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Rideout v. Riendeau: Grandparent Visitation in Maine After Troxel

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RIDEOUT V. RIENDEAU: GRANDPARENT VISITATION IN MAINE AFTER *TROXEL*

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I. INTRODUCTION

Rideout v. Riendeau[1] presented a case in which two grandparents, Rose and Chesley Rideout, sought visitation of their three grandchildren.[2] Though the Rideouts had served as the childrens' "primary caregivers and custodians"[3] for significant periods of time,[4] the childrens' parents, Heaven-Marie Riendeau, who was the Rideouts' daughter, and Jeffrey Riendeau,[5] ended all contact between the children and the Rideouts due to a strained relationship between the Rideouts and the Riendeaus.[6] The Rideouts filed a complaint[7] pursuant to Maine's Grandparents Visitation Act (the Act),[8] which allows grandparents to bring a petition for visitation when there is a "sufficient existing relationship between the grandparent and the child" or when, in the absence of an existing relationship, a "sufficient effort to establish one has been made."[9] The Riendeaus filed a motion to dismiss,

1. 2000 ME 198, 761 A.2d 291.

2. *Id.* ¶ 3, 761 A.2d 291.

3. *Id.* ¶ 4, 761 A.2d 291.

4. The Rideouts served as the "primary caregivers and custodians" for the first seven years of the oldest child's life, the first four years of the second oldest child's life, and "several months" of the youngest child's life. *Id.*

5. Heaven-Marie Riendeau was the biological mother of each child. Jeffrey Riendeau was the biological father of the youngest child, the adopted father of the middle child, and stepfather to the oldest child. *Id.* ¶ 3, 761 A.2d 291.

6. *Id.* ¶ 5, 761 A.2d 291. Though Heaven-Marie Riendeau actively sought the Rideouts' involvement in raising her children in their early years, going so far at one point to sign power of attorney for Rose Rideout to act as the legal guardian for the youngest child, Ms. Rideout's involvement in raising the children apparently created tension between her and Heaven-Marie. *Id.* ¶ 4, 761 A.2d 291. The Riendeaus also claimed that Rose Rideout's "interference in their family unit" created tension leading to a temporary separation of the Riendeaus. *Id.* ¶ 5, 761 A.2d 291.

7. *Id.* ¶ 5, 761 A.2d 291.

8. ME. REV. STAT. ANN. tit. 19-A, §§ 1801-1805 (West 1964).

9. *Id.* § 1803(1) (A), (C). The statute provides in full:

> 1. Standing to petition for visitation rights. A grandparent of a minor child may petition the court for reasonable rights of visitation or access if:
>
> A. At least one of the child's parents or legal guardians has died;
>
> B. There is a sufficient existing relationship between the grandparent and the child; or
>
> C. When a sufficient existing relationship between the grandparent and the child does not exist, a sufficient effort to establish one has been made.
>
> 2. Procedure. The following procedures apply to petitions for rights of visitation or access under subsection 1, paragraph B or C.
>
> A. The grandparent must file with the petition for rights of visitation or access an affidavit alleging a sufficient existing relationship with the child, or that sufficient efforts have been made to establish a relationship with the child. When the petition and accompanying affidavit are filed with the court, the grandparent shall serve a copy of both on at least one of the parents or legal guardians of the child.

claiming that the Act unconstitutionally infringed upon their parental rights.[10] The District Court (West Bath, Field, J.) found that, if the Act were constitutional, under the statute's criteria the Rideouts would be entitled to visitation; however, the court determined that the Act violated the Fourteenth Amendment's Due Process Clause.[11] Accordingly, the District Court granted the Riendeau's motion to dismiss.[12]

B. The parent or legal guardian of the child may file an affidavit in response to the grandparent's petition and accompanying affidavit. When the affidavit in response is filed with the court, the parent or legal guardian shall deliver a copy to the grandparent.

C. The court shall determine on the basis of the petition and the affidavit whether it is more likely than not that there is a sufficient existing relationship or, if a sufficient relationship does not exist, that a sufficient effort to establish one has been made.

D. If the court's determination under paragraph C is in the affirmative, the court shall hold a hearing on the grandparent's petition for reasonable rights of visitation or access and shall consider any objections the parents or legal guardians may have concerning the award of rights of visitation or access to the grandparent. The standard for the award of reasonable rights of visitation or access is provided in subsection 3.

3. Best interest of the child. The court may grant a grandparent reasonable rights of visitation or access to a minor child upon finding that rights of visitation or access are in the best interest of the child and would not significantly interfere with any parent-child relationship or with the parent's rightful authority over the child. In applying this standard, the court shall consider the following factors:

A. The age of the child;

B. The relationship of the child with the child's grandparents, including the amount of previous contact;

C. The preference of the child, if old enough to express a meaningful preference;

D. The duration and adequacy of the child's current living arrangements and the desirability of maintaining continuity;

E. The stability of any proposed living arrangements for the child;

F. The motivation of the parties involved and their capacities to give the child love, affection and guidance;

G. The child's adjustment to the child's present home, school and community;

H. The capacity of the parent and grandparent to cooperate or to learn to cooperate in child care;

I. Methods of assisting cooperation and resolving disputes and each person's willingness to use those methods; and

J. Any other factor having a reasonable bearing on the physical and psychological well-being of the child.

4. Modification or termination. The court may modify or terminate any rights granted under this section as circumstances require. Modification or termination of rights must be consistent with this section.

5. Enforcement. The court may issue any orders necessary to enforce orders issued under this section or to protect the rights of parties.

6. Costs and fees. The court may award costs, including reasonable attorney's fees, for defending or prosecuting actions under this chapter.

Id. § 1803.

10. Rideout v. Riendeau, 2000 ME 198, ¶ 5, 761 A.2d 291. The Riendeau's motion was based solely on alleged violations of the U.S. Constitution. Neither party raised any question regarding the Maine Constitution. *Id.* at n.3.

11. *Id.* ¶ 6, 761 A.2d 291. *See also* U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law.").

12. Rideout v. Riendeau, 2000 ME 198, ¶ 6, 761 A.2d 291.

The Rideouts appealed to the Superior Court (Sagadahoc County, Humphrey, J.), which affirmed the District Court.[13] A divided Maine Supreme Judicial Court, sitting as the Law Court, reversed, holding the Act constitutional as applied, finding the Act to be narrowly tailored to serve a compelling state interest in preserving the children's relationship with the grandparents who had acted as their primary caregivers.[14] Two justices concurred, arguing that the court should find the Act constitutional on its face, and refrain from placing any limits on the application of the statute.[15] One justice dissented, arguing that the majority's finding of a compelling state interest was not supported by the language of the statute, and that the statute impermissibly allowed parents to be drawn into litigation before the grandparents established standing.[16] As such, the dissent argued, the statute was not narrowly tailored to advance a compelling state interest.[17]

This Note examines the *Rideout* decision in light of the United States Supreme Court's prior treatment of grandparent visitation in *Troxel v. Granville*,[18] which held a Washington grandparent visitation statute broader than that addressed in *Rideout*[19] to be unconstitutional[20] while leaving open the possibility that states could provide a means for grandparents to seek visitation of grandchildren against the wishes of the parents.[21] The note begins with an analysis of the various approaches taken by the states in adopting grandparent visitation statutes, comparing Maine's approach with that taken in other states. The *Rideout* decision is then analyzed within the framework established by *Troxel* and Supreme Court jurisprudence in general, with a focus on whether the Maine Act is sufficiently narrow in its attempt to advance a compelling state interest. To this end, the note questions whether the Act's "sufficient existing relationship" standard provides adequate protection of parental rights or whether such a standard, absent more specific parameters, fails to prevent parents from being subjected to litigation more often than may be constitutionally permissible by creating the possibility that parents could become involved in litigation when the grandparents may ultimately lack standing to seek visitation.

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13. *Id.* ¶ 3, 761 A.2d 291.

14. *Id.* ¶¶ 33-34, 761 A.2d 291.

15. *Id.* ¶¶ 35-46, 761 A.2d 291 (Wathen, C. J., and Rudman, J., concurring).

16. *Id.* ¶¶ 47-70, 761 A.2d 291 (Alexander, J. dissenting).

17. *Id.* ¶ 48, 761 A.2d 291.

18. 530 U.S. 57 (2000).

19. For example, the Washington statute allowed any person to petition for visitation at any time, and visitation was to be awarded anytime it was deemed to be in the best interest of the child. WASH. REV. CODE ANN. § 26.09.240 (West 1997). *See also* Troxel v. Granville, 530 U.S. at 67 (describing the Washington statute's provisions). By comparison, the Maine Act allows only grandparents to seek visitation when they have a "sufficient existing relationship" with their grandchildren, or when they have made "sufficient effort" to establish such a relationship. ME. REV. STAT. ANN. tit. 19-A, § 1803 (1998). Furthermore, while the Maine Act bases visitation in part on the best interests of the child, the Act requires that courts find that visitation would not interfere with the parent-child relationship before visitation can be granted. *Id.* § 1803(3). Other considerations weigh into the balance, including the relationship between the parents and grandparents. *Id.* § 1803 (H), (I). *See infra* notes 169-70 and accompanying text (outlining the Maine Act's provisions designed to protect parental rights). For the full text of the Maine Act, *see supra* note 9.

