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All the Better To Eat You With, My Dear: The Need for a Heightened Harm Standard in Utah's Grandparent Visitation Statute

I. INTRODUCTION

In the classic children's folktale "Little Red Riding Hood,"¹ a young girl was deceived by a wolf posing as her grandmother. The child willingly approached the disguised wolf—who ultimately ate her—because she believed the wolf was her grandmother, someone she trusted would never harm her.² The early proliferation and popularity of grandparent visitation statutes was premised on a similar assumption: court-ordered grandparent visitation would never harm grandchildren.³ Experience has shown, however, that court-ordered grandparent visitation against the parent's wishes may be like a wolf in disguise because such visitation is sometimes the product of petitions by grandparents willing to act in ways that harm their grandchildren and because court-ordered visitation may be ultimately harmful even to children ordered to visit with otherwise benevolent grandparents.⁴

1. See Andrew Lang, *Little Red Riding Hood*, in *THE BLUE FAIRY BOOK* 51, 51 (Andrew Lang ed., Dover Publ'ns, Inc. 1965) (1889).

2. *Id.*

3. See Joan Catherine Bohl, *Grandparent Visitation Law Grows Up: The Trend Toward Awarding Visitation Only when the Child Would Otherwise Suffer Harm*, 48 *DRAKE L. REV.* 279, 281 (2000).

4. Laurence C. Nolan, *Beyond Troxel: The Pragmatic Challenges of Grandparent Visitation Continue*, 50 *DRAKE L. REV.* 267, 269 (2002). For example, court-ordered grandparent visitation always "disrupts the normal routine of parents and their children," and this disruption can range from minor to substantial, even perhaps involving cross-country airline travel or missed school and extra-curricular activities. *Id.* at 281. Overnight visitation and frequent changes in daily routines and discipline styles are particularly problematic for young children. *Id.* at 283. For parents who must work throughout the week, weekend grandparent visitation interferes with the only significant uninterrupted time available for the parent-child relationship. *Id.* at 282. This is especially true for working custodial parents whose children have weekend visitation orders with the noncustodial parent as well as with grandparents. In fact, grandparent visitation may be a tool used by the noncustodial parent to obtain more visitation. *Id.* Grandparents may expose children to people and/or activities that a parent believes will be harmful to the children. See *id.* at 280. Even if such exposures are not inherently harmful, the parent loses the ability to decide with whom the children should associate and what activities are in the children's best interest. Ultimately, the parent must deal

In Utah, there is no common law right of grandparent visitation; however, the Utah legislature has authorized statutory grandparent visitation since 1975.⁵ Utah's current Grandparent Visitation Statute⁶ represents a clash between parents, who have a traditionally protected autonomy to make decisions regarding the care, custody, and control of their children, and grandparents, who by political fiat may now enlist the power of the state to override parental autonomy and obtain and enforce court-ordered visitation rights with their grandchildren.⁷ In the resultant controversy, both parties defend their positions with the ostensible motive of protecting the best interests of the children involved. There is no doubt that out-of-

with the consequences of these exposures. Scheduling issues, rescheduling missed visits, and parental input about what occurs during grandparent visits are especially difficult to address between parents and grandparents already so hostile to each other that they are in court fighting over the children. *Id.* at 273. Children are inevitably exposed to these conflicts between parents and grandparents, notwithstanding court orders that adults keep these disputes to themselves. *Id.* at 284. Children may be harmed by the loss of household income that a parent must expend to defend against the grandparents' visitation lawsuit; this expense may be so burdensome that many parents may not be able to mount a defense. *Id.* at 272. Finally, children may be harmed by the sanctions courts can impose on their parents while enforcing grandparent visitation, such as make-up visitation, additional parental time and household income expended on court-ordered counseling or mediation, attorney's fees, fines or payment of the grandparents' attorney's fees, or even incarceration. *Id.* at 277; *see also* Stephen A. Newman, *Grandparent Visitation Claims: Assessing the Multiple Harms of Litigation to Families and Children*, 13 B.U. PUB. INT. L.J. 21, 23 (2003) (pointing out that courts, in almost all cases, hear grandparent visitation disputes involving families whose relationships are fundamentally broken, appraising the "negative consequences of intergenerational litigation and the harms caused by state-coerced grandparent visitation in the context of the malfunctioning extended family," and arguing that a very high degree of deference be given to the parent's visitation decision to prevent harm to children); Theresa H. Sykora, *Grandparent Visitation Statutes: Are the Best Interests of the Grandparent Being Met Before Those of the Child?*, 30 FAM. L.Q. 753, 761 (1996) (describing studies that analyze various forms of grandparent-grandchild interactions, arguing that courts often fail to appropriately analyze the child's best interest in light of the harms visitation orders may cause, and concluding that a parent's fundamental right to make decisions for their children must include even the right to be temporarily wrong about a visitation decision).

5. *See* UTAH CODE ANN. § 30-3-5 (1953) (amended 1975); *see also* Family Court Act, ch. 72, 1969 Utah Laws 327.

6. UTAH CODE ANN. § 30-5-2(1)-(2) (Supp. 2005).

7. *See* Joan C. Bohl, *The "Unprecedented Intrusion": A Survey and Analysis of Selected Grandparent Visitation Cases*, 49 OKLA. L. REV. 29, 31 (noting the "impressive political cloud wielded by a graying America" that has resulted in broad grandparent visitation statutes enforceable through "the awesome power of the state"); Michael K. Goldberg, *Over the River and Through the Woods—Again: The New Illinois Grandparent Visitation Act*, 29 S. ILL. U. L.J. 403, 409 (2005) (quoting one U.S. representative as saying that "[i]t is a well known fact that seniors are the most active lobby in this country, and when it comes to grandparents there is no one group more united in their purpose").

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wedlock births, increased divorce rates, and other factors are changing the family structures in which children are raised. This may result in children having, for at least some period of time, meaningful parent-like interactions with extended family members upon which the children come to rely.⁸ Depending on the circumstances, these relationships may be deserving of court protection. But in other cases, the controversy represents an unwarranted attempt by grandparents to forcibly infringe upon a parent's fundamental right and obligation to direct a child's upbringing, or it represents an intrusion into a purely intra-familial dispute in which courts have historically declined to intervene.⁹ Because legitimate claims to safeguard children exist alongside spurious demands, a state is at times justified in the exercise of its *parens patriae*¹⁰ power to override grandparent visitation decisions made by parents. However, concerns over the constitutionality of Utah's Grandparent Visitation Statute, both facially and as applied, are also justified because great harm to children and parents may result from abuse of state power where the state's *parens patriae* interest is not implicated.

Since its inception, Utah's Grandparent Visitation Statute has undergone numerous revisions and amendments.¹¹ Although two of the Statute's amendments¹² were direct attempts to comply with state and federal constitutional mandates,¹³ ongoing constitutional controversy has plagued the Statute.¹⁴ This is partly due to the

8. See Lawrence Schlam, *Standing in Third-Party Custody Disputes in Arizona: Best Interests to Parental Rights—And Shifting the Balance Back Again*, 47 ARIZ. L. REV. 719, 720 (2005).

9. See Laurence C. Nolan, *Honor Thy Father and Thy Mother: But Court-Ordered Grandparent Visitation in the Intact Family?*, 8 BYU J. PUB. L. 51, 53 & n.10 (1993).

10. Literally means "parent of his or her country"; a doctrine authorizing state intervention on behalf of those unable to protect themselves. BLACK'S LAW DICTIONARY 1144 (8th ed. 2004).

11. See Pilot Program Repeal Clean-Up, ch. 129, 2005 Utah Laws 1215; Visitation Rights of Grandparents, ch. 85, 2002 Utah Laws 298; Grandparents Visitation Rights, ch. 265, 2000 Utah Laws 1107; Grandparents Visitation Rights, ch. 104, 1998 Utah Laws 361; Grandparents Visitation Rights, ch. 257, 1995 Utah Laws 834; Visitation Rights of Grandparents and Other Immediate Family Members, ch. 152, § 2, 1993 Utah Laws 593; Grandparents' Rights Extended, ch. 175, 1992 Utah Laws 676; Grandparents' Visitation Rights, ch. 123, 1977 Utah Laws 566.

12. See Visitation Rights of Grandparents, ch. 85, 2002 Utah Laws 298; Grandparents Visitation Rights, ch. 104, 1998 Utah Laws 361.

13. See *Troxel v. Granville*, 530 U.S. 57, 70 (2000); *Campbell v. Campbell*, 896 P.2d 635, 642 (Utah Ct. App. 1995).

14. See *Uzelac v. Thurgood (In re Estate of S.T.T.)*, 2006 UT 46, 144 P.3d 1083.

United States Supreme Court's splintered opinion in *Troxel v. Granville*,¹⁵ which left substantial leeway to state legislatures to draft grandparent visitation statutes within its constitutional confines. The controversy is also partly due to ongoing social transformation about the definition of "family" and the resulting legislative and judicial uncertainty regarding the amount of protection that should be afforded to meaningful, non-parental relationships with children.

The recent Utah Supreme Court decision *Uzelac v. Thurgood (In re Estate of S.T.T.)*¹⁶ affirmed the constitutionality of Utah's current Grandparent Visitation Statute because the Statute complied with the due process requirements mandated in *Troxel v. Granville*.¹⁷ Simultaneously, the decision acknowledged that the current statute, although constitutional, is flawed, confusing, and difficult for courts to apply.¹⁸ The Utah Supreme Court called for greater legislative clarity regarding the multiple factors courts must consider before making an award of grandparent visitation.¹⁹ Specifically, the court encouraged the Utah legislature to issue guidelines on the weight to be given to each of the Statute's several factors and attempted to aid the legislature by grouping these factors into three categories.²⁰ However, the court's suggestions for revising the Statute, as well as its as-applied analysis in *Thurgood*, failed to address important factual and policy considerations that the legislature should explore prior to amending the Statute.

This Comment argues that Utah's Grandparent Visitation Statute should be amended to require grandparents to show, as a threshold consideration, that a parent is unfit to make a visitation decision that is in the children's best interest. Alternatively, grandparents should be required to show that the children's health, safety, and welfare would be harmed more without a visitation order than with a visitation order. If grandparents can make this showing, the court should then examine whether the amount and type of visitation preferred by the parent is reasonably suited to prevent the harm that would be caused without a visitation order. If it is, the

15. 530 U.S. 57 (2000). *Troxel v. Granville* is the Supreme Court's only grandparent visitation case to date.

16. 2006 UT 46, 144 P.3d 1083.

17. *Id.* ¶¶ 26–36.

18. *Id.* ¶ 36.

19. *Id.*

20. *Id.* ¶¶ 26–35.

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court should defer to the parent. Requiring grandparents to make a heightened showing that a visitation order would prevent harm to the child is the most appropriate way to balance the competing needs and claims of children, parents, and grandparents.

In support of these propositions, Part II of this Comment considers the enactment and early history of Utah's Grandparent Visitation Statute.²¹ Part III discusses the first constitutional challenge to the Statute in *Campbell v. Campbell*, the resulting 1998 amended Statute cited favorably in *Troxel v. Granville*, and the poorly timed 2000 amendment that passed while *Troxel* was pending before the U.S. Supreme Court. Part IV summarizes the *Troxel* holdings, addresses their incorporation into Utah's 2002 and 2005 amendments, and analyzes the remaining precedential value of *Campbell* prior to *Uzelac v. Thurgood (In re Estate of S.T.T.)*. Part V introduces Utah's two post-*Troxel* grandparent visitation cases—*Pasquin v. Souter*²² and *Thurgood*—and explores the implications of the court's recent decision in *Thurgood*. Finally, Part VI argues that amending Utah's Grandparent Visitation Statute to require a heightened showing of harm better balances the competing interests in grandparent visitation cases. Part VI also briefly summarizes recent post-*Troxel* interpretations of state grandparent visitation statutes by other states and, in particular, the approaches taken by states in the Rocky Mountain area. Part VII provides a brief conclusion.

II. THE ENACTMENT AND EARLY AMENDMENT HISTORY OF UTAH'S GRANDPARENT VISITATION STATUTE

The origin and history of Utah's Grandparent Visitation Statute must be examined to provide needed context for asserting that the Statute should incorporate a heightened harm standard. Because the first reference to visitation for grandparents occurred in the context of a Utah Code section addressing divorce proceedings, the likely purpose of the early statute was to protect children from the harm of losing significant extended family relationships in an increasingly divorce-ridden society. This Part will show how both the legislature

21. The Statute's provisions regarding adoption will not be addressed as they are beyond the scope of this Comment.

22. *Pasquin v. Souter*, No. 970910481 (Utah 3d Dist. Ct. July 8, 2001) (mem.), *aff'd mem.*, 2003 UT App 10.

and the courts have had difficulty settling on the principles to apply to the visitation doctrine during its early development.

By the time the first constitutional challenge to Utah's Grandparent Visitation Statute arose in 1995, visitation was largely an adult-centered right that imposed few or no obligations on the individuals awarded visitation. This led to grandparent visitation decisions²³ that were at odds with fundamental parental rights and that were arguably far removed from the Statute's purpose of protecting children from the harm of losing significant extended family relationships.

A. The 1975 Precursor to, and the 1977 Enactment of, the Utah Grandparent Visitation Statute

In Utah, statutory "grandparent visitation" began as a segment of the Utah Code provision dealing with divorce proceedings in a 1975 amendment to the 1969 Family Court Act.²⁴ Prior to 1975, the term "visitation" was completely absent from any Utah Code section regarding children. The 1975 amendment's provision for child custody determinations upon divorce²⁵ gave courts jurisdiction over "visitation rights of parents, grandparents and other relatives" while requiring that courts "take into consideration the welfare of the child."²⁶

Although this provision was an extension of the court's statutory jurisdiction over children upon divorce and not a per se "grandparent visitation statute," at least one case reveals that as early as 1976 the Utah Supreme Court was aware of, and approved, the early stages of the national grandparent visitation trend.²⁷ In *Wilson v. Family Services Division*, which was not a grandparent visitation case,²⁸ a grandmother was granted a hearing to determine her

23. See, e.g., *Campbell v. Campbell*, 896 P.2d 635 (Utah Ct. App. 1995).

24. See UTAH CODE ANN. § 30-3-5 (1953) (amended 1975); see also Family Court Act, ch. 72, 1969 Utah Laws 327.

25. Family Court Act, ch. 72, 1969 Utah Laws 327 (codified as amended at UTAH CODE ANN. § 30-3-5(5) (2004)).

26. Act to Provide the Court with the Discretion to Award Visitation Rights to Grandparents, ch. 81, 1975 Utah Laws 331, 332 (codified as amended at UTAH CODE ANN. § 30-3-5(5)(a) (2004)).

27. *Wilson v. Family Servs. Div.*, 554 P.2d 227 (Utah 1976). This may have been a judicial herald of approval for grandparent visitation legislation in Utah.

28. See *id.* at 230-31.

suitability to adopt her grandchild after the parental rights of the child's parents had been terminated.²⁹ In reaching its decision, the Utah Supreme Court averred in dicta that “[t]he affection of a grandparent can safely be said to be no less in depth than parental affection,”³⁰ and the court favorably cited a Wisconsin case recognizing a “grandparent’s right of visitation.”³¹

One year later in 1977, the legislature separately enacted what is known today as the Grandparent Visitation Statute, codified as section 30-5-2 of the Utah Code.³² Grandparents’ visitation rights under the divorce proceedings section of the Family Code Act remained intact.³³ With this enactment, the legislature expanded grandparents’ standing to bring a visitation petition to include grandparents whose child—the parent of the grandchild—was dead or living out of state after divorce or legal separation.³⁴ The 1977 enactment also changed the standard for visitation decision-making from the “welfare of the child” standard to the “best interests” standard and gave district courts authority to “grant grandparents reasonable rights of visitation to grandchildren, if it was in the best interest of the grandchildren.”³⁵

These early statutes represented an attempt to protect children from at least some of the harmful effects of a parent’s death or divorce by granting grandparents the ability to petition for visitation in appropriate cases so that, when necessary, some degree of extended family continuity could be maintained in the children’s lives.

29. *Id.* at 228–29.

30. *Id.* at 230 (quoting Commonwealth *ex rel.* Stevens v. Shannon, 164 A. 352, 354 (Pa. Super. Ct. 1933)).

31. *Id.* (citing Weichman v. Weichman, 184 N.W.2d 882 (Wis. 1971)).

32. Grandparents’ Visitation Rights, ch. 123, 1977 Utah Laws 566.

33. UTAH CODE ANN. § 30-3-5(5)(a) (2004).

34. Grandparents’ Visitation Rights, ch. 123, 1977 Utah Laws 566.

35. *Id.* Originally, the “best interest” standard was vaguely defined and could include anything and everything the court deemed relevant. Although some statutes and courts have attempted to outline factors to consider under a best interests analysis, *see, e.g.*, Uzelac v. Thurgood (*In re Estate of S.T.T.*), 2006 UT 46, ¶ 43 n.9, 144 P.3d 1083, and the weight to be given to these factors, the standard is still quite vague and is often weighted according to the judge’s own background and perceptions. *See* Jeff Atkinson, *The Current Face of Best Interests*, 26-WTR FAM. ADVOC. 18 (2004).

*B. Early Indirect Interpretations Disconnecting Visitation Rights
with a Child from Obligations to the Child*

There is no record of appellate-level litigation over the Grandparent Visitation Statute for many years; in fact, in 1991 the Utah Court of Appeals in *Kasper v. Nordfelt* asserted that no case had yet construed the fourteen-year-old Grandparent Visitation Statute.³⁶ However, early cases that generally interpreted visitation doctrine impacted the interpretation of the Grandparent Visitation Statute by disconnecting visitation rights with the child from parent-like obligations to the child.³⁷ The effect of these visitation interpretations has been an increased emphasis on the rights and desires of adults rather than a focus on preventing harm to children. These changes have contributed to the current need for the Utah legislature to refocus the Grandparent Visitation Statute on preventing harm to children by implementing a heightened harm standard.

