

MAINE STATE BAR ASSOCIATION

FAMILY LAW INSTITUTE

GRANDPARENTS' VISITATION RIGHTS

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GRANDPARENTS' VISITATION RIGHTS

I. INTRODUCTION

Perhaps it was the increase in divorce and non-traditional families, perhaps it was the rising age, power, and influence of the baby boomers, or perhaps there was some altogether different catalyst, but in the 1970s and 1980s grandparent visitation statutes were enacted throughout the United States.¹

By the mid-1990s grandparents' statutory rights to petition courts for visitation with their grandchildren appear to have reached their high water mark. While parents were challenging these laws in state courts throughout the country, they were apparently meeting with little success. One court stated, "the vast majority of courts that have addressed the constitutionality of grandparent visitation statutes authorizing visitation if in the best interest of the child, have upheld these statutes."²

Although family law has always been the province of the states, at the turn of the century the U.S. Supreme Court reviewed the non-parental³ visitation statute of the State of Washington in the landmark case of *Troxel v. Granville*.⁴

Due to what the Supreme Court characterized as "the sweeping breadth" of the statute at issue in *Troxel* it is difficult to compare the Washington statute with those of other states.⁵ However, and perhaps by design, the Supreme Court used its complex decision to lay out a number of fundamental principles that the states could use to assess the constitutional validity of their own visitation statutes.

Since 2000, when *Troxel v. Granville* was decided, a number of courts around the country have declared their state laws in violation of the U.S. Constitution's protection of parents' fundamental right to the care, custody, and control of their children.⁶

While Maine still maintains some semblance of grandparents' visitation rights, as is outlined in detail hereafter, these rights have been gradually eroding at the hands of the Maine Supreme Court to the point that it is debatable whether the original statute that was enacted a decade and a half ago retains any meaningful legal significance today.

¹ *Troxel v. Granville*, 530 U.S. 57, 74 n. (2000).

² *Campbell v. Campbell*, 896 P.2d 635, 643 n.18 (Utah Ct. App. 1995).

³ The Washington statute was not restricted to grandparents' visitation, but rather, extended to virtually anyone who petitioned the court.

⁴ 530 U.S. 57 (2000).

⁵ *Id.* at 75.

⁶ 26 National Law Journal 1 (October 14, 2002).

II. LEGISLATIVE HISTORY

In 1991, the Maine Legislature enacted the “The Grandparents Visitation Act”, which granted a right to petition for visitation to grandparents in only those cases where “at least one of the child’s parents or legal guardians has died.”⁷

The Legislature revised The Grandparents Visitation Act during the next legislative session, adding language to allow certain grandparents to petition the court for visitation in cases where none of the child’s parents or legal guardians had died.⁸ The amended language granted standing for a grandparent to petition the court for visitation only after it was established, via affidavit, the grandparent had an existing relationship with the child or had made efforts to establish such a relationship.⁹

During the 117th Legislature in 1996, the Judiciary Committee undertook the ambitious task of re-codifying and revising Title 19 of the Maine Revised Statutes.¹⁰ While this exercise made no substantive changes to The Grandparents Visitation Act, it changed the statutory reference to its current 19-A M.R.S.A. §§1801, *et seq.*

In 1999, the Act was again amended, however, the only change was to allocate exclusive jurisdiction of petitions to the District Court.¹¹ This change was not specific to grandparents’ visitation matters, but part of larger policy change that allocated jurisdiction of all family matters to the District Court.

Further amendments were made to the Act in the 120th Legislature in 2001. During that session a bill was passed that prohibited convicted sex offenders from being awarded primary residence of minor children and placed certain restrictions on the parent-child contact for convicted sex offenders. The amendment to The Grandparents Visitation Act included similar language regarding contact between children and their grandparents who are convicted sex offenders.¹²

Finally, the most recent Legislature made a few additional amendments to the Act, most of which had little substantive impact. First, the Legislature enacted a bill that allowed for the District Court to order a party in any family matter to pay the other party’s attorneys’ fees; this made the section in the Act that allowed for an award of counsel fees to be redundant so it was repealed.¹³ Second, another bill before the Legislature sought to improve the guardian ad litem system in the State; the law that was enacted included a section that allows

⁷ 1991 Me. Laws c. 414.

⁸ 1993 Me. Laws c. 479.

⁹ *Id.*

¹⁰ 1995 Me. Laws c. 694.

¹¹ 1999 Me. Laws c. 731 Pt. ZZZ §35.

¹² 2001 Me. Laws c. 665 §§ 5-7.

¹³ 2005 Me. Laws c. 323 §13.

for guardians ad litem to be appointed in grandparent visitation cases and for the court to consider the report of a guardian ad litem when rendering a decision.¹⁴ Finally, a bill designed to protect children from sex offenders included an amendment to The Grandparents Visitation Act wherein there is a rebuttable presumption that contact between a child and a grandparent who is a convicted sex offender creates a jeopardy situation for the child and is adverse to the best interest of the child.¹⁵

This review brings us to the current state of the Act. Section III sets out the entire text of the statute as presently constituted.