20. Troxel v. Granville, 530 U.S. at 73.

21. *See id.* at 70. *See also* text accompanying notes 103-04 (noting that the *Troxel* court declined to hold any specific type of visitation statute as unconstitutional *per se*, and also suggested that certain visitation statutes may adequately protect parental rights).

II. GRANDPARENT VISITATION

A. Varying Approaches Among the States

Grandparents have no common law right to seek visitation of their grandchildren in opposition to the wishes of the children's parents.[22] This would leave grandparents without redress to seek court-ordered visitation in the absence of a statute granting them a right to do so.[23] Perhaps in response to the growing role grandparents may be called on to fulfill in today's society, all fifty states have enacted some form of grandparent visitation statute.[24] With close to one-in-three of all children under eighteen being raised in single-parent households,[25] "persons outside the nuclear family are called upon with increasing frequency to assist" parents in a child's upbringing.[26] That grandparents may be called on more often to play a greater role in raising a child is witnessed by the fact that better than five percent of all children under eighteen now live with their grandparents.[27]

While all states have responded in some manner to the interests of grandparents in the face of changing familial structures, a uniform statutory model has not emerged. Rather, the states have adopted a wide range of approaches for balancing the often competing interests of grandparents, parents, and children. Many states provide for grandparent visitation only in cases where the parents have died, separated or divorced, lost custody for some other reason,[28] such as incarcera-

22. George L. Blum, Annotation, *Grandparents' Visitation Rights Where Child's Parents are Living*, 71 A.L.R. 5th 99 (1999). *See also* Enos v. Correia, 647 N.E.2d 1215, 1218 n.11 (Mass. App. Ct. 1995) (collecting cases): *In re* Marriage of Herreras, 768 P.2d 673 (Ariz. Ct. App. 1989); Kanvick v. Reilly, 760 P.2d 743 (Mont. 1988); Preston v. Mercieri, 573 A.2d 128 (N.H. 1990); In re Whitaker, 522 N.E.2d 563, 566 (Ohio 1988); Clark v. Evans, 778 S.W.2d 446, 448 (Tenn. Ct. App. 1989).

23. Enos v. Correia, 647 N.E.2d at 1218, 1218 n.11 (noting that the power to grant visitation rights must be found in the applicable statute; authority to grant such rights is not rooted in a court's equitable powers); E.N.O. v. L.M.M., 711 N.E.2d 886, 895 (Mass. 1999) (Fried, J., dissenting) (stating that a claim seeking visitation based on equitable principles "state[s] no theory recognized under [the] law.").

24. Justice O'Connor's plurality opinion in *Troxel v. Granville* suggests that passage of grandparent visitation statutes is due, in part, to the increased role grandparent's play in assisting single-parent households in raising children. Troxel v. Granville, 530 U.S. at 64, 73-74 n.1 (2000) (listing all 50 statutes).

25. The Census reports that 28% of all children under the age of eighteen live in single-parent households. *Id.* at 64 (citing U.S. DEPT. OF COMMERCE, BUREAU OF CENSUS, CURRENT POPULATION REPORTS, 1997 POPULATION PROFILE OF THE UNITED STATES 27 (1998)).

26. *Id.*

27. *Id.* Four million, or 5.6 percent of all children under eighteen live with their grandparents (citing U.S. DEPT. OF COMMERCE, BUREAU OF CENSUS, CURRENT POPULATION REPORTS, MARITAL STATUS AND LIVING ARRANGEMENTS: MARCH 1998 (Update), p. *i* (1998)).

28. Eighteen states require either death of a parent, marital dissolution, or separation before grandparents may be awarded visitation rights. *See* ARIZ. REV. STAT. ANN. § 25-409 (West 2000); ARK. CODE ANN. § 9-13-103 (Michie 1998); COLO. REV. STAT. § 19-1-117 (2000); FLA. STAT. ANN. § 752.01 (West Supp. 2001) (held unconstitutional in *Belair v. Drew*, 776 So.2d 1105 (Fl. Dist. Ct. App., 2001)); GA. CODE ANN. § 19-7-3(b), (c) (1999); IND. CODE ANN. § 31-17-5-1 (West 1998); LA. REV. STAT. ANN. § 9.344 (West 2000); MASS. GEN. LAWS ch. 119, §§ 23, 26 (West Supp. 2001); MICH. COMP. LAWS § 722.27(b) (West Supp. 2001); NEB. REV. STAT. § 43-1802 (1998); N.H. REV. STAT. ANN. § 458:17-d (Supp. 2000); N.C. GEN. STAT. §§ 50-13.2(b1), 50-13.2A, 50-13.5(j) (1999); OHIO REV. CODE ANN. § 3109.05(B)(1) (West Supp. 2000); S.C. CODE ANN. § 20-7-420(33) (West Supp. 2000); TENN. CODE ANN. § 36-6-306 (Supp. 2000); VT. STAT.

tion,[29] or in other limited circumstances such as when a parent has become "physically or mentally incapable of making a decision" regarding the child.[30]

Even among these states, which may be viewed as the most restrictive with respect to the interests of grandparents, the stringency of the visitation statutes vary considerably. For instance, while most of these states simply require that visitation be in the best interest of the child, others add additional requirements. For instance, both Virginia[31] and Tennessee[32] require that the grandparents have had a relationship with the children pre-dating the visitation action. In Vermont[33] a grandparent can only appear as a witness, not as a party in a visitation action. Georgia[34] may be the most restrictive state, from the standpoint of grandparents seeking visitation: In Georgia, grandparents are not only restricted to seeking visitation when a parent dies or the parents cease to live together, but visitation is also contingent on a showing of harm to the child should visitation be denied.[35] Georgia is the only state to require such a showing of harm.[36]

The approach in most states, however, is to grant much broader rights to grandparents seeking visitation of their grandchildren, allowing visitation actions to be brought even when both parents are alive and living together.[37] All of these states

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ANN. tit. 15, §§ 1011, 1012 (1989); VA. CODE ANN. § 63.1-204.1 (Michie 1995); WASH. REV. CODE ANN. § 26.09.240 (West 1997). For a brief discussion of each state's grandparent visitation act as of 1999, see Stephen Elmo Averett, *Grandparent Visitation Right Statutes*, 13 BYU J. PUB. L. 355 (1999).

29. LA. REV. STAT. ANN. § 9.344(c) (West 2000).

30. VT. STAT. ANN. tit. 15 § 1012 (1989).

31. VA. CODE ANN. § 63.1-204.1 (Michie 1995).

32. TENN. CODE ANN. § 36-6-306 (Lexis Supp. 2000).

33. VT. STAT. ANN. tit. 15, §§ 1011, 1012 (1989).

34. GA. CODE ANN. § 19-7-3(b), (c) (1999).

35. *Id.*

36. Tennessee also requires a showing of harm, but defines harm as a cessation of a pre-existing relationship between the grandparent and child. TENN. CODE ANN. § 36-6-306(b)(1) (Lexis Supp. 2000). Georgia is, then, the only state to require a showing of general harm before visitation may be granted.

37. Thirty-one states allow grandparents to seek visitation when the parents are alive and living together. *See* 1999 Ala. Acts 436; ALASKA STAT. 25.20.065 (Lexis 2000); CAL. FAM. CODE § 3104 (West 1994); CONN. GEN. STAT. ANN. § 46B-59 (as amended by 1999 Conn. Legis. Serv. 137) (West 1995); DEL. CODE ANN. tit. 10, § 1031 (1999); HAW. REV. STAT. § 571-46.3 (Supp. 2000); IDAHO CODE § 32-719 (1996); 750 ILL. COMP. STAT. ANN. 5/607 (West 1999); IOWA CODE ANN. § 598.35 (West Supp. 2001); KAN. STAT. ANN. § 38-129 (2000); KY. REV. STAT. ANN. § 405.021 (Lexis 1999); ME. REV. STAT. ANN. tit. 19-A, § 1803 (West 1998); MD. CODE ANN., FAM. LAW § 9-102 (1999); MINN. STAT. ANN. § 257.022 (West 1998); MISS. CODE ANN. § 93-16-3 (West Supp. 2001); MO. ANN. STAT. § 452.402 (West 1997); MONT. CODE ANN. § 40-9-102; 1999 NEV. REV. STAT. ANN. § 125C.050 (1999); N.J. STAT. ANN. § 9:2-7.1 (West Supp. 2001); N.M. STAT. ANN. § 40-9-2 (Michie 2001); N.Y. DOM. REL. LAW § 72 (West 1999) (held unconstitutional in *Hertz v. Hertz*, 717 N.Y.S.2d 497 (2000)); N.D. CENT. CODE § 14-09-05.1 (Michie Supp. 2001); OKLA. STAT. tit. 10, § 5 (1998); OR. REV. STAT. § 109.121 (1999); 23 PA. CONS. STAT. ANN. § 5313 (West 1991); R.I. GEN. LAWS § 15-5-24.3 (2000); TEX. FAM. CODE ANN. § 153.433 (Vernon's Supp. 2001); UTAH CODE ANN. § 30-5-2 (Supp. 2001); W. VA. CODE § 48-2B-4 (Supp. 2000); WIS. STAT. ANN. § 767.245 (West 1993); WYO. STAT. ANN. § 20-7-101 (Lexis 2001). Though Illinois allows grandparents to seek visitation when both parents are alive and living together, they may do so only if one parent joins the petition. 750 ILL. COMP. STAT. ANN. 5/607(b)(D) (West 1992). Similarly, Delaware allows grandparents to seek visitation when both parents are alive and living together, but visitation is not to be granted if, in such a situation, both parents object to visitation. DEL. CODE ANN. ê t. 10, § 1031(7) (1999).

