



**State of Arkansas
Bureau of
Legislative Research**

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MEMORANDUM

TO: Representative Hammer

FROM: Sarah Creasman, Legislative Attorney, Legal Research and Drafting

DATE: March 10, 2016

SUBJECT: Grandparents' rights in Arkansas and controlling federal law

QUESTION PRESENTED

1. Generally, what rights belong to Grandparents in Arkansas?
2. Is there any federal law that controls grandparents' rights in Arkansas?

BRIEF RESPONSE

1. Rights belonging to grandparents in Arkansas are addressed in Part I of this document. Grandparents' rights initially depend on whether or not parental rights have been terminated by a court. If parental rights have not been terminated, grandparents have certain visitation and notice rights. In some circumstances, a grandparent may also petition the relevant court for an award of custody or a guardianship. A judge may grant custodial rights to a grandparent, but the court must also find that the parent is an unfit parent. Courts are very reluctant to deprive natural parents the custody of their child. Arkansas has specific requirements that a grandparent or great-grandparent must meet in order to obtain custody or visitation rights, set forth in Ark. Code Ann. 9-13-101, 9-13-103, and 9-13-107. Grandparents are eligible to be awarded visitation rights whether or not the child is in the custody of a parent. However, if parental rights have been terminated before a grandparent's attempt to obtain custody or visitation rights, all rights belonging to a grandparent have likewise been terminated.
2. Controlling federal law concerning grandparents' rights is addressed in Part II of this document. Grandparents' rights are largely left to a state's discretion. Federal legislation requires that each state give full faith and credit to child custody decrees from other states. It also requires reciprocal recognition of grandparents' visitation rights once a state has

established those rights. And, federal law requires states to give notice to relatives, like grandparents, when children are placed in foster care.

DISCUSSION

I. Grandparents' rights in Arkansas

A. Grandparents' rights when parental rights have NOT been terminated

1.) VISITATION

a.) 9-13-103. Visitation rights of grandparents when the child is in the custody of a parent.

Arkansas has a statute specifically concerning grandparents' or great-grandparents' visitation rights when the child is in the custody of a parent. The statute allows a grandparent or great-grandparent to petition the court for "reasonable visitation rights" when the marital relationship between the parents of the child has ended because of death, divorce, or legal separation. It also allows maternal grandparents or great-grandparents to seek visitation rights of an illegitimate child. Likewise, it allows paternal grandparents or great-grandparents to seek visitation rights of an illegitimate child if paternity has been legally established.

This statute also sets forth a rebuttable presumption that the decision of the parent or parents in custody of the child to deny or limit grandparent or great-grandparent visitation is in the best interest of the child. To rebut the presumption, the grandparent or great-grandparent must prove that he or she has a "significant and viable relationship with the child" and that such visitation would be in the best interest of the child.

In order to prove a viable relationship, the grandparent or great-grandparent must prove one of the following: (1) the child lived with the grandparent or great-grandparent for at least 6 consecutive months; (2) the grandparent or great-grandparent was the child's regular caregiver for at least 6 consecutive months; (3) grandparent or great-grandparent had "frequent or regular contact" with the child for at least 12 consecutive months; or (4) other facts that establish that the loss of grandparent's or great-grandparent's relationship with the child is likely to harm the child.

In order to prove that visitation rights are in the best interest of the child, the grandparent or great-grandparent must prove that (1) he or she has the capacity to give the child love, affection, and guidance; (2) the loss of the relationship is likely to harm the child; and (3) he or she is willing to cooperate with the parent or parents in custody of the child.

If visitation rights are granted, the visits may occur without regard to which parent has custody of the child. For example, a paternal grandparent may visit the child even when the child is in the custody of the mother. Likewise, a maternal grandparent may visit the child even when the child is in the custody of the father. If the court finds that the visitation should be limited in any way, then the court can restrict the order granting the visitation to reflect the limitations. After the court grants or denies visitation, the grandparent or great-grandparent may petition the court for (1) contempt proceedings if a party to the order fails to comply with the order, (2) an alteration to the visitation rights based on a change in circumstances, or (3) an alteration to the visitation rights to address the need to add or modify limitations to the visitation rights. An order granting or denying visitation rights is final for purposes of appeal.