III. THE GRANDPARENTS VISITATION ACT

All copyrights and other rights to statutory text are reserved by the State of Maine. The text included in this publication is current to the end of the Second Special Session of the 122nd Legislature, which adjourned July 30, 2005, but is subject to change without notice. It is a version that has not been officially certified by the Secretary of State. Refer to the Maine Revised Statutes Annotated and supplements for certified text.

CHAPTER 59: VISITATION RIGHTS OF GRANDPARENTS

§1801. Short title

This chapter is known and may be cited as the "Grandparents Visitation Act."

§1802. Definitions

As used in this chapter, unless the context otherwise indicates, the following terms have the following meanings.

1. Grandparent. "Grandparent" is a biological or adoptive parent of a child's biological or adoptive parent. "Grandparent" includes a biological or adoptive parent of a child's biological or adoptive parent whose parental rights have been terminated pursuant to Title 18-A, section 9-204 or Title 22, chapter 1071, subchapter VI, but only until the child's adoption.

§1803. Petition

1. Standing to petition for visitation rights. A grandparent of a minor child may petition the court for reasonable rights of visitation or access if:

- A. At least one of the child's parents or legal guardians has died;
- B. There is a sufficient existing relationship between the grandparent and the child; or
- C. When a sufficient existing relationship between the grandparent and the

¹⁴ 2005 Me. Laws c. 360 §3.

¹⁵ 2005 Me. Laws c. 366 §4.

child does not exist, a sufficient effort to establish one has been made.

2. Procedure. The following procedures apply to petitions for rights of visitation or access under subsection 1, paragraph B or C.

A. The grandparent must file with the petition for rights of visitation or access an affidavit alleging a sufficient existing relationship with the child, or that sufficient efforts have been made to establish a relationship with the child. When the petition and accompanying affidavit are filed with the court, the grandparent shall serve a copy of both on at least one of the parents or legal guardians of the child.

B. The parent or legal guardian of the child may file an affidavit in response to the grandparent's petition and accompanying affidavit. When the affidavit in response is filed with the court, the parent or legal guardian shall deliver a copy to the grandparent.

C. The court shall determine on the basis of the petition and the affidavit whether it is more likely than not that there is a sufficient existing relationship or, if a sufficient relationship does not exist, that a sufficient effort to establish one has been made.

D. If the court's determination under paragraph C is in the affirmative, the court may appoint a guardian ad litem as provided in section 1507. The court shall hold a hearing on the grandparent's petition for reasonable rights of visitation or access and shall consider any objections the parents or legal guardians may have concerning the award of rights of visitation or access to the grandparent. If the court has appointed a guardian ad litem, the court shall also consider the report of the guardian ad litem. The standard for the award of reasonable rights of visitation or access is provided in subsection 3.

3. Best interest of the child. The court may grant a grandparent reasonable rights of visitation or access to a minor child upon finding that rights of visitation or access are in the best interest of the child and would not significantly interfere with any parent-child relationship or with the parent's rightful authority over the child. In applying this standard, the court shall consider the following factors:

A. The age of the child;

B. The relationship of the child with the child's grandparents, including the amount of previous contact;

C. The preference of the child, if old enough to express a meaningful preference;

D. The duration and adequacy of the child's current living arrangements and the desirability of maintaining continuity;

E. The stability of any proposed living arrangements for the child;

F. The motivation of the parties involved and their capacities to give the child love, affection and guidance;

G. The child's adjustment to the child's present home, school and community;

H. The capacity of the parent and grandparent to cooperate or to learn to cooperate in child care;

I. Methods of assisting cooperation and resolving disputes and each person's willingness to use those methods;

J. Any other factor having a reasonable bearing on the physical and psychological well-being of the child; and

K. The existence of a grandparent's conviction for a sex offense or a sexually violent offense as those terms are defined in Title 34-A, section 11203.

4. Modification or termination. The court may modify or terminate any rights granted under this section as circumstances require. Modification or termination of rights must be consistent with this section.

5. Enforcement. The court may issue any orders necessary to enforce orders issued under this section or to protect the rights of parties.

6. Costs and fees. (repealed)

7. Supervision required; convictions for sexual offenses.

Notwithstanding any other provision of this chapter, the court may award a grandparent who is convicted of a child-related sexual offense visitation with a minor grandchild only if the court finds that contact between the grandparent and the child is in the best interest of the child and that adequate provision for the safety of the child can be made. For purposes of this section, "child-related sexual offense" has the same meaning as in section 1653, subsection 6-A.

The court may require that visitation may occur only if there is another person or agency present to supervise visitation. If the court allows a family or household member to supervise grandparent-child contact, the court shall establish conditions to be followed during that contact. Conditions include, but are not limited to, those that:

A. Minimize circumstances when the family of the grandparent who is a sex offender or sexually violent predator would be supervising visits;

B. Ensure the safety and well-being of the child; and

C. Require that supervision be provided by a person who is physically and mentally capable of supervising a visit and who does not have a criminal history or history of abuse or neglect.

