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GRANDPARENT VISITATION – A PRACTITIONER'S APPROACH

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Introduction

Grandparent visitation[1] is an issue of growing concern in Illinois and across the U.S. With the rise in single-parent homes (as well as double income homes), increasingly grandparents and other relatives are called upon to care for grandchildren As a result, following divorce and in other situations such as the death of a parent, grandparents increasingly seek relief from the courts for visitation time with minor children. In Illinois, the Legislature attempted to address this issue several times via the Grandparent Visitation Statute ("GVS"), 750 ILCS 5/607(a-3), *et seq*. Because the Illinois Supreme Court held a prior version of the statute unconstitutional[2], the Legislature amended the GVS again, and the current version became law on January 1, 2007.

Many excellent articles exist regarding the GVS and the common law regarding grandparent visitation ("GV") in Illinois. These articles cover everything from the problems with the current GVS[3]; a review of the 2007 amendments to the GVS[4]; and a concise survey of common law GV principles and the 2007 statute[5]. Instead of revisiting the information covered in those fine sources, this article focuses on how to plead and prove this type of case from a practical standpoint.

Non-Constitutional Issues are the Focus

Clearly, the constitutionality of the GVS is a key problem as well as an obvious line of attack for parties defending a GV claim. However, the Illinois Supreme Court is not likely to address the constitutionality of the current GVS soon. Recently, the Court avoided dealing with the constitutionality of the GVS[6]. Furthermore, practitioners are unlikely to have a client with the funds and desire to attack the issue on constitutional grounds and potentially appeal a trial court decision. Finally, even if the statute is declared unconstitutional, grandparents still may retain common law visitation rights in Illinois[7]. While a constitutional challenge may certainly be made by the party defending a GV action, this article concentrates on the non-constitutional issues.

Inherent Bias in Favor of Grandparent Visitation – Best Interest is not the Standard

One difficulty facing the attorney for the parent is the general bias among some jurists, attorneys, and possibly Child Representatives ("CRs") or Guardians Ad Litem ("GALs") that a grandparent *should* have visitation. These well-intentioned practitioners believe GV is in the best interest of the children and mistakenly apply that standard to GV analysis. However, this is not the correct standard. The legal standards for both the GVS and common law GV are set forth in detail below. The Illinois Supreme Court stated "The constitution prohibits the state from forcing fit parents to yield visitation rights to a child's grandparents when the parents do not wish to do so merely because a trial judge believes that such visitation would be appropriate."[8] The parent preventing visitation may have very good reasons for doing so. Even if the parent has no good reason to deny

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grandparent visitation, U.S. and Illinois law still require the grandparent to meet a fairly high burden to secure visitation of a grandchild, in order to respect every parent's superior right to raise a child the way that parent sees fit.[9]

The grandparent's counsel has the advantage of the emotional pull in favor of GV in general, but must be prepared to present a claim well grounded in fact and law in order to obtain a successful result. The practitioner defending against a GV petition must focus the Court on the key legal requirements of the GVS and common law and make sure the grandparent meets his or her burden of proof.

Grandparent Visitation Statutory Requirements

The requirements for pleading and proving a GV claim under the GVS are as follows:

1. Petitioner must be a grandparent, great-grandparent, or sibling of the child;

2. The child must be over one year old;

3. The Petition must be filed in the county where the child resides;

4. The Petitioner must show an **unreasonable denial of visitation** AND

a. one parent must be deceased, missing for three months, incompetent, or jailed for three months; or

b. in a divorce (and pending divorce), legal separation, or another proceeding involving custody or visitation of the child, one parent does not object to the petitioner having visitation – but that visitation time is subtracted from the time with that parent; or

c. in the case of a child born out of wedlock, the parents are not living together.

5. Most importantly, the provision in 750 ILCS 5/607 (a-5)(3) states:

In making a determination under this subsection (a-5) ***there is a rebuttable presumption that a fit parent's actions*** *and decisions regarding grandparent, great-grandparent, or sibling visitation* ***are not harmful*** *to the child's mental, physical, or emotional health. The* ***burden is on the party filing a petition*** *under this Section to prove that the parent's actions and decisions regarding visitation times* ***are harmful*** *to the child's mental, physical, or emotional health.* (Emphasis added).