Early in the evolution of the visitation doctrine, both the legislature and the courts favored imposing parent-like obligations and duties prior to granting a party standing to petition for visitation privileges.³⁸ In *Gribble v. Gribble*, “consideration [of] the welfare of the child” influenced the court to consider the visitation rights of stepparents—a class of persons traditionally and statutorily without standing to petition for visitation.³⁹ The court remanded for a hearing to determine three issues: first, whether the stepfather stood in loco parentis to the stepchild; second, whether it was in the child’s best interest to have visitation with the stepfather; and third, whether any visitation granted to the stepfather should be made conditional upon *accepting the responsibilities incurred by enjoying the “rights of a natural parent.”*⁴⁰ Later, the Utah legislature imposed on stepparents a legal support obligation for stepchildren and coupled this obligation with standing to seek visitation rights in the best interest of the child.⁴¹ Together, *Gribble* and the stepparent

36. 815 P.2d 747, 750 (Utah Ct. App. 1991).

37. See *In re J.W.F.*, 799 P.2d 710, 714–15 (Utah 1990).

38. See UTAH CODE ANN. § 30-3-5 (2004); UTAH CODE ANN. § 78-45-4.1 (1987); *Gribble v. Gribble*, 583 P.2d 64, 65 (Utah 1978).

39. 583 P.2d 64, 66 (Utah 1978) (citing UTAH CODE ANN. § 30-3-5 (1975)).

40. *Id.* at 68 (emphasis added).

41. UTAH CODE ANN. § 78-45-4.1 (1987).

legislation indicate early support for the idea that parent-like obligations to the child were inseparable from visitation rights and privileges.⁴²

However, a few years later in *In re J.W.F.*,⁴³ the Utah Supreme Court moved away from a visitation doctrine that combined legal support obligations with standing to petition for a custody or visitation order.⁴⁴ The court cited Utah's Grandparent Visitation Statute as an example of standing for visitation being based on "status or relationship to the child" rather than on the existence of legal obligations and responsibilities toward the child.⁴⁵ As a result, the court determined that visitation petitions by "[t]hose who have legal *or personal* connections with the child" should be heard on the basis of the child's best interest.⁴⁶ Since then, Utah's visitation philosophy has separated parent-like obligations from visitation rights, following a national trend that emphasizes individual adult rights over obligations toward children—often with detrimental results.⁴⁷

The effect of this trend encourages visitation petitioners to view themselves as having status equal to all other persons with whom a child has a relationship, including a child's own biological parents.⁴⁸

42. The Utah Supreme Court quoted *Gribble* in its recent *Thurgood* case: "The [grandparent visitation statute] amendment reflected the 'legislative intent to protect the relationships which affect the child whose parents are being divorced, and to be sensitive to the fact that relationships beyond those of parent-child may be important enough to protect vis-à-vis visitation.'" *Uzelac v. Thurgood (In re Estate of S.T.T.)*, 2006 UT 46, ¶ 16, 144 P.3d 1083 (quoting *Gribble*, 583 P.2d at 66). However true this may be, this language is dicta and should not be used in support of a broad interpretation of the grandparent visitation statute. See *Gribble*, 583 P.2d at 66. *Gribble* was limited to addressing visitation for a stepparent who may have engaged in significant parenting functions over a period of time on behalf of the child and was reviewed in the context of a remand to the trial court to decide whether the imposition of parent-like obligations on this stepfather should be inseparable from granting him standing to seek visitation. *Id.* at 68.

43. 799 P.2d 710 (Utah 1990).

44. *Id.* at 715.

45. See *id.*

46. *Id.* at 716 (emphasis added).

47. See generally Lynn D. Wardle, *Parenthood and the Limits of Adult Autonomy*, 24 ST. LOUIS U. PUB. L. REV. 169 (2005); Lynn D. Wardle, *The Use and Abuse of Rights Rhetoric: The Constitutional Rights of Children*, 27 LOY. U. CHI. L.J. 321, 332-34 (1996).

48. See, e.g., Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives when the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 882 (1984) (arguing that "the child's need for continuity in intimate relationships demands that the state provide the opportunity to maintain" such "relationships with adults outside of nuclear families" (emphasis added)).

As this philosophy took hold, it was not surprising that the number of grandparent visitation lawsuits increased nationwide as some grandparents began to feel entitled to visitation rights even over parents' objections.⁴⁹ Unfortunately, this trend has further taken the focus of grandparent visitation statutes away from preventing harm to children.

*C. Expansion and Retraction: The 1992, 1993, and 1995
Amendments*

For unknown reasons in the early 1990s, the Utah legislature first expanded and then retracted visitation rights available under the Grandparent Visitation Statute. Whether or not this statutory fiddling represented purposeful legislative efforts to experiment with various approaches to the Statute, by 1995 the legislature had rejected a more expansive visitation approach.

In 1992, the Statute was amended to extend standing to seek grandparent visitation to all grandparents, not just those whose child had died or undergone divorce or legal separation.⁵⁰ Next, in 1993 "other immediate family members," in addition to all grandparents, were granted standing to seek visitation rights with children.⁵¹ Also, parents became subject to the same penalties for noncompliance with court-ordered grandparent visitation that applied to parents who failed to comply with visitation orders with each other under the divorce statute.⁵² However, in 1995 these expansions were retracted, and once again, standing under the Grandparent Visitation Statute was restricted to grandparents whose child had died or was deemed a noncustodial parent following divorce.⁵³

49. See, e.g., Karen Czapanskiy, *Grandparents, Parents and Grandchildren: Actualizing Interdependency in the Law*, 26 CONN. L. REV. 1315, 1350-51 (1994) (suggesting that some grandparents come to consider access to their grandchildren as a competition with the child's parents that they have an equal right to win).

50. Grandparents' Rights Extended, ch. 175, 1992 Utah Laws 676.

51. Sanctions for Denial of Child Visitation, ch. 152, § 2, 1993 Utah Laws 592, 593.

52. Compare Sanctions for Denial of Child Visitation, ch. 152, § 1, 1993 Utah Laws 592, with Sanctions for Denial of Child Visitation, ch. 152, § 2, 1993 Utah Laws 593. These penalties could include make-up visitation, requirements to participate in workshops, counseling, classes to educate the parent about the importance of complying with the court order, ten to twenty hours of community service, fines, jail sentences, or changes in custody. See UTAH CODE ANN. § 78-32-12.2 (1993) (repealed as applied to UTAH CODE ANN. § 30-5-2 by Pilot Program Repeal Clean-Up, ch. 129, § 2(6), 2005 Utah Laws 1215).

53. Grandparents Visitation Rights, ch. 257, 1995 Utah Laws 834.

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While no explicit reason for these changes can be found,⁵⁴ it is obvious that although the structure of the Grandparent Visitation Statute had changed since it was enacted, the rights available under the 1995 statute remained identical to those originally granted in the 1977 statute.⁵⁵ Specifically, a reasonable right of grandparent visitation was only available to grandparents whose child had died or undergone divorce or legal separation, and where the visitation was found to be in the best interest of the grandchildren.⁵⁶ Presumably, by rejecting a more expansive authorization of visitation and returning to the Statute's original formulation, the legislature also affirmed its approval of the Statute's original purpose of protecting children from the harmful loss of significant extended family relationships in limited circumstances. In this setting, the first case to construe Utah's Grandparent Visitation Statute and challenge its constitutionality arose in 1995.⁵⁷

III. IMPETUS FOR CHANGE: THE *CAMPBELL V. CAMPBELL*
CONSTITUTIONAL CHALLENGE AND THE POST-*CAMPBELL*
AMENDMENTS

Campbell v. Campbell represented a Utah appellate court's first opportunity to consider the constitutionality of the Grandparent Visitation Statute. The court found the Statute to be constitutional,⁵⁸ but in the process it ignored the Statute's original purpose of preventing harm to children caused by the loss of extended family relationships.

Although the court acknowledged the constitutional concerns presented by the Statute and imposed some limitations on its application, the court's statutory interpretation still authorized substantial intrusions on parental autonomy.⁵⁹ The opinion clearly favored judicial—not parental—determination of what constitutes a

54. The author was unable to locate any legislative history of these bills or of the sessions in which they were passed to uncover an explanation for these changes.

55. Compare Grandparents' Visitation Rights, ch. 123, 1977 Utah Laws 566, with Grandparents Visitation Rights, ch. 257, 1995 Utah Laws 834.

56. Grandparents Visitation Rights, ch. 257, 1995 Utah Laws 834.

57. See *Campbell v. Campbell*, 896 P.2d 635 (Utah Ct. App. 1995).

58. *Id.* at 640–44.

59. *Id.* at 642–43. This is true despite the court's claim that the statute did not "substantially infringe on the parent's fundamental rights or the autonomy of the nuclear family." *Id.* at 642.

child's best interest regarding "reasonable" grandparent visitation decisions.⁶⁰

The *Campbell* court's constitutional approval of the Grandparent Visitation Statute emboldened the Utah legislature to amend it in 1998 to substantially expand grandparent visitation.⁶¹ In so doing, the legislature actually passed a statute with text containing strong presumptions in favor of parental autonomy that many grandparents would have difficulty surmounting.⁶² Although this revision may not have been consistent with the pro-grandparent mood reflected in the legislative history,⁶³ this 1998 parent-protective statute was nevertheless the version favorably cited in the 2000 United States Supreme Court grandparent visitation case *Troxel v. Granville*.⁶⁴ Therefore, *Campbell's* value as Utah precedent has been limited by *Troxel*, as well as by subsequent Utah Grandparent Visitation Statute amendments,⁶⁵ and by the Utah Supreme Court's recent decision in *Uzelac v. Thurgood (In re Estate of S.T.T.)*.⁶⁶

A. Campbell v. Campbell

The ruling in *Campbell* seemed almost guaranteed to increase harm—rather than prevent harm—to children. *Campbell* arose after the death of Janet Campbell's husband Kelly while she was pregnant with the couple's fifth child.⁶⁷ Despite Janet's willingness to allow her children to maintain their relationships with Kelly's parents, they wanted more involvement in the children's lives than Janet believed she and the children could reasonably accommodate.⁶⁸ The

60. *Id.* at 639. For example, Janet Campbell did not dispute that some visitation with the grandparents was in the children's best interest. She offered a visitation schedule that she believed was suitable and in the best interests of her children, which was rejected by the grandparents and the appeals court. Without evaluating Janet's offer for objective reasonability, the court refused to accept as "reasonable" an amount of visitation that grandparents could receive "as a matter of grace from the parent," *id.*, ruling instead that the statute required the court to make the visitation determination. *Id.* at 640.

61. *See* Grandparents Visitation Rights, ch. 104, 1998 Utah Laws 361.

62. *See id.*

63. *See infra* Part III.B–C.

64. 530 U.S. 57, 70 (2000).

65. Pilot Program Repeal Clean-Up, ch. 129, 2005 Utah Laws 1215; Visitation Rights of Grandparents, ch. 85, 2002 Utah Laws 298; Grandparents Visitation Rights, ch. 265, 2000 Utah Laws 1107.

66. 2006 UT 46, 144 P.3d 1083.

67. *Campbell v. Campbell*, 896 P.2d 635, 636 (Utah Ct. App. 1995).

68. *Id.* at 637.

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grandparents, believing their visitation requests were reasonable, became disgruntled over the boundaries Janet set and eventually filed suit under the 1993 amendment to the Grandparent Visitation Statute seeking a specific formal visitation schedule.⁶⁹

After initially requiring Janet to “show cause why [the grandparents] should not be granted reasonable visitation rights with their grandchildren,” the district court ordered what it considered to be reasonable visitation.⁷⁰ After several appeals, hearings, and stipulated orders, the grandparents, evidently attempting to assume a quasi-parental role in the place of their deceased son, requested vastly expanded visitation rights with the children.⁷¹ This request intensified the district court’s “strong concerns” about the Statute’s constitutionality and resulted in a flurry of off-the-record consultations with counsel and Janet’s older children.⁷² Subsequently, the district court set forth its constitutional concerns that the Statute infringed on parental autonomy and only issued an order of visitation corresponding to that which Janet had previously offered.⁷³

1. Statutory ruling on appeal

The court of appeals analyzed the Grandparent Visitation Statute from both a statutory and a constitutional standpoint. On a statutory basis, the court of appeals rejected the district court’s finding that Janet’s stipulated visitation offer was “appropriate and reasonable.”⁷⁴ Instead, the court of appeals concluded that under the Statute, “the court’s first finding, that some visitation would be in the children’s best interests, [was] conclusory.”⁷⁵ Noting that “[i]f court-ordered

69. *Id.*

70. *Id.* (granting the right to visit “every other Saturday at 9:00 a.m. until Sunday in time for the grandchildren to attend church” and “the right ‘to visit with the grandchildren on the telephone at reasonable times and under reasonable circumstances’”).

71. *See id.* at 635. This included a request for scheduled visitation every other weekend as well as an order for visitation near each child’s birthday, every Father’s day, one day during the children’s Thanksgiving holiday, three days during their Christmas holiday, a week during the summer, and more. *Id.* at 637. They also wanted the order to approve of their request for the children to work for the grandparents during the summers to “[assist] Janet in teaching the children a strong work ethic.” *Id.*

72. *Id.* at 638.

73. *Id.*

74. *Id.* at 639.

75. *Id.*

grandparent visitation were to be entirely dictated by the preferences of the parent, the statute would be rendered meaningless,”⁷⁶ the court essentially held that once grandparents show that visitation is in the children’s best interest, the court becomes the final arbiter of what constitutes reasonable visitation.⁷⁷ The mother’s visitation offer was not considered for objective reasonability; rather, the court outlined the following factors to consider in making a reasonable award of visitation under the Statute: (1) the nature of the existing grandparent-grandchild relationship, (2) the children’s preferences, (3) the children’s relationships with each other and with other individuals with whom children interact and to whom they may be exposed, and (4) the fitness of all parties.⁷⁸ These factors were presented as aids to the courts in fashioning a “reasonable” visitation award, not to aid them in making the initial determination as to whether visitation was in the children’s best interest and should be ordered over the parent’s wishes.

The appellate court held that making the state the proper judge of these factors, rather than the parent, did not “substantially infringe upon the parent’s fundamental rights or the autonomy of the nuclear family” and that only a statute granting “unrestricted vested right[s] of visitation” in the grandparents would raise constitutional concerns.⁷⁹ The court did require, however, that grandparents bear the burden of proof to show that visitation was in the children’s best interest, rather than requiring the parent to show why visitation was not in the children’s best interest.⁸⁰ Additionally, the appellate court instructed the district court to make findings that a visitation order would not unduly interfere with the parent-child relationship.⁸¹

76. *Id.*

77. *See id.*

78. *Id.* at 640.

79. *Id.* at 642–43.

80. *Id.* at 643. While the *Campbell* court heralded this burden shifting as sufficiently parent-protective, the court in *Uzelac v. Thurgood (In re Estate of S.T.T.)* acknowledged that grandparent proof of “best interests” alone is no longer constitutionally adequate post-*Troxel*. 2006 UT 46, ¶ 26 n.4, 144 P.3d 1083.

81. *See Campbell*, 896 P.2d at 644.

2. Constitutional ruling on appeal

From a constitutional standpoint, the court of appeals held that the Statute passed constitutional muster on three bases: first, constitutionally protected family relationships include grandparents and other family members;⁸² second, the Statute passes a rational basis review;⁸³ and third, the state has a greater reason to interfere with family autonomy when the “nuclear family has been dissolved.”⁸⁴

The district court’s conclusion that the parent-child relationship is the only relationship given constitutional consideration in our society was rejected by the appellate court.⁸⁵ Citing *Prince v. Massachusetts*⁸⁶ and *Moore v. City of East Cleveland*⁸⁷ as examples of constitutionally protected extended family relationships, the court of appeals essentially disregarded the parental “liberty interest . . . [in] child-rearing autonomy” by stating that any protection of that autonomy is a mere byproduct of “the [Supreme] Court’s larger concern with privacy rights of the family.”⁸⁸ Therefore, as long as state intervention to preserve family relationships broader than the parent-child relationship was not unduly burdensome, it was found to be constitutionally permissible.⁸⁹

Second, the court of appeals approved the district court’s finding that the Statute “compromise[d] and encroached upon and is in some ways detrimental to the relationship of authority, control, and custody provided by the natural situation.”⁹⁰ However, because the appellate court interpreted the constitutional protection of families as going beyond parent-child or quasi-parent-child relationships to include extended family relationships, it only required a rational basis standard of review for grandparent visitation cases.⁹¹ And since the

82. *See id.* at 643.

83. *Id.* at 643–44.

84. *Id.* at 640 n.9.

85. *Id.* at 639.

86. 321 U.S. 158 (1944).

87. 431 U.S. 494 (1977).

88. *Campbell*, 896 P.2d at 641 n.12.

89. *Id.* at 642.

90. *Id.* at 640 n.10.

91. *See id.* at 642.

Statute only authorized “reasonable” visitation, the appellate court found such visitation to be rationally related to the state’s interest.⁹²

By its own prerogative, the appellate court determined that the state’s interest was to encourage extended family members, such as grandparents, to play an “important role in the lives of their grandchildren”⁹³ and to “promote intergenerational contact and strengthen the bonds of the extended family” given the “disintegration of the nuclear family” occurring with regularity in society.⁹⁴ Further, the Statute was found to be reasonably related to these hypothesized state purposes, since the Statute did not “presume that grandparent visitation was necessarily in the children’s best interest,” but required grandparents to demonstrate “by a preponderance of the evidence that court-ordered visitation [was] in the children’s best interest.”⁹⁵

Third, the court of appeals rejected the district court’s conclusion that deferring to reasonable parental decisions served the public policy interest,⁹⁶ and, therefore, the State should not infringe “upon a parent’s right to raise his or her children” without a showing of parental unfitness unreasonably “expos[ing] the children to danger.”⁹⁷ Instead, the appellate court simply concluded that despite the fundamental liberty interest parents have to raise their own children,⁹⁸ “the state has a stronger argument for court intervention to protect the extended family when the nuclear family has been dissolved.”⁹⁹ The resulting “judicial oversight” required to make findings of fact and conclusions of law “explicitly demonstrating that the best interests of the children will be served by granting visitation” was thus considered adequate to protect the “integrity of the family.”¹⁰⁰

The court of appeals’ constitutional analysis was flawed, resulting in *Campbell*’s reduced precedential importance and, more importantly, lessening the Grandparent Visitation Statute’s

92. *Id.*

93. *Id.*

94. *Id.* at 643.

95. *Id.*

96. *Id.* at 639.

97. *Id.* at 640.

98. *Id.* at 641.

99. *Id.* at 640 (quoting *Hawk v. Hawk*, 855 S.W.2d 573, 580 n.10 (Tenn. 1993)).