8. Conviction or adjudication for certain sex offenses; presumption.

There is a rebuttable presumption that the grandparent would create a situation of jeopardy for the child if any contact were to be permitted and that contact is not in the best interest of the child if the court finds that the grandparent:

A. Has been convicted of an offense listed in Title 19-A, section 1653, subsection 6-A, paragraph A in which the victim was a minor at the time of the offense and the grandparent was at least 5 years older than the minor at the time of the offense except that, if the offense was gross sexual assault under Title 17-A, section 253, subsection 1, paragraph B or C and the minor victim submitted as a result of compulsion, the presumption applies regardless of

the ages of the grandparent and the minor victim at the time of the offense; or
B. Has been adjudicated in an action under Title 22, chapter 1071 of sexually abusing a person who was a minor at the time of the abuse.

The grandparent seeking contact with the child may present evidence to rebut the presumption.

§1804. Mediation

The court may refer the parties to mediation at any time after the petition is filed and may require that the parties have made a good faith effort to mediate the issue before holding a hearing. If the court finds that either party failed to make a good faith effort to mediate, the court may order the parties to submit to mediation, dismiss the action or any part of the action, render a decision or judgment by default, assess attorney's fees and costs or impose any other sanction that is appropriate in the circumstances. The court may also impose an appropriate sanction upon a party's failure without good cause to appear for mediation after receiving notice of the scheduled time for mediation.

An agreement reached by the parties through mediation on an issue must be reduced to writing, signed by the parties and presented to the court for approval as a court order.

§1805. Jurisdiction

An action may be commenced in the District Court for the district in which the minor child resides. If a child protective proceeding pursuant to Title 22, chapter 1071 that involves the minor child is pending, the court may consolidate the action filed under this chapter with that child protection proceeding.

An action must be commenced in accordance with the Maine Rules of Civil Procedure. Proceedings under this chapter are governed by the Maine Rules of Civil Procedure.

IV. GRANDPARENTS' RIGHTS CASE LAW

While it is obviously of vital importance that attorneys study the text of the laws on which they advise their clients, laws as drafted and enacted by legislative bodies do not exist in a vacuum. To the contrary, laws are abrogated, amended, or otherwise altered, at least in the way they are administered and enforced, when courts review and interpret them. In order to gain a solid understanding of the present state of The Grandparents Visitation Act one must look beyond the text of the statute and examine the case law that has impacted the Act. A review and analysis of each of the cases in which The Grandparents Visitation Act came before the Maine Supreme Court is set forth below.

However, no analysis of grandparents' visitation rights would be complete without first examining the seminal United States Supreme Court case of *Troxel v. Granville*.¹⁶

A. *Troxel v. Granville*

Factual Background After the suicide of their son, the grandparents commenced an action for visitation under the State of Washington statute.¹⁷ The statute then in effect allowed any person to petition the superior court for visitation rights at any time, and authorized the court to grant such visitation rights when visitation served the best interest of the child.¹⁸ In this case, the child's mother did not oppose visitation altogether, but sought to limit the visitation to one day per month with no overnight stay.¹⁹ The Washington Supreme Court held that the statute unconstitutionally infringed on the fundamental right of parents to rear their children.²⁰ The Court's decision was based on the finding that the United States Constitution permits a State to interfere with the right of parents to rear their children only to prevent harm or potential harm to a child and the statute required no threshold showing of harm.²¹

Plurality Decision Justice O'Connor delivered the decision of the Court that affirmed the Washington Supreme Court decision. The Court stated "the liberty interest at issue in the case -- the interest of parents in the care, custody, and control of their children -- is perhaps the oldest of the fundamental liberty interests recognized by this Court."²² The Court held that the statute, as applied to Granville, unconstitutionally infringed on her fundamental parental rights. The Court was struck by the sweeping breadth of the statute that permitted "any person" to petition for visitation "at any time", subject only to the requirement that the visitation serve the best interest of the child.²³ Under the statute, the parent's decision that the visitation would not be in the child's best interest is accorded no deference or special weight.²⁴ The trial court had also applied a presumption in favor of grandparent visitation rather than deferring to the mother's judgment on whether visitation was in the best interest of the children.²⁵

The Court also made specific note of the fact that there were no allegations in the case that the surviving parent was unfit.²⁶ "Accordingly, so long as a parent adequately cares for his or her children (i.e., is fit), there will normally

¹⁶ 503 U.S. 57 (2000).

¹⁷ *Id.* at 60.

¹⁸ *Id.*

¹⁹ *Id.* at 61.

²⁰ *Id.* at 63.

²¹ *Id.*

²² *Id.* at 65.

²³ *Id.* at 67.

²⁴ *Id.*

²⁵ *Id.* at 69.

²⁶ *Id.* at 68.

be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent’s children.”²⁷ The Court cited with approval Maine’s Grandparents Visitation Act that permits the court to award grandparent visitation where it is in the best interest of the child “and would not significantly interfere with any parent-child relationship or with the parent’s rightful authority over the child.”²⁸

Holding The official holding in the case was that the statute as applied to Granville was an unconstitutional infringement on her fundamental right to make decisions concerning the care, custody, and control of her two daughters.²⁹ The Court was sensitive to the fact that “the burden of litigating a domestic relations proceeding can itself be ‘so disruptive of the parent-child relationship that the constitutional right of a custodial parent to make certain basic determinations for the child’s welfare becomes implicated.’”³⁰

