

STUDENT NOTE

IN THE AFTERMATH OF *TROXEL V. GRANVILLE* Is Mediation the Answer?

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In 1999, the United States Supreme Court granted certiorari to *Troxel v. Granville*,¹ a case that came out of the Washington Supreme Court, and entertained oral arguments in January 2000.² Rendering its decision on June 5, 2000, the Court held that the application of the Washington Grandparent Visitation Statute, with respect to this particular case, was unconstitutional and included dicta concerning the problems presented by the statute's language.³

Throughout the plurality opinion in *Troxel*, an underpinning concern was that statutes, which purport to give grandparents greater rights to directly petition courts for visitation, actually take away fundamental rights from the custodial parents.⁴ Yet, the custodial parents' freedom to care, control, and maintain custody of their children is a right that the Supreme Court holds as a liberty, protected by the Due Process Clause of the United States Constitution.⁵ Citing to seminal cases,⁶ the Court notes the importance of such protections in making decisions concerning the care, custody, and control of their children under the Fourteenth Amendment.⁷

A further concern and the motivation of this note is the Court's dicta on the enormous burden placed on the mother (custodial parent) in litigating against grandparents.⁸ "The litigation costs incurred by Granville [custodial parent] on her trip through the Washington court system and to this Court are without a doubt already substantial."⁹ The Court noted that not only there is a monetary concern but there is a concern that the litigation process is "disruptive of the parent-child relationship" and that any additional litigation "would further burden Granville's parental right."¹⁰ In spite of the Court's concern about the adverse affects that prolonged litigation can have on children, nothing in this decision speaks of possible alternatives to litigation.

Family law is an area of law drastically different in its ideology from many others. Family law has a distinct emphasis in self-determination and goal of limited state intrusion into family. In response to the concern of natural parents to the possible intrusion into family life, along with the understanding of the enormous costs of litigation, the Supreme Court handed down the decision in *Troxel*. This note serves to discuss whether there should be a statute mandating that grandparent visitation cases go through a mediation type process before they are litigated, a solution of which the Court in *Troxel* does not speak. The focus of this note is to propose a standard for mediation as a viable alternative to traditional litigation in parent/grandparent visitation cases.

Part I of this article will examine the current versions of several statutes regarding grandparent visitation rights. In addition, it will focus on Washington's statute and others that showcase the lack of uniformity between the jurisdictions. Part II will show the burdens that these current statutes are placing on the parties involved in the litigation process. Part III will

explore the purpose and benefits of mediation in general. Part IV will provide a look into mediation and the other avenues of law that use this process effectively. Part V will conclude with a discussion of the states that currently use mediation in grandparent visitation petitions.

I. CURRENT STATE OF GRANDPARENT VISITATION CASES

In recent years, the Supreme Court has denied certiorari in many family law matters, including grandparent visitation rights, in effect choosing not to address the matter.¹¹ In essence, the Court has left it to the state legislatures and courts to decide these issues.¹² This choice, by the Court, has left legal entitlement of grandparents, to visit with their grandchildren, in a state of constant flux.¹³ In addition, little help has been provided by Congress, as it has maintained that family matters are of state concern.¹⁴ Consequentially, each state, as well as the District of Columbia, has enacted some form of visitation rights for grandparents.¹⁵

TROXEL V. GRANVILLE (WASHINGTON'S STATUTE)

The Supreme Court (plurality opinion) in *Troxel* addressed the constitutionality of the State of Washington's nonparental visitation statute.¹⁶ The Washington statute provides,

Any person may petition the court for visitation rights at any time including, but not limited to, custody proceedings. The court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances.¹⁷

In *Troxel*, the parents, who were never married, had two children. The father regularly brought the children to visit with his parents. Sometime after the father committed suicide, the mother informed the paternal grandparents that she wished to limit their visitation with the children to one visit per month.¹⁸ The grandparents petitioned for visitation under Washington Statute Section 26.10.160(3).¹⁹ The trial court found that more extensive visitation with the grandparents was in the children's best interests and, therefore, ordered the visitation.²⁰

The Washington Court of Appeals reversed the lower court's visitation order on the basis that nonparents lack standing to seek visitation under section 26.10.160(3), unless a custody action is pending.²¹ The appellate court reasoned that this limitation, on nonparental visitation actions, was consistent with the constitutional restrictions on state interference with parents' fundamental liberty interest in raising their children.²²

The Supreme Court of Washington disagreed with the appellate court's reading of the statute, holding that the plain language of section 26.10.160(3) gives grandparents standing to seek visitation regardless of whether a custody action is pending.²³ The Washington Supreme Court held, however, that section 26.10.160(3) was an unconstitutional infringement on the fundamental right of parents to rear their children.²⁴ Specifically, the court found that the statute was too broad because it allows "any person" to petition for forced visitation with the child "at any time" with the only requirement being that visitation serves the best interest of the child.²⁵ Thus, the Washington Supreme Court held that the statute allows the state to interfere with the fundamental right of parents to rear their children, without requiring a threshold showing of harm to the child as a result of the discontinued visitation.²⁶

The Supreme Court found that section 26.10.160(3), as applied to the facts of the case, was an unconstitutional infringement on this specific mother's fundamental liberty interest

in raising her children.²⁷ The Court began its analysis with a discussion of the important role that grandparents play in the increasingly prevalent existence of single-parent households.²⁸ The Court pointed out that the nationwide enactment of nonparental visitation statutes is certainly due to the states' recognition of the changing realities of the American family; however, these statutes also "comes with an obvious cost."²⁹ For example, the State's recognition of an independent third-party interest in a child can place a substantial burden on the traditional parent-child relationship.³⁰

Turning to the Washington statute, the Court in *Troxel* focused on its broad scope.³¹ Section 26.10.160(3) allows "any person" to petition for visitation "at any time"³² and provides no requirement that a court must give deference to the parent's decision that visitation would not be in the child's best interest.³³ Furthermore, the Court emphasized that the trial court gave no special weight to the mother's determination of her children's best interests.³⁴ In fact, the court presumed that the grandparents' request for visitation should be granted unless the children would be adversely affected.³⁵ Thus, the Court effectively reversed the burden and placed it on the mother to disprove that visitation would be in the best interests of her children.³⁶

The question posed in this note, and voiced in the opinion of *Troxel*, is what effect these differing state statutes will have on custodial parents and the children they try to protect. Interpretations in various jurisdictions differ since the state statutes all afford broad discretion to the judges, which leads to an increased burden on custodial parents to defend their decisions in court.³⁷ While the Court in *Troxel* recognizes the problem, it fails to provide any solution to it. This note poses a possible solution that fits into the *Troxel* standard, most notably by attempting to limit litigation's increased possibility for intrusion into the lives of a family. Alternatives to litigation, more specifically mediation, provides such a scenario. This note examines mediation, to see whether these methods, which have been increasingly used in other avenues of law,³⁸ should also be used to shield those involved in grandparent visitation cases.

