

STATE OF MICHIGAN  
COURT OF APPEALS

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THERESA ODAY DeROSE, a/k/a THERESA SEYMOUR,

Plaintiff/Third-Party Defendant-Appellant,

v

JOSEPH ALLEN DeROSE,

Defendant,

and

CATHERINE DeROSE,

Third-Party Plaintiff-Appellee.

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FOR PUBLICATION  
January 25, 2002  
9:00 a.m.

No. 232780  
Wayne Circuit Court  
LC No. 97-734836-DM

Updated Copy  
April 12, 2002

Before: Cooper, P.J., and Sawyer and Owens, JJ.

COOPER, P.J. (*dissenting*).

I respectfully dissent from the majority opinion holding Michigan's grandparent visitation statute, MCL 722.27b, unconstitutional.

If the goal of my esteemed colleagues is to stay out of the legislative cloakroom, such an end would be better achieved by adhering to basic principles of statutory construction in order to uphold the intent of the Legislature.

It is a well-established rule that a statute is presumed to be constitutional unless its unconstitutionality is clearly apparent. *McDougall v Schanz*, 461 Mich 15, 24; 597 NW2d 148 (1999).

MCL 722.27b was specifically reviewed by our Supreme Court in *Frame v Nehls*, 452 Mich 171; 550 NW2d 739 (1996), when it addressed the issue of standing under an equal protection challenge. In that case, the Court pointed out that grandparent visitation is specifically a part of the Child Custody Act:

The legislative purpose behind the Child Custody Act is to "*promote the best interests and welfare of children.*" The act directs that it is "equitable in nature and shall be liberally construed and applied to establish promptly the rights

of the child and the rights and duties of the parties involved." Section 7b of the Child Custody Act deals specifically with grandparent visitation. The grandparent visitation statute is consistent with the general purpose of the act, in that it permits a court to enter a grandparent visitation order "if the court finds that it is in the best interests of the child" to do so. [*Id.* at 176-177 (emphasis added, citations omitted).]

The majority opinion relies heavily on *Troxel v Granville*, 530 US 57; 120 S Ct 2054; 147 L Ed 2d 49 (2000). In that case, the United States Supreme Court struck down a Washington state statute that was "breathtakingly broad" in that it allowed any person to petition at any time for visitation of a minor child.

However, Justice O'Connor, writing for the majority in *Troxel*, specifically indicated that the Court would be hesitant to hold specific nonparental visitation statutes violative per se of the Due Process Clause.<sup>1</sup> *Id.* at 73. Justice O'Connor emphasized that the constitutionality of any standard for awarding visitation turns on the specific manner in which the standard is applied. *Id.*

The *Troxel* decision was based on the sweeping breadth of the Washington statute *and* the application of that broad, unlimited power to the specific facts of the case. *Id.* The United States Supreme Court expressly refused to decide whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm to the child as a condition precedent to granting visitation. *Id.*

My colleagues agree that the Michigan statute does not have the broad expanse of the Washington statute; however, they declare the statute unconstitutional because it authorizes a court to issue a visitation order to a grandparent whenever the court deems it to be in the best interests of the child.

They claim that the lack of legislative guidance renders this otherwise valid statute fatally flawed. A careful reading of *Troxel* indicates that it was only because the Washington Supreme Court refused to give the Washington statute a narrower construction that the United States Supreme Court was compelled to make its ruling. *Id.* at 74-75.

The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature. *In re MCI Telecommunications Complaint*, 460 Mich 396, 411; 596 NW2d 164 (1999). It is not an invasion of legislative prerogative to interpret a statute to require that the burden of proof be on the petitioner. Nor is it judicial overreaching to require the trial court to make specific findings of fact regarding why grandparent visitation is or is not in the best interests of the child. Placing the burden on the grandparents presupposes that the parental wishes are a factor in the decision.

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<sup>1</sup> Michigan's grandparent visitation statute, MCL 722.27b, was cited in the footnote to this statement.

While the courts have long recognized the fundamental presumption that parents will act in the best interests of their children, that presumption is rebuttable. The Michigan statute provides for minimal intrusion on parental rights in situations where a custody dispute or death has altered the traditional nuclear family. In those situations, custodial parents who are otherwise fit may be motivated by factors that have little to do with the best interests of the child.

"Cases like this do not present a bipolar struggle between the parents and the State over who has final authority to determine what is in a child's best interests. There is at a minimum a third individual, whose interests are implicated in every case to which the statute applies—the child." [*Fitzpatrick v Youngs*, 186 Misc 2d 344, 349; 717 NYS2d 503 (2000), quoting *Troxel, supra* at 86 (Stevens, J., dissenting).]

I would therefore remand the case to the trial court for specific findings of fact, bearing in mind that the petitioner has the burden of proof.

/s/ Jessica R. Cooper