allow for grandparent visitation when it would be in the best interest of the child. In some cases, this is the only requirement that must be met by the grandparents.[38]

Additional requirements and safeguards of parental rights are imposed to varying degrees. Several states, including Alaska,[39] California,[40] Iowa,[41] Kansas,[42] Oregon,[43] Rhode Island,[44] Utah,[45] and Wisconsin,[46] require that grandparents must have had, or attempted to have had a relationship with the children prior to petitioning for visitation in order for visitation to be granted.[47] The preexisting relationship requirements are even more stringent in states such as Minnesota,[48] Mississippi,[49] New Mexico,[50] Oklahoma,[51] Pennsylvania,[52] and Texas,[53] where a visitation order is contingent on the children having lived with the grandparents for periods ranging from a few months[54] to a minimum of a year,[55] or the grandparents having established a "prior custodial relationship" with the children.[56]

Measures to protect or safeguard parental rights also vary considerably among states that provide for visitation when both parents live together. Some states' visitation acts have no provisions that specifically protect parental rights.[57] In

38. *See, e.g.*, KY. REV. STAT. ANN. § 405.021 (Lexis 1999); MD. CODE ANN., FAM. LAW § 9-102 (1999), MONT. CODE ANN. § 40-9-102 (1999), N.J. STAT. ANN. § 9:2-7.1 (West Supp. 2001), N.D. CENT. CODE § 14-09-05.1 (Michie Supp. 2001).

39. ALASKA STAT. § 25.20.065 (Lexis 2000).

40. CAL. FAM. CODE § 3104 (West 1994).

41. IOWA CODE ANN. § 598.35 (West Supp. 2001).

42. KAN. STAT. ANN. § 38-129 (2000).

43. OR. REV. STAT. § 109.121 (1999).

44. R.I. GEN. LAWS § 15-5-24.3 (2000).

45. UTAH CODE ANN. § 30-5-2 (1998 & Supp. 2001).

46. WIS. STAT. ANN. § 767.245 (West 1993 & Supp. 1999).

47. Tennessee, which allows grandparents to seek visitation only upon the death of a parent, or when the parents are not living together, also requires a preexisting relationship between the grandparents and the children. The Tennessee statute requires a finding of harm before visitation may be granted, and defines harm as the cessation of a significant preexisting relationship between the children and the grandparents. TENN. CODE ANN. § 36-6-306(b)(1)(C) (Supp. 2000).

48. MINN. STAT. ANN. § 257.022 (West 1998 & Supp. 2001).

49. MISS. CODE ANN. § 93-16-3 (West 1994).

50. N.M. STAT. ANN. § 40-9-2 (Michie 1999).

51. OKLA. STAT. tit. 10, § 5 (West 1998).

52. 23 PA. CONS. STAT. ANN. § 5313 (West Supp. 2001).

53. TEX. FAM. CODE ANN. § 153.433 (Vernon & Supp. 2001).

54. For example, New Mexico allows grandparents to seek visitation when the grandchild has lived with the grandparents for a period of at least three months if the child is under the age of six, N.M. STAT. ANN. § 40-9-2(C) (Michie 1999 & Supp. 2001), or when the child has lived with the grandparents for at least six months and the child is more than six years old. *Id.* § 40-9-2(D). In Texas, the requirement is that the child must have lived with the grandparents for at least six months within the two years immediately preceding a petition for visitation. TEX. FAM. CODE ANN. § 153.433 (Vernon 1996 & Supp. 2001).

55. Pennsylvania and Minnesota both make a visitation petition contingent on the child having lived with the grandparents for a minimum of a year. 23 PA. CONS. STAT. ANN. § 5313 (West Supp. 2001); MINN. STAT. ANN. § 257.022 (West Supp. 2001). Mississippi allows grandparents to seek visitation if they have supported the child for at least six months *or* the child has had "frequent visits, including overnight stays" for a minimum of a year. MISS. CODE ANN. § 93-16-3 (Supp. 2001).

56. OKLA. STAT. ANN. tit. 10, § 5 (West Supp. 2001).

57. For example, Kentucky and Maryland require only that grandparent visitation be in the best interests of the children. Whether, or to what extent the courts must consider the parents' rights is not specifically addressed by statute. *See* KY. REV. STAT. ANN. § 405.021 (Lexis 1999); MD. CODE ANN., FAM. LAW § 9-102 (1999).

several states, a court determining the best interest of the child must balance the interests of the children or grandparents against the interest of protecting parental rights,[58] or at least consider the impact visitation would have on the parent-child relationship.[59] Other states specifically require that a court determine that visitation would not interfere with the parent-child relationship or parental rights before visitation may be granted.[60] In some instances protection of parental rights manifests itself in a presumption in favor of the parents—this may take the form of a rebuttable presumption that visitation is not in the children's best interests if the parents object to visitation, as is the case in California,[61] or rebuttable presumptions that the parents' refusal to allow visitation was reasonable, as is the case in Rhode Island and Utah.[62] Similarly, Iowa and Mississippi both require that a parental denial of visitation be "unreasonable" before a court may grant a visitation order contrary to the parents' wishes.[63] Perhaps the most stringent protections of parental rights are found in Delaware, where visitation may not be granted by a court if both parents live together and both object to visitation,[64] and in Illinois, where, unless the parents are living together, one parent must join the grandparents' petition in order for visitation to be granted.[65]

B. Maine's Visitation Statute

The rights of grandparents seeking visitation in Maine are outlined in Title 19-A, section 1803 of the Maine Revised Statutes (The Act).[66] The Act gives grandparents standing to petition a court for visitation rights when a parent or legal guardian has died,[67] when there is a "sufficient existing relationship between the grandparent and the child,"[68] or when "a sufficient effort to establish" such a relationship has been made by the grandparents.[69] The court is then required to make a finding, based on the petition and affidavits filed by the grandparents and any affidavits filed in response by the parents or legal guardians, of whether "it is more likely than not that there is a sufficient existing relationship" between the grandparents and the child(ren), or that a "sufficient effort to establish" such a relationship has been made.[70] Any parents wishing to contest a grandparent's petition, then, will necessarily become embroiled in litigation before a court even establishes whether the grandparent(s) have standing under the Act. This, of course, leaves open the possibility that parents will be drawn into litigation even in cases in which grandparents are held to lack standing. The problem is exacerbated by

58. CAL. FAM. CODE § 3104 (West 1994).

59. N.J. STAT. ANN. § 9:2-7.1 (West Supp. 2001); W. VA. CODE ANN. § 48-2B-5 (Lexis 1999).

60. *See, e.g.*, ME. REV. STAT. ANN. tit. 19-A, § 1803(3) (West 1998); MINN. STAT. ANN. § 257.022 (West Supp. 2001); 23 PA. CONS. STAT. ANN. § 5313(a) (West Supp. 2001); WYO. STAT. ANN. § 20-7-101(a) (2001).

61. CAL. FAM. CODE § 3104(e) (West Supp. 2001).

62. R.I. GEN. LAWS § 15-5-24.3 (2000); UTAH CODE ANN. § 30-5-2 (Supp. 2001).

63. *See* IOWA CODE ANN. § 598.35 (West 1996); MISS. CODE ANN. § 93-16-3 (West 1999).

64. DEL. CODE ANN. tit. 10, § 1031 (1999).

65. 750 ILL. COMP. STAT. ANN. 5/607 (West 1999).

66. ME. REV. STAT. ANN. tit. 19-A, § 1803 (West 1998). *See supra*, note 9 for the complete text of Maine's visitation statute.

67. ME. REV. STAT. ANN. tit. 19-A, § 1803(1)(A) (West 1998).

68. *Id.* § 1803(1)(B).

69. *Id.* § 1803(1)(C).

70. *Id.* § 1803(2)(A), (B), (C).

the Act's lack of specific guidelines as to when grandparents will have standing—courts are left to determine what, exactly, constitutes a "sufficient" relationship, leaving no clear guideline for future courts or future litigants.