Issues Left for Another Day The Court specifically passed on the question of whether the Due Process Clause requires all non-parental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation.³¹ The Court also did not define the precise scope of the parental due process right in the visitation context.³²

B. *Rideout v. Riendeau*

Factual Background The Rideouts first became grandparents when their daughter Heaven had a son when she was an unmarried sixteen year old high school student living at home.³³ Heaven had two other children in the seven years that followed.³⁴ For those seven years the Rideouts acted as the children’s primary caregivers and custodians.³⁵ After a turbulent first marriage ended in divorce, Heaven married Jeffrey Riendeau.³⁶ The two endured an inauspicious start, allegedly caused by the Rideouts’ interference in their family unit.³⁷ After the Rideouts contacted the Department of Human Services regarding the Riendeau’s treatment of the children, the Riendeaus jointly elected to eliminate all contact between the children and the Rideouts.³⁸ While this appeared to help

²⁷ Id. at 68-69.

²⁸ Id. at 70.

²⁹ Id. at 72-73. Although the plurality decision did not set forth the level of scrutiny to be applied, Justice Thomas noted that the proper standard of review would be strict scrutiny because the court was dealing with a question regarding a fundamental right.

³⁰ Id. at 75.

³¹ Id. at 73.

³² Id. at 73-74.

³³ 761 A.2d 291, 295 (Me. 2000).

³⁴ Id. at 295.

³⁵ Id.

³⁶ Id.

³⁷ Id.

³⁸ Id.

stabilize the Reindeaus' marriage, the Rideouts wanted to visit with their three grandchildren in spite of the Riendeaus' wishes and filed a petition seeking court-ordered visitation pursuant to The Grandparents Visitation Act.³⁹ The Riendeaus filed a motion to dismiss on the ground that the Act is an unconstitutional infringement on their fundamental rights as parents.⁴⁰

The Trial Court made findings of fact that led to the conclusion that pursuant to The Grandparents Visitation Act, the Rideouts would be entitled to visitation, however, the Court found the Act to be unconstitutional and granted the Riendeaus' motion to dismiss.⁴¹ The Rideouts appealed.⁴²

Issue / Issues Left for Another Day The sole issue before the Court was whether subsection 1803(1)(B) of The Grandparents Visitation Act could be applied in a manner consistent with the Due Process Clause of the United States Constitution.⁴³ The Court specifically refused to shed any light on the constitutionality of subsections 1803(1)(A) and 1803(1)(C).⁴⁴ Furthermore, whereas neither party had raised the issue of the Act's constitutional validity under the Maine Constitution, the Court elected not to address that question either.⁴⁵

Reliance on *Troxel v. Granville* Before ever reaching an analysis of that portion of The Grandparents Visitation Act at issue, the Court engaged in a detailed analysis of the then-recently decided Supreme Court case of *Troxel v. Granville*.⁴⁶ The Court ultimately concluded that the statute at issue in *Troxel* was so dramatically different than Maine's Grandparents Visitation Act that the two could not be readily compared, however, the Court outlined three guiding principles derived from the *Troxel* decision that were equally applicable in its decision in *Rideout*.

First, parents have a fundamental right to direct the care, custody, and control of their children.⁴⁷ Second, the "best interest of the child" standard, standing alone, is not a sufficiently compelling state interest to allow for interference with a parent's fundamental rights.⁴⁸ And third, there is a

³⁹ Id.

⁴⁰ Id. It is worth noting that this was not the first time the Grandparents Visitation Act came before the Maine Supreme Court. In 1997, the Court decided the case of *Berg v. Bragdon*, 695 A.2d 1212 (Me. 1997). After grandparent visitation was granted by the district court, the parent appealed to the superior court which, even in advance of *Troxel v. Granville*, declared the statute unconstitutional. However, because the parent had failed to contest the constitutionality of the Act at the trial court level, the Maine Supreme Court held that it was not properly preserved for appeal and refused to address the issue.

⁴¹ Id.

⁴² Id.

⁴³ Id. at 299.

⁴⁴ Id.

⁴⁵ Id. at 295.

⁴⁶ Id. at 295-298.

⁴⁷ Id. at 297.

⁴⁸ Id.

presumption that fit parents act in the best interest of their children, and therefore, if a parent is deemed to be fit, his or her decision not to allow visitation with grandparents, or any other third party, must be granted some “special weight” by the court.⁴⁹

Standard of Review The Court was careful to point out that its decision was limited only to the facts before it, and therefore, it was only deciding the constitutionality of subsection 1803(1)(B) of the Act which required a “sufficient existing relationship” between the grandparent and grandchild to exist in order to have standing to petition the court for visitation.⁵⁰

The Court acknowledged that because a parent’s fundamental liberty interest in directing the care, custody, and control of his or her child was implicated by the statute allowing for grandparent visitation, the Court indicated the statute would need to withstand strict scrutiny to be upheld; that is, the statute would need to be narrowly tailored to advance a compelling state interest.⁵¹

Compelling State Interest In its discussion of what constitutes a compelling state interest in cases of this sort, the Court indicated that certainly the State has a compelling interest in protecting children from harm.⁵² The Court went on to say that there are compelling interests that amount to something less than actual harm, for example, demanding school attendance and restricting child labor.⁵³ Nevertheless, the Court was guided by *Troxel* in stating that advancing the “best interest of the child” was not a sufficiently compelling state interest.⁵⁴