100. *Id.* at 643.

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effectiveness at balancing the harms facing children who are the subject of grandparent visitation disputes.

3. *Flaws in the Campbell analysis*

Three flaws in the appellate court's constitutional analysis resulted in an inappropriate statutory interpretation. The flaws include: (1) an overly broad conception of constitutional protection for extended families, (2) an arguably incorrect hypothesis about the Statute's purpose, and (3) a failure to accord a fit single parent the same constitutional protection as parents in an intact family.

a. An overly broad conception of constitutional protection for extended families. First, the court's use of *Prince* and *Moore* to support constitutionally protected extended family relationships failed to consider that in those cases, the extended family members were acting in loco parentis toward the children at issue.¹⁰¹ *Prince* involved an aunt who was the custodian of her nine-year-old niece, whose health and safety the court considered at risk as a consequence of street tracting.¹⁰² This risk of harm to the child justified state intervention in the quasi-parent-child relationship to prohibit the street tracting.¹⁰³ *Prince* does not support the contradictory proposition of the *Campbell* court that extended constitutional protection to broader family member relationships, because those relationships are not all parental or quasi-parental relationships, as was the case in *Prince*.¹⁰⁴

Moore, in a similar manner, involved a boy living with his then-custodial grandmother after the death of his mother.¹⁰⁵ His presence in the apartment violated a family housing ordinance that the court found unconstitutional because it impermissibly restricted the definition of family by excluding extended family households.¹⁰⁶ The Supreme Court in *Moore* spoke of providing constitutional

101. *Moore v. City of E. Cleveland*, 431 U.S. 494, 505 n.16 (1977); *Prince v. Massachusetts*, 321 U.S. 158, 160-63 (1944).

102. *Prince*, 321 U.S. at 160-63. The aunt and the niece were Jehovah's Witnesses who distributed religious pamphlets on city streets. *Id.* at 161.

103. *Id.* at 169-70.

104. *Campbell*, 896 P.2d at 642-43.

105. *Moore*, 431 U.S. at 505 n.16.

106. *Id.* at 505.

protection for a “larger conception of the family”;¹⁰⁷ however, that language must be judged in the context of the case’s facts. This was a grandmother in a quasi-parental relationship with her grandson. The grandmother was essentially the boy’s guardian after his mother’s death—sharing the same household was a protective circumstance in this case that the child’s mother would undoubtedly have welcomed and approved. It was a questionable stretch by the *Campbell* court to apply *Moore*’s “larger conception of the family” language to constitutionally protect a grandparent-grandchild relationship without similar compelling circumstances and in the face of parental opposition. Arguably, expanding constitutional protection for extended family relationships in very factually different grandparent visitation cases will result in state intrusion that constitutes the undue burden forbidden by the court of appeals under rational basis review.¹⁰⁸

b. An arguably incorrect hypothesis about the statute’s purpose. The court of appeals hypothesized that the legislative purpose for the Grandparent Visitation Statute was to “promote intergenerational contact and strengthen the bonds of the extended family”¹⁰⁹ by permitting grandparents to play an “important role in the lives of their grandchildren.”¹¹⁰ The court of appeals offered no evidence to support its expansive and sentimental interpretation of the Statute’s purpose. Instead, the origin and history of the Statute suggest that its purpose was limited to protecting children from the harm of losing established and significant extended family relationships upon the death or divorce of a parent.¹¹¹ Further, this interpretation of the Statute’s purpose is also more consistent with broader state family law doctrines¹¹² and with constitutional principles that permit state

107. *Id.*

108. *Campbell*, 896 P.2d at 642 (stating that heightened scrutiny is required when “state interference ‘interfere[s] substantially’ or ‘heavily burden[s]’ fundamental rights”).

109. *Id.* at 643.

110. *Id.* at 642 (citing *Moore*, 431 U.S. 494).

111. Yet even state intervention to prevent harm was not necessary in the *Campbell* case, where the children were in no significant danger of losing their extended family relationships.

112. *See, e.g.*, UTAH CODE ANN. § 78-3a-102 (2003) (discussing abuse, dependency, and neglect proceedings); *Id.* § 30-3-5 (2003) (discussing visitation upon divorce). The principles underlying these statutes serve to protect children from harm while preserving parental rights to the fullest extent possible. These doctrines have little to no focus on promoting the desires of adults at the expense of children.

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intervention into family life when necessary to protect children from harm.¹¹³

The court of appeals' decision is at odds with United States Supreme Court decisions in *Meyer v. Nebraska*,¹¹⁴ *Pierce v. Society of the Sisters*,¹¹⁵ and *Wisconsin v. Yoder*,¹¹⁶ which all represent a long-standing constitutional doctrine that protects parental decision-making from state interference where the parents' decisions are not "inherently harmful."¹¹⁷ And—although the general evolution of visitation doctrine in Utah has tended to equate the parental role with the status and relationship roles of non-parental visitation petitioners—as seen earlier,¹¹⁸ the court of appeals did not analyze or discuss whether this equation is constitutionally accurate. In fact, in the absence of a quasi-parental role played by a grandparent, the parent-child relationship does receive constitutional protections that are unavailable to the grandparent-grandchild relationship, as the United States Supreme Court indicated when it decided *Troxel*.¹¹⁹

Moreover, the court of appeals' hypothesized purposes make the Grandparent Visitation Statute both under- and over-inclusive; the Statute does not apply to grandparents of children in intact families who seek to play an "important role" in the lives of their grandchildren, nor does it foster "intergenerational contact" between grandparents and grandchildren when it would be in the child's best interest but the grandparent is simply not interested in participating. While a rational basis review does not require such congruence, a review under a heightened standard does. And since the parent-child relationship is a fundamental liberty protected by the Constitution,¹²⁰ the court of appeals should have applied a

113. See, e.g., *Moore*, 431 U.S. 494; *Prince v. Massachusetts*, 321 U.S. 158 (1944).

114. 262 U.S. 390, 402–03 (1923) (recognizing that parents have the right to decide to have their children taught the German language because it "is not injurious to the health, morals or understanding" of the children).

115. 268 U.S. 510, 534 (1925) (refusing to interfere with parents' decision to send their children to private schools rather than public schools because there was no evidence the children would be harmed by private school attendance).

116. 406 U.S. 205, 234 (1972) (refusing to compel Amish parents to educate their children in public schools rather than receive an Amish education because an Amish education would not be harmful to the children).

117. *Pierce*, 268 U.S. at 534.

118. See *supra* Part II.B.

119. See *Troxel v. Granville*, 530 U.S. 57, 65–67 (2000); see also *infra* Part IV.

120. The parent-child relationship is protected under the Due Process Clause of the Fourteenth Amendment. See *Troxel*, 530 U.S. at 65.

heightened standard of review, under which the court's hypothesized purpose for the Grandparent Visitation Statute would not have survived.

Finally, the court of appeals' grandparent-centered conception of the Statute's purpose makes it far more likely that courts will find grandparent visitation to be in the children's "best interest" and result in an intrusive visitation order the court finds "reasonable." Under the appellate court's conception, grandparents stand on essentially equal constitutional footing with parents. This concept fails to consider that parents have obligations and responsibilities to both the child and the state that are not shared by extended family members. This consideration alone makes the court's expansive hypothesis about the Statute's purpose inappropriate to justify state intervention in parental decisions.

c. Failure to accord a fit single parent the same constitutional protection as parents in an intact family. The third flaw in the *Campbell* court's analysis is its constitutional conclusion that "the state has a stronger argument for court intervention to protect the extended family when the nuclear family has been dissolved."¹²¹ This conclusion was based on dicta found in a footnote in *Hawk v. Hawk*, the case that struck down Tennessee's grandparent statute as unconstitutional because it did not require a showing of harm to the children if grandparent visitation were not ordered.¹²² The holding in *Hawk* actually required a two-part analysis prior to an order of visitation: (1) an initial showing of harm to the child, and only then (2) a consideration of whether the "best interests of the child" support a visitation order.¹²³

In order to be consistent with its holding, *Hawk's* dicta¹²⁴ must logically only apply to the second part of its analysis—nuclear family breakdown as a factor to consider in the best interest analysis. The *Campbell* court used it out of context to justify state intrusion on single parent autonomy for the benefit of adult extended family members rather than to benefit children who may suffer significant harm caused by dissolving family relationships. Further, the

121. *Campbell v. Campbell*, 896 P.2d 635, 640 (Utah Ct. App. 1995) (quoting *Hawk v. Hawk*, 855 S.W.2d 573, 580 n.10 (Tenn. 1993)).

122. *Hawk*, 855 S.W.2d at 580–81.

123. *Id.* at 580.

124. *Id.* at 580 n.10.

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Campbell court failed even to apply the *Hawk* dicta to the facts of its case: it promoted extended family relationships at the expense of a widowed mother's authority, even when her husband's death did not place the children at any risk of losing their relationships with their father's extended family.

d. Other flaws in Campbell. In addition to the above, the *Campbell* decision was flawed because it increased the likelihood that children would be harmed by court-ordered grandparent visitation. Sociological studies and anecdotal evidence of parental visitation orders on divorce reveal that court-ordered visitation is intrusive and often harmful for all parties involved, including the children it was intended to protect.¹²⁵ The justification for state intrusion despite this harm in cases of divorce is largely based on the parents' co-equal rights and responsibilities as well as the child's greater need for a continuing relationship with both parents.

With grandparent visitation outside of a quasi-parental setting, the grandparents' rights and responsibilities are not co-equal with the parents'; therefore, the *only* justification for an intrusive visitation order is when the harm created by such an order is outweighed by the harm to a child that would result without an order. When determining visitation "reasonability" when the parties do not have equal rights and responsibilities, the *Campbell* court's grandparent-centered interpretation fails to consider the inherent harms of visitation orders.

B. Legislative Incorporation of Campbell into the 1998 Amendment

As a result of the court of appeals' pro-grandparent decision in *Campbell*, the Utah legislature voted to expand the Grandparent Visitation Statute in 1998 to "keep adults letting adults in[to] the lives of children."¹²⁶ Sponsored by nearly half of the House

125. See generally Nolan, *supra* note 4, at 281-88. Visitation orders result in a multitude of issues between often hostile parties that require ongoing court intervention, such as (1) the duration, location, logistics, and possible supervision of visits; (2) modification orders as circumstances change, relocation problems, and the potential impact of multiple visitation orders; as well as (3) parental sanctions for violation of a visitation order. *Id.* at 269; see also Newman, *supra* note 4, at 21.

126. Utah House Floor Debate (Audio Recording), 52d Leg., Gen. Sess. (Feb. 26, 1998), <http://www.le.state.ut.us/asp/audio/index.asp?Sess=1998GS&Day=39&Bill=&House=H> (statement of Rep. Buffmire).

membership¹²⁷ and abandoning a focus on preventing harm to children, the bill added a new section to the Statute which gave standing to seek grandparent visitation to all grandparents, not just those whose child had died or been divorced.¹²⁸

In doing so, however, the legislature acknowledged one important check on state intrusion into parental autonomy provided by the *Campbell* decision.¹²⁹ This check required that grandparents bear the burden of proof to show that visitation was in the best interest of the children rather than by requiring the parent to show why visitation was not in the children's best interest.¹³⁰ This was referred to by the legislators as presuming parents' "basic interests," and the amendment went on to outline five factors grandparents could use to rebut the presumption that a parent's grandparent visitation decision was reasonable.¹³¹

However, these "basic interests" were only protected for certain parents. The legislature apparently noted *Campbell's* holding that state intrusion on parental decision-making authority was appropriate as long as a family was not intact, even when children were at no risk of harm from the loss of extended family relationships. This is true because the original statutory language in section 1 was retained, which "grant[ed] grandparents reasonable rights of visitation, if it is

127. House Bill 136 (Grandparents Visitation Rights) was sponsored by twenty-eight representatives. See An Act Relating to Grandparents; Expanding the Rights of Grandparents to Seek Court-Ordered Visitation, ch. 104, 1998 Utah Laws 361.

128. *Id.*

129. *Campbell v. Campbell*, 896 P.2d 635, 642 (Utah Ct. App. 1995).

130. *Id.* at 643. While the *Campbell* court heralded this burden shifting as sufficiently parent-protective, the court in *Thurgood* acknowledged that grandparent proof of "best interests" alone is no longer constitutionally adequate post-*Troxel*. See *Uzelac v. Thurgood (In re Estate of S.T.T.)*, 2006 UT 46, ¶ 26 n.4, 144 P.3d 1083.

131. An Act Relating to Grandparents; Expanding the Rights of Grandparents to Seek Court-Ordered Visitation, ch. 104, 1998 Utah Laws 361. The factors were as follows:

- (a) [visitation] is in the best interest of the grandchild;
- (b) the petitioner is a fit and proper person to have rights of visitation with the grandchild;
- (c) the petitioner has repeatedly attempted to visit the grandchild and has not been allowed to visit the grandchild as a direct result of the actions of the parent or parents;
- (d) there is no other way for the petitioner to visit the grandchild without court intervention; and
- (e) the petitioner has, by clear and convincing evidence, rebutted the presumption that the parent's decision to refuse or limit visitation with the grandchild was reasonable.

UTAH CODE ANN. § 30-5-2(2)(a)-(e) (1998).

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in the best interest of the grandchildren” for grandparents whose children had died or been divorced.¹³²

By retaining this language and making section 1 independent, the amendment subjected children whose parents had died or divorced to the same Grandparent Visitation Statute interpreted under *Campbell*. This meant that without any consideration of the potential harm faced by children, the court would determine a “reasonable” visitation award under a very expansive statutory purpose favoring grandparents as long as grandparents showed by a preponderance of the evidence that visitation was in the best interest of the child.¹³³

For children in intact families, however, the 1998 amendment established a presumption in favor of the parent’s decision to limit or refuse visitation. It gave grandparents the burden of proving both that visitation was in the best interest of the children and that the parent’s decision was unreasonable by “clear and convincing” evidence¹³⁴ rather than by *Campbell*’s mere “preponderance of the evidence.”

Additionally, this section of the amendment reflected *Campbell*’s factual underpinnings as well as its holdings in three of the factors grandparents could use to establish that visitation was in the child’s best interest and that the parent’s visitation decision was unreasonable:¹³⁵ (1) the grandparent seeking visitation must be a “fit and proper person,” (2) the grandparent must have repeatedly attempted and been disallowed visitation with the children, and (3) only a court order will result in parental compliance with grandparent visitation requests.¹³⁶ Had these factors been applied in Janet Campbell’s case, it is unlikely that the court would have overridden Janet’s reasonable visitation offers.¹³⁷

The United States Supreme Court favorably cited this newly amended section of Utah’s 1998 statute in its landmark grandparent

132. UTAH CODE ANN. § 30-5-2(1).

133. *Campbell*, 896 P.2d at 642–43.

134. UTAH CODE ANN. § 30-5-2(2)(a)–(e).

135. Daren G. Mortenson, *Recent Developments in Utah Law*, 2003 UTAH L. REV. 703, 797.

136. An Act Relating to Grandparents; Expanding the Rights of Grandparents to Seek Court-Ordered Visitation, ch. 104, § 30-5-2(2)(b)–(d), 1998 Utah Laws 361.

137. Janet had never prohibited her children’s visits with their paternal grandparents, so court intervention was not the only way for the grandparents to see their grandchildren.

visitation case *Troxel v. Granville*.¹³⁸ Additionally and significantly, in *Troxel* the Supreme Court applied a nearly identical presumption favoring the grandparent visitation decision of a single mother whose children's father had died.¹³⁹ This suggests that the decision of the district judge respecting a widowed mother's visitation decision in *Campbell* was more constitutionally accurate than the decision of the appellate court and that the legislature's reliance on *Campbell* to apply a far lesser standard of proof to non-intact families was constitutionally infirm. Nonetheless, while the *Troxel* opinion was pending, the legislature attempted to go one step further than the *Campbell* decision and erode even the parental presumptions favoring intact families.

C. The Ill-Timed 2000 Amendment

Of all the Grandparent Visitation Statute amendments the Utah legislature had passed to date, the 2000 amendment was the least parent-protective and the least focused on preventing harm to children. Despite *Troxel* pending before the United States Supreme Court, sponsors in the legislature proposed a bill that would have eliminated the parental presumption of reasonableness in all cases except those where the nuclear family remained intact.¹⁴⁰

The proposed bill would have allowed a court to override any parent's grandparent visitation decision based on its own determination of "the best interest of the grandchild."¹⁴¹ After legislative review noted that the bill raised constitutional concerns about parental autonomy, and because the *Troxel* case was pending before the United States Supreme Court,¹⁴² the legislature rejected this language and considered several modifications. Eventually, the

138. 530 U.S. 57, 70 (2000).

139. 530 U.S. at 68.

140. An Act Relating to Grandparents; Clarifying Grandparents' Standing to Bring an Action in District Court; and Removing the Statutory Presumption Regarding a Parent's Decision, S. 166, 53d Leg., Gen. Sess. (Utah 2000), available at <http://www.le.state.ut.us/~2000/htmdoc/Sbillhtm/SB0166.htm> (including bill as originally proposed). The author's survey of cases available for review in Lexis-Nexis indicates that grandparent visitation cases involving intact families remain the minority of cases. Furthermore, with *Campbell* as precedent, it is arguably true that had this amendment passed, even intact nuclear families would have been at risk for routine rebuttal of the parental presumption.

141. *Id.*

142. The legislative history for Utah Senate Bill 166 can be found at <http://www.le.state.ut.us/~2000/bills/sbillamd/SB0166.pdf>.