If the court finds that the grandparents do have standing, the court is to then hold a hearing in which objections of the parents or legal guardians are to be heard.[71] In assessing whether visitation should be granted, the court is to determine whether visitation would be in the best interest of the child.[72] Additionally, the court must also find that visitation "would not significantly interfere with any parent-child relationship or with the parent's rightful authority over the child" before visitation may be awarded to the grandparents.[73]

In making such a determination the court is to weigh several factors. First, the court is to consider the child's age,[74] the nature of the child's relationship with the grandparents,[75] and the preference of the child if the child is "old enough to express a meaningful preference."[76] The child's living arrangements are also to be considered, including whether it would be desirable to maintain the child's current living arrangements,[77] the nature of the living arrangements proposed by the grandparents,[78] and how the child has adjusted to their "present home, school, and community."[79]

The court is also required at this stage to weigh the nature of the relationship between the parents and grandparents. In making its visitation determination, the court must consider "the motivation of the parties involved,"[80] the ability of the grandparents and parents to "cooperate in child care,"[81] and the means by which the parties can settle disputes and facilitate cooperation as well as the willingness of the parties to do so.[82] Finally, the court is to consider any other factor that may affect the "physical and psychological well-being of the child."[83]

In sum, the Act requires a three-step process: first, the grandparents are to file a petition and any supporting affidavits alleging a sufficient existing relationship. The parents or guardians may respond with affidavits of their own, meaning they may become involved in litigation before a court has determined that the grandparents have standing to seek visitation. Next, the court must determine whether it is more likely than not that a sufficient existing relationship exists between the child and the grandparents, or that sufficient efforts have been made to establish such a relationship. Finally, if such a finding is made, the court is to hold a hearing to determine whether visitation would be in the best interests of the child, weighing all the factors outlined above.

The extent to which the District Court formally followed this procedure in *Rideout* is not entirely clear: the court simultaneously entertained a motion to

71. *Id.* § 1803(2)(D).
72. *Id.* § 1803(3).
73. *Id.*
74. *Id.* § 1803(3)(A).
75. *Id.* § 1803(3)(B).
76. *Id.* § 1803(3)(C).
77. *Id.* § 1803(3)(D).
78. *Id.* § 1803(3)(E).
79. *Id.* § 1803(3)(G).
80. *Id.* § 1803(3)(F).
81. *Id.* § 1803(3)(H).
82. *Id.* § 1803(3(I).
83. *Id.* § 1803(3(J).

dismiss filed by the Riendeaus while also holding a hearing to consider the merits of the Rideouts' petition.[84] It was at this hearing that the court found the Act to be unconstitutional, while also finding that, if the Act were constitutional, the Rideouts would otherwise be entitled to visitation.[85]

III. THE LEGAL FRAMEWORK

A. Troxel v. Granville

The *Rideout* decision came in the wake of the U.S. Supreme Court's decision in *Troxel v. Granville*.[86] In *Troxel*, the Supreme Court held that a Washington State visitation statute, as applied, unconstitutionally infringed on the parental interest in the "care, custody, and control" of children, an interest the Court referred to as "perhaps the oldest of the fundamental liberty interests recognized by [the] Court."[87] The Court found the Washington statute to be "breathtakingly broad" because it allowed any person to petition for visitation at any time, and because it allowed the court to grant visitation whenever it would serve a child's best interests as determined by the court.[88] The statute's best interest standard, at least as applied, afforded no deference to a parent's decision that visitation would not be in the child's interest, thereby placing the best-interest determination "solely in the hands of the judge."[89] The net result, according to the Court, was to "effectively [permit] any third party . . . to subject any decision by a parent concerning visitation of the parent's children to state court review" that could be overturned by a judge's unfettered "determination of the child's best interests."[90]

In finding the statute unconstitutional as applied, the Court declined to follow the Washington Supreme Court's decision, which held the statute to be unconstitutional on its face.[91] The Washington court based its decision on not just the breadth of the statute—the fact that anyone could petition for visitation—but also on its reading of the U.S. Constitution as permitting infringement of parental rights only in cases of harm, or potential harm to the child.[92] This reading of the Constitution served as an additional ground upon which the state court found the Washington

84. Rideout v. Riendeau, 2000 ME 198, ¶ 6, 761 A.2d at 295.

85. *Id.*

86. 530 U.S. 57 (2000).

87. *Id.* at 65. The fundamental right of parents to control the upbringing of their children is rooted in cases establishing parental rights to "establish a home and bring up children," Meyer v. Nebraska, 262 U.S. 390, 399-401 (1923), and to "direct the upbringing and education of children under their control," Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925). These rights have been consistently upheld by the Court over the course of the past 75 years. Troxel v. Granville, 530 U.S. at 65-66.

88. Troxel v. Granville, 530 U.S. at 67. The Washington statute provided that "[a]ny 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." WASH. REV. CODE § 26.10.160(3) (1994).

89. Troxel v. Granville, 530 U.S. at 67.

90. *Id.*

91. *Id.* at 63.

92. *Id.* The Washington Supreme Court stated that the best interest standard employed by the Washington statute did not, "[s]hort of preventing harm to the child," provide a compelling state interest to intrude upon parental rights. *In re* Smith, 969 P.2d 21, 30 (Wash. 1998).

statute to be in violation of the Due Process Clause: because the statute failed to require a showing of harm, it was held to violate parental rights guaranteed by the Constitution.[93]

Having based its decision on other grounds, the U.S. Supreme Court declined to address the question of whether a showing of harm is required before a third party may be permitted to petition for visitation.[94] The Supreme Court plurality opinion saw the problem with the Washington statute not as one involving the question of whether the state could "inject itself into the private realm of the family" but rather the manner by which the state had intervened in the *Troxel* case.[95] In particular, as discussed above, the application of the Washington statute afforded no weight nor any deference to a parent's decision regarding a child's best interests.[96] More importantly, the Court noted, the trial judge had apparently started from a presumption that visitation by a third party[97] would be in the best interests of the child, putting the burden on the parents to prove that visitation would not be in the child's best interests.[98]

This approach ran contrary to the "presumption that fit parents act in the best interests of their children."[99] This presumption serves to ensure protection of a parent's fundamental right to control the upbringing of their children, while deviation from the presumption impermissibly undermines a parent's constitutional rights.[100] Because neither the language of the Washington statute, nor the manner in which it was applied provided any protection of parental rights,[101] the statute was held unconstitutional as applied.[102] However, the Court refrained from defin-

93. Troxel v. Granville, 530 U.S. at 63.

94. *Id.* at 73. The question of requiring a showing of harm was addressed most directly by Justice Kennedy's dissent, in which he argued that the harm to the child standard is not necessarily required, and that the "conclusion that the Constitution forbids the application of . . . best interests of the child standard in any visitation proceeding . . . appears to rest upon assumptions the Constitution does not require." *Id.* at 98.

95. *Id.* at 68-69.

96. *Id.* at 69.

97. As in *Rideout*, the third parties were the grandparents of the child in question. *Id.* at 60.

98. *Id.* at 69. The Court's determination that the trial court shifted the burden to the parents is somewhat questionable, having been based on the following statement made by the trial court:

> 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 commonsensical approach [is that] it is normally in the best interest of the children to spend quality time with the grandparent, unless the granparent [*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 can tell.

Id. (quoting Verbatim Report of Proceedings in *In re* Troxel, No. 93-3-00650-7 (Wash. Super. Ct., Dec. 14, 19, 1994), p. 213). In his dissent, Justice Stevens characterized this language, and other similar language used by the trial judge, as merely representing a conclusion that visitation was in the children's best interests. *Id.* at 82 n.3. (Stevens, J. dissenting). Referring to the plurality opinion's reliance on such language, Stevens stated the following:

> I find no suggestion in the trial court's decision in this case that the court was applying any presumptions at all in its analysis, much less one in favor of the grandparents . . . [t]here is . . . only a "'commonsensical'" estimation that, usually but not always, visiting with grandparents can be good for children.

Id.

99. *Id.* at 68 (citing Parham v. J.R., 442 U.S. 584, 602 (1979)).

100. *See id.* at 68-69.

101. *Id.* at 73.

102. *Id.*

ing the full scope of parental rights or the potentially permissible scope of visitation statutes, noting that "awarding visitation turns on the specific manner" in which the standard for awarding visitation is applied.[103]

In declining to declare specific visitation statutes as *per se* violations of the Due Process Clause,[104] the Court did suggest that certain types of statutes may adequately protect parental rights while allowing third parties to seek visitation.[105] Without addressing the constitutionality of any specific visitation act (other than Washington's), the Court noted that some statutes create rebuttable presumptions that visitation is not in the best interest of the child if parents oppose visitation rights,[106] while other states, such as Maine, allow court-ordered visitation only in cases where visitation would not impermissibly interfere with parents' relationships with their children.[107] However, the Court also indicated that the protection of a parent's rights must be substantial by suggesting that the *mere act* of engaging in a visitation proceeding could be "'so disruptive of the parent-child relationship'" as to infringe upon the parent's constitutional rights.[108] In this sense, the Court warned that any attempt to involve parents in litigation over visitation could infringe upon the parents' fundamental rights, unless the statute authorizing such a proceeding were very carefully drawn. Still, the Court left the door open to the possibility that visitation statutes could survive a constitutional challenge.[109]

The *Troxel* decision created a legal framework that would serve to define the parameters of the *Rideout* decision. Though *Troxel* did not enunciate specific criteria for a statute to meet to stay within the bounds of the Due Process Clause, the Court's holding did direct that a statute (1) allowing any person to seek visitation without (2) giving any deference to a parent's decision, thereby allowing a court to substitute its own judgment for that of the parent in determining a child's best interests, would not meet the requirements of the Fourteenth Amendment.[110]

B. Standard of Review

The *Troxel* decision was void of any reference to the appropriate standard of review.[111] Nevertheless, this was precisely where the Maine Supreme Judicial Court began its analysis in *Rideout v. Riendeau*.[112] The standard of review was essential to the disposition of the case—the court held that strict scrutiny was the appropriate standard of review.[113] The court could only find the Act to be consti-

103. *Id.*

104. *Id.*

105. *See id.* at 70.

