Issue Brief

Visitation Rights of Grandparents

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Introduction

Third-party custody and visitation rights, and particularly the visitation rights of grandparents, have been a frequent concern for many of the Commonwealth's constituents in recent years and have become a source of legislation and debate among members of the General Assembly. To say this situation is emotionally charged would be an understatement.

One scenario that the members unfortunately hear about too often happens when a parent of a minor child has died. On one side, there are grandparents who may have been involved daily in the minor child's life who are suddenly being denied the ability to even see that child. On the other side, there may be a parent with a constitutionally protected liberty interest "in the care, custody, and control of their children"[1] who is suddenly dealing with the death of his partner and the prospect of facing a civil suit for visitation rights brought by the parents of the deceased partner with whom he does not have a functioning relationship. These situations present emotional and legal difficulties on both sides, but in the end, the court and the Commonwealth have the duty to provide for the best interest of the child and uphold the constitutional rights of the parent.

After previous legislative attempts at expanding the rights of grandparents failed, in 2021 the General Assembly passed and the Governor signed *SB 1325*[2] patroned by Senator Siobhan Dunnavant. SB 1325 provides the court with a framework to make grandparent visitation determinations in the special circumstance where the parent of the minor child is deceased or incapacitated by allowing the petitioning grandparent to introduce evidence of such deceased or incapacitated parent's prior consent to the grandparent's visitation. This change makes it easier for a grandparent in those circumstances to win visitation rights because it removes certain constitutional hurdles that must be overcome when at least one parent does not consent to the requested visitation.

This issue brief examines the history of third-party visitation law in Virginia, focusing on the constitutional rights of parents and the Commonwealth's duty to provide a child's best interest. It will provide a brief history of previous legislation introduced in the Commonwealth, culminating with the enactment of SB 1325.

Constitutional Framework

Subsection B of § 20-124.2 of the Code of Virginia provides the court the authority to award visitation to a third party: "The court shall give due regard to the primacy of the parent-child

[1] *Troxel v. Granville*, 530 U.S. 57, 65 (2000).
[2] https://lis.virginia.gov/cgi-bin/legp604.exe?212+sum+SB1325.

relationship but may upon a showing by clear and convincing evidence that the best interest of the child would be served thereby award custody or visitation to any other person with a legitimate interest." The Code of Virginia explicitly includes grandparents in the definition of "person with a legitimate interest."[3] Grandparents, therefore, have standing to petition the court for visitation rights but, as third-parties, have a higher burden to overcome than a parent when seeking custody or visitation.

The primacy of the parent-child relationship, which is codified in § 20-124.2 as noted above, has been enshrined in case law as the "parental presumption."[4] In *Troxel v. Granville*, the United States Supreme Court (the Court) upheld a Washington Supreme Court opinion overturning a Washington law that "permit[ed] 'any person' to petition a superior court for visitation rights 'at any time,' and authorize[d] that court to grant such visitation rights whenever 'visitation may serve the best interest of the child.'"[5] The Court stated that "[t]he liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court," and that it had been applied to the states through the Fourteenth Amendment's Due Process Clause.[6] The Court held that the Washington statute "unconstitutionally infringe[d] on that fundamental right" and that it was "breathtakingly broad."[7] The Court specifically noted that the Washington statute allowed a state court to "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."[8] In doing so, the state court gave no weight to the parent's decision not to afford visitation. Because the Court was able to overturn the Washington statute on the grounds that it was overbroad, it noted that it did "not consider the primary constitutional question passed on by the Washington Supreme Court—whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation."[9] Therefore the Court left open to the states the decision of what standard gives rise to the compelling state interest required to overcome the parental presumption and allow a court to interfere with a parent's liberty interest in raising his child.

