Grandparents' Rights In Texas - Update

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In past years, the right of a grandparent to have access to a grandchild against the parent's wishes has been unclear under Texas law. Except for the rare family feud that keeps grandchildren and grandparents apart, grandparent access cases usually come about when the grandparent's child has died or has had his or her parental rights terminated. In such cases, the grandparents seek to retain access to their grandchildren, but the remaining parent can be cautious of the grandparents, especially in termination cases, and often want to move on to a new life. In either event, remarriage by the surviving parent followed, at times, by a stepparent adoption can create even greater distance between grandparents and the remaining parent.

On June 5, 2000, the United States Supreme Court decided a grandparent access case called *Troxel v. Granville,* 530 U.S. 57 (2000). *Troxel* addressed what rights grandparents have to maintain a relationship with their grandchildren after their child has died and over the surviving parent's objection. The decision in *Troxel* - consisting of a plurality opinion, two concurrences and three dissents - further muddied an already unclear are of the law. The only clear holding from *Troxel* was that a "fit" parent had the right to decide whether a child's grandparents could have access to the child.

In the years following *Troxel,* Texas appellate courts struggled to apply the case, but the Texas Supreme Court did not address *Troxel* until its brief, per curiam opinion in *In re: Mays-Hooper,* 189 S.W.3d 777 (Tex. 2006) (per curiam). In that case, the Court applied *Troxel* to Texas' old grandparent rights statutes but declined to analyze them more extensively because the 2005 legislature had amended them. More recently, the Court considered the amended grandparent rights statutes, Tex. Fam. Code § 153.431 *et seq.,* in *In re: Derzapf,* 2007 Tex. LEXIS 270, 50 Tex. Sup. 563 (2007) (per curiam), where the Court conditionally granted mandamus because the trial court had abused its discretion by requiring grandparent access.

These two Texas Supreme Court cases have greatly clarified the Texas grandparent rights statutes, both substantively and procedurally. These clarifications are summarized in the

following points:

1. If It Looks Like a Duck . . . In *Mays-Hooper,* the Court found *Troxel's* facts "in all relevant respects the same as those here." According to *Mays-Hooper,* a plurality of the *Troxel* bench found the Washington visitation statute "unconstitutional as applied, pointing to three factors: (1) the child's mother was not unfit, (2) her decisions about grandparent access were given no deference, and (3) she was willing to allow some visitation." Because the facts in *Mays-Hooper* were "virtually the same" as in *Troxel,* "the judgment must be the same, too." This meant that the trial court's order allowing grandparent access could not stand. The lesson to be learned? If the facts in a given grandparent access case are like *Troxel* or *Mays-Hooper,* then grandparent access cannot be imposed.

2. A Little Possession Prevents More. In *Troxel* and *Mays-Hooper,* an important fact mentioned by both courts was that the mother had permitted the grandparents "some" visitation. In *Troxel,* that visitation consisted of one day per month; in *Mays-Hooper,* the Court stated only there there was "no evidence that [the mother] intended to exclude [the grandparent's] access completely." Although neither *Troxel* nor *Mays-Hooper* so states, one might very well reason that a parent who shuts off grandparent access significantly impairs a child's physical health or emotional well-being. Under *Troxel* and *Mays-Hooper,* a parent who allows "some" access will prevail in a grandparents' access suit. Only a parent who disallows access completely risks a court order requiring access.

3. **Evidence of Significant Impairment Must Be Stout.** As amended, Tex. Fam. Code § 153.433(2) permits grandparent access orders over the parent's objection only if denial of access "would significantly impair the child's physical health or emotional well-being." In *Derzapf,* the Court emphasized how tough this standard is. An expert psychologist testified that cutting off grandparent access could be "harmful" to one of the children. He also said that "it was in the children's best interest that they have some contact with their grandparents." Finally, the expert "noted the children's 'sadness' at being unable to see their grandparents," but he conceded that the feelings of sadness "did not rise to the level of a significant emotional impairment." Emphasizing the word "significant," the *Derzapf* Court concluded that there had been no showing that depriving the children of grandparent access would significantly impair the children's physical health or emotional well-being.

4. Mandamus Can Be Appropriate Relief. Except in termination cases - which are not defined as suits affecting the parent-child relationship in Texas - there is no right of accelerated appeal from a court order granting or denying possession or access. But *Mays-Hooper* and *Derzapf* both have shown that mandamus relief is appropriate in cases where a trial court has ordered grandparent access. In *Mays-Hooper,* the Court did not struggle with whether the extraordinary remedy of mandamus might be appropriate because both parties agreed that the remedy should apply. The *Derzapf* Court formalized the availability of mandamus relief for grandparent cases:

> The temporary orders here divest a fit parent of possession of his children, in violation of *Troxel's* cardinal principle and without overcoming the statutory presumption that the father is acting in his children's best interest. Such a divestiture is irremediable, and mandamus relief is therefore appropriate.

This reasoning does not, however, support the conclusion that stymied grandparents could invoke mandamus relief. To the contrary, the *Derzapf* Court emphasized that "grandparents' rights are generally subordinate to a parent's."

5. Fit Parents Rule. In *Troxel,* Justice O'Connor's plurality opinion stated: "So long as a parent adequately cares for his or her children (*i.e.,* is fit), there will normally be no reason for the State to inject itself into the private realm of the family . . . ." *Mays-Hooper* quoted this language, as did *Derzapf.* Obviously, the Texas Supreme Court has taken this language to heart.