106. *Id.* (citing CAL. FAM. CODE § 3104(e) (West 1994); R.I. Gen. Laws § 15-5-24.3(a)(2)(v) (Supp. 1999).

107. *Id.* (citing ME. REV. STAT. ANN. tit. 19-A, § 1803(3) (West 1998); MINN. STAT. § 257.022(2)(a)(2) (1998); NEB. REV. STAT. § 43-1802(2) (1998)).

108. *Id.* at 75 (quoting Justice Kennedy's dissent, Troxel v. Granville, 530 U.S. at 101).

109. *Id.* at 70.

110. *See generally id.*

111. Justice Thomas made this very point in his concurring opinion, noting that the plurality, along with a concurring Justice (Souter) and a dissenting Justice (Kennedy) recognized the fundamental right of parents to control their children's upbringing without stating what the proper standard of review should be: "[c]uriously none of them articulates the appropriate standard of review. I would apply strict scrutiny to infringements of fundamental rights." *Id.* at 80 (Thomas, J., concurring).

112. Rideout v. Riendeau, 2000 ME 198, ¶¶ 18-20, 761 A.2d 291.

113. *Id.* ¶ 20, 761 A.2d 291.

tutional if it found that the Act was narrowly tailored to further a compelling state interest.[114] Understanding the standard of review required in cases involving visitation statutes, then, is important in evaluating the outcome in *Rideout*. Determining what standard of review is to be applied begins with an analysis of the rights to be protected, and the level of protection required by the Constitution.[115]

1. The Fundamental Rights of Parents

As noted above, the rights of parents to control the upbringing of their children was recognized in the *Troxel* decision as one of the oldest fundamental rights acknowledged by the Supreme Court.[116] This fundamental right has been found to be a core component of the Western concept of the family.[117] Given the important role the legal system assigns parental rights in the development of the family, the Due Process Clause is to provide "heightened protection against state intervention" in parents' right to control the upbringing of their children.[118] In order to ensure that parents' rights are afforded this heightened level of protection, strict scrutiny must be applied in reviewing any statutes that intrude upon those rights.[119] However, while parental rights are afforded heightened protection, parental rights are not absolute—under certain circumstances, they may be subject to legislative restrictions.[120] Such restrictions may survive the Due Process Clause if the statute in question is found to be narrowly tailored to meet a compelling state interest.[121] Narrow tailoring is particularly important given the *Troxel* Court's warning that the mere act of involving parents in litigation over visitation may constitute an infringement of parental rights.[122]

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114. *Id.*

115. *See id.* at ¶ 19 (stating that "heightened protection" of fundamental rights "mandates strict scrutiny of the statute at issue") (citing Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997)).

116. Troxel v. Granville, 530 U.S. at 65 (citing Meyer v. Nebraska, 262 U.S. 390, 399, 401 (1923)) (recognizing the fundamental right of parents to "establish a home and bring up children"); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (recognizing the right of parents to "direct the upbringing and education of children under their control").

117. Troxel v. Granville, 530 U.S. at 66 (citing Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children.")); Parham v. J.R., 442 U.S. 584, 602 (1979) ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course.").

118. Rideout v. Riendeau, 2000 ME 198, ¶ 19, 761 A.2d 291 (citing Parham v. J.R., 442 U.S. 584, 603-05 (1979)).

119. *Id.* at ¶ 19, 761 A.2d 291 (citing Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997)); Sch. Admin. Dist. No. 1 v. Comm'r, Dep't of Educ., 659 A.2d 854, 857 (Me. 1995)).

120. Wisconsin v. Yoder, 406 U.S. 205, 230 (1972) (stating that even when parental actions are taken pursuant to religious beliefs such actions are "not totally free from legislative restrictions") (internal citations omitted); Prince v. Massachusetts, 321 U.S. 158, 166 (1943) (rights of parenthood are not beyond limitation); *see also* Planned Parenthood v. Danforth, 428 U.S. 52, 75 (1975) (stating that the state's interest in preserving parental authority does not extend to giving parents "absolute power to overrule" a minor's decision to terminate pregnancy).

121. Reno v. Flores, 507 U.S. 292, 301-02 (1993) (The Constitution's "guarantee of 'due process of law' [includes] a substantive component, which forbids the government to infringe certain 'fundamental' [] interests . . . unless the infringement is narrowly tailored to serve a compelling state interest.").

122. Troxel v. Granville, 530 U.S. at 75 (quoting Justice Kennedy's dissent, Troxel v. Granville, 530 U.S. at 101).

2. *Compelling State Interests*

What constitutes a sufficiently compelling state interest to permit a state's intrusion into the parental sphere of rights is not clearly defined by Supreme Court jurisprudence.[123] Harm, or potential harm to a child is considered a sufficiently compelling ground upon which a state may seek to limit parental authority.[124] While harm to the child is viewed as a compelling state interest, there is no formal rule, at least not from the U.S. Supreme Court's perspective, that the harm standard is the only one that may justify legislative restrictions of parental authority.[125]

Indeed, the Court has recognized state interests other than harm to the child as giving rise to state intervention in the upbringing of children. Specifically, a state's *parens patriae*, or "general interest in [a] youth's well being,"[126] is sufficiently compelling to allow the state to require a child's attendance in school,[127] or to regulate child labor,[128] spheres of regulation that almost inevitably intrude upon some parental decisions.[129]

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123. *See id.* at 98-101 (Kennedy, J., dissenting) (describing the history of parental rights vis-á-vis third parties seeking visitation and the vagueness of the parameters defining compelling state interests).

124. Wisconsin v. Yoder, 406 U.S. at 233-34 ("the power of the parent, even when linked to a free exercise claim, may be subject to limitation . . . if it appears that parental decisions will jeopardize the health or safety of the child."); Prince v. Massachusetts, 321 U.S. at 168-69. The *Prince* court placed certain restraints on parental authority within the state's authority to provide for a healthy citizenry:

> A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. It may secure this against impeding restraints and dangers within a broad range of selection. Among evils most appropriate for such action are the crippling effects of child employment . . . and the possible harms arising from other activities subject to all the diverse influences of the street. It is too late now to doubt that legislation appropriately designed to reach such evils is within the state's police power, whether against the *parent's* claim to control of the child or one that religious scruples dictate contrary action.

Id. (emphasis added).

125. Troxel v. Granville, 530 U.S. at 97 (Kennedy, J., dissenting) (while "[s]tates have the authority to intervene to prevent harm from children . . . [this] is not the same as saying that a heightened harm to the child standard must be satisfied in every case in which a third party seeks a visitation order").

126. Prince v. Massachusetts, 321 U.S. at 166.

127. *Id.*; Pierce v. Society of Sisters, 268 U.S. at 534. The *Pierce* court summarized a state's authority to regulate parental decisions regarding education as follows:

> No question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.

Id.