Virginia left this decision to its courts. Virginia's custody and visitation statute provides that the court may award third-party custody or visitation rights upon a showing by clear and convincing evidence that doing so would be in the best interest of the child.[10] However, this showing alone does not overcome the parental presumption as required by *Troxel*. Virginia courts have adopted an actual harm standard that must be met for the constitutional requirement of *Troxel* to be satisfied before the court can proceed to the best interests determination found in statute.[11]

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[3] VA. CODE § 20-124.1.
[4] *Troxel* at 68 ("[T]here is a presumption that fit parents act in the best interests of their children," and so a court will typically defer to the decision of parents to deny visitation to a third party.); *see also Wilkerson v. Wilkerson*, 214 Va. 395, 397 (1973) ("[T]he rights of the [natural] parents may not be lightly severed but are to be respected if at all consonant with the best interest of the child.").
[5] *Troxel* at 60.
[6] *Id.* at 65.
[7] *Id.* at 66.
[8] *Id*. at 67.
[9] *Id.* at 73.
[10] VA. CODE § 20-124.2 (B).
[11] *Williams v. Williams*, 24 Va. App. 778, 485 S.E.2d 651 (Va. Ct. App. 1997).

In *Williams v. Williams*, the Court of Appeals of Virginia held:

> "[T]he language of Code § 20-124.2(B) that 'the court shall give due regard to the primacy of the parent-child relationship' requires proof that harm or detriment to the welfare of the child would result without visitation, before visitation may be ordered over the united opposition of the child's parents."[12]

The court further ruled:

> "The 'best interests' standard is considered in determining visitation only *after* a finding of harm if visitation is not ordered. Without a finding of harm to the child, a court may not impose its subjective notions of 'best interests of the child' over the united objection of the child's parents without violating the constitutional rights of those parents. In this regard, the parents' constitutional rights take precedence over the 'best interests' of the child."[13] (emphasis in original).

The "actual harm" test developed by the *Williams* court established that grandparents must overcome a two-pronged test before being awarded visitation over the unified objection of the parents: first, they must show that actual harm would come to the child if visitation is denied and second, that granting visitation is in the best interest of the child.[14] Courts in Virginia have routinely upheld the *Williams* test, and overcoming the actual harm prong has proven incredibly difficult.[15]

If the objection to grandparent visitation is not unified, meaning that one parent favors granting grandparent visitation rights and the other does not, then the grandparent need only prove that visitation is in the child's best interests, bypassing the actual harm test.[16] However, bypassing the actual harm test is only available to grandparents when one parent has affirmatively consented to the visitation over the objection of the other. If one parent objects, and

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[12] *Williams* at 780.

[13] *Id.* at 785.

[14] *Id.* The *Williams* court also noted that "a finding by a court that it would be 'better,' 'desirable,' or 'beneficial' for a child to have visitation with his or her grandparents" is insufficient to find actual harm, making the actual harm standard a high burden to overcome. *Williams* at 784.

[15] For example, in a circuit court case in Norfolk, the court denied visitation to the petitioner-grandmother after she failed to prove that her lack of visitation would result in actual harm to the minor child. The court heard evidence that the grandmother lived with the child for the first three years of his life and then just a short walk away from his house with his mother and that she contributed significantly to his upbringing. The court noted that "[a]ll evidence indicated that Child has benefited, and would continue to benefit, from visitation with Grandmother . . . and there is no evidence that future visitation would adversely affect Mother's parental relationship with Child or his health or emotional development." *Melton-Parson v. Melton*, 94 Va. Cir. 305 (Norfolk, Sept. 27, 2016); *see also Richter v. Manning*, 2013 Va. App. LEXIS 143 (Va. Ct. App. 2013) (Court of Appeals upheld trial court's denial of grandparent visitation despite minor child having lived with his grandparents for part of his life after his biological father died).

[16] *Dotson v. Hylton*, 29 Va. App. 635, 513 S.E.2d 901 (Va. Ct. App. 1999) ("When only one parent objects to a grandparent's visitation and the other parent requests it, the trial court is not required to follow the standard enumerated in *Williams*." *Dotson* at 639.); s*ee also Yopp v. Hodges*, 43 Va. App. 427, 598 S.E.2d 760 (Va. Ct. App. 2004).

the other parent is silent, then the court will impose the actual harm test.[17] This landscape led to Virginia grandparents contacting their state legislators to ask what could be done when one of the parents was deceased and therefore cannot affirmatively consent to visitation.

