

- SUBJECT:** Grandparents' ability to gain visitation rights to a grandchild
- COMMITTEE:** Juvenile Justice and Family Issues — committee substitute recommended
- VOTE:** 5 ayes — Dutton, Goodman, Castro, Nixon, Strama  
0 nays — None  
4 absent — Y. Davis, Dunnam, J. Moreno, Thompson
- WITNESSES:** For — Denise Auger, Coalition for the Restoration of Parental Rights; Roy Getting, Texas Father's Alliance; April Mullinix; Stephen Spencer; Tom Stansbury, Texas Family Law Foundation  
Against — None  
On — Robert Green, Lone Star Fatherhood Initiative; Elizabeth Kromrei, CPS/Department of Protective and Regulatory Services
- BACKGROUND:** Family Code, ch. 153, subch. H, governs access and possession (visitation) rights of grandparents to their grandchildren. Under Family Code, sec. 155.433, a court may offer reasonable access by a grandparent to a grandchild if it is in the child's best interest and at least one of the following circumstances exists:
- the child's parent has been incarcerated, found incompetent, or died;
  - the parents have divorced or have been living apart for the three-month period preceding the filing of the petition or a suit for divorce is pending;
  - the child has been abused or neglected by a parent;
  - the child has been adjudicated to be a child in need of supervision or a delinquent child;
  - the parent-child relationship has been terminated by court order; or
  - the child has lived with the grandparent for at least six months.
- A grandparent may not request visitation if the grandchild has been adopted by a person other than the child's stepparents.

Since this statute last was modified in 1997, the U.S. Supreme Court issued a landmark ruling, *Troxel v. Granville*, 530 U.S. 57 (2000), on the visitation rights of grandparents. The Supreme Court held that a Washington state law that allowed any person, even a non-relative, to seek visitation rights if it served the best interest of the child violated the right of parents, under the due process clause of the Fourteenth Amendment, to make decisions concerning the care, custody, and control of their children.

In October 2004, Atty. Gen. Greg Abbott issued an opinion (GA-0260) addressing the constitutionality of the Texas grandparent visitation statute following the *Troxel* decision. He concluded that while Texas' statute could be applied constitutionally, it must be applied in light of the limitations imposed by *Troxel*. To meet the constitutional standard, a court would have to require a grandparent to overcome the presumption that a parent acts in the best interest of his or her child by proving by a preponderance of the evidence that the parent is not fit or that denial of grandparental access significantly would impair the child's well-being.

**DIGEST:**

CSHB 261 would require that a court grant reasonable possession of or access to a grandchild if the petitioning grandparent overcame the presumption that the parent acted in the best interest of the child. The grandparent would have to prove by a preponderance of the evidence that denial of visitation rights significantly would impair the child's physical health or emotional well-being.

The grandparent would have to be the parent of the grandchild's parent, and would have to show that the grandchild's parent:

- was incarcerated;
- had been found incompetent;
- had died; or
- did not have actual or court-ordered possession of or access to the grandchild.

The bill would take effect September 1, 2005 and would apply to a suit that was pending or filed on or after the effective date.

**SUPPORTERS  
SAY:**

CSHB 261 would attempt to make the Texas grandparent visitation statute constitutionally compliant with the requirements in the *Troxel* decision as interpreted by the attorney general. It substantially would limit the ability of a grandparent to seek possession or access to a grandchild by restricting

the eligibility to petition the court for visitation to certain fact situations. This appropriately would defend parental rights by making it difficult for a grandparent to disrupt the family unit without good cause.

The current best interest standard long has been abused by judges. A judge can grant visitation rights even if parents are found to be fit as long as the judge finds that grandparental visitation rights are in the child's best interest. Regardless of whether or not both parents are present in the child's life and do not want the grandparent to have access to the child, a judge can grant visitation simply because the parents are divorced or a divorce case has been filed. CSHB 261 would mandate that if the grandparent's child (the parent) maintained a connection with his or her child, the grandparent would have no grounds to petition for visitation rights, thus helping to prevent frivolous lawsuits.

It is unconscionable when courts overrule the rights of fit parents. These suits are time consuming and emotionally and financially damaging and can deeply disrupt the dynamics of a family. It should be the parent's choice whether or not a child should interact with a grandparent, and parents should not be forced to choose between exposing their children to the potentially harmful influence of a grandparent or facing jail time by not complying with court-ordered visitation requirements.

Courts in Florida, Georgia, Iowa, and Oklahoma have ruled that the "best interest of the child" test is unconstitutional. Additionally, more than one-third of the states have narrowed grandparent visitation laws. Even in states where the highest courts have upheld the constitutionality of their laws, including Kentucky, Massachusetts, Mississippi, Missouri, Virginia, and West Virginia, the laws have been narrowed to restrict the ability of grandparents to petition for visitation rights. Texas should make similar changes to its grandparental visitation rights statute.

Preponderance of evidence is the normal standard used in civil cases. The presumption provided in CSHB 261 still could be rebutted by the grandparent by showing that the child's physical health or emotional well-being significantly would be impaired by the denial of visitation rights.

**OPPONENTS  
SAY:**

Grandparent visitation rights are crucial because grandparents play a valuable role in the lives and well being of grandchildren. The Supreme Court's ruling in *Troxel* has been widely misconstrued, leading to the erosion of grandparents' rights across the country. CSHB 261 would make

it extremely difficult, if not impossible, for many grandparents to petition for visitation rights if a parent did not agree with the interaction, even if grandparental involvement would be in the child's best interest.

Unfortunately, parents do not always have the best interests of their children in mind when making these decisions. They sometimes let selfishness or personal problems interfere with what is best for their children. Grandchildren should not be denied the benefits of a relationship with grandparents simply because their parents do not agree with it.

**OTHER  
OPPONENTS  
SAY:**

The bill should require a clear and convincing evidentiary standard. A preponderance of the evidence standard would allow for too much discretion by the court. A clear and convincing evidence standard would ensure that application of the visitation statute passed constitutional muster.

**NOTES:**

The committee substitute differs from the original bill by limiting the circumstances under which a grandparent could petition for possession of or access to a grandchild. The substitute also would modify the evidence a grandparent would have to prove when petitioning the court.