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enacted amendment defined a “grandparent” with standing to petition for visitation to include biological grandparents, adoptive grandparents, and persons whose child, by marriage, is the parent of the grandchildren—presumably step-grandparents.¹⁴³ Additionally, it eliminated the “clear and convincing evidence” standard required for a grandparent to rebut the parental presumption of reasonability.¹⁴⁴

By expanding the number of adults with standing to seek visitation while eliminating the heightened standard for rebutting a parent’s visitation decision, the amendment disregarded parents’ rights and increased the likelihood that children would be harmed by becoming the focus of visitation battles. Yet, during the minimal legislative floor debates on this amendment, no legislator expressed any concern about respect for parental autonomy.¹⁴⁵ One legislator mischaracterized the amendment as merely providing courts with the ability to consider a grandparent’s bonded relationship with a grandchild in cases of death or divorce.¹⁴⁶ But the legislature had already authorized courts to consider bonded relationships with grandparents in cases of death and divorce since at least 1977.¹⁴⁷

Two other legislators made emotional appeals in support of the bill, the first supporting the amendment as a means to prevent grandparents from being “punished along with the children” when the parents of the grandchildren undergo a divorce.¹⁴⁸ The second appeal, which was representative of the general legislative mood during floor debate on this bill, extolled the virtues of “extended families in dealing with the nurturing and upbringing of children” and stated that the bill “highlights the importance” of the “vital role of grandparents”¹⁴⁹ (language remarkably similar to that employed

143. Grandparents Visitation Rights, ch. 265, § 3, 2000 Utah Laws 1107.

144. *Id.*

145. Utah House Floor Debate (Audio Recording), 53d Leg., Gen. Sess. (Feb. 28, 2000), <http://www.le.state.ut.us/asp/audio/index.asp?Sess=2000GS&Day=0&Bill=SB0166S01&House=H> [hereinafter 2000 Floor Debate].

146. *See id.*

147. *See* Grandparents’ Visitation Rights, ch. 123, 1977 Utah Laws 566 (allowing grandparents, defined as persons whose child—deceased or divorced—is the parent of the child with whom visitation is being sought, to sue at law for visitation rights).

148. 2000 Floor Debate, *supra* note 145 (statement of Rep. Bilrey).

149. *Id.* (statement of Rep. Harper).

by the court in *Campbell*).¹⁵⁰ The legislature was apparently heavily weighted in favor of grandparents' interests; before the final vote was taken on the bill, thirty-eight senators, in a jovial atmosphere, registered "conflicts" to the bill by proudly announcing that they were grandparents or grandparents-to-be.¹⁵¹

This legislative history reveals that not only were the provisions of the easily passed 2000 amendment not well understood, but that no consideration was given to the important interests at stake for parents and children. Consequently, Utah law after *Campbell* and the post-*Campbell* amendments subjected even reasonable parental decisions about grandparent visitation to scrutiny and potential overturn by a court in every case where death or divorce impacted a family. For all other families, fit grandparents who provided evidence of repeatedly limited or denied attempts to visit their grandchildren, even if reasonably limited or denied, were likely to obtain a visitation order by persuading a court by a mere preponderance of the evidence that visitation was in the grandchild's best interest.

This is due to *Campbell's* instruction for courts to interpret the Statute in light of the state's interest in promoting the "important" role of grandparents,¹⁵² making it more likely that a court would find visitation to be in a child's best interest. This, in turn, would be enough to rebut the parental presumption. Fortunately for parents and children, the *Campbell* interpretation and the 2000 amendment were severely undermined when the United States Supreme Court released its decision in *Troxel v. Granville*, which while not requiring a heightened harm standard, permits and may even encourage one.

IV. THE IMPACT OF *TROXEL V. GRANVILLE* ON UTAH'S GRANDPARENT VISITATION STATUTE

Troxel v. Granville placed important limitations on state grandparent visitation statutes to protect families from the harm of violating parents' fundamental liberties in the "care, custody, and control of their children"¹⁵³ The Supreme Court's decision

150. *Campbell v. Campbell*, 896 P.2d 635, 642 (Utah Ct. App. 1995) ("[G]randparents are members of the extended family whom society recognizes as playing an important role in the lives of their grandchildren").

151. 2000 Floor Debate, *supra* note 145.

152. *See Campbell*, 896 P.2d at 642.

153. 530 U.S. 57, 65 (2000).

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impacted grandparent visitation statutes in all fifty states, and many state statutes have been amended or judicially reinterpreted after *Troxel*.¹⁵⁴

Utah's statute has been similarly impacted by *Troxel*. After *Troxel*, a 2002 amendment to the Statute reinstated the presumption of reasonableness in favor of all parents' visitation decisions and suggested that courts consider the possibility that a denial of visitation might harm the child when determining whether the grandparents have rebutted that presumption.¹⁵⁵ Additionally, a recent Utah Supreme Court decision that awarded grandparent visitation emphasized a district court's finding that a denial of visitation rights would harm the particular child in question.¹⁵⁶

A brief discussion of the *Troxel* opinions is necessary to appreciate the impact they had on the *Campbell* holding, the 2002 amendment, and the *Thurgood* holding. This section will then consider Utah's post-*Troxel* amendments, which incorporate *Troxel* and certain *Campbell* holdings into the 2002 Grandparent Visitation Statute. These amendments render the current Statute facially compliant with both federal and state constitutional precedents and arguably establish, as a practical matter, that grandparent visitation orders will not be made without a showing that the child would be harmed by a denial of visitation.¹⁵⁷

Troxel v. Granville involved the challenge of a Washington statute permitting "any person" at "any time" to petition for visitation rights with a child under a "best interests" standard.¹⁵⁸ Tommie Granville, a woman who never married the father of her two daughters, contested the statute when the paternal grandparents became unhappy with the frequency and duration of visitation Granville offered them after the father committed suicide.¹⁵⁹ The father's parents, the Troxels, had established a relationship with the girls during the father's twice-monthly custodial weekends prior to his death and on a similar basis for some months after his death.¹⁶⁰

154. *See infra* Part VI.C.

155. Visitation Rights of Grandparents, ch. 85, 2002 Utah Laws 298.

156. *Uzelac v. Thurgood (In re Estate of S.T.T.)*, 2006 UT 46, 144 P.3d 1083.

157. Visitation Rights of Grandparents, ch. 85, 2002 Utah Laws 298.

158. *Troxel*, 530 U.S. at 60 (plurality opinion) (quoting WASH. REV. CODE § 26.10.160(3) (1994)).

159. *Id.*

160. *Id.* at 61.

However, after Granville married and established a new family unit, she informed the Troxels that she would prefer that the girls visit only once per month.¹⁶¹ The Troxels objected to this limitation, filed suit under the Washington statute, and the court eventually awarded them additional visitation against Granville's wishes.¹⁶²

On appeal, the Washington Supreme Court held that the statute was an unconstitutional infringement on parental autonomy because it permitted the state to intervene with fundamental parental rights without a showing of harm to the child if the state did not intervene.¹⁶³ It also held that the statute was overbroad, permitting any person at any time to force the parents to undergo judicial review of their decisions regarding the care, custody, and control of their children.¹⁶⁴ This decision was appealed to the United States Supreme Court.¹⁶⁵

A. *Troxel's Constitutional Requirements*

Troxel was a 4+1+1-3 decision, with the four Justices making up the plurality opinion declaring the statute unconstitutional as the statute was applied to Ms. Granville and her children.¹⁶⁶ Two of the three dissenting Justices similarly dissented on a statutory basis.¹⁶⁷ The remaining Justices wrote concurring or dissenting opinions specifically on the basis of constitutional reasoning and interpretation.¹⁶⁸ Because the decision has no majority opinion and many Justices wrote separate opinions, the holding of the Court in *Troxel* is complicated and warrants careful analysis.

The plurality in *Troxel* declined to invalidate grandparent visitation statutes in all fifty states on a per se basis. Rather, the plurality discussed missing statutory elements that could render state grandparent visitation statutes constitutional.¹⁶⁹ These elements included limits on third party standing to subject parental visitation

161. *Id.*

162. *Id.*

163. *Id.* at 63.

164. *Id.*

165. *Id.*

166. *Id.* at 73.

167. *Id.* at 81 (Stevens, J., dissenting); *id.* at 91 (Scalia, J., dissenting).

168. *Id.* at 75 (Souter, J., concurring); *id.* at 80 (Thomas, J., concurring); *id.* at 93 (Kennedy, J., dissenting).

169. *Id.* at 67 (plurality opinion).

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decisions to state court review¹⁷⁰ and “special weight” or deference to be granted to the parent’s visitation decision.¹⁷¹ It was in this context that the Court favorably cited Utah’s 1998 statute for establishing a presumption in favor of the parent’s visitation decision that could only be rebutted by “clear and convincing evidence.”¹⁷² Additionally, statutes may constitutionally consider the parent’s fitness to make a visitation decision.¹⁷³ Whether the grandparents had previously been offered a reasonable amount of visitation may also be a consideration.¹⁷⁴

Justice Stevens dissented from this enumeration of statutory factors that would render state grandparent visitation statutes constitutional.¹⁷⁵ He objected to even considering a statute’s constitutionality before an appeals court had determined the adequacy of the trial court’s findings.¹⁷⁶ He further argued that the “best interest” standard alone is not necessarily unconstitutional, particularly when other persons have an established relationship with the child that justifies limiting parental autonomy.¹⁷⁷ Citing *Michael H. v. Gerald D.* as an example,¹⁷⁸ Justice Stevens argued that parental interests could appropriately be limited when necessary to consider the independent interest of the family.¹⁷⁹

Justice Scalia’s dissent essentially abdicated from the constitutional debate because parental rights are not enumerated in the Constitution and because Washington’s grandparent visitation

170. *Id.*

171. *Id.* at 70.

172. *Id.* at 70 (citing UTAH CODE ANN. § 30-5-2(2)(e) (1998)).

173. *Id.* at 67.

174. *Id.* at 71.

175. *Id.* at 82–83 (Stevens, J., dissenting).

176. *Id.*

177. *Id.* at 86–87.

178. *Id.* at 87 (citing *Michael H. v. Gerald D.*, 491 U.S. 110 (1989)).

179. *Id.* at 87–88. However, this is not an apt comparison since the holding in *Michael H.* prevented an outsider (a biological parent, no less) from disrupting a nuclear family, whereas in *Troxel*, a nuclear family was being disrupted by a nonparent. See *Michael H.*, 491 U.S. at 124. Further, *Michael H.* involved competing parental claims from men both willing to undertake the responsibilities and rights of fatherhood, whereas *Troxel* involved a contest between a parent and an extended family member who was not seeking parental rights and responsibilities but merely rights without responsibilities. See *id.* at 126–27.

statute was enacted by duly elected representatives.¹⁸⁰ Thus, he would have simply upheld the statute.¹⁸¹

The two concurring opinions by Justices Thomas and Souter concurred with the plurality in affirming the Washington Supreme Court's invalidation of the state's grandparent visitation statute, but they did so on a constitutional, rather than a statutory, basis.¹⁸² Justice Thomas's opinion strongly supported parental autonomy as a fundamentally privileged right. Since parents have a fundamental right to "direct the upbringing of their children," Justice Thomas argued that any state intervention should be subject to "strict scrutiny" before "second-guessing a fit parent's decision regarding visitation with third parties."¹⁸³

Justice Souter observed that the Washington Supreme Court's decision was consistent with the U.S. Supreme Court's prior precedent protecting fundamental parental rights from state intervention and found that no further delineation of the precise scope of the parents' rights or protections was necessary.¹⁸⁴ However, he did imply that another factor may be relevant: whether an existing substantial relationship with the child deserves protection.¹⁸⁵

Justice Kennedy's dissent, based on constitutional grounds, also suggested that legitimate and established relationships, especially parent-like relationships, should be protected even over the parents' objection.¹⁸⁶ However, he was not certain that the "best interest" test provided sufficient constitutional protection for parental autonomy.¹⁸⁷ He was also the only Justice to point out that grandparent visitation litigation itself may be so disruptive to parents that the parents need constitutional protection.¹⁸⁸

180. *Troxel*, 530 U.S. at 92 (Scalia, J., dissenting) ("[W]hile I would think it entirely compatible with the commitment to representative democracy set forth in [our] founding documents to argue, in legislative chambers or electoral campaigns, that the State has *no power* to interfere with parents' authority over the rearing of their children, I do not believe that the power which the Constitution confers on me *as a judge* entitles me to deny legal effect to laws that (in my view) infringe upon what is (in my view) an unenumerated right.").

181. *Id.*

182. *Id.* at 75–80 (Souter, J., concurring).

183. *Id.* at 80 (Thomas, J., concurring).

184. *Id.* at 76 (Souter, J., concurring).

185. *Id.* at 77.

186. *Id.* at 98 (Kennedy, J., dissenting).

187. *Id.* at 101.

188. *Id.*

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Due to the complexity of the separate opinions in the *Troxel* decision, the following table summarizes the positions of the members of the Court regarding the necessary factors for state grandparent visitation statutes to pass constitutional muster:

Factors	Plurality	Souter	Thomas	Stevens	Scalia	Kennedy
Broadness limited	Yes		By implication			Yes
Deference to parent's decision	Yes	Yes	By implication			Yes
Parental fitness	Yes		By implication			Yes
Denial of all visitation requests	Yes					
Requires a showing of harm to child	Didn't reach	Didn't reach	Probably—strict scrutiny	No		Covered in “best interest”
Established, substantial relationship protected		Yes		Yes		Yes
Changed circumstances						Yes
Child's preferences considered				Yes		
Broader definition of “family” protected				Yes		

Factors	Plurality	Souter	Thomas	Stevens	Scalia	Kennedy
More weight to state's <i>parens patriae</i> powers against arbitrary parental decisions				Yes		
Parental protection from litigation						Yes

As can be seen, there was strong support for the first three factors addressed in the plurality opinion (broadness of standing limited (6-3), deference to the parent's decision (7-2), and parental fitness to make a visitation decision (6-3)). Constitutionally protected third-party visitation with children in substantial, established relationships against the parent's wishes did not receive majority support (3-6), a fact that may have significance in related visitation decisions pending in Utah courts.¹⁸⁹

The most significant question in *Troxel* for the purposes of this Comment is the one that was not really answered: whether a showing of harm to the child without a visitation order is required before grandparent visitation may constitutionally be ordered against the parent's wishes. Justice Stevens expressly rejected this requirement,¹⁹⁰ and, at the other extreme, Justice Thomas implicitly required nothing short of harm to overcome a strict scrutiny analysis.¹⁹¹ The remaining Justices may have discussed—but ultimately did not require—a statutory harm element because the

189. *See, e.g.*, Jones v. Barlow, No. 20040932 (Utah 3d Dist. Ct. Aug. 30, 2005). In this case, the former lesbian partner of the biological mother of a three-year-old child was granted parental status and visitation by a district court judge. *Id.* On appeal, the mother challenges both the parental status determination and the third party visitation order. *Id.*

190. *Troxel*, 530 U.S. at 81 (Stevens, J., dissenting).

191. *Id.* at 80 (Thomas, J., dissenting).

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Constitution's silence about parental rights made this factor fall within an acceptable constitutional range that, as related to domestic law, is best determined by individual state legislatures.¹⁹² Several Justices expressed concern about the *Troxel* decision ushering in federal family law, an area of regulation historically and appropriately left to the states.¹⁹³ As discussed below, the Utah legislature chose to include a harm factor in its post-*Troxel* amendment, a fact that was given due consideration in the Utah Supreme Court's interpretation of the Grandparent Visitation Statute in *Thurgood*.¹⁹⁴

B. Campbell as Precedent After Troxel: Incorporation of Campbell and Troxel into the 2002 and 2005 Amendments

Troxel halted the swift expansion of grandparent and other third-party visitation rights in many states, including Utah. Courts and legislatures were now required to carefully consider parents' fundamental rights and were advised to more carefully consider the impact of grandparent visitation statutes on children. Key portions of Utah's *Campbell* case were effectively overruled, and the Utah legislature amended the Grandparent Visitation Statute to reflect *Troxel* considerations, including the fact that grandparents may need to show that the child would be harmed without a visitation order.¹⁹⁵

Troxel invalidated *Campbell's* conclusion¹⁹⁶ that courts have the prerogative to determine reasonable grandparent visitation and that a court's decision supersedes the visitation decision made by a fit

192. *Id.* at 73 (plurality opinion); *id.* at 90 (Stevens, J., dissenting); *id.* at 93 (Scalia, J., dissenting), *id.* at 101 (Kennedy, J., dissenting).

193. *Id.* at 73 (plurality opinion) (explaining that whether any specific grandparent visitation statute violates the Constitution depends on how it is applied and that "[b]ecause 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."); *id.* at 90 (Stevens, J., dissenting) ("It is indisputably the business of the States, rather than a federal court employing a national standard, to assess in the first instance the relative importance of the conflicting interests that give rise to disputes such as this."); *id.* at 93 (Scalia, J., dissenting) ("I think it obvious—whether we affirm or reverse the judgment here . . . that we will be ushering in a new regime of judicially prescribed, and federally prescribed, family law."); *id.* at 94 (Kennedy, J., dissenting) ("The protection the Constitution requires, then, must be elaborated with care, [and] we must keep in mind that family courts in the 50 States . . . are best situated to consider the unpredictable, yet inevitable, issues that arise.").

194. *See infra* Part V.B.

195. Visitation Rights of Grandparents, ch. 85, § 30-5-2(2)(d), 2002 Utah Laws 298.

196. *Campbell v. Campbell*, 896 P.2d 635, 639, 643 (Utah Ct. App. 1995).

parent under a “best interest” standard.¹⁹⁷ *Troxel* clearly rejected state interference that amounts to little more than substituting a judge’s visitation decision for a fit parent’s visitation decision when there are no factors that rebut the parental presumption of reasonability.¹⁹⁸

Further, *Troxel* rejected *Campbell’s* suggestion¹⁹⁹ that the state can intervene with a lesser showing of deference when the nuclear family is dissolved.²⁰⁰ *Troxel* afforded the same parental presumption to the visitation decision of Tommie Granville, an unwed mother whose nuclear family was not intact, as it required states to afford to all other parents.²⁰¹ Therefore, *Troxel* effectively overruled *Campbell’s* conclusion that “promot[ing] intergenerational contact and strengthen[ing] the bonds of the extended family” are enough justification for the state to intrude on parental autonomy regardless of whether the family is intact.²⁰² However, before any Utah appellate-level grandparent visitation cases arose after *Troxel* to confirm these conclusions about *Campbell*, the Utah legislature amended the Grandparent Visitation Statute.²⁰³

Following *Troxel’s* favorable citation to Utah’s parent-protective 1998 statutory provisions, the Utah legislature recognized that the ill-timed 2000 amended statute “did not give proper deference to the opinions of parents regarding the issue of grandparent visitation.”²⁰⁴ Accordingly, in a much more somber legislative atmosphere than existed when the 2000 amendment was passed,²⁰⁵ the legislature revised the Statute in 2002 to reflect *Troxel’s* holding that “parents are the proper ones to raise children” and are presumed

197. *Troxel*, 530 U.S. at 68, 72–73 (plurality opinion).