The Key Issue – Rebuttable Presumption in Favor of the Parent

The GVS then describes the factors the court shall consider when determining whether to grant visitation. Petitioner's counsel will have a tendency (and preference) to jump right to these issues, and ignore the threshold presumption. The respondent's counsel must

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redirect the debate to the presumption issues, and the petitioner must be ready to rebut the presumption with relevant evidence. The threshold presumption issues are:

1. Whether an *unreasonable* denial of visitation exists (750 ILCS 5/607 (a-5)(1));

2. Whether the parent is "fit" – because a fit parent gains the benefit of a strong presumption in favor of that parent's decision-making, and evidence of "unfitness" would avoid the (a-5)(3) presumption entirely (750 ILCS 5/607 (a-5)(3));

3. If the parent is fit, petitioner must show that the actions of the parent in denying visitation are *harmful to the child's health*. (Id.) In most cases, this issue will be the crux of the case. (Even in the case of an "unfit" parent, the stature still requires that petitioner show that the parent's actions and decisions regarding visitation are harmful to the child's health).

Importantly, there is an element of causation implied in the GVS language. The statute in (a-5)(3) clearly states that the actions in limiting visitation "are harmful to the child's health" – indicating that the limitation of visitation must be shown to *cause* harm. This means that the petitioner must be prepared to prove not only some adverse medical or mental condition suffered by the child, but that it was *caused* by the unreasonable denial of visitation. On the opposite side, the respondent may be able to show that the child suffered from a pre-existing medical or emotional condition, or that the condition had another cause unrelated to denial of visitation with the grandparents.

Illinois Common Law Grandparent Visitation

In the event the GVS is held unconstitutional, at present, depending on the jurisdiction, the practitioner may have to deal with the Illinois common law on GV. Alternatively, the court may hold that no common law right exists for GV depending on the applicable jurisdiction. GV common law is set forth in detail with an historical analysis by the Second District Appellate Court in *Felzak v. Hruby*[10]. That court held pursuant to the Illinois Supreme Court holding in *Chodzko*, that a grandparent could seek visitation of a child upon a showing of "special circumstances." The Appellate Court in *Felzak* went on to hold that *Wickham* narrowed the common law right to GV. Now, to assert common law GV rights, the grandparent must not only plead "special circumstances" (such as the death of a parent) but also must overcome the presumption that the actions of a fit parent in denying visitation are presumed to be in the best interest of the child.[11]

Basic Pleading Requirements Under the GVS and Illinois Common Law

As the petitioner, you must be prepared to plead in two counts for safety – one based on the GVS, and one under Illinois GV common law. Under the GVS count, the key items petitioner must plead beyond basic jurisdictional allegations are:

1. Unreasonable denial of visitation;
2. Unfitness of the parent denying visitation, and/or:

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3. That the child suffered mental, physical, or emotional harm from the unreasonable denial of visitation.

The common-law count must contain allegations stating:

1. Denial of visitation;
2. "Special Circumstances" – i.e., death of parent, jailing of parent);
3. Unfitness of the parent denying visitation, and/or;
4. Denial or limitation of visitation is not in the child's best interests.

Evidence Gathering

Then, the petitioner must gather evidence to support this claim. This can be in the form of oral testimony from the parties, third-party lay witnesses, or better yet, expert witnesses. Without this evidence, the petitioner will not overcome the presumption in favor of the custodial parent. The respondent's counsel, conversely, must carefully review the evidence in the case, and be sure to handle depositions in the case with an eye toward limiting the testimony of the petitioner(s) regarding harm to the child or parental unfitness.

