant to the physical and psychological well-being of the child.
- If the grandparent overcame the presumption by a preponderance of the evidence, the court would have to enter an order providing for reasonable grandparenting time. In addition, a court could refer a complaint or motion for grandparenting time to the Friend of the Court for mediation. If a complaint or motion was

referred and no settlement was reached within a reasonable period of time, the complaint or motion would be heard by the court.

Currently, the act allows a court to modify or terminate a grandparenting order whenever a modification or termination is in the best interest of the child. The bill would instead specify that a court could so modify or terminate a grandparenting order if there was a change of circumstances and if the modification or termination was appropriate after determining that the presumption had been rebutted by applying the factors listed above.

The bill would retain a provision that prohibits a grandparent from filing a complaint or motion seeking a grandparenting time order more often than once every two years without showing good cause. Furthermore, the court currently must make a record of the reasons for denying a request for grandparenting time; the bill would delete this and instead require the court to make a record of its analysis and findings under provisions pertaining to 1) the list of factors used to determine if the presumption in favor of a fit parent had been rebutted; 2) a grandparent with good cause filing more than one motion or complaint in a two-year period; and 3) an order entered to modify or terminate a grandparenting order if there were a change of circumstances and the modification or termination was appropriate after a determination of whether the presumption had been rebutted by applying the factors listed above.

The act currently states that a court shall not enter an order restricting the movement of a child if the movement is solely for the purpose of allowing a grandparent to exercise his or her rights to grandparenting time. The bill would rewrite this provision, so that the court would be prohibited from entering an order prohibiting a person who has legal custody of a child from changing the domicile of the child if the prohibition is primarily for the purpose of allowing a grandparent to exercise his or her grandparenting time.

MCL 722.22 and 722.27b

HOUSE COMMITTEE ACTION:

The substitute adopted by the House committee made the following changes:

- Allowed, subject to other provisions in the bill, a grandparent to seek grandparenting time if legal custody had been given to a nonparent or if the child had been placed outside of the home and did not live with one of the parents.
- Allowed the grandparent who, within one year of commencing an action for grandparenting time, had provided a custodial environmental to seek grandparenting time.
- Changed the level of proof needed by the grandparents to rebut the presumption in favor of a fit parent's actions and decisions regarding grandparenting time from clear and convincing to preponderance of the evidence.
- Added, as a factor for the court to consider in determining if the presumption were rebutted, whether the parent's objections to, or lack of an offer of, grandparenting time were related to the child.

- Restricted a court to modifying or terminating a grandparenting order to when there was a change of circumstances and the modification or termination was appropriate after determining if the presumption had been rebutted by applying the list of factors specified in the bill.

BACKGROUND INFORMATION:

The bill is similar to House Bill 5039, which was passed by the House last December.

FISCAL INFORMATION:

The bill's fiscal impact on the judiciary would depend on how it affected caseloads for local courts and Friend of the Court offices.

ARGUMENTS:

For:

Opinions may differ on the DeRose court's interpretation and application of the Troxel decision to the state's grandparent visitation law, but the state supreme court's ruling in DeRose nonetheless rendered the Michigan law unconstitutional, thereby voiding all existing grandparenting time orders and putting a hold on pending actions. Therefore, it is imperative that the legislature move quickly to revise the statute so that it can pass constitutional muster.

Senate Bill 727 is superior to the old law in many respects. Foremost, it would address the deficiencies raised in the majority opinion and articulated so clearly by Justice Weaver in the concurring opinion by "creating a rebuttable presumption that a fit parent's action and decisions regarding grandparenting time are in the best interests of the child"; placing the burden on grandparents by requiring the grandparent to overcome the presumption by a preponderance of the evidence; and by giving deference to a parent's decision regarding grandparent visits and by dismissing the case altogether if both parents opposed visits with the grandparent.

For:

The recently voided law had been interpreted to apply only to grandparents of children whose parents had at one time been married. The grandparents of children whose parents never married only had standing to petition for visits if their son or daughter had died. Legislation has been offered many times through the years to correct this oversight. It has long been considered unfair to children that a child who lost a parent had their rights to a relationship with the grandparents protected whereas the child whose parents were both living did not share that same level of protection. Senate Bill 727 would rightfully expand standing to include grandparents whose living sons or daughters never married the child's other parent as long as paternity has been established and, in the case of a putative father, support or care for the child has been provided.