OTHER STATES' STATUTES

Many state statutes promote the fears of undue economic and emotional hardship for the custodial parent, and ultimately the children, that the *Troxel* court sees as a grave reality. More substantially, the multitude of statutes breeds uncertainty within the legal system, which directly correlates into an increase in litigation whereby the court rewards the party willing to take the risks or gambles of litigation.³⁹

While the *Troxel* Court believes there is an inherent right for custodial parents to decide the visitation rights of their children, there are currently numerous jurisdictions that allow grandparents to petition for visitation under any circumstances.⁴⁰ These jurisdictions provide little in the way of safeguards, give little or no deference to parents' objections, and the petitions are determined regardless of the family unit's status.⁴¹ Not only do they give very broad discretion to the trial judge but they also allow anyone to petition, which in turn, provides petitioners with expansive abilities to get into court.⁴²

In Connecticut, any person may be granted the right of visitation to a minor child by a decision of the Court.⁴³ In determining which factors will be considered in the decision to allow such visitation, the statute uses the "best interest standard" as well as weighing the wishes of the child.⁴⁴ However, the Connecticut statute is devoid of any language that even suggests that the court should give deference to the wishes of the custodial parent.⁴⁵ Similarly, the Kentucky statute provides grandparents with a mechanism for petitioning the court but does not speak of any deference given to the desires of the custodial parents.⁴⁶ Florida's

statute gives a list of criteria for the court to follow when determining what the “best interests” of the child are and when it is appropriate to use them.⁴⁷ However, one factor missing is the parent’s deference.⁴⁸ The Florida statute stands in opposition to the *Troxel* standard that a parent knows what is best for their child.⁴⁹ Even more dramatically different from the *Troxel* standard is North Dakota’s visitation statute, which states that grandparents of an unmarried minor must be granted reasonable visitation rights by the court unless a finding is made that visitation is not in the best interests of the minor.⁵⁰ The statute also states that visitation rights of grandparents are presumed to be in the best interest of the minor.⁵¹

Few statutes grant the courts discretion to award visitation rights to grandparents whenever they find that it would be in the best interests of the grandchild, regardless of whether the family is intact or some disruption has occurred.⁵² As previously noted, Connecticut allows a court to decide visitation based solely on the determination of the child’s best interest, weighing no deference to parent’s wishes or to the family’s current structure.⁵³ Similarly, Delaware’s statute provides that on petition, a grandparent’s right to visitation, with respect to their grandchild, will be decided “regardless of marital status of the parents of the child or the relationship of the grandparents to the person having custody of the child.”⁵⁴ Also worth noting is New York’s grandparent visitation statute, which provides for visitation “where either or both of the parents of a minor child, residing within this state, is or are deceased, or where circumstances show that conditions exist which equity would see fit to intervene.”⁵⁵ The statute leaves this determination of “best interests” solely up to the judge and provides that the judge can decide to grant visitation even without dissolution, decease, or divorce in the family structure.⁵⁶

Many states have also changed their statutes in the past five years, adding to the vagueness and uncertainty in each jurisdiction. Alabama initially allowed grandparents to petition the court for visitation even when the family was intact.⁵⁷ Currently, the statute only allows a petition during or following divorce proceedings.⁵⁸ North Dakota amended its statute to create a statutory presumption that grandparent visitation was in the best interests of the children.⁵⁹ However, the North Dakota Supreme Court held that this new law violated parents’ fundamental liberty interest in controlling the persons with whom their children may associate and was thus deemed void.⁶⁰

Only a few states strive to provide deference to custodial parents’ wishes by limiting petitioners’ access to court proceedings, while far too many states provide little in the way of judicial obstacles to prevent a petitioner from getting a court proceeding. Illustrating this point is New Jersey’s statute, which allows a grandparent or any sibling of a child to make an application for an order of visitation.⁶¹ Consequently, this statute makes it very easy for a grandparent or a sibling to get before a judge. In an extremely broad ranging and open-ended statute, Idaho’s grandparent visitation statute provides, “The district court may grant reasonable visitation rights to grandparents or great-grandparents upon a proper showing that the visitation would be in the best interests of the child.”⁶² The statute goes no further and does not provide the trier of fact with any further details or criterion to help make the decision.⁶³ It, therefore, provides the court with extremely broad discretion as well as provides the petitioner with an extremely lenient standard to at least initiate a court proceeding.

In addition to the obvious inconsistencies among various jurisdictions’ grandparent visitation statutes, courts have been equally inconsistent in applying these statutes.⁶⁴ From the plain language of Tennessee’s, Kentucky’s, Missouri’s, and New York’s statutes, it would appear that visitation would be granted to grandparents even in the context of intact families.⁶⁵ However, in recent decisions by each of these four courts, only the Missouri and Kentucky courts actually allowed it.⁶⁶ While the disparity cannot be explained by the language of

the statutes, it has been noted that a possible resolution may be that considerations, other than the “best interests” of the child—the paramount consideration asserted in all of these cases—might be at play.⁶⁷