198. *Id.* at 72–73 (“[T]he Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a ‘better’ decision could be made.”).

199. *Campbell*, 896 P.2d at 640 n.9 (quoting *Hawk v. Hawk*, 855 S.W.2d 573, 580 n.10 (Tenn. 1993)).

200. *See Troxel*, 530 U.S. at 69–70 (plurality opinion).

201. *Id.*

202. *Campbell*, 896 P.2d at 643.

203. Visitation Rights of Grandparents, ch. 85, 2002 Utah Laws 298 (amending sections 30-5-1 and 30-5-2 of the Utah Code).

204. *See* Utah House Floor Debate (Audio Recording), 53d Leg., Gen. Sess. (Feb. 27, 2002), <http://www.le.state.ut.us/asp/audio/index.asp?Sess=2002GS&Day=0&Bill=SB0087S01&House=H> (statement of Rep. Urquhart).

205. *See id.*

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to “act in the child’s best interest.”²⁰⁶ The new Statute contained a presumption in favor of parents’ decisions that grandparents may only rebut based on factors defined by the amendment.²⁰⁷ It therefore appears clear that the legislature intended the new amendment to protect parents’ fundamental rights and obligations to make decisions regarding when and with whom their children may visit. At the same time, the amendment provided a means unavailable at common law for grandparents to override a parent’s unreasonable visitation decision when necessary for the children’s welfare.²⁰⁸

In the process of enacting the 2002 amendment, the legislature considered an initial bill that proposed emphasizing the “special weight” to be accorded to a parent’s decision.²⁰⁹ However, after several revisions and a bill substitution, the amendment restored language similar to the favorably cited 1998 statute presuming that “a parent’s decision with regard to grandparent visitation is in the grandchild’s best interests.”²¹⁰ The 2002 amendment also incorporated all of the *Troxel* plurality’s statutory guidelines into its factors by which the parental presumption may be rebutted.²¹¹ It limited broadness by allowing only grandparents to seek visitation under the statute²¹² and only against the parent’s wishes in defined circumstances that require the court to make findings.²¹³ A fit and competent parent’s decision was granted deference.²¹⁴ And, it posited that when a fit parent offers some amount of visitation to the grandparent, the court must make other significant findings before overriding the parent’s decision as unreasonable.²¹⁵

206. *Id.* The remainder of the House floor discussion on this amendment consisted solely of one representative relating the unhappy experience of a constituent parent who had had very little influence or recourse when a court ordered grandparent visitation, against her wishes, to her child’s paternal grandmother, a woman convicted on several drug charges and whose son was currently in jail for committing two public shootings and an additional shooting while on probation. *Id.* (statement of Rep. Wallace).

207. Visitation Rights of Grandparents, ch. 85, § 30-5-2(2)(a)–(g), 2002 Utah Laws 298.

208. *Id.*

209. S. 87 Substitute, 2002 Gen. Sess., at line 50 (Utah 2001), *available at* <http://www.le.state.ut.us/~2002/htmldoc/sbillhtm/sb0087s1.htm>.

210. *Id.*

211. *See supra* Part IV.

212. Visitation Rights of Grandparents, ch. 85, § 30-5-2(1), 2002 Utah Laws 298.

213. *Id.* § 30-5-2(2)(a)–(g).

214. *Id.* § 30-5-2(2)(c).

215. *Id.* § 30-5-2(2)(a)–(g).

In addition to incorporating the *Troxel* plurality's statutory guidelines, the factors discussed in the *Troxel* concurrences and dissents are also represented in the statute. The 2002 amendment provides that the court may consider an established, parent-like relationship as a factor in deciding whether to override a parent's unreasonable visitation decision.²¹⁶ Most importantly, the Utah legislature chose to require courts to consider whether the children would be harmed without a visitation order.²¹⁷ Finally, even some of *Campbell's* standards are represented in the amendment, such as consideration of the nature of the existing relationship and the fitness of all parties.²¹⁸ In summary, the current statutory provisions, as amended in 2002, are presented below, with the apparent source noted in brackets:

- (a) The petitioner is a fit and proper person to have visitation with the grandchild [*Campbell*, 1998 statute, *Troxel*];
- (b) Visitation with the grandchild has been denied or unreasonably limited [1998 statute, *Troxel*];
- (c) The parent is unfit or incompetent [*Campbell*, *Troxel*];
- (d) The petitioner has acted as the grandchild's custodian or caregiver, or otherwise has had a substantial relationship with the grandchild [*Campbell*, *Troxel*], and the loss or cessation of that relationship is likely to cause harm to the grandchild [*Troxel*];
- (e) The petitioner's child, who is a parent of the grandchild, has died, or has become a noncustodial parent through divorce or legal separation [1977 statute];
- (f) The petitioner's child, who is a parent of the grandchild, has been missing for an extended period of time [new];

or

216. *Id.* § 30-5-2(2)(b), (d).

217. *Id.* § 30-5-2(2)(d).

218. *Id.* § 30-5-2(2)(a), (d); *see* *Campbell v. Campbell*, 896 P.2d 635, 640 (Utah Ct. App. 1995).

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(g) Visitation is in the best interest of the grandchild [Common to all previous versions, *Campbell*, and *Troxel*].²¹⁹

In addition to the *Campbell* holdings that survived *Troxel* and were incorporated into the current amendment, three other *Campbell* factors survived and appear to remain good law in Utah. First, courts may continue to consider the preferences of the children as well as the children's relationships with each other and others to whom they will be exposed,²²⁰ factors that *Campbell* instructed courts to consider once it determined that a visitation order was appropriate.²²¹ Second, courts must still make findings that a visitation order would not unduly interfere with the parent-child relationship.²²²

Third, without making any substantive changes to the 2002 statute, the 2005 Grandparent Visitation Statute amendment repealed the parental sanctions provision established in the 1993 amendment under pilot program section 78-32-12.2,²²³ presumably leaving the court free to use its other remedial powers against parents in contempt of a visitation order.²²⁴

The calculus of which of these 2002 statutory factors carries the most weight in individual grandparent visitation cases was an issue of substantial concern to the Utah Supreme Court in *Thurgood*.²²⁵ However, the Statute's final provision, which authorizes grandparent visitation rights when "visitation is in the best interest of the grandchild," is clearly no longer sufficient justification alone for a visitation order.²²⁶

After many efforts by both courts and legislators to strike an appropriate balance between the competing interests of children, parents, and grandparents, the parent-child relationship in Utah is currently guarded by special statutory protections, at least in the context of grandparent visitation cases. These protections recognize

219. UTAH CODE ANN. § 30-5-2 (Supp. 2005) (emphasis added).

220. See, e.g., *Uzelac v. Thurgood (In re Estate of S.T.T.)*, 2006 UT 46, ¶ 5 n.1, 144 P.3d 1083.

221. *Campbell*, 896 P.2d at 640.

222. *Id.* at 639.

223. See Grandparents' Rights Extended, ch. 175, 1992 Utah Laws 676.

224. Pilot Program Repeal Clean-Up, 2005 Utah Laws 1107 (codified as amended at UTAH CODE ANN. § 30-5-2 (Supp. 2005)).

225. *Thurgood*, 2006 UT 46, ¶¶ 29-32.

226. UTAH CODE ANN. § 30-5-2(g).

the fundamental interest parents have in the care, custody, and control of their children, and they presume that parents act in the best interest of their children regarding grandparent visitation decisions. Nevertheless, upon a showing of sufficient countervailing factors by clear and convincing evidence, grandparents can rebut the presumption that the parent's decision is reasonable and in the best interest of the child.²²⁷ Grandparents who meet this stricter standard are still able to obtain state assistance to gain visitation in order to prevent harm to their grandchildren.²²⁸

V. TESTING *TROXEL'S* IMPACT: DO UTAH'S POST-*TROXEL* DECISIONS PROPERLY DEFER TO A FIT PARENT'S DECISION WHEN THE CHILD WOULD NOT BE HARMED ABSENT AN ORDER?

A review of grandparent visitation decisions in Utah appellate courts after *Troxel* reveals that the amendments to the Grandparent Visitation Statute are probably not clear enough to protect parents' fundamental interests in raising their children or to focus courts' attention on preventing harm to children. Since *Troxel*, one Utah grandparent visitation case has been decided based on the 1998 statute,²²⁹ and a second case was recently decided in the Utah Supreme Court under the 2002 statute.²³⁰

In the first case, *Pasquin v. Souter*, the court found no evidence that the child would be harmed without a visitation order, so it deferred to the parent's visitation decision, an interpretation of the 1998 Grandparent Visitation Statute that is consistent with *Troxel*.²³¹

The second case, *Uzelac v. Thurgood (In re Estate of S.T.T.)*, was an as-applied constitutional challenge to the Utah Grandparent Visitation Statute.²³² The Utah Supreme Court correctly found the revised 2002 statute constitutional under *Troxel* but admitted that

227. UTAH CODE ANN. § 30-5-2(2).

228. It is important for courts, legislators, and grandparent visitation advocates to remember that those grandparents who cannot meet this standard still have resources—albeit old-fashioned ones—for increasing the likelihood that their visits with their grandchildren will be encouraged and welcomed: kindness, cooperation, and respect for the parent's role and decision-making, combined with being of true assistance to both the parent and the children.

229. *Pasquin v. Souter*, No. 970910481 (Utah 3d Dist. Ct. July 8, 2001) (mem.), *aff'd mem.*, 2003 UT App 10.

230. *Thurgood*, 2006 UT 46.

231. *See Pasquin*, No. 970910481.

232. 2006 UT 46.

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legislative guidance on the application of the statute's factors would be helpful to ensure that judges properly balance the competing demands involved in grandparent visitation cases.²³³ The court's as-applied decision in this case concluded that the lower court's grandparent visitation order did not infringe upon parental liberty interests.²³⁴ However, the court's application of the Statute in this case is evidence that without further legislative guidance, particularly regarding the Statute's harm factor, grandparent visitation in Utah is still more likely to cause greater harm to children than it prevents.

A. Pasquin v. Souter: A Visitation Order Denied

Utah's first post-*Troxel* grandparent visitation case upheld a fit single mother's decision to completely deny grandparent visitation.²³⁵ *Pasquin v. Souter* required the court to apply the 1998 statute to a petition by a grandmother who requested visitation with her deceased son's child against the mother's (Ms. Souter's) wishes.²³⁶ The dispute over visitation was the result of a rocky relationship between the mother and the grandmother.²³⁷ While the grandmother had previously had a meaningful relationship with her grandchild, she had only had minimal contact with the child for three years prior to her son's death.²³⁸ The grandmother filed a petition for visitation under the Statute so that she could teach her granddaughter about her father's life and preserve his memory, stating she was "best equipped to accomplish this and eager to start."²³⁹ The mother objected to visitation in part because the grandmother planned to have the child associate with other children fathered by her deceased son in other nonmarital relationships.²⁴⁰

The court's memorandum decision noted that although the 1998 Grandparent Visitation Statute only required a "best interest" analysis in cases of death or divorce of the grandparent's child,²⁴¹ after *Troxel*, courts must analyze each of the statutory factors when

233. *Id.* ¶ 36.

234. *Id.* ¶ 43.

235. *Pasquin*, No. 970910481.

236. *Id.* at 3.

237. *Id.* at 4.

238. *Id.*

239. *Id.* at 3.

240. *Id.*

241. *Id.* at 2.

considering visitation petitions by all grandparents.²⁴² Therefore, despite the 1998 statute's contrary language and the *Campbell* precedent on record, the court interpreted both the statute and *Campbell* to constitutionally require all grandparents to rebut the presumption of parental reasonability by clear and convincing evidence.²⁴³ This standard was implied by the court's declaration that "it is difficult to imagine a situation in which a parent's reasonable decision to deny a grandparent visitation with a child would be contrary to the child's best interests."²⁴⁴ The trial court reviewed the facts of the case and ruled that the record "contain[ed] facts sufficient . . . to conclude that the best interests of [the child were] best served by deferring to decisions made by her mother concerning visitation with the [grandmother]."²⁴⁵ The mother refused all visitation at that time.²⁴⁶ On appeal, the decision was upheld.²⁴⁷

Pasquin demonstrates that a post-*Troxel* Utah court interpretation of the Grandparent Visitation Statute followed *Troxel's* requirement for courts to presume that a fit parent's decision is in the child's best interest, even when a single parent denied all visitation to a fit grandparent. The court's decision notably did not include a *Campbell* analysis; thus, *Campbell* appears to have had little to no precedential influence. Instead, the most significant statutory factor appears to have been the lack of any current, ongoing relationship between the grandmother and the grandchild despite there having been a previously existing relationship, indicating that the child would probably suffer no harm from losing the relationship by deferring to the mother's decision. Unfortunately, *Pasquin* is a district court memorandum decision with limited precedential influence on higher state courts.²⁴⁸ Nevertheless, it is a good example of deference to a parent's visitation decision under *Troxel* and suggests that when a visitation

242. *See id.*

243. *Id.* at 2–3.

244. *Id.* at 2.

245. *Id.* at 3.

246. *Id.* at 5.

247. *Pasquin v. Souter*, 2003 UT App 10 (mem.).

248. This is true even in the unusual situation presented by *Pasquin*, which was decided in the Third District by the Honorable Ronald E. Nehring, now of the Utah Supreme Court, who concurred in the *Thurgood* decision that affirmed a grandparent visitation order against a fit father's wishes.

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order may create greater harm to the child than it will prevent, grandparent visitation is appropriately denied.

B. Thurgood: Failure To Properly Defer, or a Sufficient Showing of Harm that Justifies Overriding a Fit Parent's Visitation Decision?

In contrast to *Pasquin*, the Utah Supreme Court upheld a grandparent visitation award in *Uzelac v. Thurgood (In re Estate of S.T.T.)*, a recent high-conflict case.²⁴⁹ This decision may delineate what the court considers to be a sufficient showing of harm to justify overriding a fit parent's visitation decision. Alternatively, the court may have failed to properly defer to the parental presumption by *Troxel* standards before applying the Grandparent Visitation Statute's rebuttal factors. In either case, the decision is troubling and suggests that the Statute should be amended to require a heightened showing of harm so that the competing needs and interests of children, parents, and grandparents are more appropriately balanced.²⁵⁰

1. History of the case

The Utah Supreme Court began its *Thurgood* opinion with a truncated and grandparent-centered recital of the facts. This is a reflection of its focus on the rebuttal factors of the Grandparent Visitation Statute rather than on any factors relevant to first upholding the constitutionally-required presumption that the parent's decision was in the child's best interest.²⁵¹ The decision fails to either include or analyze facts relevant to whether the father's visitation decision was reasonable and should have been granted deference because it could be presumed to be in his child's best interest. Therefore, this Section begins by presenting additional

249. 2006 UT 46, 144 P.3d 1083.

250. Unless the statute is amended, *Thurgood* will likely have significant precedential effect. It has already garnered significant media attention heralding grandparent rights. See Geoffrey Fattah, *Grandparent-Visit Ruling Is Praised*, DESERET MORNING NEWS, Aug. 26, 2006, available at <http://deseretnews.com/dn/view/0,1249,645196283,00.html>. This article contains numerous factual errors, but it garnered enough attention statewide that even the court's case file on *Thurgood* contains a letter from a Utah attorney referencing it and requesting a copy of the case because of the hope it gave grandparents. See also Pamela Manson & Jeremiah Stettler, *Grandparent Visitation Rights Upheld*, SALT LAKE TRIB., Aug. 26, 2006, available at http://www.sltrib.com/utah/ci_4242203; *Utah Court Upholds Grandparent Visitation Rights*, KUTV, Aug. 26, 2006, http://kutv.com/topstories/local_story_238181300.html.

251. *Thurgood*, 2006 UT 46, ¶¶ 1–12.

background of the *Thurgood* case as identified in the appellate record and in a previous court of appeals decision.²⁵²

This case began in 2000, when a father, Darryl Thurgood, disputed visitation rights sought by his daughter's maternal grandmother, Darlene Uzelac.²⁵³ Mr. Thurgood and his wife divorced in 1994; after a brief reconciliation, their child was born in December 1995.²⁵⁴ From 1996 to 1999, the mother and child lived with the maternal grandparents while the mother worked in the grandparents' home-based real estate business.²⁵⁵ Because of this living situation, the grandparents had daily contact and interaction with the child.²⁵⁶ They continued to have frequent contact with the child after she and her mother moved into their own home in February of 1999.²⁵⁷

In 2000, when the child was four years old, the mother died unexpectedly from a short illness, leaving instructions with the maternal grandmother to apply for guardianship of the child in contravention to Mr. Thurgood's parental rights.²⁵⁸ For a two-month period, the grandmother did not notify Mr. Thurgood of the mother's death; instead, she moved into the child's home to care for her while her petition for custody and guardianship of the child was being considered by the court.²⁵⁹

Mr. Thurgood learned of his ex-wife's death in the newspaper.²⁶⁰ At that time, the grandmother refused to relinquish his daughter, and he was forced to file an action to gain physical possession and an appointment of guardianship over his child.²⁶¹ The court awarded him temporary custody in June 2000 as "the natural father" with "absolute parental rights."²⁶² The final order of February 2001 made Mr. Thurgood's custody of his daughter permanent, noting that he

252. See generally *Thurgood v. Uzelac* (*In re S.T.T.*), 2003 UT App 439, 83 P.3d 398; Appellate Record, *Thurgood*, 2006 UT 46 (No. 20040796) (on file with the Utah Supreme Court, Salt Lake City, Utah) [hereinafter Appellate Record].

253. *Thurgood*, 2006 UT 46, ¶¶ 3–12.

254. *Id.* ¶ 3.

255. Appellate Record, *supra* note 252, at 1046; see also *Thurgood*, 2006 UT 46, ¶ 4.

256. *Thurgood*, 2006 UT 46, ¶ 3.

257. *Id.* ¶ 4.

258. Appellate Record, *supra* note 252, at 30.

259. *Id.*; *Thurgood v. Uzelac* (*In re S.T.T.*), 2003 UT App 439, ¶¶ 2–3, 83 P.3d 398.

260. *In re S.T.T.*, 2003 UT App 439, ¶ 2.

261. *Id.*

262. *Id.* (citing trial court minute entry of September, 2000).