The Court then restated the “compelling interest” standard by suggesting a parent’s rights should only be interfered with for “the most urgent reasons.”⁵⁵ The Court concluded that a child maintaining a relationship with a grandparent who has functioned as a parent to the child is an “urgent reason” that would permit the State to interfere with a parent’s rights to restrict a child’s contact with a grandparent.⁵⁶

Narrowly Tailored Action The Court spoke at length about the structure of The Grandparent’s Visitation Act, with its multiple layers of protection against unwarranted invasions into private family matters and concluded that these three separate levels of protection provided to parents: requiring a grandparent demonstrate standing; giving careful consideration to the parents objection to the

⁴⁹ Id. at 297

⁵⁰ Id. at 299.

⁵¹ Id. at 300.

⁵² Id.

⁵³ Id. (citing the historic cases of *Prince v. Massachusetts*, 321 U.S. 158 (1944) and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)).

⁵⁴ Id. at 301.

⁵⁵ Id. (citing *Merchant v. Bussell*, 27 A.2d 816, 818 (Me. 1942)).

⁵⁶ Id. at 301.

visitation; and, granting visitation only where it would not significantly interfere with the parents' rightful authority over the child, ensured that the statute was crafted as narrowly as possible to advance the State's compelling interest or urgent reason.⁵⁷

Holding The holding has become far more important in the development of case law regarding *de facto* parents rights to contact with children than grandparents rights. Nevertheless, the strict holding of the case is that where a grandparent has functioned as a parent to a child for a significant period of time, the grandparent has standing to petition the court for visitation with the child. Furthermore, in that context, The Grandparents Visitation Act serves a compelling state interest in protecting an existing relationship between a grandparent and a child and is sufficiently narrowly tailored to advance that compelling state interest that it is not an unconstitutional infringement of the parent's fundamental right to direct the care, custody, and control of that child.⁵⁸

C. Robichaud v. Pariseau

Factual Background Ms. Pariseau had three children.⁵⁹ The children's father, Mr. Sprague, did not live with the rest of the family and was subject to a protection from abuse order that limited his contact.⁶⁰ Mr. Sprague's mother, Ms. Robichaud, had intermittent contact with her grandchildren during their lives which consisted of visits ranging from a day to a week interspersed with periods during which she had daily contact with the children.⁶¹ When Sprague was arrested for burglary, Pariseau prohibited him from having any further contact with the children.⁶² This prohibition apparently extended to Sprague's mother, who petitioned the court for visitation under The Grandparent's Visitation Act claiming standing under subsection 1803(1)(B).⁶³ Pariseau filed a motion to dismiss. Initially, the district court held a case management conference and sent the parties to mediation before addressing the merits of Pariseau's motion and dismissing the petition for lack of standing.⁶⁴

Issue The issue before the Court was whether a grandparent who had what one might characterize typical contact with her grandchildren had standing to petition the court for visitation under subsection 1803(1)(B) of The Grandparents Visitation Act.⁶⁵

⁵⁷ Id. at 302-303.

⁵⁸ Id. at 303.

⁵⁹ *Robichaud v. Pariseau*, 820 A.2d 1212 (Me. 2003).

⁶⁰ Id. at 1214.

⁶¹ Id.

⁶² Id.

⁶³ Id. at 1215.

⁶⁴ Id.

⁶⁵ Id.

Holding In order to achieve standing to petition the court for visitation under The Grandparents Visitation Act one must demonstrate a compelling interest or an urgent reason that would allow the state to interfere with a parent's fundamental right to direct the care, custody, and control of his or her child.⁶⁶ A past history of intermittent contact between grandparent and grandchild does not constitute a compelling interest or urgent reason sufficient to interfere with parents' fundamental liberty interests.⁶⁷ To achieve standing under subsection 1803(1)(B), one must demonstrate extraordinary contact between grandparent and grandchild.⁶⁸

Procedural Instruction The U.S. Supreme Court in *Troxel* and the Maine Supreme Court in *Rideout* spent significant portions of their decisions addressing the vital importance of eliminating grandparents' visitation petitions very early in the legal process where the petitions lack merit.⁶⁹ The rationale for doing this is that "the burden of litigating a domestic relations proceeding can itself be 'so disruptive of the parent-child relationship that the constitutional right of a custodial parent to make certain basic determinations for the child's welfare becomes implicated.'"⁷⁰

The Court in *Robichaud* reiterated this point, criticizing the trial court for forcing the parties to attend a case management conference and mediation before addressing the parent's motion to dismiss.⁷¹ The Court provided clear instruction for future courts that "until this preliminary standing question is resolved to allow the grandparents' action to proceed, no case management conferences and related hearings or court ordered mediation sessions should be scheduled."⁷² The Court went on to say that grandparent petitioners have no right to an evidentiary hearing on the issue of standing, but rather, must establish standing in their petition and accompanying affidavit or else be barred from proceeding further.⁷³

D. Conlogue v. Conlogue

Factual Background After the death of their son, the grandparents filed a petition under The Grandparents Visitation Act, seeking court-ordered visitation with their granddaughter.⁷⁴ The mother filed a motion to dismiss because the grandparents had not filed an affidavit pursuant to section 1803(2)(A) of the Act alleging facts that would establish their standing under section 1803(1)(B) or

⁶⁶ Id. at 1216.