II. BURDENS THE CURRENT STATUTES CREATE FOR PARTIES

As evidenced in the prior section, states have made the waters of grandparent visitation statutes murky with uncertainty.⁶⁸ In many situations, parties are unaware of even the criteria a judge will use in determining the outcome of a dispute.⁶⁹ It is this uncertainty that encourages litigation since the outcome could go either way.⁷⁰ Increased litigation is in no one’s best interests. As *Troxel* points out, “The burden of litigating a domestic relations proceedings can itself be ‘so disruptive of the parent-child relationship that the constitutional right of a custodial parent to make certain basic determinations for the child’s welfare becomes implicated.’”⁷¹ Justice Kennedy further states in his dissent, “If a single parent who is struggling to raise a child is faced with visitation demands from a third party, the attorney’s fees alone, might destroy her hopes and plans for the child’s future.”⁷² As the plurality discusses, the litigation costs incurred by Granville, in her legal battle, throughout the Washington court system and to the Supreme Court are substantial, to say the least.⁷³ By *Troxel*’s own admission, this litigation’s court fees prior to its ascent to the United States Supreme Court topped more than \$50,000.⁷⁴

Courts have generally maintained that the goal of all grandparent visitation rights statutes is to maintain the already existing vital relationships between grandparents and grandchildren, and not to forge new relationships.⁷⁵ However, the current system for grandparent visitation, as demonstrated by the facts of the *Troxel* case, creates economic burdens as well as psychological and emotional burdens suffered by both the custodial parent and the child.⁷⁶ Kennedy further prefaces his dissent with “our system must confront more often the reality that litigation can itself be so disruptive that constitutional protection may be required.”⁷⁷ It is this grave realization by the plurality, as well as the dissent, that drives this note to proffer an alternative to litigation.

The current structure of most grandparent visitation statutes provides the petitioner with a twofold process to gain visitation rights.⁷⁸ The first step in this process for court intervention is for the petitioner to demonstrate that the family situation fits within the legislatively defined range of circumstances in which the courts are given discretion to act.⁷⁹ The second step is to provide the court with sufficient evidence to persuade the trier of fact that court-ordered visitation is warranted.⁸⁰ As discussed earlier, since the “best interests” standard is and cannot be defined precisely, there is little restraint at this second stage on judge’s discretion in determining family relationships.⁸¹ This lack of restraint may result in “impermissible intrusions upon parental interests protected by the Constitution.”⁸² It is lack of restraint on judge’s powers that only further fuels the uncertainty in litigation and encourages grandparents to seek out litigation.⁸³

Studies and psychological literature have shown that the impact of a lawsuit on the stability of a child’s environment can be extremely detrimental.⁸⁴ Lawsuits accompanied by intrusions by psychological experts and lawyers cause an inevitable disruption of the nuclear family, which eventually results in extreme anxiety and dislocation for a child.⁸⁵

Besides the possibility for intrusion and insecurity by the courts because of the lack of uniformity, the adversarial setting of the courtroom provides a poor environment for resolv-

ing family issues by allowing underlying problems between the parent and the grandparent to play out in public.⁸⁶ By allowing grandparents to seek court intervention, the system has created a “situation ripe for abuse by parents or grandparents motivated not by the best interest of the child but by the emotions resulting from underlying problems between the parent and grandparent.”⁸⁷ For example, parents may deny visitation, and grandparents may petition for visitation, as a means of retaliation out of frustration or anger.⁸⁸ If this contest is taken out of the courtroom and placed in a setting where the underlying issues can be worked out, the situation would likely solve itself and would likely eliminate the dispute over grandparent visitation.⁸⁹

In *Troxel*, the plurality was especially cognizant of a custodial parent’s wishes.⁹⁰ It was the belief of the Court that the “decisional framework employed by the Superior Court [in *Troxel*] directly contravened the traditional presumption that a fit parent will act in the best interest of his or her child” by not affording the parent’s decision, to limit visitation, any deference.⁹¹ This current framework for statutes, which provides little or no deference to parents’ wishes, may create adverse consequences.⁹² When a court intervenes and orders visitation that parents do not welcome, the result might be ill feelings, bitterness, and animosity between the parent and grandparent.⁹³ While on the surface this attempt by the court to foster a positive relationship between the grandparent and the child might seem to be successful, a court order will not serve the best interest of the child if it forces the child into an environment consisting of hostile and conflicting authority figures.⁹⁴ Even the possible benefits of love and affection of a grandparent may not necessarily justify awarding grandparents visitation privileges.⁹⁵ In the author’s opinion, litigation is not the solution to these problems; alternatives should be sought. Mediation is one such alternative.

III. MEDIATION

At some point during most litigation between grandparent and parent, courts often express discomfort that the child has become a central focal point in some sense to a family power struggle.⁹⁶ These courts further lament the family’s inability to resolve their own conflicts in a setting that is most certainly inadequate to resolve such familial conflicts.⁹⁷ The hostilities involved in a grandparent visitation case often echo the hostilities involved in divorce proceedings.⁹⁸ Thus, as in divorce proceedings, grandparent visitation cases have the same potential for becoming a traumatic event for a child.⁹⁹ Unfortunately, litigation can make these emotionally wrenching family conflicts even more difficult for the child involved.¹⁰⁰ Besides emotional detriment to the child, court adjudication may not be well suited for the resolution of grandparent visitation because disputes, heard in a single court hearing, are generally insufficient to resolve the background issues that have taken years to develop.¹⁰¹ Because the dispute is frequently based on perceptions rather than facts, a fact-finding justice system is said to be ineffective.¹⁰² Thus, courts might prefer that these disputes be resolved without resort to litigation.¹⁰³ As Mnookin stated, in child custody disputes during divorce proceedings,

a process that leads to agreement between the parents is preferable to one that necessarily has a winner and a loser. A child’s future relationship with each of his parents is better ensured and his existing relationship less damaged by a negotiated settlement than by one imposed by a court after an adversary proceeding.¹⁰⁴

As of 1998, more than two thousand laws have been enacted by legislatures dealing with mediation and other dispute resolution processes, and even more courts and administrative agencies have advocated for its use.¹⁰⁵ Mediation is a process through which a mediator, a neutral third party, assists parties in negotiating a voluntary and mutually agreeable settlement of their differences.¹⁰⁶ The mediator assists in the process but maintains no interest in the dispute.¹⁰⁷ An essential characteristic of mediation is its informality, allowing the process to have a free and open level of discussion between the parties and the facilitator.¹⁰⁸

