

## **NC Court of Appeals rules application of grandparent visitation statutes unconstitutional**

In an opinion issued on March 16, 2021, the North Carolina Court of Appeals held that a trial court's award of visitation to paternal grandparents pursuant to North Carolina's grandparent visitation statutes violated mother's constitutional right to control with whom her children associate.

### **[Alexander v. Alexander](#)**

Mother and father settled custody by a consent custody order when they divorced. When father became ill a few years later, he began living with his parents and he filed a motion to modify custody. His parents also filed a motion to intervene and filed a claim for visitation pursuant to the grandparent visitation statutes, [GS 50-13.2\(b1\)](#) and [50-13.5\(j\)](#). The trial court granted the grandparents' motion to intervene, but father died before the court heard his motion to modify or grandparents' request for visitation. Following his death, the trial court entered a permanent order granting mother primary physical and legal custody and awarding grandparents extensive visitation rights. Mother appealed.

### **Statutory authority to order visitation**

Mother first argued that the court had no statutory authority to grant visitation to the grandparents following the death of father. The court of appeals disagreed, holding that current case law interprets the grandparent visitation statutes to allow a court to award visitation when grandparents request visitation while there is an on-going action for custody between the parents. The appellate court held that because the grandparents had been allowed to intervene before father died, their claim remained pending when father passed away and the trial court had statutory authority to consider their request for visitation.

### **Constitutional authority to order visitation**

Mother then argued that the grandparent visitation statutes are unconstitutional as applied in her case in that they allowed the trial court to impermissibly interfere with her fundamental Due Process right to exclusive care, custody and control of her child and the court of appeals agreed. The appellate court first noted that the grandparent visitation statutes are not facially unconstitutional in that both the US Supreme Court and the NC Supreme Court have recognized that there are situations where a trial court can award visitation rights to grandparents without violating Due Process, citing as an example the situation where a parent is found to be unfit or to have waived her constitutional right to custody. However, relying primarily on [Troxel v. Granville, 530 U.S. 57 \(2000\)](#), the court of appeals held that the trial court violated mother's constitutional right to control with whom her child associates by awarding visitation without giving sufficient deference to mother's decision regarding whether her child would visit with grandparents

and by awarding such extensive visitation as to interfere with the parent/child relationship.

### **Required deference to parent's decision regarding visitation**

Citing *Troxel's* holdings that fit parents are presumed to act in the best interest of their children and that this presumption cannot be overturned "merely because a judge believes that a different decision would be better", the court of appeals stated that "the court must *presume* that the Mother's determination [about the appropriateness of visitation with the grandparent] is correct." (italics in original) Neither *Troxel* nor the court of appeals in this case gives specific guidance as to what specific circumstances will be sufficient to rebut the presumption, but the court of appeals suggests that one situation may be where the child has a significant bond with the grandparent and the mother denies all contact without justification. In this case, the court of appeals noted that the trial court order gave no indication that the court afforded any deference to mother's decision regarding visitation and contained no findings of fact indicating whether mother denied visitation altogether or about her reasons for her decision about visitation.

### **Interference with the parent/child relationship**

Also based on *Troxel*, the court of appeals held that any award of visitation cannot "adversely interfere with the parent-child relationship". The trial court in *Alexander* granted grandparents every other Thanksgiving and Christmas with the child as well as every other weekend. The court of appeals stated:

"Mother, as the Child's sole custodial parent, has the right to determine with whom her Child spends these major holidays and should not be deprived of any right to spend these holidays with her Child. Also, the grant of visitation every other weekend is too extensive. Mother, as the Child's sole custodial parent, has the right to direct how her Child spends a large majority of the weekends."

The court of appeals remanded the visitation issue to the trial court with the instruction to consider grandparents' request for visitation by applying "the appropriate legal standard set forth in *Troxel* and other binding authority, recognizing the paramount right of Mother to decide with whom her Child may associate."

### **Where are we now?**

Until there is further guidance from the appellate courts, this is what we know now about a court's authority to award grandparent visitation rights.

1. Pursuant to [G.S. 50-13.1](#), the court can grant custody or visitation to a grandparent if the court concludes the parent has waived her constitutional right to custody by being unfit, neglecting the welfare of the child or otherwise acting inconsistent with her fundamental

Due Process right to exclusive care, custody and control of her child, and the trial court concludes visitation is in the best interest of the child; and

2. Pursuant to the grandparent visitation statutes, [GS 50-13.2\(b1\)](#) and [G.S. 50-13.5\(j\)](#), the court can grant visitation rights to a grandparent when there is an on-going custody dispute between the parents and:
  1. The grandparent overcomes the presumption that the parent's decision regarding visitation is in the best interest of the child,
  2. The court concludes visitation is in the best interest of the child, and
  3. The visitation awarded does not adversely interfere with the parent/child relationship.