For:

Confusion appears to remain as to the ruling in the Troxel case. The U.S. Supreme Court did not strike down the Washington law as unconstitutional, nor did it strike down all grandparenting rights laws. It did, however, agree that the Washington statute swept "too broadly" and that the statute as applied to the Troxel case did not give deference to the fit parent's decision regarding visits with the grandmother; therefore, the entry of the order constituted an infringement on the mother's 14th Amendment Due Process Clause rights to make decisions concerning her daughters' care, custody, and control without undue state infringement.

Senate Bill 727 does provide adequate protections to parents so that state infringements on their constitutional rights to rear their children would not happen. For instance, the bill only covers situations where the family is not intact, e.g., the parents were never married, divorced, separated, or the child has been removed from the home. It also would rightfully focus the protection on the relationship between a child and his or her grandparents. To do otherwise would treat the child as property of the parents rather than as a person in his or her own right. Too often, the acrimony that accompanies a breakdown of the parents' relationship is transferred to the parents of the noncustodial parent and they are unfairly restricted in their access to and ability to maintain a relationship with the grandchild or grandchildren.

In both the U.S. and the state supreme court decisions, the writers of the opinions acknowledged the significant role for good that grandparents can play in the lives of the grandchildren. These relationships need to be protected, albeit properly balanced so that the rights of parents to care for their children are not impeded. Senate Bill 727 contains such protections. It would clearly define the circumstances under which grandparents have standing to seek a visitation order, it protects the rights of adoptive parents other than adoption by a stepparent, and it establishes clear guidelines for courts in determining when a grandparenting time order is appropriate. (Previously, a court could overrule a parent's decision simply because it disagreed as to what was best for the child.) Also of importance, it would protect the right of a child to maintain a relationship with a grandparent from a parental decision motivated by fear, anger, hurt, or resentment.

Response:

Unfortunately, some grandparents will never see their day in court or even have a chance to resolve differences through mediation. This is because the bill would automatically dismiss a petition for grandparenting time if both parents agreed, in writing, that they didn't want the child to visit the grandparent. Though meant to be a protection of the rights of parents, it unfairly ends the rights of a child to see his or her grandparent without a hearing on the merits of the case. Obviously, if there were a history of abuse at the hands of the grandparent, there should be a mechanism whereby the petition could be dismissed without a hearing or mediation if supporting evidence were presented. This would at least give the grandparent a chance to refute the allegations. The problem with the bill as written is that the grandparent's side would never get to be presented, and the parents' objections to the visits would never be revealed.

For:

The strength of Senate Bill 727 is that the parties could be referred to Friend of the Court for mediation. Thus, both parties would be brought to the table, and in so doing, the parties involved could resolve differences quickly with minimal court intervention. According to some family law specialists, the majority of actions seeking grandparenting time orders never make it to trial. The pre-trial hearings and mediation involved in these proceedings usually suffice to get the parties talking. Once dialogue is established, concerns are aired and discussed, often leading the parties to resolve the conflicts and decide on a visitation arrangement amenable to both sides. In the long run, the bill could likely result in savings to courts (and thus taxpayers) by decreasing the number of cases that go to trial as well as the number of cases appealed.

Response:

The bill should be amended to exclude from mediation those cases involving a history of physical or sexual abuse on the part of the grandparent. This is a difficult issue because many incidents of incest or physical abuse have gone unreported and therefore no legal record exists. Many times the grandparent denies ever abusing the parent when that parent was a child. Forcing a parent into mediation with a parent that may have abused him or her or other family members would be very traumatic. One of the listed factors that a court must consider in determining whether the rebuttable presumption has been overcome is whether or not there is a history of physical, emotional, or sexual abuse or neglect of any child by that grandparent. Therefore, these cases would be better suited for a court, rather than a mediator, to hear.

Against:

Some remain opposed to Senate Bill 727 because they feel that the level of proof to overcome the rebuttable presumption should be raised to "clear and convincing" instead of by "preponderance of the evidence". Preponderance of the evidence is met when there is 51 percent of supporting evidence, whereas the clear and convincing standard would require approximately 75 percent in favor of the grandparents. Clear and convincing is a level familiar to family court professionals as that is the proof level needed for removing a child from his or her family. Also, clear and convincing more accurately fits with the *DeRose* ruling that deference should be given to a fit parent's decision regarding his or her children.