As opposed to other alternative dispute resolution processes, such as arbitration, mediation does not allow the neutral party to determine the outcome of the negotiations.¹⁰⁹ The mediator is only allowed to oversee the process, whereas the parties are the entities that develop the agreement. The mere belief of an opportunity for expression is seen as fair.¹¹⁰ A belief that a process is fair leads to an increased satisfactory level, regardless of the outcome.¹¹¹

Mediation's ease of settlement and cost-saving outcomes have also resulted in a feeling of satisfaction among parties.¹¹² Mediation, as a whole, is less expensive than going to trial, and furthermore, after spending a fortune on a trial, parties generally do not get the intended results or receive results no different than those that could have been ascertained through mediation.¹¹³ Furthermore, it has been seen that in a trial, the party better able to bear the transaction costs, whether financial or emotional, will have an advantage in bargaining.¹¹⁴ Mediation as a process attempts to eliminate advantages in bargaining, leaving parties on an equal plane.

Mediation enables parties to look beyond legal issues and remedies in developing more efficient ways to solve the two parties' problems.¹¹⁵ Since the mediator is not required to stay within the formal rules of evidence and parliamentary procedure, parties may introduce any evidence they feel necessary in any way they feel comfortable.¹¹⁶ The purpose is not to prevent evidence but to enable a settlement or at the very least provide the mechanism for allowing the possibility for a "win-win" resolution.¹¹⁷

With the understanding that the parties have more extensive knowledge of the situation than any judge could hope to have, mediation provides the opposing parties an opportunity to maintain and increase their potential for shaping the remedy.¹¹⁸ Mediation also guarantees that the agreement can be as specific as the parties desire as opposed to a court determined order.¹¹⁹ With the use of mediation, children will be less likely the subject of future conflicts, as it has been shown that mediated settlements are usually better adhered than are court judgments.¹²⁰

Finally, while mediation may result in a positive solution to the parties' dilemma, the process does not eliminate the right of either party to seek relief by way of the courts.¹²¹ However, it is this safety net that could lead to an increased potential for a successful mediation, as the threat of a trial could force the parties to resolve their differences.¹²²

IV. MEDIATION IN OTHER AVENUES OF LAW

It has been noted that the unique nature of family law, in that it meshes both law and personal feelings, enables mediation to be most conducive to producing a settlement.¹²³ Florida initiated the first mediation program in 1975, when it created the first court-connected mediation program to resolve community disputes.¹²⁴ Florida has since opened its mediation doors to all types of litigated topics.¹²⁵ Florida has also authorized the referral of all family matters to mediation.¹²⁶ Florida Family Law Rule 12.020(a) defines family law matters to

include among others, matters arising from dissolution of marriage, paternity, child support, custodial care or access to children, adoption, emancipation proceedings, and declaratory judgment actions related to premarital, marital, or postmarital agreements.¹²⁷ Furthermore, Rule 12.740 states, "All contested family matters and issues may be referred to mediation."¹²⁸

In 1980, the California legislature enacted the first statute requiring a form of mediation in all contested child custody cases.¹²⁹ As of 1995, twenty-five states had enacted either a mandatory or discretionary mediation statute in child custody cases.¹³⁰ California Civil Code § 4607 became effective on January 1, 1981, with a stated purpose to "reduce the acrimony which may exist between the parties and to develop an agreement, assuring the child or children's close and continuing contact with both parents after marriage is dissolved."¹³¹

By 1999, forty states as well as the District of Columbia had established either mandatory or discretionary statutes for mediation in child custody cases.¹³² Of those forty-one jurisdictions, eleven make the mediation process mandatory.¹³³ Exemptions for mediation are listed for either domestic abuse allegations, undue hardship, extraordinary causes, or sexual or physical abuse.¹³⁴ Under the California statute, there is no direct cost to either party for the use of the Family Court Services' Mediation Program.¹³⁵ The statute allows the court to appoint mediators or the parties can select their own.¹³⁶ The mediator will notify the court if an agreement has been met and will submit the agreement to the court for approval.¹³⁷ If no agreement is met, the mediator will advise the court whether further mediation would be helpful in resolving the matter, in which case, the court may order the parties to return for further mediation.¹³⁸

However, just as in grandparent visitation statutes, mediation statutes vary between states as well. In Kansas, mediation is discretionary and any issues of domestic disputes may be mediated.¹³⁹ In Kansas, the parties are responsible for mediation fees.¹⁴⁰ In addition, any understanding, reached through mediation, is not binding in Kansas until it is in writing and is signed by the parties and their attorneys, if any are involved, and approved by the court.¹⁴¹ In Alaska, mediation is used at the trial court's discretion, and any issues concerning divorce and the dissolution of marriage can be mediated.¹⁴² However, mediation will not be ordered or recommended in a proceeding concerning child custody or visitation if a protective order has been issued or filed.¹⁴³ The Alaska court appoints the mediator and can appoint anyone it finds suitable.¹⁴⁴ If mediation efforts fail, then the mediator will notify the court clerk, and the divorce action will proceed in the usual manner.¹⁴⁵

Very few studies have been done on the quantifiable advantages mediation provides.¹⁴⁶ One such study was completed after the enactment of California Civil Code § 4607.¹⁴⁷ In 1980, an evaluation showed a reduction in the average number of custody or visitation hearings from 275 per year, in 1977 to 3 in 1980.¹⁴⁸ A later study, in Virginia, found that its mediation program resulted in a 61 percent reduction in the number of cases going to trial.¹⁴⁹ In addition, mediated final agreements were achieved in one-half of the time required to reach an agreement through the litigation channel.¹⁵⁰

In addition to the efficiency and ability to clear the backlog existing within the legal system, mediation provides a monetary benefit as well.¹⁵¹ A 1979 study of Los Angeles County's custody mediation program showed a savings of over a week and a half, in man-time hours, as opposed to litigation as well as an average savings of close to \$1,000,000 (one million dollars) for the county.¹⁵² Finally, in a California study completed in the mid-1980s, the average cost to litigate a divorce proceeding was 134 percent higher than to mediate the action.¹⁵³