Evidence to gather at the outset will focus on the identities of anyone who has information about the physical, mental, or emotional health of the parent, child, and/or grandparent, depending on the situation. In addition, obtaining the psychological/mental records, school records, medical history, and evidence of criminal convictions for the parent, child and grandparent will be important. The nature of any existing or prior relationship between grandparents and children is important, as well as evidence of and wrongdoing or conditions that might be harmful to the child related to the grandparents. Deposition questions of lay witnesses can concentrate on the direct observations and knowledge of the witness regarding unfitness of the parent, or more likely, any harm the children suffered. Proof of harm can be found in evidence of physical injury such as bruising, cuts, or illness. Emotional or psychological injuries, evidenced by diagnosed abnormal psychological conditions, dropping grades in school, et cetera can be sufficient proof of harm as well.

The parties may need to retain controlled experts to examine the children in order to determine whether they have suffered any physical or mental harm, and if so, the cause of that damage. Rule 215 examinations may be very useful to gather this kind of evidence. Naturally, this type of case, if properly handled, can get very expensive in terms of expert witness costs and attorney's fees—this alone may present a barrier to entry for many grandparents, or a strong incentive to settle for respondents facing well-funded grandparents.

Conclusion

As pointed out by David Schaffer in his recent article, the GVS is in need of a substantial rewrite[3]. Unfortunately, without guidance regarding the current GVS from the Illinois

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Supreme Court and in the absence of a revised GVS that can pass constitutional muster, the careful practitioner must plead and prove a grandparent visitation case under both the statute and Illinois common law. As the GVS seems to be amended annually and case law continues to evolve, the practitioner might find the law changing during the pendency of a case. Therefore, keeping current on the law in this area is more important than ever. This article is no substitute for a complete review of current law, and the articles and cases cited in the endnotes will help provide the background you need to do a good job for your client in this ever-growing area of family practice. Keeping a tight focus on the key pleading and proof requirements under both the Illinois Grandparent Visitation Statute and Illinois common law will be important to obtain the optimum outcome for your client.

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[1] This article also applies to other family members, such as aunts and uncles. The term "grandparent" is used throughout but is intended to include these other potential parties.

[2] *Wickham v. Byrne*, 199 Ill.2d 309, 320 (Ill.2004).

[3] "Child Custody Statutes Ready for A Complete Overhaul," David N. Schaffer, <u>ISBA Family Law</u>, Vol. 51, No. 1, July 2007.

[4] "New Amendments to the Illinois Grandparent Visitation Statute," Michael K. Goldberg, 94 IBJ 660, December 2006.

[5] "Grandparent Visitation," Nicole M. Onorato, <u>ISBA Child Law</u>, Vol. 19, No. 1, P. 7, September 2006.

[6] *Felzak v. Hruby*, --- N.E.2d ---, 2007 WL 2729357 (Ill. 2007). The Illinois Supreme Court declined to address the constitutionality of the GVS, finding that since the child in question was now age 18, the issue of forcing grandparent visitation was moot.

[7] Prior to enactment of the first GVS, Illinois recognized a common law right to visitation for family members (including grandparents) with a showing of "special circumstances." See *Chodzko v. Chodzko*, 66 Ill.2d 28 (1976), *Bush v. Squellati*, 122 Ill.2d 153, 156 (1988). In cases dealing with the GVS, the Second District held that if the GVS was unconstitutional, the parties reverted to common law visitation rights, *In re Marriage of Sullivan*, 355 Ill.App.3d 1162 (2nd Dist. 2003), and *Felzak v. Hruby*, 367 Ill.App.3d 695 (2nd Dist. 2006). But see *Buerksen v. Graff*, 351 Ill.App.3d 148 (1st Dist. 2004) where the First District held that no common law right to GV existed where the GVS was held unconstitutional; and *In re Marriage of Ross*, 355 Ill.App.3d 1162 (5th Dist. 2005) where the court held that a common law right to GV was as unconstitutional as the invalidated GVS because the "special circumstances" to be proven under the common law were similar to the problematic GVS provisions.

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[8] *Wickham v. Byrne*, 199 Ill.2d 309, 320 (Ill.2004).

[9] *Troxel v. Granville*, 530 U.S. 57 (2000)

[10] *Felzak v. Hruby*, 367 Ill.App.3d 695, 706 (2nd Dist. 2006).

[11] *Felzak v. Hruby*, 367 Ill.App.3d 695, 707 (2nd Dist. 2006).