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was a fit parent and that Ms. Uzelac's petition for custody failed.²⁶³ Nonetheless, the court recommended "some future visitation" between the grandmother and child, subject to the father's approval.²⁶⁴ However, no specific visitation order was made.²⁶⁵

During this adjustment period, as Mr. Thurgood attempted to reestablish his own parent-child relationship with his daughter, he permitted three one- to two-hour visits and numerous phone calls between the maternal grandparents and his daughter over a nine-month period.²⁶⁶ According to filings in the record, Mr. Thurgood was unhappy with these interactions.²⁶⁷ He alleged that the grandmother was attempting to manipulate the child's affections and undermine his relationship with his daughter by showering her with wrapped gifts, which the child opened during the grandmother's visit at Mr. Thurgood's home, and then packing up the toys in the trunk of her car and telling the child that she could play with them when she came to live at the grandparents' home.²⁶⁸ Additionally, Mr. Thurgood alleged that the grandmother was not acting in his daughter's best interest by withholding approximately \$4000 of his daughter's Social Security survivor's benefits that the grandmother obtained after the child was removed from her custody.²⁶⁹

The record also reveals that after Ms. Uzelac's petition to take custody of the child was denied, she amended it to seek a visitation order.²⁷⁰ Her counsel submitted a hearing brief in May 2001 arguing that Utah's 2000 Grandparent Visitation Statute was constitutional under the newly decided *Troxel* case and that visitation should be ordered because Mr. Thurgood "has cut his daughter off from visitation with her grandparents."²⁷¹ Mr. Thurgood objected and

263. Appellate Record, *supra* note 252, at 500.

264. *In re* S.T.T., 2003 UT App 439, ¶ 3 (quoting trial court order of February 7, 2001).

265. Appellate Record, *supra* note 252, at 705.

266. *Uzelac v. Thurgood (In re Estate of S.T.T.)*, 2006 UT 46, ¶ 6, 144 P.3d 1083; Appellate Record, *supra* note 252, at 177-78.

267. Appellate Record, *supra* note 252, at 176-81.

268. *Id.* at 178-79.

269. *Id.* at 771 (transcript of Hearings on Motions, Jan. 9, 2003, p. 16).

270. *Id.* at 703.

271. *Id.* at 349. Additionally, the brief asked the court to order visitation according to "the directives of . . . *Campbell v. Campbell*." *Id.* As shown in Part III.A.3 and Part III.C., it is questionable whether either the 2000 statute or *Campbell* would have passed constitutional muster under *Troxel*.

filed a constitutional challenge to the 2000 Grandparent Visitation Statute that was heard in the Third District Court in June 2001.²⁷²

In July, the court ruled that the 2000 statute was constitutional under *Troxel*, and that despite Mr. Thurgood's fitness as a parent, the court could determine grandparent visitation "based solely upon question of best interests of the minor granddaughter."²⁷³ The court informed Mr. Thurgood that he had "invited" the court's intervention into his visitation decisions by divorcing the child's mother, and that the death of the child's mother had "created a situation where the court should consider the issue of visitation between [the grandmother] and the child."²⁷⁴

At the grandmother's request, the court ordered a visitation evaluation by a "duly qualified evaluator," after which a trial on visitation issues would occur near the end of 2001.²⁷⁵ While these issues were pending, no order of visitation was put in place, and Mr. Thurgood chose not to respond to Ms. Uzelac's repeated demands for visitation.²⁷⁶ Unsatisfied by the response to her demands, Ms. Uzelac filed a motion for a temporary order of visitation in April 2002.²⁷⁷

In June 2002, apparently without a hearing of any kind, the court ordered temporary grandparent visitation beginning with two hours of supervised visitation and increasing over a period of time to one unsupervised weekend visit each month.²⁷⁸ This order coincided with Mr. Thurgood's then six-year-old daughter's summer vacation from school, and Mr. Thurgood spent a month during that vacation traveling with her in Australia shortly after this order was made.²⁷⁹ When he returned in August, during a time when he was unrepresented by counsel,²⁸⁰ Ms. Uzelac had obtained a court order granting her a schedule of stepped-up visitation culminating in

272. *Id.* at 498.

273. *Id.* at 500. This surprising ruling makes one wonder if the court had read the *Troxel* case, which clearly forbade courts from ordering visitation solely upon "best interests," absent consideration or even a mention of deference to a fit parent's wishes. *See Troxel v. Granville*, 530 U.S. 57, 70 (2000).

274. Appellate Record, *supra* note 252, at 500.

275. *Id.* at 500-01.

276. *Id.*

277. *Thurgood v. Uzelac (In re S.T.T.)*, 2003 UT App 439, ¶¶ 1-2, 83 P.3d 398.

278. Appellate Record, *supra* note 252, at 540.

279. *In re S.T.T.*, 2003 UT App 439, ¶ 4.

280. Appellate Record, *supra* note 252, at 549.

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visitation one weekend per month to continue until trial.²⁸¹ For two months, Mr. Thurgood did not comply with this order, and five scheduled weekend visits were missed.²⁸²

In October, Ms. Uzelac filed a motion seeking a contempt order against Mr. Thurgood for “violations” of this visitation order.²⁸³ The court found Mr. Thurgood in contempt, sentenced him to sixty days in jail, and informed him that the only way to stay the jail sentence was for him to deliver his daughter to Ms. Uzelac for visitation every other weekend throughout the pendency of the case.²⁸⁴

In the face of this looming jail sentence and as his child's only surviving parent in an ongoing battle with a woman who had previously sought to take guardianship of his child away from him, Mr. Thurgood appeared to have little choice but to comply with the visitation order. He duly delivered his daughter to Ms. Uzelac for twice-monthly weekend visits from January to December 2003, while appealing the contempt order to the Utah Court of Appeals.²⁸⁵ Mr. Thurgood argued that the trial court abused its discretion because the Utah Code provides that the penalty for violations of visitation orders can consist of a statutory maximum jail sentence of only thirty days and make-up visitation only in an amount that remedies the lost visitation.²⁸⁶ The Utah Court of Appeals agreed with Mr. Thurgood and reversed the contempt order because the trial court had abused its discretion by sentencing Mr. Thurgood to sixty days of jail time and by awarding Ms. Uzelac vastly increased visitation.²⁸⁷ However, the Utah Court of Appeals refused to consider Mr. Thurgood's claims about the trial court's initial errors in awarding visitation under the Grandparent Visitation Statute.²⁸⁸

In January 2004, following this December 2003 decision by the court of appeals, Mr. Thurgood and his eight-year-old daughter moved to Florida.²⁸⁹ Prior to moving, Mr. Thurgood filed with the

281. *Id.* at 545–47.

282. *See id.* at 545, 561. The court's order for every other weekend visitation was dated August 23, 2002, meaning that by October 21, the date of Ms. Uzelac's motion, Mr. Thurgood would have missed five scheduled visitation weekends.

283. *Id.* at 561.

284. *In re* S.T.T., 2003 UT App 439, ¶ 5; Appellate Record, *supra* note 252, at 400.

285. *In re* S.T.T., 2003 UT App 439, ¶ 5; Appellate Record, *supra* note 252.

286. *In re* S.T.T., 2003 UT App 439, ¶¶ 13, 14.

287. *Id.* ¶ 14.

288. Appellate Record, *supra* note 252, at 401–02.

289. Uzelac v. Thurgood (*In re* Estate of S.T.T.), 2006 UT 46, ¶ 6, 144 P.3d 1083.

court an appropriate notification of his intent to move.²⁹⁰ The notice proposed an offer of grandparent visitation to include three days at Christmas, four days in the summer, twice-weekly phone calls, and visits in Florida for two to three days at a time (including overnight visits) at the father's approval.²⁹¹ This offer was apparently rejected, and there is no indication in any subsequent hearing or decision that Mr. Thurgood's offer was ever considered by the courts as evidence that Mr. Thurgood was willing to offer some amount of reasonable visitation to the grandparents.

Ms. Uzelac's visitation evaluator presented her formal findings of the child's attachment to her grandparents to the court on January 19, 2004—almost immediately after Mr. Thurgood's move to Florida—even though the evaluation had been conducted four months earlier.²⁹² Additionally, Ms. Uzelac spoke by telephone to the child in February 2004, after which the record reveals no further visitation or telephone calls.²⁹³

The trial on the issue of grandparent visitation was held in Utah on July 28, 2004. Mr. Thurgood was represented by two attorneys, though he did not attend himself.²⁹⁴ At the trial, Ms. Uzelac offered as conclusive the testimony of her visitation expert.²⁹⁵ The visitation expert's report to the court concluded that the petitioning grandparents were fit and proper persons to have visitation with the child, that the child was warmly attached to her grandparents, and that the child particularly enjoyed being in the home with toys and clothes she remembered having during the time her mother was alive.²⁹⁶ This expert further testified that the child “[kept] the memory of her mother alive via her access to the maternal

290. *Id.*; Appellate Record, *supra* note 252, at 868.

291. Appellate Record, *supra* note 252, at 869.

292. Appellate Record, *supra* note 252 (including information from pages 1 and 4 of the Grandparent-Grandchild Assessment). The evaluator's visit occurred in the Uzelacs' home during one of the child's 2003 visitation weekends, although the visit was not a “traditional formal visitation evaluation” typically requested by courts when making visitation determinations. *Id.*

293. The grandmother claimed that she called and left messages at least three times weekly for several months. Handwritten Log by Grandmother, *Thurgood*, 2006 UT 46 (No. 20040796). The father argued that he complied with all applicable Orders—the one regarding telephone contact expired on March 1, 2004. Appellate Record, *supra* note 252, at 901.

294. Appellate Record, *supra* note 252, at 1045.

295. *Id.* at 1049.

296. Appellate Record, *supra* note 252 (including information from pages 4 and 6 of the Grandparent-Grandchild Assessment).

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grandparents,” that she “[was] strongly attached” to the Uzelacs, and that she would “suffer” if deprived of the relationship.²⁹⁷ The expert therefore opined that “frequent and on-going visitation” with the maternal grandparents would be in the child’s best interest.²⁹⁸

The court subsequently ordered grandparent visitation to occur every fifth weekend within one hundred miles of the child’s home in Florida (unless a holiday weekend intervened, in which case the child would spend it with her father), ten days during the summer vacation, and telephone contact for a minimum of thirty minutes each Wednesday at seven o’clock in the evening—as well as at any other time the child wished to call her grandparents.²⁹⁹ Mr. Thurgood appealed the order, claiming that the Utah Grandparent Visitation Statute was unconstitutional as it was applied to him.³⁰⁰ He claimed that the courts had never deferred to his visitation decisions regarding “who, when, and where third parties [were] going to be permitted visitation with his daughter”³⁰¹ despite “no prior ruling that [he was] an unfit parent.”³⁰² The court granted a stay of the visitation order while Mr. Thurgood’s challenge to the constitutionality of the Statute was pending.³⁰³

2. Constitutional ruling on appeal

The Utah Supreme Court correctly concluded that the current amended version of Utah’s Grandparent Visitation Statute was constitutional after *Troxel*.³⁰⁴ It began its constitutional analysis by acknowledging that parents have a constitutional right to make decisions concerning the “care, custody, and control of their children” and that those decisions are entitled to deference under the presumption that they are “in the best interests of their children.”³⁰⁵

297. Appellate Record, *supra* note 252, at 1051–52.

298. *Id.*

299. *Id.* at 1053–54.

300. *Id.* at 704.

301. *Id.*

302. *Id.* at 500.

303. *Id.* at 1069.

304. *Uzelac v. Thurgood (In re Estate of S.T.T.)*, 2006 UT 46, ¶ 36, 144 P.3d 1083.

305. *Id.* ¶ 13. The court discussed the following cases from 1923–2000: *Troxel v. Granville*, 530 U.S. 57 (2000); *Santosky v. Kramer*, 455 U.S. 745 (1982); *Parham v. J.R.*, 442 U.S. 584 (1979); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); and *Meyer v. Nebraska*, 262 U.S. 390 (1923).

However, the court then emphasized that the state may legitimately “limit parental autonomy in raising children” when its *parens patriae* interests were implicated.³⁰⁶ It contended that a state’s *parens patriae* interest was implicated when a child’s parents divorce,³⁰⁷ when custody of a child is at issue,³⁰⁸ and when a child has formed relationships with non-parental third parties.³⁰⁹ The court also cited numerous state grandparent visitation statutes, including Utah’s, as evidence that grandparent-grandchild relationships are among those third-party relationships that implicate a state’s *parens patriae* power.³¹⁰

Then, in support of its conclusion that Utah’s current Grandparent Visitation Statute was constitutional, the court reviewed the plurality’s holdings in *Troxel*.³¹¹ According to the court, *Troxel* (1) rejected a “‘best interest’ standard as the only limiting factor” to

306. *Thurgood*, 2006 UT 46, ¶ 14. The court supported this assertion by citing to the following United States Supreme Court cases that upheld state interference with parental autonomy to protect children from harm: *Santosky v. Kramer*, 455 U.S. 745 (1982) (terminating parental rights after due process hearing in cases of abuse and neglect); *Prince v. Massachusetts*, 321 U.S. 1158 (1944) (upholding a state law prohibiting an aunt from allowing her nine-year-old niece to street tract at a busy intersection); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (requiring child education); and *Sturges & Burn Manufacturing Co. v. Beauchamp*, 231 U.S. 320 (1913) (prohibiting youth from working in hazardous occupations).

307. *Thurgood*, 2006 UT 46, ¶ 15 (citing Utah’s divorce statute).

308. *Id.* The court discussed *Palmore v. Sidoti*, 466 U.S. 429 (1984), which notes that courts grant custody to one parent over another based on the best interests of the child.

309. *Thurgood*, 2006 UT 46, ¶¶ 15–16. The court cited *Campbell v. Campbell*, 896 P.2d 635 (Utah Ct. App. 1995), which approves state intervention to foster grandparent-grandchildren relationships when it would be in the children’s best interest, and *Gribble v. Gribble*, 583 P.2d 64 (Utah 1978), which recognizes that some “relationships beyond those of parent-child may be important enough to protect vis-à-vis visitation,” *id.* at 66, in that case, a stepparent relationship upon divorce, *id.* at 65. Using these citations to justify the state’s *parens patriae* intervention to promote third-party visitation in a child’s best interest seems somewhat inapposite because *Campbell*, as discussed in Part IV.B., was essentially overruled after *Troxel*, and *Gribble* was not truly a third-party visitation case, but a case between the divorcing parent/stepparent of the child.

310. *Thurgood*, 2006 UT 46, ¶¶ 15–16 & n.2. The court also presented a truncated review of the history of Utah’s Grandparent Visitation Statute. *Id.* ¶¶ 16–17. Unfortunately, the review did not take into consideration the limited purposes of its original enactment or address the early experimentation between broad and narrow approaches to the statute that the legislature settled in favor of a narrow formulation prior to judicial involvement in *Campbell* in 1995. The court essentially jumped from the 1977 original statute to the 2005 amended statute without commenting on the intervening debate and concluded that “the statute favors” grandparents of grandchildren whose parents have died or been divorced. *Id.* ¶ 17.

311. *Id.* ¶¶ 19–24.

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a grandparent visitation award,³¹² (2) required “proper deference to the parental presumption” of a fit parent,³¹³ and (3) noted that “special weight” was to be afforded to a fit parent’s grandparent visitation decision.³¹⁴

The Utah Supreme Court also correctly recognized that constitutionally acceptable statutes were likely to contain provisions deferring to the presumption that fit parents’ visitation decisions were in their children’s best interest.³¹⁵ Further, where visitation was limited or denied, the court also recognized that a statute requiring a finding that the parent was acting unreasonably “would be more likely to be upheld.”³¹⁶

The Utah Supreme Court then applied the *Troxel* holdings to Utah’s Grandparent Visitation Statute to determine whether it was constitutional.³¹⁷ First, it presumed without comment that the Statute met *Troxel*’s first requirement that third-party visitation statutes not be overly broad.³¹⁸ The court made this presumption because Utah’s statute gives standing only to grandparents and notes that the timing of visitation petitions are limited and governed by the Statute.³¹⁹

Next, the court noted that section 30-5-2(2) met the prerequisite of deference to a parent’s visitation decision by requiring courts to presume that fit parents’ visitation decisions are in the best interests of their children.³²⁰ The court then engaged in a lengthy discussion about the various statutory factors by which a fit parent’s visitation decision may be rebutted.³²¹ The court broke down these rebuttal factors into three general categories: One that addresses situations where a child’s interests may differ from the parent’s, one that addresses harm a child may suffer without a visitation order, and one that identifies necessary threshold findings. This Comment will discuss the court’s interpretation of these groupings in comparison

312. *Id.* ¶¶ 19, 21 (quoting *Troxel v. Granville*, 530 U.S. 57, 63 (2000)).

313. *Id.* ¶¶ 20, 23.

314. *Id.* ¶¶ 22, 23.

315. *Id.*

316. *Id.* ¶ 23.

317. *Id.* ¶¶ 27–37.

318. *See Troxel v. Granville*, 530 U.S. 57, 67 (2000).

319. UTAH CODE ANN. § 30-5-2(1) (2005).

320. *Thurgood*, 2006 UT 46, ¶ 27.

321. *Id.* ¶¶ 29–35.

to *Troxel*. Then, a review of the *Thurgood* court's as-applied decision will discuss how these factors were inappropriately applied, and therefore indicate a need for better legislative clarification of the Statute.

a. Differing interests. The first category of factors in Utah's Grandparent Visitation Statute to be identified by the Utah Supreme Court recognized that divisions in the primary family, for whatever reason, may result in situations where the interests of children may be different from the interests of parents.³²² The court saw a greater likelihood that situations in which the "in-law" relationship [was] the only remaining adult connection"³²³ would create circumstances where parents' interests may differ from children's interests, resulting in unreasonable parental visitation decisions that are not in the child's best interest.³²⁴ The court anticipated that such parent visitation decisions would receive heightened scrutiny to determine their reasonability.³²⁵

Because the Utah Supreme Court predicted that parents in intact families were less likely to have interests that conflicted with the best interest of their children, it was careful to point out that visitation decisions by parents in intact families would likely be upheld.³²⁶

b. Harm without a visitation order. The second category addressed statutory factors indicating that a child may be harmed unless the court intervenes with a visitation order.³²⁷ Interestingly, this set of factors was characterized by the court quite differently than it was in *Troxel*. The first factor emphasized by the Utah

322. *Id.* ¶ 30.