V. STATES THAT HAVE DISCRETIONARY STATUTES FOR MEDIATION OF GRANDPARENT VISITATION CASES

Few states have passed statutes enabling the court to use the mechanism of mediation in grandparent requested visitation cases.¹⁵⁴ In the state of Florida, where mediation is used to resolve “differences over grandparent visitation,” the statute reads that “it shall be the public policy of this state that families resolve differences over grandparent visitation within the family.”¹⁵⁵ The statute provides for a mediation service where the lines of communication within the family structure have broken down.¹⁵⁶ The statute also delineates that the mediation program may either be formal or informal and that the determination of such a program falls squarely on the family.¹⁵⁷ The court’s direction to the parties to seek mediation is the only court-induced interference provided for by the statute.¹⁵⁸

Virginia is a second jurisdiction in which a legislature saw fit to implement a mediation program to handle disputed visitation cases.¹⁵⁹ While the statute does not specifically state that mediation is discretionary, there is no provision requiring mediation; rather, under this section, trial courts have discretionary authority to refer parties, in an appropriate case, to evaluation for possible mediation services.¹⁶⁰ The mediation service is also paid for by the commonwealth, enabling an even larger percentage of the population to benefit from mediation.¹⁶¹ In North Dakota, a similar discretionary statute permits the court to require mediation in those situations in which the court determines that families would benefit from the service.¹⁶² The statute goes on to permit the court to order the dispute arbitrated by the person who attempted mediation.¹⁶³

New Mexico also established a legislative statute to provide mediation services to petitioning grandparents in visitation cases.¹⁶⁴ In contrast, West Virginia has no statute for discretionary mediation but does provide in court cases for possible mediation.¹⁶⁵

In California, mediation for contested custody as well as visitation is mandatory.¹⁶⁶ This mediation program, which covers both custody and visitation, is heavily guided by state law and provides for a mediator to be certified by the state.¹⁶⁷ In an effort to keep this dispute out of the courts,

Where the parties have not reached agreement as a result of the mediation proceedings, the mediator may recommend to the court that an investigation be conducted pursuant to Chapter 6 or that other services be offered to assist the parties to effect a resolution of the controversy before a hearing on the issues.¹⁶⁸

An indication of the trend toward meditation use between parents and grandparents may be seen in a variety of local court rules in jurisdictions in Nevada, Texas, and Arizona.¹⁶⁹

CONCLUSION

On June 5, 2000, the Supreme Court voiced its opinion by concluding that a Washington statute regarding grandparent visitation rights, as it pertained to this specific situation, was unconstitutional, in large part, for its breadth of scope. In doing so, the Court also opined that the process, by which state courts allow for third parties to petition the courts for visitation, places unreasonable burdens on custodial parents as well as on the child. This note has attempted to provide a window on the basis for this belief, as well as to provide a mechanism

for alleviating the deleterious side effects of third parties petitioning for visitation via litigation. Mediation as the recommended mechanism has been successful in other avenues of law, including closely related areas such as child custody. Moving families toward the mediation process could provide sufficient momentum to solve their problems by mutual agreement, instead of through a court order. It is, therefore, the hope that whereas grandparent/parent struggles in a courtroom atmosphere only serve to ignite smoldering problems, a mediated agreement, between family members, might serve to extinguish visitation dispute flames. In this way, it is hoped that family members may settle disputes amicably while making the best interests of the child paramount.

NOTES

1. *Troxel v. Granville*, 530 U.S. 57 (1999).
2. *Id.*
3. *See id.*
4. *See generally, Troxel*, 530 U.S. 57.
5. *See id.*
6. *See Troxel*, 530 U.S. at 65 (citing *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Prince v. Mass.*, 321 U.S. 158 (1944)).
7. *See Troxel*, 530 U.S. at 65.
8. *Troxel*, 530 U.S. at 75.
9. *Id.*
10. *Id.*
11. The Supreme Court in 1992 denied certiorari in *King v. King*, 828 S.W.2d 630 (Ky.) (granting paternal grandfather right to visit with his granddaughter over objections of child's married, natural parents), cert denied 506 U.S. 941 (1992) and in *H.F. v. T.F.*, 483 N.W.2d 803, 804-7 (Wisc.) (granting paternal grandparents right to visit with grandchild despite adoption of child by stepfather), cert denied, 506 U.S. 953 (1992).
12. *See generally Troxel*, 530 U.S. 57. Leaving the question of whether grandparents have a right to visitation unanswered.
13. *See* Judith L. Shandling, Note, *The Constitutional Constraints on Grandparents' Visitation Statutes*, 86 COLUM. L. REV. 118, 119-21 (1986) (discussing lack of jurisdictional uniformity in grandparent visitation cases).
14. *See* U.S. CONST. art. I, § 8 (family law or grandparents' visitation rights are not encompassed in powers of Congress); U.S. CONST. Amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.")
15. *See* ALA. CODE § 30-3-4.1 (1999); ALASKA STAT. ANN. § 25.20.065 (1998); ARIZ. REV. STAT. ANN. § 25-409 (1994); ARK. CODE ANN. § 9-13-103 (1998); CAL. FAM. CODE ANN. § 3104 (West 1994); COLO. REV. STAT. § 19-1-117 (1999); CONN. GEN. STAT. § 46B-59 (1999); DEL. CODE ANN., TIT. 10, § 1031(7) (2000); FLA. STAT. § 752.01 (2000); GA. CODE ANN. § 19-7-3 (1991); HAW. REV. STAT. § 571-46.3 (1999); IDAHO CODE § 32-719 (2000); ILL. COMP. STAT., CH. 750, § 5/607 (1998); IND. CODE § 31-17-5-1 (1999); IOWA CODE § 598.35 (1999); KAN. STAT. ANN. § 38-129 (1993); KY. REV. STAT. ANN. § 405.021 (Baldw. 1990); LA. REV. STAT. ANN. § 9:344 (West Supp. 2000); LA. CIV. CODE ANN., ART. 136 (West Supp. 2000); ME. REV. STAT. ANN., TIT. 19A, § 1803 (1998); MD. FAM. LAW CODE ANN. § 9-102 (1999); MASS. GEN. LAWS § 119:39D (1996); MICH. COMP. LAWS ANN. § 722.27b (Supp. 1999); MINN. STAT. § 257.022 (1998); MISS. CODE ANN. § 93-16-3 (1994); MO. REV. STAT. § 452.402 (Supp. 1999); MONT. CODE ANN. § 40-9-102 (2000); NEB. REV. STAT. § 43-1802 (1998); NEV. REV. STAT. § 125C.050 (Supp. 1999); N. H. REV. STAT. ANN. § 458:17-D (1992); N. J. STAT. ANN. § 9:2-7.1 (West Supp. 1999-2000); N. M. STAT. ANN. § 40-9-2 (1999); N. Y. DOM. REL. LAW § 72 (McKinney 1999); N. C. GEN. STAT. §§ 50-13.2, 50-13.2A (1999); N. D. CENT. CODE § 14-09-05.1 (2000); OHIO REV. CODE ANN. §§ 3109.051, 3109.11 (Supp. 1999); OKLA. STAT., TIT. 10, § 5 (Supp. 1999); ORE. REV. STAT. § 109.121 (1997); 23 PA. CONS. STAT. §§ 5311-5313 (1991); R. I. GEN. LAWS §§ 15-5-24-15-5-24.3 (Supp. 1999); S. C. CODE ANN. § 20-7-420(33) (SUPP. 1999); S. D. CODIFIED LAWS § 25-4-52 (1999); TENN. CODE ANN. §§ 36-6-306, 36-6-307 (Supp. 1999); TEX. FAM. CODE ANN. § 153.433 (Supp. 2000); UTAH CODE ANN. § 30-5-2 (1998); VT. STAT. ANN., TIT. 15, §§ 1011-1013 (1989); VA. CODE ANN. § 20-124.2 (1995); REV. CODE WASH. § 26.09.240 (2000); W. VA. CODE §§ 48-2B-1-48-2B-7 (1999); WIS. STAT. §§ 767.245, 880.155 (1993-1994); WYO. STAT. ANN. § 20-7-101 (1999).