⁶⁷ Id.

⁶⁸ Id. at 1215.

⁶⁹ *Troxel*, 503 U.S. at 75; *Rideout*, 761 A.2d at 302-303.

⁷⁰ *Rideout*, 761 A.2d at 303 (quoting *Troxel*, 530 U.S. at 75).

⁷¹ *Robichaud*, 820 A.2d at 1214.

⁷² Id. 1215-1216.

⁷³ Id. 1216.

⁷⁴ *Conlogue v. Conlogue*, 890 A.2d 691, 693 (Me. 2006).

1803(1)(C).⁷⁵ The mother withdrew her motion when the grandparents objected to the motion to dismiss and clarified that they were proceeding under section 1803(1)(A), which gives grandparents standing to file a petition when "[a]t least one of the child's parents or legal guardians has died" and does not require the filing of an affidavit.⁷⁶ The mother filed a new motion to dismiss attacking the constitutionality of section 1803(1)(A) and the trial court held a non-testimonial hearing and granted the motion.⁷⁷

Issue The issue raised by the mother was that section 1803(1)(A) is unconstitutional on its face and as applied under the due process and equal protection⁷⁸ clauses of the United States and Maine Constitutions.⁷⁹ The Court declined to address all of these issues and instead determined that the case could be resolved on an as-applied basis.⁸⁰ The Court's discussion was confined to the issue of whether section 1803(1)(A), as applied in this case, violated the mother's federal substantive due process rights.

Decision of the Court The Court's analysis consisted of an overview of the *Troxel* and *Rideout* cases as set forth above. The Court in *Rideout* applied strict scrutiny, which requires that the infringement be narrowly tailored to serve a compelling state interest.⁸¹ The Court in *Rideout* found a compelling state interest (urgent reason) in the preservation of an existing relationship between grandparents and grandchildren when the grandparents functioned as parents to the children for a significant period of time and the Court further found that the statute was narrowly tailored to serve this compelling interest.⁸²

The Court noted that in sharp contrast to the statute at issue in *Troxel*, the Maine Act contains multiple layers of protection before grandparent visitation can be ordered: (1) the grandparent must first establish standing; (2) the court must consider the parent's objections; and, (3) the court may order visitation only if it

⁷⁵ Id.

⁷⁶ Id.

⁷⁷ Id.

⁷⁸ As the case was decided on the Due Process argument, it was unnecessary for the Court to address the Equal Protection argument.

⁷⁹ Id. at 693-694. The Court did not address the validity of the Statute under the Maine Constitution as the mother did not argue that "the Maine Due Process and Equal Protection clauses provide greater protection than the federal counterparts. *cf. Carroll F. Look Constr. Co. v. Town of Beals*, 802 A.2d 994, 999 (Me. 2002)(stating federal and Maine Due Process rights are coextensive); *Botting v. Dep't of Behavioral & Developmental Servs.*, 838 A.2d 1168, 1176 (Me. 2003)(stating federal and Maine Equal Protection rights are coextensive)." Id. at 694.

⁸⁰ Id. at 694. The Court opined that nothing in the Act limits grandparent visitation petitions to situations where the child is in the custody of a biological or adoptive parent and to find section 1803(1)(A) is unconstitutional on its face, they would need to conclude that there are no circumstances in which it would be valid. *United States v. Salerno*, 481 U.S. 739, 745 (1987), *cited in In re Heather C.*, 751 A.2d 448, 454, n. 7 (Me. 2000). To do this, the Court would need to explore the very different issues that would be raised by a petition to require visitation against the wishes of a nonparent custodian such as a legal guardian. Id.

⁸¹ Id. at 695.

⁸² Id.

would not significantly interfere with the parent-child relationship or the parent's rightful authority over the child.⁸³

Standard of Review To determine the proper level of scrutiny in this case, the Court focused on the exact imposition on the mother's rights that is at issue. Section 1803(1)(A) does not force a parent to allow visitation.⁸⁴ Rather, it forces the parent to litigate the question of visitation, which would then be decided by the trial court (presumably after a hearing) applying the statutory criteria in section 1803(3).⁸⁵ "Whether we must apply strict scrutiny, therefore, depends on *whether being forced to litigate a claim that may result in an infringement of a fundamental right itself constitutes an infringement of that right.*"⁸⁶ The Court found that the opinions in *Troxel* and *Rideout* as well as decisions from courts in other states support the conclusion that being forced into litigation is itself an infringement of that right.⁸⁷

As stated above, the *Troxel* plurality noted how litigating a domestic relations proceeding alone can implicate a parent's fundamental liberty interests.⁸⁸ Similar concerns were voiced in *Rideout* wherein the plurality concluded that the Maine Act, as applied in that case, was narrowly tailored to serve a compelling state interest due to the fact that the grandparents were required to convince the court of their statutory standing by an initial showing of a "sufficient existing relationship" with their grandchildren, thus providing the parents with some "protection against the expense, stress, and pain of litigation."⁸⁹ The grandparents' showing that they had functioned as parents to their grandchildren gave the state a compelling interest in "providing a forum" in which the grandparents could litigate the visitation issue.⁹⁰