128. Prince v. Massachusetts, 321 U.S. at 166, 168-69.

129. In Maine, the "State's authority over parental decisions is well established in certain areas." Rideout v. Riendeau, 2000 ME 198, ¶ 23 n.14, 761 A.2d 291. The State's sphere of authority includes immunization requirements, ME. REV. STAT. ANN. tit. 20-A, § 6354 (West 1964), education requirements, ME. REV. STAT. ANN. tit. 20-A, § 5001-A (West 1964), and "safety requirements, addressed in the Child and Family Services and Child Protection Act, ME. REV. STAT. ANN. tit. 22, §§ 4001-4093 (West 1992 & Supp. 1999)." *Id.*

While the state may intervene in a parent's decisions in some instances, the general presumption remains in favor of a parent's decision: a fit parent is deemed to act in the best interest of his or her children.[130] Typically, then, provided that a parent provides adequate care for his or her children, the state will not be justified in challenging a parent's ability to "make the best decisions concerning" a child's upbringing.[131] This suggests that, in order to find that a statute constitutionally limits parental rights, a court must find special circumstances to exist, removing the statute from the protected field in which a parent's decisions are presumptively in the best interest of the child, and giving rise to a compelling state interest. Of course, the statute must then be narrowly tailored to meet that interest. Determining whether such circumstances existed was the challenge confronting the Law Court as it considered *Rideout v. Riendeau*.[132]

IV. THE *RIDEOUT* DECISION

In *Rideout*, two grandparents, Rose and Chesley Rideout sought visitation of their three grandchildren pursuant to Title 19-A, section 1803 of the Maine Revised Statutes,[133] which gives grandparents standing to seek visitation when "[t]here is a sufficient existing relationship between the grandparent and the child" or when a "sufficient effort" to establish such a relationship has been made.[134] The Rideouts claim of standing rested on the fact that they had for significant periods of time served as "primary caregivers and custodians" to each of their three grandchildren.[135] Their oldest grandchild, Keiko, had been in their care for the first seven years of her life.[136] Another grandchild, Roman, had been in their care for the first four years of his life, and the youngest, Mariah, had been in their care for several months.[137] Though the relationship between the Rideouts and their daughter, Heaven-Marie, was difficult at times,[138] the extent to which the Rideouts were asked to care for their grandchildren was demonstrated by the fact that Heaven-Marie often placed Keiko in Rose Rideout's sole custody and at one point granted the grandmother power of attorney to serve as legal guardian for Keiko.[139]

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130. *See* Parham v. J.R., 442 U.S. at 602. In *Parham*, the court stated that the presumption in favor of the parent springs from the parent-child relationship:

> The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.

Id. (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *447; 2 J. KENT, COMMENTARIES ON AMERICAN LAW *190).

131. Troxel v. Granville, 530 U.S. at 68-69.

132. 2000 ME 198, ¶ 1, 761 A.2d 291.

133. ME. REV. STAT. ANN. tit. 19-A, § 1803 (West 1998).

134. *Id.* § 1803(1)(B), (C).

135. Rideout v. Riendeau, 2000 ME 198, ¶ 4, 761 A.2d 291.

136. *Id.*

137. *Id.*

138. At one point the Rideouts reported their daughter's husband, Jeffrey Riendeau, to the police, which resulted in a search of the Riendeau's home. Rose Rideout also filed allegations of abuse and neglect with the Department of Human Services, and a suit to adopt Keiko. *Id.* ¶ 64 (Alexander, J., dissenting).

139. *Id.* ¶ 4, 761 A. 2d 291.

After completing job training, Heaven-Marie moved in with her first husband.[140] At this point, both Keiko and Roman, who had only recently been born, were living with their parents.[141] When the marriage turned abusive, Heaven-Marie moved back in with her parents.[142] A couple of years later[143] Heaven-Marie married Jeffrey Riendeau, only to be separated about a year later, which was also around the time that Mariah was born.[144] The couple blamed their separation on what they called "tensions caused by Rose's interference in their family unit."[145] Once again, Heaven-Marie and her children returned to live with the Rideouts, who eventually sought to adopt Keiko and filed complaints relating to the Riendeaus' care of the children.[146]

Shortly after these incidents, Heaven-Marie and her children returned to live with Jeffrey Riendeau,[147] and the couple then broke off all contact between the children and their grandparents.[148] The Rideouts then filed a complaint seeking visitation of their grandchildren.[149]

The District Court (West Bath, Field, J.), after making findings of fact, granted the Riendeaus' motion to dismiss, holding the Act to be unconstitutional.[150] The court based its holding on the fact that the Act did not require a showing of harm before visitation could be granted to grandparents.[151] The Act did require a finding that visitation would be in the child's best interest,[152] but the court held such a standard to fall short of a compelling state interest.[153] The Superior Court (Sagadahoc County, Humphrey, J.) affirmed.[154] The Rideouts then appealed to the Law Court.[155]

The Law Court agreed that the best interest standard, absent other considerations, was not sufficiently compelling to warrant state limitations on parental

140. *Id.*

141. *Id.*

142. *Id.*

143. It is not clear how many years Heaven-Marie and her first two children lived with the Rideouts in this interim period. She initially moved in with her first husband in 1989, and returned to the Rideouts' home "soon" after. She then re-married in 1992. *Id.* ¶ 5, 761 A.2d 291.

144. *Id.*

145. *Id.*

146. *Id.*

147. Though Jeffrey Riendeau was the biological father of only one of the children, he adopted Roman, while Keiko's biological father "surrendered his parental rights" to Mr. Riendeau. *Id.* ¶ 3. So, while Mr. Riendeau was not the natural father of all three children, the only parental rights on which the case turned were those of the Riendeaus.

148. *Id.* ¶ 5, 761 A.2d 291.

149. *Id.* ¶ 6, 761 A.2d 291.

150. *Id.* ¶ 6, 761 A.2d 291. The District Court held a hearing to consider the merits and the motion to dis-miss. It found that the Rideouts would, under the statute, be granted visitation. However, the court then found the statute to be in violation of the Fourteenth Amendment. *Id.*

151. *Id.* ¶ 2, 761 A.2d 291.

152. ME. REV. STAT. ANN. tit. 19-A, § 1803(3) (West 1998)

> The court may grant a grandparent reasonable rights of visitation or access to a minor child upon finding that rights of visitation or access are in the best interest of the child and would not significantly interfere with any parent-child relationship or with the parent's rightful authority over the child.

153. Rideout v. Riendeau, 2000 ME 198, ¶ 22, 761 A.2d 291.

154. *Id.* ¶ 2, 761 A.2d 291.

155. *Id.* ¶ 6, 761 A.2d 291.

rights.[156] The Law Court did, however, hold that "the state does have a compelling interest in providing a forum within which grandparents who have acted as parents to their grandchild may seek continued contact with that child."[157] Accordingly, the court held the Act to be constitutional as applied.[158] Two justices concurred, stating that the Act should be found constitutional on its face,[159] while one justice dissented, stating that the Act's language did not support the majority's application of the statute and that the holding would lead to litigation that would infringe upon parents' fundamental rights.[160]

A. Compelling State Interest: Providing a Forum for Primary Caregivers

In light of the *Troxel*[161] decision and other Supreme Court precedent establishing such a right,[162] the Law Court began its analysis in *Rideout* by recognizing that parents have a fundamental right "to make decisions concerning the care, custody, and control of their children."[163] Therefore, to find the Act constitutional, the court had to determine that the Act furthered a compelling state interest.[164] Stating that a finding of harm was not required to advance a compelling state interest[165] the court held that the state has a compelling interest in injecting itself into the parent-child relationship when grandparents who have been the "primary caregiver[s] and custodian[s]" for a "significant period of time" are denied visitation by the parents.[166] The basis of this interest, according to the court, is rooted in the state's *parens patriae* authority,[167] or its "general interest in [a] youth's well-being."[168] Under this reasoning, the courts are to provide a forum in which the parent's fundamental rights are to be balanced against a child's interest in maintaining a relationship with people who have served as parents for significant periods of time.[169]

Due to the paucity of Supreme Court guidelines defining compelling interests in contexts such as those presented in *Rideout*,[170] the Law Court was to a considerable extent defining the compelling interest in *Rideout* free of any guiding legal precedent.[171] The court did note that other states have recognized similar compelling interests in providing a means for a child to maintain relationships with people

156. *Id.* ¶ 23, A.2d 791.
157. *Id.* ¶ 2, A.2d 791.
158. *Id.* ¶ 33, A.2d 791.
159. *Id.* ¶ 35, A.2d 791 (Wathen, C.J., concurring).
160. *Id.* ¶ 47, A.2d 791 (Alexander, J., dissenting).
161. Troxel v. Granville, 530 at 63.
162. *See* discussion *supra* Parts III(A), III(B)(1).
163. Rideout v. Riendeau, 2000 ME 198, ¶ 18, 761 A.2d 291 (quoting Troxel v. Granville, 530 U.S. 57, 66).
164. *Id.* ¶ 20, A.2d 791. *See also* notes 171-185 and accompanying text.
165. *Id.* ¶ 23, A.2d 791.
166. *Id.* ¶ 27, A.2d 791.
167. *Id.*
168. Prince v. Massachusetts, 321 U.S. 158, 166 (1944).
169. Rideout v. Riendeau, 2000 ME 198, ¶ 27, 761 A.2d 291. The court declined to define whether a com-pelling state interest would exist under facts differing from those presented in *Rideout*. *Id.* ¶ 27 n.17, A.2d 791.
170. *See* discussion *supra* Part III(B)(2); Troxel v. Granville, 530 U.S. at 98-101 (Kennedy, J., dissenting) (describing the history of parental rights vis-à-vis third parties seeking visitation, and the vagueness of the parameters defining compelling state interests).
171. The Supreme Court, however, has recognized the states' *parens patriae* interest generally, without addressing facts such as those presented by *Rideout*. *See, e.g.*, Prince v. Massachusetts, 321 U.S. at 166.

who have acted as primary caregivers.[172] Nonetheless, the court was essentially crafting a newly defined compelling state interest, making it difficult to assess whether such a compelling interest would be recognized under the *Troxel* framework.