16. *See Troxel*, 530 U.S. at 65. “In this case, we are presented with just such a question. Specifically, we are asked to decide whether § 26.10.160(3), as applied to Tommie Granville and her family, violates the Federal Constitution.” *Id.*

17. *Troxel*, 530 U.S. at 61 quoting WASH. REV. CODE § 26.10.160(3) (1994).

18. *See id.*

19. *See In re Troxel*, 940 P.2d 698, 700 (1997).

20. *See id.* at 61-62.

21. *See In re Troxel*, 940 P.2d 698, 700 (1997).

22. *See id.*

23. *See Troxel*, 530 U.S. at 62-63. (citing *In re Smith*, 969 P.2d 21, 26-27 (1998)).

24. *See Troxel*, 530 U.S. at 63.

25. *See id.*

26. *See id.* at 63 (citing *In re Smith*, 969 P.2d at 28-31).

27. *See id.* at 67.

28. *See id.* at 63-64.

29. *Id.*

30. *See id.* at 64.

31. *See id.* at 67.

32. Wash. Rev. Code § 26.10.160(3) (1994).

33. *See Troxel*, 530 U.S. at 67. “Thus, in practical effect, in the State of Washington a court can disregard and overturn any decision by a fit custodial parent concerning visitation whenever a third party affected by the decision files a visitation petition, based solely on the judge’s determination of the child’s best interests.” *Id.*

34. *See id.* at 69.

35. *See id.*

In reciting its oral ruling after the conclusion of closing arguments, the Superior Court judge explained: The burden is to show that it is in the best interest of the children to have some visitation and some quality time with their grandparents. I think in most situations a commensal approach [is that] it is normally in the best interest of the children to spend quality time with the grandparent, unless the grandparent [sic], there are some issues or problems involved wherein the grandparents, their lifestyles are going to impact adversely upon the children. That certainly isn’t the case here from what I cant tell. *Id.*

36. *See id.*

37. *See* Michael Quintal, *Court Ordered Families: An Overview of Grandparent-Visitation Statutes*, 29 SUFFOLK U.L. REV. 835, 836-37 (1995).

38. *See* David A. Ruiz, *Note & Comment: Asserting a Comprehensive Approach for Defining Mediation Communication*, 15 OHIO ST. J. ON DISP. RESOL. 851, 851 (2000). “Mediation and other forms of alternative dispute resolution (ADR) have experienced immense popularity in recent years.” *Id.*

39. *See* Robert H. Mnookin and Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 969. (1979). “Often, the outcome in court is far from certain, with any number of outcomes possible. Indeed, existing legal standards governing custody, alimony, child support, and marital property are all striking for their lack of precision and thus provide a bargaining backdrop clouded by uncertainty.” *Id.*

40. *See* Shandling, *supra* note 13, at 119.

41. *See id.*

42. *See id.*

43. *See* CONN. GEN. STAT. § 46b-59 (1999).

44. *Id.*

45. *See generally id.*

46. *See* Ky. Rev. Stat. Ann. § 405.021 (1998).

47. Fla. Stat. § 752.01 (2000) “the court shall, upon petition filed by a grandparent of a minor child, award reasonable rights of visitation to the grandparent, with respect to the child, when it is in the best interest of the minor child.”

48. *See generally id.*

49. *Troxel*, 530 U.S. at 66. “In subsequent cases also, we have recognized the fundamental right of parents to make decisions concerning the care, custody and control of their children.” *Id.* “In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody and control of their children.” *Id.*

“There is a presumption that fit parents act in their children’s best interests; there is normally no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent’s children.” *Id.* at 68-69.

50. *See* N.D. CENT. CODE, § 14-09-05.1 (2000).

51. *See id.*

52. *See* Shandling, *supra* note 13, at 119.

53. *See* Conn. Stat., *supra* note 43; see also MONT. CODE ANN. § 40-9-102 (2000).