323. *Id.*

324. *See id.* ¶ 30 & n.6.

325. This is because the court presumed that the statutory factors are more likely to apply in divided families than in intact families. *See id.* ¶ 30 (citing UTAH CODE ANN. § 30-5-2(2)(c), (e), (f) (2005)). However, although the court's reasoning on this issue may be generally valid, it appears to have resulted in prejudging Mr. Thurgood's visitation decision as presumptively unreasonable merely because the in-law relationship is the only remaining adult connection between the child and her grandparents. *See id.*

326. *Id.* ¶ 30 n.6. As a result of this declaration, Utah courts are far less likely to be faced with the kinds of grandparent visitation battles other states are facing—visitation disputes fought in typically high-conflict situations between grandparents and their own married children.

327. *Id.* ¶ 31.

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Supreme Court was the child's potential loss of a "substantial relationship,"³²⁸ a factor that did not receive majority support from the U.S. Supreme Court in *Troxel* as constitutionally sufficient to rebut the parental presumption.³²⁹

The second factor in this category was "denied or unreasonably limited" visitation,³³⁰ which would likely show that "the parent is not acting in the child's best interests."³³¹ However, in *Troxel*, the court considered the mother's limited offer of visitation as evidence that her visitation decision was not per se unreasonable.³³² Since Mr. Thurgood's previous visitation offer was not considered in the Utah Supreme Court's as-applied decision, this suggests that the court may view denied or limited visitation as per se evidence that a parent's visitation decision is unreasonable.³³³ This may not be constitutional under *Troxel* and is an important distinction because it emphasizes that under this factor, the reasonability of the parent's decision—not what may be in the child's best interest—is what courts should be examining at this stage.

Finally, this category also includes the statutory factor addressing harm to the child that may occur as a result of the loss of a caretaking or otherwise substantial grandparent relationship.³³⁴ The court correctly concluded that constitutional grandparent visitation statutes after *Troxel* do not require a "showing of harm to the child."³³⁵ It must be remembered, however, that *Troxel* left a harm

328. *Id.* (quoting UTAH CODE ANN. § 30-5-2(2)(d)).

329. *See supra* Part IV.A. Only three out of nine justices agreed that established, significant non-parent relationships with children should receive constitutional protection.

330. UTAH CODE ANN. § 30-5-2(2)(b).

331. *Thurgood*, 2006 UT 46, ¶ 31.

332. *See Troxel v. Granville*, 530 U.S. 57, 71 (2000). Four out of nine judges in *Troxel* suggested that denied or limited grandparent visitation may be considered in the context of determining the reasonability of the parent's visitation decision. *Id.* at 71. The plurality did not, as implied by the Utah Supreme Court in *Thurgood*, indicate that denied or limited visitation was per se unreasonable and, therefore, a signpost that by itself rebuts the parental presumption. *See* 2006 UT 46, ¶ 31.

333. This position is as untenable as the opposite extreme rejected by the court, namely, that a fit parent's visitation decision can never be rebutted. *See Thurgood*, 2006 UT 46, ¶ 24. Rather, "special weight" must be given to a fit parent's "decision about whether to cultivate an intergenerational relationship" in the first place, *id.* (quoting *Troxel*, 530 U.S. at 70), and satisfaction of due process requires that grandparents rebut the parental presumption by clear and convincing evidence, *id.* ¶ 28.

334. *Id.* ¶ 31 (citing UTAH CODE ANN. § 30-5-2(2)(d)).

335. *Id.* ¶ 24.

requirement, in addition to numerous factors other than the basic elements required by due process, to the prerogative of state legislatures.³³⁶ Thus, while not constitutionally required to uphold the validity of the Utah statute, Utah's harm factor was intended to be an important element in the as-applied analysis due to its inclusion in the legislature's post-*Troxel* revised statute.³³⁷ Unfortunately, the Statute provides no guidance as to the type of harm that will justify rebuttal of the parental presumption, and the court merely stated that the child must be "affirmatively" harmed by the parent's visitation decision.³³⁸

c. Necessary threshold findings. The court characterized the final category of statutory factors as "necessary threshold findings" without which the court cannot order visitation,³³⁹ namely, that the grandparent must be a "fit and proper person" to be awarded visitation³⁴⁰ and that all other findings notwithstanding, the court believes that visitation is in the best interest of the child.³⁴¹

By classifying the Statute's rebuttal factors in this way, the court reiterated that the parent's decision regarding grandparent visitation should never be rebutted simply because of the fitness of the grandparents or because visitation would be in the child's best interest.³⁴²

Using this approach, the court declared that Utah's current Grandparent Visitation Statute included the necessary statutory factors to make it constitutional under *Troxel*.³⁴³ Further, the court made very little reference to *Campbell*, although it did note that the Statute's expansive purpose of "fostering relationships between grandparents and their grandchildren" had been "narrowed significantly" since the version of the statute at issue in *Campbell*.³⁴⁴

336. *See supra* text accompanying note 194.

337. *Thurgood*, 2006 UT 46, ¶ 29.

338. *Id.* ¶ 33.

339. *Id.* ¶ 32.

340. UTAH CODE ANN. § 30-5-2(2) (2004).

341. *Id.* § 30-5-2(2)(g).

342. *Thurgood*, 2006 UT 46, ¶ 33.

343. *Id.* ¶ 35.

344. *Id.* ¶ 26 n.4 (quoting *Campbell v. Campbell*, 896 P.2d 635, 643 (Utah Ct. App. 1995)).

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However, despite affirming the constitutionality of the Grandparent Visitation Statute, the Utah Supreme Court declared that the Statute was flawed.³⁴⁵ The court called upon the legislature to provide courts with additional statutory guidelines³⁴⁶ because giving the proper weight to each factor in an individual visitation decision was difficult and confusing.³⁴⁷ Indeed, an examination of the court's application of the Statute to Mr. Thurgood reveals that the court's request is not only appropriate but may be necessary to protect the fundamental interests at stake. In any case, how to protect those interests within *Troxel's* flexible guidelines is a policy decision for the legislature, not the judiciary. The legislature should require grandparents to make a heightened showing of harm to the child before a visitation order is issued so that the competing needs of parents, grandparents, and children can more appropriately be balanced.

2. Statutory as-applied ruling on appeal

Unfortunately, the *Thurgood* court's as-applied analysis did not follow its own outlined structure of factors when ruling on Mr. Thurgood's constitutional complaint. It also did not start its analysis at the Statute's beginning by first giving Mr. Thurgood's visitation decision special weight or evaluating the reasonability of his visitation decision.³⁴⁸ Rather, the court started its analysis by examining whether the district court had made clear and convincing findings on each of the "relevant factors" in the rebuttal section of the Statute.³⁴⁹

By doing so, the Utah Supreme Court appeared to treat these rebuttal factors more like the elements in a statutory "best interest" analysis, with the focus on determining whether a combination of factors existed that made a visitation order appropriate, rather than

345. *Id.* ¶ 36.

346. *Id.*

347. *See id.* ¶ 36 n.7.

348. *Id.* ¶ 39. The Utah Supreme Court simply stated that "the district court gave special weight to Mr. Thurgood's decisions" by placing "the burden of proof on the grandparents to rebut the presumption that Mr. Thurgood's visitation decision was in the best interests of the child." *Id.* However, there is no indication that the district court ever considered Mr. Thurgood's reasons for his denial and/or restriction of visitation to determine if they were reasonable or examined whether the circumstances justified his belief that he was acting in his daughter's best interest.

349. *Id.*

on examining whether Mr. Thurgood's visitation decision was unreasonable and not in his child's best interest or whether his previous offer of visitation was insufficient to protect her from harm and thus primed for rebuttal. This application is at odds with both the Statute and with *Troxel*.

As a result, Mr. Thurgood has been forced to undergo years of expensive litigation that he might have been spared if his constitutionally required parental presumption had first been examined. The time, expense, and disruption to both Mr. Thurgood and his daughter is exactly what Justice Kennedy warned of in *Troxel*, stating that courts may have a constitutional obligation to protect parents from such litigation when the disruption is severe.³⁵⁰

Starting with section 30-5-2(2)(a)-(g) of the Utah Code, the court concluded that the district court had made findings that the grandparents had rebutted the parental presumption because (1) Mr. Thurgood's family structure was non-intact, and the Uzelac's daughter had died;³⁵¹ (2) by a rote and sterile recitation of visitation dates, Mr. Thurgood was found to have "unreasonably" restricted visitation;³⁵² (3) the child's contacts with the Uzelacs in previous years constituted a "substantial relationship," the loss of which "would be harmful to the child"³⁵³ based on a one-time informal visitation evaluation conducted in 2003 when the child was seven years old;³⁵⁴ and (4) using the statutory "best interest" factors identified in section 30-3-34 of the Utah Code to determine visitation and custody decisions between competing parents with co-equal claims in divorce, grandparent visitation was found to be in the child's best interest.³⁵⁵

The Utah Supreme Court's as-applied decision should instead have followed its own constitutional analysis for consistency and accuracy. Had it done so, the court would have begun with section 30-5-2(2), the parental presumption of reasonability. Reviewing Mr. Thurgood's decision for reasonability would likely have led the court to carefully review the record and acknowledge in its statement of the facts that from the moment of her daughter's death, Ms. Uzelac

350. See *supra* Part IV.A.

351. *Thurgood*, 2006 UT 46, ¶ 40.

352. *Id.* ¶ 41.

353. *Id.* ¶ 42.

354. *Id.* ¶¶ 6, 8.

355. *Id.* ¶ 43 & n.9.

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began pursuing a course to undermine Mr. Thurgood as a parent. Had the court done so, it would not have been difficult to understand why a father, adjusting to the new role as sole custodian of his daughter, might not be overly anxious to relinquish her to a grandparent who actively sought to deny him that right, especially when, at the time, grandparent visitation was to occur at his discretion.

The court would also have had to acknowledge other factors relevant to upholding Mr. Thurgood's parental presumption of reasonability. For example, the court should have at least acknowledged bias in its statement that the last contact of record between the child and Ms. Uzelac was in February 2004. In fact, Mr. Thurgood had offered grandparent visitation at the time of his notice of intent to move.³⁵⁶ Further, after the trial in July 2004, the parties stipulated that the court's visitation order be stayed during the pendency of Mr. Thurgood's appeal, which was granted by the court.³⁵⁷ Instead, the decision omits these facts and others just as relevant to the reasonability of Mr. Thurgood's visitation restrictions. The limited facts presented in the opinion about Mr. Thurgood tend to portray him as an insensitive parent willfully harming his daughter by callously restricting grandparent visitation.³⁵⁸ Whether counsel for Mr. Thurgood failed to argue these points or whether the court's sympathies lay with the grandmother for whatever reason, relevant facts relating to Mr. Thurgood's decisions were never considered in the court's opinion.

Giving Mr. Thurgood's visitation decision "special weight" should at a minimum have required the court to examine his visitation decisions to evaluate their purpose, reasoning, and

356. Appellate Record, *supra* note 252, at 868.

357. *Id.* at 1062 (Order Granting Motion for Stay).

358. These statements include the following, which are not countered by any background facts to explain or justify Mr. Thurgood's decisions or point of view: After Mr. Thurgood was awarded sole custody of his daughter, "it became apparent that the parties could not work out a mutually acceptable visitation schedule." *Thurgood*, 2006 UT 46, ¶ 6. "Mr. Thurgood . . . did not allow any visitation between the child and the Uzelacs for five months. . . . Mr. Thurgood allowed Ms. Uzelac to spend one hour with the child." *Id.* "Despite the court-ordered schedule for visitation . . . Mr. Thurgood only allowed Ms. Uzelac to visit the child twice between July 2002 and January 2003." *Id.* This occurred "despite repeated attempts by the Uzelacs to contact the child." *Id.* ¶ 41. The contempt order was intended to remedy "the number of visits the father had prevented." *Id.* ¶ 6. "The last telephonic visitation on record" after Mr. Thurgood moved to Florida "occurred in February 2004." *Id.* "Mr. Thurgood terminated all phone contact between the Uzelacs and the child." *Id.* ¶ 41.

projected progression. Had the court done so, the record would clearly have revealed facts that made Mr. Thurgood's visitation decisions sympathetic, if not fully justified. For example, Ms. Uzelac failed to notify Mr. Thurgood of her daughter's sudden death, forced Mr. Thurgood to seek court assistance to obtain physical possession of his daughter, and then fought Mr. Thurgood in court to obtain custody of his daughter.³⁵⁹ According to Mr. Thurgood, during the visitations that he permitted, Ms. Uzelac attempted to undermine his attempts to establish his own parent-child relationship with his daughter and manipulated his daughter's affections by giving, and then withholding, material gifts.³⁶⁰ Mr. Thurgood reported financial underhandedness that made him doubt that Ms. Uzelac's intentions were in the child's best interest.³⁶¹ Further, Ms. Uzelac has hounded Mr. Thurgood for over six years in the legal system, resulting in legal bills of an undoubtedly enormous amount, in her aggressive efforts to obtain and enforce court-ordered visitation.³⁶² The statutory presumption in favor of Mr. Thurgood's visitation decision was never evaluated on the basis of these or any other facts.

Additionally, the court did not consider the harm that Ms. Uzelac was willing to impose on her granddaughter. The court expressed no concern that Ms. Uzelac sought and obtained a contempt order against her granddaughter's only remaining parent for missing five visits.³⁶³ If Mr. Thurgood had resisted this order and served his sixty-day jail sentence as a matter of principle, his young daughter would effectively have lost both of her parents in a short amount of time. Contempt orders for missing visitation may be more appropriate in the context of two divorced parents with an equal claim to the child, but for a grandmother to guarantee visitation by using the threat of a jail sentence against a child's only surviving parent seems absurdly harmful to the child.³⁶⁴

359. *See supra* Part V.B.1.

360. *Id.*

361. *Id.*

362. *Id.*

363. *Thurgood*, 2006 UT 46.

364. This may be why these sanctions were repealed in 2005. *See* Pilot Program Repeal Clean-Up, ch. 129, 2005 Utah Laws 1215. These forces on a single parent in a grandparent visitation battle are nearly irresistible, as shown by Mr. Thurgood's compliance with a visitation order for the entire year that it took to appeal and receive relief.

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Further, the court did not acknowledge the harm the grandmother was causing to Mr. Thurgood or the child by constantly undercutting Mr. Thurgood's role as a parent.³⁶⁵ Had these harms been considered, the court might have acknowledged that it was reasonable under these circumstances for a father to feel that his child's best interest was served by temporarily creating a little distance from her grandmother. Mr. Thurgood did not argue that his decision to restrict or deny visitation was forever fixed and unchangeable; he merely argued that, given the history and current circumstances, his grandparent visitation decision deserved constitutional protection.³⁶⁶

The harm the court did discuss in its decision was the rebuttal factor in section 30-5-2(2)(d), addressing the likely harm to be suffered by the grandchild as a result of the loss or cessation of the grandparent relationship.³⁶⁷ The court's reliance on the visitation expert's testimony³⁶⁸ about harm the child would suffer without a visitation order raises several questions about the Statute's harm requirement that the legislature and courts should consider.

In particular, what kind of harm to the child justifies a visitation order? Does "affirmative" harm mean anything more than "a specialist says so"? For example, if the evidence revealed that a child had successfully weathered a transition period where a visitation order to maintain continuity may previously have been justified, must a parent comply with an ongoing grandparent visitation order so that the child may "process" previous losses? If so, for how long? In *Thurgood*, where the child is now nearly eleven years old and there is no evidence in the record that she has been unable to keep the memory of her mother alive without visitation with her maternal grandparents during the pendency of the case, should the father's visitation offer be superseded by the court because at some point in the past the child and her mother lived in the grandparents' home?

At what point does a cross-country grandparent visitation order imposed on a parent in a high conflict situation cause more harm to the child than it prevents? If it is true, as the court stated in *Pasquin*,

365. *Thurgood*, 2006 UT 46.

366. Brief for the Appellant, *Uzelac v. Thurgood (In re Estate of S.T.T.)*, 2006 UT 46, 144 P.3d 1083 (No. 003900606).

367. See *Thurgood*, 2006 UT 46, ¶ 31 (citing UTAH CODE ANN. § 30-5-2(2)(d) (2005)).

368. *Id.* ¶ 10.

that “[i]t is difficult to imagine a situation in which a parent’s *reasonable* decision to deny a grandparent visitation with a child would be contrary to the child’s best interests,”³⁶⁹ is state intrusion to order grandparent visitation justified by the showing of harm that has been made in this case? Do high conflict relationships between the parents and grandparents over prolonged, expensive litigation and visitation orders harm children less than the harm the visitation order is intended to prevent?

Should the court consider not just the harm that may occur without a visitation order, but also consider how the child has been harmed by the grandparents’ attempts to secure visitation? In *Thurgood*, for example, the court did not appear to consider that the child may have been harmed by the grandmother’s refusal to inform the father of the mother’s sudden death or by her attempts to prevent the child’s access to, and bonding with, her father. Additionally, the court did not seem to consider that the child may have been harmed by knowing that her grandmother would seek to send her father to jail unless she visited with her grandmother. These questions suggest that the Utah legislature should spell out the relevant factors for showing harm to a child that justify a visitation order. By doing so, courts are more likely to balance all of the harms facing children as a result of grandparent visitation litigation.

VI. THE IMPLICATIONS OF REQUIRING A HEIGHTENED HARM STANDARD IN THE UTAH GRANDPARENT VISITATION STATUTE

There are several excellent reasons for the Utah legislature to amend the Grandparent Visitation Statute to require all grandparents to make a heightened showing of harm before authorizing courts to award grandparent visitation. First, grandparents—in the absence of special circumstances that have created a quasi-parental status toward the child—simply do not stand on an equal constitutional footing with parents; nor do they share the same obligations and responsibilities toward the child that the state requires of parents. As *Thurgood* demonstrated, the Statute’s constitutional protection for parents—the initial presumption that a parent’s decision is in the best interest of the child—was easily overcome as the Statute’s harm factor is currently formulated.

369. *Pasquin v. Souter*, No. 970910481, at 2 (Utah 3d Dist. Ct. July 8, 2001) (mem.), *aff’d mem.*, 2003 UT App 10.