History of SB 1325 (Senator Dunnavant, 2021 Special Session I)

As far back at 2013, members of the General Assembly sought a solution to expand visitation rights of grandparents.[18] Practitioners and staff studied the issue and concluded that there was little to be done without infringing on a parent's constitutionally protected right in the upbringing of his children. Pursuant to subsection B of § 20-124.2, the Code of Virginia already provided grandparents a legal remedy: the grandparent could petition the court as a "person with a legitimate interest" to seek visitation rights. However, because of the immense hurdle presented by the *Williams* actual harm standard, few were granted visitation, and the issue persisted.

In 2020, Senator Dunnavant introduced *SB 571*.[19] The bill would have required the court, in petitions for visitation filed by the grandparent of a child whose parent is the grandparent's child and is deceased, to consider the following factors: (i) the historical relationship between the grandparent and child, (ii) the motivation of the grandparent in seeking visitation, (iii) the motivation of the living parent in denying visitation to the grandparent, (iv) the quantity of time requested and the effect it will have on the child's daily activities, and (v) the benefits of maintaining a relationship with the extended family of the deceased parent. The bill passed the Senate but was defeated in the House of Delegates. Family law practitioners objected on the basis that the bill seemingly directed the court to ignore the *Williams* actual harm standard.

In 2021, Senator Dunnavant reintroduced the bill as SB 1325, using similar language to that used in 2020. During the 2021 Regular Session and Special Session I, she worked with family law practitioners who had previously objected to the bill to craft a compromise substitute for SB 1325. The bill as passed amends § 20-124.2 of the Code of Virginia by adding a new subsection B2, which allows a grandparent who has petitioned the court for visitation with a minor grandchild, in situations where a parent of the minor grandchild is deceased or incapacitated, "to introduce evidence of [the deceased or incapacitated] parent's consent to visitation with the grandparent, in accordance with the rules of evidence. If the parent's consent is proven by a preponderance of the evidence, the court may then determine if grandparent visitation is in the best interest of the minor grandchild."

The language of SB 1325 allows a grandparent who has evidence of the affirmative consent to visitation of the deceased or incapacitated parent to introduce such evidence as a means of proving both that (i) the objection to visitation is not unified among both parents and (ii) the deceased or incapacitated person was not silent on the issue of consent, either of which would otherwise require the court to enforce the actual harm standard.

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[17] *See Surles v. Mayer*, 48 Va. App. 146, 628 S.E.2d 563 (Va. Ct. App. 2006) ("[W]e decline to hold that a biological parent's silence is the functional equivalent of that parent's affirmative consent . . . Thus the 'actual harm' standard enunciated in *Williams* applies to Surles' petition for visitation." *Surles* at 169).

[18] *See HJ 607* (2013) patroned by Delegate Peter Farrell, which requested the Virginia Bar Association to study Virginia's current law regarding the ability of third parties to seek custody of and visitation rights with other parents' children in relation to the parents' constitutional rights to direct the upbringing of their children. HJ 607 was passed by indefinitely with a letter sent to the Virginia Bar Association to complete the study. https://lis.virginia.gov/cgi-bin/legp604.exe?131+sum+HJ607.

[19] https://lis.virginia.gov/cgi-bin/legp604.exe?201+sum+SB571.

Beginning on July 1, 2021, in certain circumstances, a grandparent may bypass the actual harm standard when seeking visitation of a minor grandchild, giving equal weight to the wishes of the deceased or incapacitated parent regarding such visitation and allowing the court to focus solely on the best interest of the child, as it does in petitions for custody and visitation between the parents of a child.

Conclusion

The changes made to § 20-124.2 of the Code of Virginia by SB 1325 offer grandparents in certain circumstances a way to get on equal footing with the parent of a minor child in the eyes of the court for the purpose of being granted visitation rights. By allowing grandparents to introduce evidence that a deceased or incapacitated parent of the child affirmatively consented to the grandparents' request for visitation, the grandparents step into the shoes of a parent, bypassing the actual harm standard and having their request for visitation judged in light of the best interests of the child, just as any other parent's petition would be. The constitutional rights of the other parent are protected because the grandparents are permitted to take this step only if they can prove such consent by a preponderance of the evidence, thereby showing that the objection to visitation is not united and allowing the court to proceed as it would have if both parents were living or having full capacity and they were not united in their objection. Senate Bill 1325 provides a solution to an issue that has proven difficult to solve but does so in a way that both addresses the particular problem presented to the General Assembly and preserves the constitutional rights of its citizens.

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