54. DEL. CODE ANN., Tit. 10 § 1031(7) (2000).

55. NY DOM. REL. § 72.

56. *See id.*

57. *See* CODE OF ALA. § 30-3-4 (Supp. 1996) (repealed).

58. *See* CODE OF ALA. § 30-3-4 (1999).

59. *See* N.D. CENT. CODE, @ 14-09-05.1 (2000).

60. *See Hoff v. Berg*, 595 N.W.2d 298 (1999) (1993 Amendment void presumption standard).

61. *See* N.J. ST 9:2-7.1 (2001).

62. Idaho Code § 32-719 (2000).

63. *See generally id.*

64. *See* Sarah Norton Harpring, Comments: Wide-Open Grandparent Visitation Statutes: Is the Door Closing, 62 U. CIN. L. REV. 1659, 1673 (1994).

65. *See* TENN. CODE ANN §§ 36-6-301(a) (1999); MO. REV. STAT § 452.402 (SUPP. 1999); KY. REV. STAT. ANN. § 405.021 (1998); NY DOM REL. § 72 (2001).

66. *See Hawk v. Hawk*, 855 S.W.2d 573 (Tenn. 1993); *Herndon v. Tuhey*, 857 S.W.2d 203 (Mo. 1993); *King v. King*, 828 S.W.2d 630 (Ky. 1992); *Doe v. Smith*, 595 N.Y.S.2d 624 (N.Y. Fam. Ct. 1993).

67. *See* Harpring, *supra* note 64, at 1673. In fact, “commentators have asserted that judges frequently decide these cases based on their own personal views of the value of grandparent-grandchild relationships. Where the applicable statutes do not expressly enumerate the factors to be considered in determining the best interests of a child regarding visitation, that is a distinct possibility.” *Id.*

68. *See* Section 1 for the list of grandparent visitation statutes in all 50 states. Most jurisdictions have different statutes which leads to differing outcomes in each state.

69. *See* Mnookin, *supra* note 39, at 971. “But in real situations, the exact odds of various possible outcomes are not known by the parties; often they do not even know what information or criteria the judge will use in deciding.” *Id.*

70. *See id.*, at 956. “Moreover, a negotiated agreement allows the parties to avoid the risk and uncertainties of litigation, which may involve all-or-nothing consequences.” *Id.*

71. *Troxel*, at 75 (O’Connor, J., quoting Kennedy, J.’s dissent).

72. *Id.* at 101.

73. *Id.* at 75.

74. Letter written by Troxel Party. (visited Mar. 3, 2001) <http://www.parentsrights.org>. “As you can imagine, our legal expenses have been overwhelming and won’t be lessening in the U.S. Supreme Court. We have spent more than \$50,000 before three state courts defending our rights to not have the court system interfere with our family decisions. We are unable to fund our Supreme Court defense on our own.” *Id.*

75. *See Apker v. Malchak*, 490 N.Y.S.2d 923, 925 (App. Div. 1985) (denying grandparents visitation rights because they had not seen their grandchildren in nine years and thus lacked any meaningful relationship with their grandchildren); *Looper v. McManus*, 581 P.2d 487, 488 (Okla. App. 1978) (“Visitation is not solely for the benefit of the adult visitor but is aimed at fulfilling what many conceive to be a vital, or at least a wholesome contribution to the child’s emotional well-being by permitting partial continuation of an earlier established close relationship.”)

76. *See Troxel*, 530 U.S. at 75.

77. *Id.* at 101.

78. *See* Shandling, *supra* note 13, at 122.

79. *See id.*

80. *See id.*

81. *See id.* at 123.

82. *Id.*

83. *See* Mnookin, *supra* note 39, at 958. “Moreover, because parents, not state officials, are primarily responsible for the day-to-day child rearing decisions both before and after divorce, parents, not judges, should have primary authority to agree on custodial arrangements.” *Id.*

84. *See id.* at 124.

85. *See id.*
86. *See Quintal, supra* note 37, at 850.
87. *See id.*
88. *See id.*
89. *See id.* at 854.
90. *Troxel*, at 70. "And, if a fit parent's decision of the kind at issue here becomes subject to judicial review, the court must accord at least some special weight to the parent's own determination." *Id.*
91. *Id.*
92. *See Quintal, supra* note 37, at 850-51.
93. *See id.*
94. *See id.*
95. *See id.*
96. *See Harpring, supra* note 64, at 1676.
97. *See id.*
98. *See id.* at 1677.
99. *See id.*
100. *See id.* "For example, one asserted problem with using the judicial system is that its adversarial nature can exacerbate the family dispute and make the existing division between the parties even more resolute, potentially making it less likely that peace will result following the adjudication." *Id.*
101. *See id.* at 1677-78.
102. *See id.* at 1678.
103. *See id.*
104. *See Mnookin, supra* note 39, at 958.
105. *See* Chris Guthrie and James Levin, A "Party Satisfaction" Perspective on a Comprehensive Mediation Statute, 13 OHIO ST. J. ON DISP. RESOL. 885, 885 (1998).
106. *See id.* at 853.
107. *See id.*
108. *See id.*
109. *See* Guthrie and Levin, *supra* note 105, at 890.
110. *See id.* 891.
111. *See id.*
112. *See id.* at 895.
113. *See* Harpring, *supra* note 64, at 1678-79.
114. *See* Mnookin, *supra* note 39, at 972.
115. *See* Ruiz, *supra* note 38, at 854.
116. *See id.*
117. *See id.* at 854-855.
118. *See id.*
119. *See id.*
120. *See* Harpring, *supra* note 64, at 1678.
121. *See id.*
122. *See id.*
123. *See* Alison E. Gerencser, *Symposium: Dispute Resolution in the Law School Curriculum: Opportunities and Challenges, Part II: Alternative Dispute Resolution has Morphed into Mediation: Standards of Conduct Must Be Changed*, 50 FLA. L. REV. 843, 852 (1998).
124. *See id.*
125. *See id.* at 853.
126. *See* Fla. Fam. Law Rule 12.020(a).
127. *See id.*
128. *See* Fla. Fam. Law Rule 12.740. There is an exception in FS 44 that excepts cases where there is a history of domestic violence which would compromise the mediation process.
129. *See* Cal. Civ. Code § 4607 (West 1993) (repealed 1994).
130. *See* Dane E. Gaschen, *Note and Comment: Mandatory Custody Mediation: The Debate Over its Usefulness Continues*, 10 OHIO ST. J. ON DISP. RESOL. 469, 472 (1995).
131. *Id.* at 470.
132. ALA. CODE § 6-6-20(b)(1) (1975); ALA. STAT. § 25.20.080 (West 1998); ARIZ. REV. STAT. § 6.8 (1999).; 1999 ARK. ACTS 704 (enacted March 18, 1999); CAL. FAM. CODE § 3170-3177 (West 1994); COLO. REV. STAT. ANN.