B. Whether the Act is Narrowly Tailored to Advance the State's Compelling Interest

Once the court determined that a compelling state interest was at stake, it was next required to determine whether the Act was narrowly tailored to advance that interest.[173] The *Troxel* decision did offer the Law Court some guidance in determining whether the Maine Act was sufficiently narrow in scope to withstand the rigors of the Due Process Clause. The *Troxel* decision rested in part on the fact that the Washington statute granted no deference to parental decisions nor did it offer any other protection of parental rights.[174] Finding that measures within the Act adequately protect the rights of parents would, then, assist the court in staying within the parameters set forth in *Troxel* while determining whether the Act was tailored in a sufficiently narrow manner.

The court held that the Act adequately protects parental rights by (1) requiring grandparents to establish standing before a hearing on the merits can be held; (2) requiring the court to consider the parents' objections to visitation; and (3) barring a visitation order if visitation would interfere with the parent-child relationship or the parents' authority over the child.[175] The latter two provisions protect parental interests by injecting those interests into the determination of whether visitation would be in the child's best interests,[176] even though neither provision gives any additional weight to the parents' interests or creates a presumption in favor of the parents.[177] Without addressing how these two provisions satisfy the constitutional presumption that fit parents are deemed to act in the best interest of their children[178] in lieu of any weighing of parental interests or presumptions in favor of parents, the court deemed them sufficient safeguards of parental rights.[179] By failing to address such constitutional concerns, the decision not only overlooked one aspect of the Act that might fail to meet the narrow tailoring requirement, but also left future courts with no guidance in determining how to adequately balance

172. Rideout v. Riendeau, 2000 ME 198 ¶ 27, 761 A.2d 291. The court cited *Youmans v. Ramos*, 711 N.E.2d 165 (Mass. 1999) and *V.C. v. M.J.B.*, 748 A.2d 539 (N.J. 2000) for this proposition. However, these cases are somewhat distinguishable in that they involved situations in which the courts were acting to either maintain a child's relationship with the "only adult" who had served as a parent to a child, Youmans v. Ramos, 711 N.E.2d at 172, or where the intervening party had taken over the parenting role because the parent had been "unwilling to undertake the obligation of parenthood." V.C. v. M.J.B., 748 A.2d at 548-49. Neither such circumstance existed in *Rideout*.

173. Rideout v. Riendeau, 2000 ME 198 ¶ 29, 761 A.2d 291 (citing Washington v. Glucksberg, 521 U.S. 702, 721 (1997)). *See also* Reno v. Flores, 507 U.S. 292, 301-02 (1993) (The Constitution's "guarantee of 'due process of law' [includes] a substantive component, which forbids the government to infringe certain 'fundamental' liberty interests . . . unless the infringement is narrowly tailored to serve a compelling state interest.").

174. *See supra* notes 88-89, 94-100, and accompanying text; discussion at Part III(A).

175. Rideout v. Riendeau, 2000 ME 198 ¶¶ 29-32, 761 A.2d 291.

176. *Id.* ¶ 31, A.2d 791.

177. *See* ME. REV. STAT. ANN. tit. 19-A, § 1803(2)(D), (3) (West 1998).

178. *See* Parham v. J.R., 442 U.S. at 602; *see also supra* note 124 and accompanying text.

179. Rideout v. Riendeau, 2000 ME 198, ¶¶ 29-32, 761 A.2d 291.

competing interests when applying these provisions designed to protect parental interests.

Perhaps most significant in considering protection of parental rights, however, is the Act's provision requiring grandparents to establish standing before a hearing on the merits is held. The court found this to be a sufficient safeguard of parental rights, at least when considered along with the Act's other provisions, because it provides a "safeguard[ ] against unwarranted intrusions into an intact family's life."[180] The provision serves this end, according to the court, by preventing parents from being forced to litigate the facts of a case unless the court first finds that the grandparents are "among those . . . who may pursue visits under the Act."[181]

Such a measure designed to prevent unnecessary litigation is essential given *Troxel's* recognition that the "burden of litigating a domestic relations proceeding can itself be 'so disruptive of the parent-child relationship that constitutional right of a custodial parent . . . becomes implicated.'"[182] However, because the Law Court held the Act constitutional as applied,[183] it did not establish a guideline for when, beyond the circumstances presented in *Rideout*, grandparents would be among those who "may pursue visits under the Act."[184] The only guidance provided to future courts considering visitation appeals was that they would apply the Act constitutionally if they were "vigilant in their application" of the Act's provisions that protected parental rights.[185]

No other guidance as to when grandparents may permissibly seek visitation through the courts was provided, meaning that courts making the preliminary standing finding required by the Act would have no legal rule to follow. Given the continuing uncertainty over when grandparents are among those who may pursue visitation, the *Rideout* decision, by failing to establish a clear rule as to who may pursue visitation, may have only a limited impact in preventing parents from unnecessarily litigating this preliminary stage of a visitation action. This would, seemingly, conflict at least somewhat with the *Troxel* Court's position that such litigation itself can constitute an infringement of parental rights.[186] Such was the point made by the dissent in *Rideout*.[187]

V. THE *RIDEOUT* DISSENT

Justice Alexander, who wrote the dissent, stated that the problem with the *Rideout* decision, was that it amounted to a "partially constitutional application of a law" that could not "justif[y] [the court's] interpretation of that law" because the majority's interpretation was not supported by the language of the statute.[188] Ac-

180. *Id.* ¶ 30, 761 A.2d 291.

181. *Id.*

182. Troxel v. Granville, 530 U.S. at 75 (quoting Justice Kennedy's dissent, Troxel v. Granville, 530 U.S. at 101).

183. Rideout v. Riendeau, 2000 ME 198, ¶¶ 29-32, 761 A.2d 291.

184. *Id.* ¶ 30, 761 A.2d 291.

185. *Id.*

186. *See* Troxel v. Granville, 530 U.S. at 75 (quoting Justice Kennedy's dissent, Troxel v. Granville, 530 U.S. at 101).

187. Rideout v. Riendeau, 2000 ME 198, ¶ 47, 761 A.2d 291 (Alexander, J. dissenting).

188. *Id.*

cording to the dissent, the majority had improperly applied the Act's language granting standing when there is a "sufficient existing relationship"[189] to the facts of the case to hold that allowing grandparents who had acted as parents to seek visitation would pass constitutional muster.[190] The dissent argued that no language in the Act could reasonably be interpreted to limit its application to such situations.[191]

Because the Act could not be interpreted in such a manner, according to the dissent, it could not meet the challenge of being narrowly tailored to meet a compelling state interest.[192] Two problems are suggested by such an analysis. First, because the Act requires a preliminary finding of standing that can involve the parents in litigation *before* a court determines that the grandparents are among those that can seek visitation under the Act, it invites a court to infringe upon parental rights (through the preliminary litigation phase) in order to determine if it would be constitutional to allow the grandparents to seek visitation.[193] Second, the lack of a strict guideline would leave the door open for any grandparent to seek visitation through the courts.[194] Such an "open door" is made more problematic by the fact that the Act allows grandparents who merely attempt to establish a relationship with a grandchild to seek visitation.[195]

The dissent argued that the result would mean that courts functioning with "virtually no guidance" would be left to "apply their own personal and essentially unreviewable lifestyle preferences to resolving each dispute,"[196] injecting the state into family matters before a determination is made that the grandparents could constitutionally seek visitation, *and* that the courts would likely be forced to do so in many cases in which the grandparents would ultimately lack standing to be granted a hearing on the merits.[197] Such a scenario would involve state action that "is so disruptive of the parent-child relationship" as to infringe on the parents' fundamental liberties.[198]

The dissent's argument that the Act impermissibly leads to parents litigating visitation before a determination that a visitation action would be constitutional would, if accepted, undermine the contention that the Act's provisions requiring

189. ME. REV. STAT. ANN. tit. 19-A, § 1803(1)(B) (West 1998).

190. Rideout v. Riendeau, 2000 ME 198, ¶ 48, 761 A.2d 291 (Alexander, J., dissenting). *See* discussion *supra* Part IV (discussing the majority opinion's application of the statute to situations in which grandparents had, to some extent, acted as parents to their grandchildren).

191. *Id.*

192. *Id.* ¶ 53, 761 A.2d 291.

193. *Id.*; Letter from Hon. John C. Sheldon (Maine District Court, Springvale, Me.) (on file with author). The dissent compared the majority's approach to holding a statute allowing search and seizure of motorists without cause to be constitutional if it was found that in most cases there was probable cause to conduct a search. Rideout v. Riendeau, 2000 ME 198, ¶ 49, 761 A.2d 291 (Alexander, J., dissenting).

194. Rideout v. Riendeau, 2000 ME 198, ¶ 48, 761 A.2d 291 (Alexander, J., dissenting) ("[T]he [Act] is an open invitation to any and all comers who can call themselves grandparents to bring suit to disrupt a family unit.").

195. As the dissent notes, "all that is needed to open the courthouse door" is "[a]n expressed desire to establish a relationship." *Id.* ¶ 59, 761 A.2d 291 (Alexander, J., dissenting). *See* ME. REV. STAT. ANN. tit. 19-A, § 1803(1)(C) (West 1998) (stating that standing may be granted when, in lieu of a sufficient pre-existing relationship, a grandparent has made a "sufficient effort to establish one").