"Other courts have also suggested that the mere commencement of third-party visitation litigation can infringe a parent's fundamental rights, and have adopted various threshold requirements for bringing such litigation when these were not provided by statute. The Connecticut Supreme Court stated that '[w]here fundamental rights are implicated . . . , standing serves a function beyond a mere jurisdictional prerequisite. It also assures that the statutory scheme is narrowly tailored so that a person's personal affairs are not needlessly intruded upon and interrupted by the trauma of litigation.' *Roth*, 789 A.2d at 442. To save the constitutionality of the Connecticut statute, which contained no limits on standing, the court added a requirement that "any third party, including a grandparent . . . , seeking visitation must allege and establish a parent-like relationship as a

⁸³ Id.

⁸⁴ Id. at 696.

⁸⁵ Id.

⁸⁶ Id.

⁸⁷ Id.

⁸⁸ Id.

⁸⁹ Id. at 696-697.

⁹⁰ Id. at 697 (citing *Rideout*).

jurisdictional threshold in order . . . to pass constitutional muster . . ." *Id.* at 443 (emphasis added). The Massachusetts Supreme Judicial Court similarly adopted a narrowing construction of the Commonwealth's grandparent visitation statute in response to a constitutional challenge. See *Blixt*, 774 N.E.2d at 1060. The court held that, because the usual requirements of notice pleading do not sufficiently protect a parent's fundamental rights from the burden of potentially unwarranted litigation, a grandparent seeking visitation must make an initial showing of facts that would justify a visitation order by filing a complaint that is either detailed and verified or accompanied by a detailed affidavit. See *id.* at 1066; accord *Daniels v. Daniels*, 885 A.2d 524, 530-31 (N.J. Super. Ct. App. Div. 2005). The New Jersey Appellate Division shared the same concern that "the litigation itself is a burden on the parent's substantive due process rights. One can easily imagine circumstances in which that burden would be grave indeed." *Wilde v. Wilde*, 775 A.2d 535, 544 (N.J. Super. Ct. App. Div. 2001). The court adopted a requirement that grandparents could not commence litigation until they had made substantial efforts to repair their relationship with the parent and their request for visitation had been denied with finality. See *id.* at 545.⁹¹

The Court held that forcing parents to defend against a claim for grandparent visitation is itself an infringement of their fundamental right to make decisions concerning the care, custody, and control of their children and such an infringement is subject to strict scrutiny, and must be narrowly tailored to serve a compelling state interest.⁹² The Court proceeded to answer the question of whether section 1803(1)(A), granting the grandparents in this case standing to petition for visitation with their granddaughter because her father had died, serves a compelling state interest, and if so whether it is narrowly tailored to advance that purpose.

Compelling State Interest The Court indicated that the question of the state interest are a spectrum with "the threat of harm to a child" on one end and "something more than the best interest of the child" on the other end.⁹³ Citing *Rideout*, the Court stated the "State's *parens patriae* interest can be compelling in this context when, even in the absence of a threat of harm, there are "urgent reasons" that may justify court-ordered grandparent visitation.⁹⁴

Urgent Reasons Illustrated Maintaining a relationship between children and grandparents who had acted as the children's parents for a significant period of time was such an urgent reason.⁹⁵ Citing *Robichaud v. Pariseau*, the Court noted that where a grandmother's affidavit pursuant to section 1803(1)(B) had alleged facts only amounting to "intermittent contact" with her grandchildren,

⁹¹ *Id.* at 697.

⁹² *Id.*

⁹³ *Id.* at 698.

⁹⁴ *Id.*

⁹⁵ *Id.* (citing *Rideout*).

rather than the "extraordinary contact", the District Court was correct to dismiss the petition without holding an evidentiary hearing because the grandmother did not satisfy the requirement to make an initial showing of urgent reasons.⁹⁶

Parental Protection from Suit "When a grandparent claims standing based on a "sufficient existing relationship" or an effort to establish one, the Act provides a summary procedure for testing that claim that allows the court to examine the specific facts of the case and decide whether urgent reasons have been shown that justify imposing on the parent the burdens of litigation. No such procedure exists when the grandparent claims standing under section 1803(1)(A) because one of the child's parents has died. In effect, the Act adopts a per se rule that the fact of a parental death in itself justifies imposing on the surviving parent the burden of litigation that, as we have said above, itself infringes on the parent's fundamental rights and may result in court-ordered visitation that more significantly infringes those rights."⁹⁷ The Court concluded that the fact of a parental death *standing alone* cannot be an urgent reason for a court's interference in family life over the objections of a custodial parent like Patricia Conlogue.⁹⁸ "Nothing in the unfortunate circumstance of one biological parent's death affects the surviving parent's fundamental right to make parenting decisions concerning their child's contact with grandparents."⁹⁹