§ 13-22-311 (West 1999); CONN. GEN. STAT. ANN. § 46b-53a (West 1999); DEL. FAM. CT. R. 16(b)(1) (1994); U.S. DIST. CT. RULES D.C., APP. C II; FLA. STAT. ANN. § 44.102 (West 1994); HAW. REV. STAT. § 580-41.5 (1998); IDAHO RULES FOR CIV. PROC. RULE 16(J)2; IL. R 17 CIR. MED. RULE 1; 1999 IOWA ACTS 683; KAN. STAT. ANN. § 23-701 (1998); KY. REV. STAT. ANN. § 509 (Banks-Baldwin 1999); ME. REV. ANN. TIT. 19-A § 251.2 (West 1999); MD. CODE ANN., FAM. LAW § 9-205; Ma. House Bill 1379 (SN) 1999; Mi. R SPEC P MCR 3.216; MINN. STAT. ANN. § 518.619 (1) (West 1999); MS RULE UNIF. CH. CT ADMIN. ORDER No. 41; COURT ANNEXED MEDIATION RULES FOR CIVIL LITIGATION; MO. R SIXTEENTH JUDICIAL CIRCUIT COURT MEDIATION PROGRAM GUIDE; MONT. CODE ANN. § 40-4-301 (1) (1999); NEB. REV. STAT. § 43-2906 (1999); NEV. REV. STAT. ANN. § 25 (1998); N.H. REV. STAT. ANN. § 458:15-A. (1999); NJ RULE 1:40-4; N.M. STAT. ELEVENTH DIST. CT. RULE LR11-115; N.M. STAT. EIGHTH DIST. CT. RULE LR8-107B; N.M. STAT. NINTH DIST. CT. RULE LR9-703B; N.C. GEN. STAT. § 50-13.1 (1995); N.D. CENT. CODE. § 14-09.102 (1999); OHIO REV. CODE ANN. § 3109.052 (West 1999); OKLA. STAT. ANN. TIT. 43 § 107.3 (West 1999); OR. REV. STAT. 107.765 (1998); PA. STAT. ANN. TIT. 23 § 3901 (C) (1); RI ST § 15-5-29(A) (1998); S.D. CODIFIED LAWS § 25-4-56 (1999); TENN. CODE ANN. § 36-4-131 (1999); TEX. FAM. CODE ANN. § 153.0071 (c); UTAH ADMIN. CODE 4-909 (1996); VA. CODE ANN. § 8.01-576.4 (Michie 1999); *Carter v. Carter*, 196 W.Va 239, 470 S.E.2d 712 (1988), W. VA. CODE § 48-11-101 (b) (1999); WIS. STAT. ANN. § 767.325 (West 1999).

133. These include California, Delaware, Florida, Idaho, Kentucky, Maine, Nevada, Pennsylvania, South Dakota, Utah, Washington and Wisconsin.

134. See Gerencser, *supra* note 123.

135. See *id.*

136. See *id.*

137. See *id.*

138. See CAL. APP. SUPP., R.10.8(e) (West 1999).

139. See KAN. STAT. ANN. § 23-701 (1998).

140. See *id.*

141. See KAN. STAT. ANN. § 23-603 (1998).

142. See ALA. STAT. § 25.24.060 (West 1998).

143. See *id.*

144. See *id.*

145. See *id.*

146. See Gaschen, *supra* note 130, at 481.

147. See *id.*

148. See *id.*

149. See *id.*

150. See *id.*

151. See *id.*

152. See *id.* at 482.

153. See *id.*

154. See FLA. STAT. § 752.015 (2000); VA. CODE ANN. § 20-124.4 (2000); N.D. CENT. CODE, § 14-09-05.1 (2000); CAL. FAM. CODE § 3160 (2000).

155. FLA. STAT. § 752.015 (2000).

156. See *id.*

157. See *id.*

158. See *id.*

159. See VA. CODE ANN. § 20-124.4 (2000).

160. See *Summers v. Summers*, No. 2759-98-4, 1999WL 1133284 at *3 (Va. App. Aug. 3, 1999)(Where a father was denied the right to mediation by the court; court concluded that mediation was a court's discretion).

161. See VA. CODE ANN. § 20-124.4 (2000).

162. See N.D. CENT. CODE, § 14-09-05.1 (2000).

163. See *id.*

164. See N.M. Stat. Ann. @ 40-9-2 (2000): (H).

165. See W. VA. CODE § 48-2B-1 (2001); see *Carter v. Carter*, 470 S.E.2d 193 (1996). "Although the West Virginia Code does not specifically require mediation in family law matters, a circuit court or a family law master in an appropriate situation may require the parties to attempt mediation of their visitation differences." *Id.*

166. In 1993 California repealed CAL. CIV. CODE 4607, replacing it in with CAL. FAM. CODE § 3160. § 3160 continues without substantive change and generalizes the first and third sentences of former Civil Code Section 4607(b).

167. See Sections 3160, 3162, 3163, 3164, 3172, 3173, 3175, 3176, 3180(b), 3181, 3183, 3184, and 3185.

168. CAL FAM CODE § 3183 (2000).

169. Interviews with Phil Bushard, Family Mediation Program, Reno, Nevada (July 16, 2001), Pat Ross, Manager, Dallas County Family Court Services (July 16, 2001), and Fred Mitchell, Family Center of the Conciliation Court, Tuscon, Arizona (July 16, 2001).

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