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Second, when courts order grandparent visitation, a variety of pragmatic challenges arise that should be considered when setting the appropriate standard of harm.³⁷⁰ Requiring grandparents to make a heightened showing that the child would be harmed without a visitation order justifies state intrusion by providing balance between the inevitable harms of visitation orders and the harm that an appropriate visitation order would prevent.³⁷¹

Third, grandparent visitation litigation places “children [at the] focal point of anger” between parents and grandparents.³⁷² When children are asked to voice their visitation preferences, not only is that stressful, but they invariably end up having to choose a side. Although children may not understand the reasoning behind their parent’s decision, they are given veto power over it.³⁷³ Requiring grandparents to meet a heightened harm standard would spare both parents and children from the harm caused by the state permitting children to undermine the very parental authority intended to protect them.

Fourth, children whose parents are divorced face special challenges in grandparent visitation cases because the child and the custodial parent may easily become subject to multiple visitation orders that substantially interfere with the parent-child relationship.³⁷⁴ Typically, the most important relationships for children to preserve in a divorce situation are their relationships with both parents. Requiring grandparents to make a heightened showing of harm would prevent visitation orders that are not essential for the child, leaving more time available for more critical parental relationships. Additionally, a heightened harm standard for grandparent visitation would prevent misuse of the Statute by grandparents primarily seeking to secure more visitation for the

370. See Nolan, *supra* note 4. The author thoughtfully considers numerous practical challenges of visitation orders and the consequences suffered by both children and parents when a standard other than harm determines the appropriateness of a grandparent visitation order. See *id.* Furthermore, “even if [a grandparent-grandchild bond would be beneficial to the child if maintained], the impact of a lawsuit to enforce maintenance of the bond over the parents’ objection can only have a deleterious effect on the child.” *Brooks v. Parkerson*, 454 S.E.2d 769, 773 (Ga. 1995).

371. For examples of pragmatic grandparent visitation challenges, see Nolan, *supra* note 4, at 269.

372. Newman, *supra* note 4, at 27–28.

373. *Id.* at 28.

374. Nolan, *supra* note 4, at 282–83.

noncustodial parent than authorized by the court in the parent's divorce decree.

Finally, grandparents of children in intact families should be required to make a heightened showing of harm to discourage controlling grandparents' improper use of state authority to compel the behavior of their adult children.³⁷⁵ The policy of the state should be to encourage grandparents to recognize their children's independence and not allow the authority of the state to be used to "attack . . . the parents' status as adults,"³⁷⁶ so that grandparents can reap the rewards of intergenerational contact where they did not sow. By refusing to intervene in parents' grandparent visitation decisions on a lesser showing of harm, the state encourages healthier development for children, parents, and grandparents alike.³⁷⁷

Adding a heightened harm requirement to Utah's Grandparent Visitation Statute raises two immediate issues: What should the standard of harm be, and at what point in the court's analysis should it be considered? The experience of other states may be helpful to reveal the implications of these choices.

A. How To Characterize a Harm Requirement

Other states that require grandparents to make a showing of harm to the child before awarding grandparent visitation characterize this harm element in varying ways. For example, in some states the loss of an established relationship alone does not constitute harm to children.³⁷⁸ In others, harm is characterized as a showing that the child's "health, safety, or welfare" will be significantly and adversely affected by the lack of a visitation order.³⁷⁹ Some states require a grandparent to have been the child's "primary caregiver and custodian" for a significant period of time before the relationship constitutes a compelling state interest that justifies "the court's

375. Newman, *supra* note 4, at 31.

376. *Id.*

377. See Nolan, *supra* note 4, at 284.

378. See Blixt v. Blixt, 774 N.E.2d 1052, 1060 (Mass. 2002); *In re Parentage of C.A.M.A.*, 109 P.3d 405, 412 (Wash. 2005).

379. See Wickham v. Byrne, 769 N.E.2d 1, 6, 8 (Ill. 2002) (explaining that true safety and welfare concerns do not include such intangibles as preserving the "child's only connection to a deceased parent's family" or arbitrary decisions based on conflict between the parent and the grandparent); Blixt, 774 N.E.2d at 1060.

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parens patriae authority on behalf of the child.”³⁸⁰ An even more protective standard of harm would require grandparents to make a threshold showing of parental unfitness to make a visitation decision before the state may consider intervening in a grandparent visitation case.³⁸¹

When the Utah legislature considers amending the Grandparent Visitation Statute, the reasoning of the district court judge in *Campbell* is worth noting. He suggested that in the absence of a showing of parental unfitness that unreasonably “exposes the children to danger,” the State should not infringe “upon a parent’s right to raise his or her children,” because the public policy interest is enhanced by deferring to reasonable parental decisions.³⁸²

One advantage of setting the Statute’s harm requirement at a high level that requires an initial showing of parental unfitness to make a visitation decision is that state courts are already familiar with parental unfitness standards in the context of custody cases and abuse, neglect, and dependency proceedings. Another advantage of this standard is that children generally do better when they are guided, reared, and protected by the decisions of their fit parents than they do under state supervised orders.³⁸³ Issuing grandparent visitation orders, on the other hand, guarantees that many cases will return to the courts for ongoing state review and intervention.

It is easy to rationalize that requiring a threshold standard of parental unfitness is a higher standard than necessary for a fairly innocuous award of grandparent visitation for a few hours several times a month. However, many awards of grandparent visitation are substantially more intrusive than that and result in significant private and public costs each time the state interferes in a fit parent’s child-rearing decisions.³⁸⁴ Requiring grandparents to show that a parent is unfit to make visitation decisions before authorizing courts to consider whether a grandparent visitation order is in the child’s best

380. *Rideout v. Riendeau*, 761 A.2d 291, 302 (Me. 2000); *see also* *Roth v. Weston*, 789 A.2d 431, 443 (Conn. 2002) (explaining that a parent-like relationship is a jurisdictional threshold that must be met before a court will consider a grandparent visitation petition).

381. *See* *Lamberts v. Lillig*, 670 N.W.2d 129, 133 (Iowa 2003); *see also* *Polasek v. Omura*, 136 P.3d 519, 522–23 (Mont. 2006).

382. *Campbell v. Campbell*, 896 P.2d 635, 640 (Utah Ct. App. 1995).

383. *See* Nolan, *supra* note 4, at 285–87.

384. *See generally* DAN L. GOLDBERG, GRANDPARENT-GRANDCHILD ACCESS: A LEGAL ANALYSIS 41 (2003), available at <http://canada.justice.gc.ca/en/ps/pad/reports/2003-FCY-15E.pdf>.

interest protects children while still providing recourse for grandparents in compelling situations. For grandparents unable to make this showing, visitation with grandchildren is merely delayed, either until the adults are able to work out their difficulties or until the children are old enough for the grandparents to approach them independently.³⁸⁵

Alternatively, the legislature should adopt a less stringent showing of harm than parental unfitness but that is still protective of children and parents. *Thurgood* demonstrated that harm characterized as the loss of substantial relationships can be proven on very insubstantial grounds.³⁸⁶ Therefore, this standard of harm is probably not high enough. An intermediate standard may be to require grandparents to show that the grandchildren's health, safety, and welfare would be harmed more without a visitation order than they would be if the grandchildren were subject to a visitation order. Under one of these alternative standards of harm, however, determining when this factor should come into play becomes important.

B. Analysis Under an Amended Statute

To protect parents from the burden of being unnecessarily required to "justify their use of parental authority,"³⁸⁷ any amendment to the Grandparent Visitation Statute should first require courts to make threshold findings about the fitness of all parties. A visitation order should never be made unless the grandparent is a "fit and proper person to have visitation with the grandchild."³⁸⁸ However, unless a grandparent makes a threshold showing of parental unfitness to make visitation decisions, the state should not consider intervening to authorize grandparent visitation.

385. The experience of numerous parents and adoptees who have successfully established meaningful relationships after the child reached the age of majority is at least one indication that a loving blood connection is not forever denied to grandparents by a court's refusal to interfere with parental autonomy on any lesser showing. See generally Jane E. Atkinson, *Grandparents' Visitation Rights: A Survey of Reciprocal Kinship-Ties Based in Historical Common Law and Legislative Policies*, 6 MARQ. ELDER'S ADVISOR 39 (2004).

386. *Uzelac v. Thurgood (In re Estate of S.T.T.)*, 2006 UT 46, ¶ 42, 144 P.3d 1083.

387. GOLDBERG, *supra* note 384, at 41 (quoting Kathleen S. Bean, *Grandparent Visitation, Can the Parent Refuse?*, 24 U. LOUISVILLE J. FAM. L. 393, 430 (1986)).

388. UTAH CODE ANN. § 30-5-2(2)(a) (Supp. 2005).

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This is the most protective grandparent visitation analysis the legislature could adopt.

Alternatively, if a less stringent showing of harm is adopted, whether the grandparents have met the required harm standard should be considered early in the statutory analysis to prevent unnecessary or protracted litigation. Accordingly, when a grandparent can show that the children's health, safety, and welfare will be harmed more without a visitation order than they would be if they were subject to a visitation order, the court should next examine the visitation preferences of the parent. If the amount and type of visitation preferred by the parent is reasonably suited to prevent the harm that would be caused without a visitation order, the court should defer to the parent's visitation offer. This deference increases the likelihood that parents will comply with the visitation orders and prevents the harm that would result if a child's parent became subject to a contempt or jail order for visitation noncompliance. And, it decreases the protracted litigation that comes at the expense of the parent and the children.³⁸⁹ As a final check, the court still should consider whether, in light of all factors, visitation would be in the child's best interest.³⁹⁰

389. Penalties for noncompliance with a visitation order are justified when a visitation order prevents harm to a child and when such a penalty protects the integrity of the court system. However, because the state's power to hold parents in contempt for noncompliance also has the effect of harming the child, state courts should exercise restraint in issuing intrusive visitation orders with which parents are not likely to comply. This is a further justification for requiring a harm standard rather than a best interest standard. *See* Nolan, *supra* note 4, at 285–86.

390. *Id.* Grandparents' demands for court-ordered visitation against the parent's wishes brings to mind Aesop's fable of the contest between the wind and the sun; the illustration is an apt one. In that contest, the wind and the sun debated over who could remove a cloak more quickly from the back of a passing traveler. The wind boasted that it was so powerful and forceful that it could remove the traveler's cloak whether the traveler liked it or not. However, upon exerting all of its power, the wind was unable to do so because the cold, biting wind compelled the traveler to cling desperately to his cloak. The sun, on the other hand, when given its turn, shone so brightly and warmly upon the traveler that in no time at all, the traveler released his tight grasp, unbuttoned his cloak, and finally, on his own initiative, removed it completely. Without a compelling case to protect a child from harm, when grandparents force parents to subject their parenting decisions to court review, expend large sums of money or acquire debt to defend their decisions, and perhaps eventually submit to a court-ordered schedule of visitation, they are like the fabled wind. The approach of these grandparents causes parents to defend their decisions and cling more tightly to their children than ever before. Similarly, statutory interpretations that require a lesser showing than harm to the child before overriding the parent's visitation decisions simply turn state power into wind as well. On the other hand, statutes and case-by-case interpretations that uphold a fit parent's

C. Learning from the Experience of Other States

Reviewing a sampling of grandparent visitation cases issued by the highest state courts that have considered their grandparent visitation statutes post-*Troxel* is helpful to reveal the implications of the choices faced by the Utah legislature. For example, in some states, *Troxel's* constitutionally mandated parental presumption may not be rebutted unless the child would be substantially harmed without a visitation order.³⁹¹ Other states do not require a showing of harm but do give the parental presumption “special weight” or allow it to be rebutted only by clear and convincing evidence.³⁹² Balancing tests³⁹³ or other standards that protect parents to varying degrees³⁹⁴ are used by other states, while some have not yet taken action to ensure the constitutionality of their statutes after *Troxel*.³⁹⁵ States in the Rocky Mountain area reflect this split among perspectives with Arizona,³⁹⁶ Colorado,³⁹⁷ Nevada,³⁹⁸ and New

visitation decision when the child is not in danger of substantial harm without the visitation order are like the fabled sun. Likewise, grandparents who accept the important role of the child's parent, respect the parent's visitation decision despite their desire for greater contact with the child, and continue to show warmth to both the parent and the child will likely find, as did the sun, that patience and gentle persuasion will help them achieve their goal.

391. *See, e.g.*, *Richburg v. Richburg*, 895 So. 2d 311 (Ala. Civ. App. 2004); *Roth v. Weston*, 789 A.2d 431 (Conn. 2002); *Sullivan v. Sapp*, 866 So. 2d 28 (Fla. 2004); *Brooks v. Parkerson*, 454 S.E.2d 769 (Ga. 1995); *Lamberts v. Lillig*, 670 N.W.2d 129 (Iowa 2003); *Rideout v. Riendeau*, 761 A.2d 291 (Me. 2000); *Blixt v. Blixt*, 774 N.E.2d 1052 (Mass. 2002); *Appel v. Appel*, 109 P.3d 405 (Wash. 2005).

392. *See, e.g.*, *Evans v. McTaggart*, 88 P.3d 1078 (Alaska 2004); *McGovern v. McGovern*, 33 P.3d 506 (Ariz. Ct. App. 2001); *Simmons v. Vassar-Hawk*, 807 A.2d 579 (Del. 2002); *In re Visitation of C.H.*, 792 N.E.2d 608 (Ind. Ct. App. 2003); *State v. Paillet*, 16 P.3d 962 (Kan. 2001); *DeRose v. DeRose*, 666 N.W.2d 636 (Mich. 2003); *Nelson v. Nelson*, 674 N.W.2d 473 (Neb. 2004); *Deem v. Lobato*, 96 P.3d 1186 (N.M. Ct. App. 2004); *Harrington v. Daum*, 18 P.3d 456 (Or. Ct. App. 2001).

393. *See, e.g.*, *Babin v. Babin*, 854 So. 2d 403 (La. Ct. App. 2003); *Herrick v. Wain*, 838 A.2d 1263 (Md. Ct. Spec. App. 2003); *Barker v. Barker*, 98 S.W.3d 532 (Mo. 2003).

394. *See, e.g.*, *In re Marriage of Harris*, 96 P.3d 141 (Cal. 2004); *Camerlingo v. Camerlingo*, 961 P.2d 1162 (Haw. Ct. App. 1998); *In re Marriage of Meyer*, No. C7-00-145, 2000 Minn. App. LEXIS 882 (Aug. 22, 2000); *Townes v. Manyfield*, 883 So. 2d 93 (Miss. 2004).

395. *See* Jessica Marie Beyer, Comment, *Idaho's Approach to Grandparent Visitation: Time for a Revision*, 40 IDAHO L. REV. 155 (2003).

396. *McGovern v. McGovern*, 33 P.3d 506 (Ariz. Ct. App. 2001).

397. *In re Adoption of C.A.*, 137 P.3d 318 (Colo. 2006).

398. *Steward v. Steward*, 890 P.2d 777 (Nev. 1995). *Steward* set Nevada's standard pre-*Troxel* in a manner that did not require major statutory changes after *Troxel*.

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Mexico³⁹⁹ requiring the parental presumption to be given special weight or to be rebutted by clear and convincing evidence. Similarly, Montana requires courts to first inquire into a parent's fitness and then give deference to a fit parent's decision.⁴⁰⁰ Wyoming requires a balancing test,⁴⁰¹ and Idaho has not yet amended its statute since *Troxel*.⁴⁰²

It is at times poignant to read court decisions where grandparent visitation is denied because of a state's higher harm standard.⁴⁰³ In most cases, it is impossible to know whether the parents and the grandparents eventually settled their differences and resumed more ordinary interaction between the grandparents and the grandchildren. On the other hand, a review of state court cases where visitation has been granted under a best interest or other standard⁴⁰⁴ frequently reveals distressing intrusions by a powerful and nearly irresistible state judiciary. Many ordinary parents, particularly those struggling with the financial challenges of raising children, simply cannot defend against these intrusions. It is questionable whether these visitation orders are ultimately benefiting children or harming them.

In the final analysis, the Utah Grandparent Visitation Statute should be amended to better balance the competing needs and interests of children, parents, and grandparents by defining and requiring a heightened showing of harm. Such an amendment will better ensure that, when appropriate, a grandparent visitation order will not cause greater harm to children than the visitation will prevent.

VII. CONCLUSION

Although Utah's Grandparent Visitation Statute may be an improvement over the lack of a common law grandparent visitation right in today's changed society, the Statute must be limited. The

399. *Deem v. Lobato*, 96 P.3d 1186 (N.M. Ct. App. 2004).

400. *Polasek v. Omura*, 136 P.3d 519, 522–23 (Mont. 2006).

401. The Wyoming Supreme Court has not ruled on the statute's constitutionality since *Troxel* but applies a best interest and reasonability analysis with a requirement to show that an order would not impair parental rights. *See, e.g., Hede v. Gilstrap*, 107 P.3d 158 (Wyo. 2005).

402. *See Leavitt v. Leavitt*, 132 P.3d 421 (Idaho 2006) (declining to reach constitutional issue since review of magistrate's decision was in parent's favor); *see also* *Beyer*, *supra* note 395.

403. *See generally supra* note 391.

404. *See generally supra* notes 392–94.

early history of the Statute indicates that its purpose was to prevent harm to children, not to advance the privileges of adults.

Courts, including the highest court in the land, have had difficulty balancing the needs and rights of parents and children with the mandates of state grandparent visitation statutes. The Utah legislature has now had experience revising its statute multiple times under both state and federal constitutional directives. Utah courts have also had experience trying to apply these various iterations of the Statute. This Comment has presented exhaustive detail about the history of these efforts. And now, the Utah Supreme Court has invited the legislature to make one more revision to the Statute on the basis of this experience.

This Comment has laid a foundation to suggest that the legislature should revise the Grandparent Visitation Statute to require a heightened showing of harm. Grandparents should not be able to rebut the parental presumption without showing that a parent is unfit and that his or her visitation decision will substantially harm the children. Alternatively, grandparents could be required to show that the children's health, safety, and welfare will be harmed more without a visitation order than they would be if they were subject to a visitation order. Only upon this showing should the court then examine whether the amount and type of visitation preferred by the parent is reasonably suited to prevent the harm that would be caused without a visitation order. If it is, the court should defer to the parent's visitation decision. Rebutting the parental presumption on any lesser showing of harm unnecessarily intrudes on the lives of children and parents and makes court-ordered visitation like a wolf in disguise that ultimately harms the very children it is intended to protect.

Tracy C. Schofield