196. Rideout v. Riendeau, 2000 ME 198, ¶ 54, 761 A.2d 291.

197. *See id.* ¶¶ 47-54, 761 A.2d 291.

198. *See id.* ¶ 62, 761 A.2d 291 (quoting Troxel v. Granville, 530 U.S. at 101 (Kennedy, J., dissenting)).

grandparents to establish standing and requiring a court to consider the parents' objections at the preliminary stage serve to adequately protect parental rights. Of course, the Act has a third provision designed to protect parental rights—the requirement that visitation only be allowed if it would not interfere with the parent-child relationship or a parent's authority over the child.[199] Noting that "as a matter of law" a parent's decision against visitation is presumed to be in the child's best interests,[200] the dissent argued that, if a court were to grant the parent's decision the weight required by the *Troxel* decision, then it would be impossible to find that visitation would not interfere with a parent's rightful authority over their children.[201] If this were the case, the Act would, under the dissent's reasoning, contain no provisions that would adequately protect a parent's rights in a visitation action.

VI. CONCLUSION: A NEED TO CLARIFY MAINE'S VISITATION ACT

The central premise of the *Rideout* decision is that the state has a compelling interest in preserving and maintaining a relationship between a child and a non-parent who has acted as a parent to the child for some period of time.[202] If this is accepted as a compelling state interest, the goal is then to ensure that the means selected to achieve that end is narrowly tailored so as to adequately protect the rights of parents. Those sympathetic to allowing grandparents to use the courts to preserve a relationship with their grandchildren will, understandably, view the *Rideout* decision favorably. However, as the dissent points out, the decision does pose some serious constitutional questions. If the goal is indeed to protect a child's right to a relationship with a grandparent who has served a parental role, it would, in the long run, be best to address these questions so that this goal can be achieved in a manner that preserves the fundamental rights of parents.

A reasonable solution lies in further clarification of when, and under what circumstances, grandparents are entitled to a visitation hearing. As it stands, all that is certain is that grandparents who have served as the primary caregivers of their grandchildren are entitled to such a hearing. The Act, of course, is much broader, requiring only a "sufficient existing relationship" or an attempt to establish one.[203] It is this breadth of scope that presents a major constitutional challenge: assuming that, in at least some circumstances, there is a compelling state interest in preserving a relationship between grandparents and grandchildren, granting a hearing under the statute would be permissible (questions of narrow tailoring aside for the moment). Under the Act, though, a court first has to determine whether

199. ME. REV. STAT. ANN. tit. 19-A, § 1803(3) (West 1998).

200. Rideout v. Riendeau, 2000 ME 198, ¶ 62, 761 A.2d 291 (citing Troxel v. Granville, 530 U.S. at 68-69). It is not clear that *Troxel* stood for this proposition to such a full extent—the plurality opinion recognized that, in general, a parent's actions are deemed to be in the best interest of the child, but did not specifically address visitation, at least not in the context presented in *Rideout*. Troxel v. Granville, 530 U.S. at 68 (stating that the "natural bonds of affection lead parents to act in the best interests of their children") (quoting Parham v. J.R., 442 U.S. 584, 602 (1979)).

201. Rideout v. Riendeau, 2000 ME 198, ¶ 63, 761 A.2d 291.

202. *See id.* ¶ 27, 761 A.2d 291 (stating that the relationship between a child and grandparents who have been "primary caregiver[s] . . . warrants application of the court's *parens patriae* authority on behalf of the child").

203. ME. REV. STAT. ANN. tit. 19-A, § 1803(1)(B), (C) (West 1998).

204. *See id.* § 2(B) ("The parent or legal guardian of the child may file an affidavit in response to the grandparent's petition . . . .").

the grandparents have standing, a process that involves the parents in litigation[204] unless they decline to respond to the grandparents' claim.[205] What this means is that parents will be involved in litigation before the constitutionality of the action is determined—only a finding that a subsequent hearing would be permissible would render the preliminary actions permissible intrusion into the realm of parental authority.[206]

Given the traditional presumption that parents act in their children's best interests[207] and *Troxel's* warning that merely involving parents in litigation threatens to infringe upon parental rights, such a process would seem to run head first into a constitutional roadblock. However, the *Troxel* directive should not be read to preclude *any* visitation action—any type of visitation statute will inevitably involve parents in litigation before a determination on the merits can be made. Furthermore, *Troxel* itself left open the possibility that visitation statutes could be crafted and applied in a constitutional manner[208] and the Supreme Court has held that parental rights may be subject to some state intervention.[209] The key, it would seem, is to ensure that parents are subject to litigation in the most limited number of situations as would be necessary to achieve the goal of protecting a child's interest in maintaining a relationship with someone who had served as their primary caregiver. Then the Act would truly be narrowly tailored to meet a compelling state interest.

This would require a more precise definition of who is to be permitted to seek visitation under the Act. Perhaps in declining to limit the scope of the Act, the Law Court indicated that it would view petition actions favorably in circumstances quite different than those presented in *Rideout.* Alternatively, the dissent may be correct in suggesting that a narrow interpretation of the Act is not possible given the language of the statute. In either event, the problem of narrow tailoring persists, which may leave proper resolution in the hands of the legislature.[210]

The approaches taken in various states suggest several possible solutions.[211] The scope of the Act could be narrowed to allow grandparents to seek visitation

205. *See id.* Of course, parents are not required to engage in the preliminary stage of litigation in which the court is to determine whether the grandparents have standing under the Act. However, it seems likely that most parents opposed to visitation with the grandparents would seek to be heard before an even more intrusive hearing on the merits is deemed necessary.

206. Letter from Hon. John C. Sheldon, Judge, Maine District Court, Springvale, Me., to the author (Mar. 9, 2001) (on file with author).

207. Troxel v. Granville, 530 U.S. at 68; Parham v. J.R., 442 U.S. at 602.

208. *See* Troxel v. Granville, 530 U.S. at 73.

209. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 230 (1972) (stating that even when parental actions are taken pursuant to religious beliefs that such actions are "not totally free from legislative restrictions"); Prince v. Massachusetts, 321 U.S. 158, 166 (1943) (rights of parenthood are not beyond limitation); *see also* Planned Parenthood v. Danforth, 428 U.S. 52, 75 (1975) (stating that the state's interest in preserving parental authority does not extend to giving parents "absolute power to overrule" a minor's decision to terminate pregnancy).

210. Still developing case law in the states offers little guidance as to possible post-*Troxel* judicial treatment of visitation statutes similar to the Maine Act. While a New York visitation has been held unconstitutional under *Troxel*, Hertz v. Hertz, 717 N.Y.S.2d 497, 500 (N.Y. 2000), the New York statute was much broader than the Maine Act in that it allowed grandparents to seek visitation whenever "equity would see fit to intervene." N.Y. DOM. REL. LAW § 72 (West 1999).

211. *See* discussion *supra* Part II(A) (outlining approaches to visitation statutes among the fifty states).

only when a grandchild had lived with them, or been in their care for a specified period of time in the past. Similarly, grandparents could be permitted to seek visitation if they had a prior "custodial relationship"[212] with their grandchildren. Additional safeguards of parental rights might also be included—the Act could be amended to recognize a rebuttable presumption that the parents' decision to deny visitation was reasonable, or to require grandparents to demonstrate that the parents' decision was unreasonable.

The *Rideout* court declined to read any restrictions of this type into Maine's visitation Act. Whether this was done as a matter of choice, or because the language of the Act precluded any such reading, the *Rideout* decision failed to answer the question of who may seek visitation and when they may do so. This will leave future courts considering visitation actions without any true guidance. Not only does this present the problem of a lack of uniformity among the courts, but it also increases the likelihood that parents will be forced to litigate when court involvement would ultimately be deemed to be unconstitutional.

Somewhere between the extremes of preventing grandparents from seeking visitation over parents' objections under any circumstances and subjecting parents to an uncertain statutory scheme that threatens to "haul"[213] them into court before it is even clear that court action would be constitutional there is likely to be a reasonable middle ground. Crafting a new statutory rule that provides clearer guidance as to when grandparents may seek visitation could go a long way toward achieving the objective of protecting competing rights to the greatest extent possible. Even such a middle ground approach requires acceptance of the idea that "providing a forum within which grandparents who have acted as parents to their grandchild[ren]"[214] is indeed a compelling state interest. If, however, such a proposition is accepted, finding a middle ground that provides a forum for grandparents only in appropriate situations (when they have acted as parents) without subjecting parents to litigation any more often than is absolutely necessary to achieve that end can only serve to further the interests of all parties involved.

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212. *See* OKLA. STAT. tit. 10, § 5 (1998); *see* discussion *supra* Part II(A).
213. Rideout v. Riendeau, 2000 ME 198, ¶ 59, 761 A.2d 291 (Alexander, J., dissenting).
214. *Id.* ¶ 2, 761 A.2d 291.