Response:

Grandparents already face an uphill battle in many situations. The anger and animosity toward an ex-partner is often directed at the ex's parents, and grandchildren are sometimes used as pawns to manipulate grandparents to give money or services to the custodial parent in return for access to visits. Besides, even "fit" parents sometimes make wrong parenting decisions and a grandparent should have a fair chance to establish visits with the grandchildren – especially since these relationships can be of such benefit to the child. If the proof level is too high, virtually no grandparent could prevail.

In addition, the bill does not define what a "fit" parent is, nor is that term defined in Michigan law. Many parents do not physically or sexually abuse their children, nor neglect the children's physical needs. However, the children may be emotionally abused or neglected, but this is very hard to prove, especially at the clear and convincing level.

In such situations, visits with the grandparents may be even more important to provide a safe place for the child and healthy interactions with adults. Often, it is in conversations with or visits with grandparents that signs of abuse are first exhibited. The love and support a grandparent can give may be instrumental in the child's healthy development, and, if the abuse is severe, notification to the proper authorities may save a child's life.

And, what if a grandparent is able to present proof at the clear and convincing level that the parent may be abusing the child in some way? Will that trigger intervention by the state's child protection services? If so, couldn't that entice some to pressure the other parent to sign the affidavit denying grandparenting time and thus triggering automatic dismissal of the action? This would enable the parent to isolate the child from adults who could protect him or her.

Further, it is one thing to require a level of clear and convincing when deciding whether to remove a child from his or her parent. In such situations, the evidence is tangible, the effects of the child's relationship with the parent is evident. But how does a grandparent prove by clear and convincing evidence that events that have not yet happened will result in damage at a future time unless visits are ordered today? The level of proof should be left at preponderance of the evidence. There are enough safeguards built into the bill to still stack the deck in favor of the parent's decision.

Against:

The bill makes no allowance for situations involving sexual or physical abuse. The children of a battered parent often have witnessed the abuse or been similarly abused by the offending parent. A significant number of domestic violence homicides occur each year during visitation transfers. A noncustodial parent may have been denied visitation and/or have a personal protection order (PPO) restricting contact with the custodial parent or the children, or both. Victims of domestic violence often have to relocate, even hide, to protect themselves and their children from further violence. Therefore, contact with grandparents may not be safe or advisable.

A grandparent, even one that does acknowledge the violence committed by his or her son or daughter, may not be able to provide adequate protection should the batterer show up when a visit is taking place or when the children are being returned to the custodial parent. In addition to the physical danger this presents, such an event could be psychologically damaging to the children as well as the custodial parent. If a custodial parent is keeping his or her location a secret out of fear that the other parent would kidnap the children or pose a threat to their physical safety, forced visitation with the grandparents could put that family at risk.

At a minimum, the bill should be amended to exclude cases involving domestic violence or sexual assault.

Response:

A grandparent is not the same as an abusive parent. Many, if not most, grandparents abhor the violence inflicted by their children on their grandchildren or grandchildren's other parent. Often, it is a grandparent whom the grandchild has confided in that first

brings the domestic violence or sexual assault to the proper authorities. Not all violence is learned at home; violence can accompany mental illness, alcoholism, and drug abuse. Also, a domestic violence conviction can range from a one-time push or verbal threat to repeated physical, verbal, and emotional abuse over the course of many years to murder. To create a blanket exclusion for these grandparents would be unfair to them and would not necessarily be in the best interests of the children involved. The grandparent should not be automatically penalized for the actions of a son or daughter, nor should they be the target of a custodial parent's fear or anger. A beneficial relationship for the children and grandparent may still be possible.

However, this concern does underscore the necessity for courts to scrutinize motions for visitation orders on a case by case basis. The dialogue between the parties that the bill may encourage could enable some of these situations to be resolved so as to afford some manner of contact between the grandparents and the grandchildren while maintaining the family's safety and well-being. For instance, a court could impose strict confidentiality restrictions on the grandparents in relation to addresses and phone numbers, allow only supervised visits in an agency facility, or deny visitation altogether until the threat of harm is resolved.

POSITIONS:

The Family Law Council/State Bar of Michigan indicated support for the Senate-passed version. (3-9-04)

The Michigan Coalition Against Domestic and Sexual Violence indicated support for the Senate-passed version. (3-9-04)

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