"When the grandparents proceed under section 1803(1)(A), the court has no way to know of such facts until it holds an evidentiary hearing, and its ability to deny visitation at that point in the proceedings comes too late to fully protect the fundamental rights of the surviving parent. The possibility of an after-the-fact award of attorney fees is an insufficient remedy, in part because the parent may be in no position to pay an attorney up front and then hope for reimbursement, but also because the burdens of litigation are not solely financial, but include various forms of "pressures and stress" that can pose a real threat to family well-being."¹⁰⁰

Illustration of What is Not a Compelling State Interest The Court set forth examples of facts that would not warrant litigation over visitation: (1) the deceased parent may have had no role in the child's life, so that the death does little to alter the child's situation; or (2) a widow or widower may have wonderful parenting support from relatives and friends, so that the children are in no sort of urgent circumstances, yet lack the financial resources to defend against a visitation petition by wealthier grandparents.¹⁰¹

⁹⁶ Id. (citing *Robichaud*, 820 A.2d at 1215-16).

⁹⁷ Id. (citing 19-A M.R.S. §§ 1803(1)(B)-(C), (2)(A)-(C)).

⁹⁸ Id.

⁹⁹ Id. (citing *Kyle O. v. Donald R.*, 102 Cal. Rptr. 2d 476, 486 (2000)).

¹⁰⁰ Id. at 698-699 (citing *Rideout*, 761 A.2d at 310 (dissenting opinion)); see also, *Rideout*, 761 A.2d at 302 (noting that litigation causes expense, stress, and pain).

¹⁰¹ Id.

Providing a forum for children who have been traumatized by the death of a parent to maintain or establish relationships with their grandparents may be in the best interest of the child, but protecting the best interest of a child is not itself a compelling state interest.¹⁰² The Court noted “in some cases there may even be “urgent reasons” to maintain or establish such a relationship, which would suffice in those cases to demonstrate a compelling interest. But given the burden that section 1803(1)(A)'s automatic grant of standing imposes on the surviving parent in *every* case, we do not believe that there can be a compelling interest in relieving grandparents of the modest burden of making an initial showing of the urgent reasons that justify their standing.”¹⁰³

The Court left the door partially open for parents of the deceased parent who have functioned as parents to the grandchild or are uniquely situated to protect the child from harm but the Court made clear that it could not say that the state interest in maintaining such connections is so compelling that it must be recognized in every case, regardless of the particular facts.¹⁰⁴

Holding The death of one parent in itself is not an urgent reason that justifies forcing the surviving parent into litigation under the Act.¹⁰⁵ “Section 1803(1)(A) thus fails to serve a compelling state interest when it is applied to allow the deceased parent's family to litigate visitation over the objection of a custodial parent like the mother in this case. Because there is no compelling state interest, the Court did not consider whether section 1803(1)(A) is narrowly tailored. In the absence of a compelling state interest, forcing the mother to defend against the grandparents' visitation petition for the sole reason that her daughter's father is dead would violate her substantive due process rights. Accordingly, the District Court did not err in dismissing the petition.”¹⁰⁶

V. CONCLUSIONS

Although this area of law continues to evolve, the courts have made clear that court-ordered grandparent visitation involves interference with a fundamental right of parents. To satisfy strict scrutiny, it must be shown that a compelling state interest is at stake and that the statute is narrowly tailored to address the specific interest. It is yet to be decided whether the standard of review would be the same in a case in which the custodian of the child was not a parent, and thus, not entitled to the same level of constitutional protection. The Court has recognized non-parent's rights regarding a child in the *de facto* parenting realm. It is conceivable that the courts will determine that *de facto* parents are entitled to the same standard of review.

¹⁰² Id. at 699.

¹⁰³ Id.

¹⁰⁴ Id.

¹⁰⁵ Id.

¹⁰⁶ Id.

In Maine, grandparents must satisfy the threshold requirement that urgent reasons exist in order to petition the court for visitation. That is, the grandparents must show that they have a sufficient existing relationship with the grandchild. The Court has provided guidance on this point through *Rideout* and *Robichaud*. In *Rideout*, the Court held a grandparent acting as a parent for a grandchild qualified as a substantial existing relationship such that urgent reasons exist to maintain this relationship.¹⁰⁷ In *Robichaud*, the Court ruled a grandparent that has intermittent contact with a grandchild that was not extraordinary did not satisfy the threshold requirement.

Title 19-A M.R.S.A. §1803(1)(C) has not heretofore been tested, it would likely need to be a pattern of significant attempts to develop a relationship to satisfy constitutional muster. It would be difficult for the Court to find a compelling state interest to entertain a suit in such a situation unless the grandparent was “uniquely situated to protect the child from harm.”¹⁰⁸

Practitioners must note that the affidavit that accompanies the petition is likely to be the single most important document to be filed. It must set forth factually, and with specificity, the contact and relationship that the grandparents have had with the grandchild. As a practical matter, parents who allow regular contact (not extraordinary), probably insulate themselves from suit. For in such a situation, the grandparents’ affidavit would be similar to *Robichaud*. Normal grandparent relationships are not sufficient to allow the State, through the courts, to intervene into a fit parent’s decision making regarding his or her child.

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¹⁰⁷ It is important to note that even in *Rideout*, the grandparents who served as parents were awarded only one weekend per month by the District Court.

¹⁰⁸ *Conlogue*, 890 A.2d at 699.