The court may also order mediation services to resolve a visitation issue if (1) mediation services are available, (2) both parties agree to participate in mediation services, and (3) one or both parties agree to pay for the mediation services. Likewise, the court may order counseling to address underlying matters surrounding the visitation issue if (1) counseling is available, (2) both parties agree to participate in counseling, and (3) one or both parties agree to pay for counseling. Any records, notes, reports, or discussions related to the counseling will not be used by the court to determine visitation issues.

b.) 9-13-107. Visitation rights of grandparents when the parent does not have custody of the child.

Arkansas also has a statute specifically concerning grandparents' and great-grandparents' visitation rights when the child is not in custody of the parents. A grandparent or great-grandparent may petition the court for "reasonable visitation rights", and the court will award such rights if it determines doing so would be in the best interest of the child.

The order granting or denying visitation rights will be in writing and will state any and all factors considered by the court in its decision to grant or deny visitation rights. The court can include restrictions, limitations, and expansions to the visitation rights in the order granting visitation. An order granting or denying visitation rights is a final order for purposes of appeal. After the court grants or denies visitation, a party to the action may petition the court for (1) contempt proceedings if a party to the order fails to comply with the order, (2) an alteration to the visitation rights based on a change in circumstances, or (3) an alteration to the visitation rights to address the need to add or modify limitations to the visitation rights.

2.) CUSTODY¹

Arkansas Code § 9-13-101 states how custody of a child is awarded in an action for divorce. A grandparent can petition the court and be granted the right to intervene in the matter. A grandparent who is not the parent of a putative father of the child may obtain custody of a child if the court holds that it is in the best interest of the child.

A grandparent is entitled to notice and an opportunity to be heard in a child custody proceeding involving a child who is a year old or younger if (1) the child resides with the grandparent for at least 6 continuous months prior to the child's first birthday, (2) the grandparent was the primary caregiver and financial supporter during the time the child resided with the grandparent, and (3) the continuous custody occurred within 1 year of the date the custody proceeding was initiated. A grandparent is entitled to notice and an opportunity to be heard in a child custody proceeding involving a child who is 1 year of age or older if (1) the child resides with the grandparent for at least 1 continuous year, (2) the grandparent was the primary caregiver and financial supporter of the child when the child resided with the grandparent, and (3) the continuous custody occurred within 1 year of the date the child custody proceeding was initiated.

However, a court will usually award custody of a minor child to the child's parent before it would award custody to the child's grandparent, unless the parent is incompetent or unfit to have custody of the child. The Arkansas Supreme Court has said that courts are very reluctant to deprive natural parents the custody of their child, "and will not do so unless the parents have manifested such indifference to [the child's] welfare as indicates a lack of intention to discharge the duties imposed by the laws of nature and of the state to their offspring suitable to their station in life."² This rule is not absolute, and a court will award custody to a grandparent in some circumstances.

3.) CUSTODIAL PLACEMENT

a.) 9-27-334. Disposition — Dependent-neglected — Generally.

If a juvenile is found to be dependent-neglected, the circuit court may enter an order making any of the following dispositions: (1) Order family services; (2) If it is in the best interest of the juvenile, transfer custody of the juvenile to DHS, to another licensed agency responsible for the care of juveniles, or to a relative or other individual; (3) Order that the parent, both parents, or the guardian of the juvenile attend a court-ordered parental responsibility training program, if available, and participate in a juvenile drug court program; and (4) Determine the most appropriate goal of the case.

¹ Ark. Code Ann. § 9-13-101.

² Lloyd v. Butts, 37 S.W.3d 603, 606 (Ark. 2001).

b.) **9-28-105. Preference to relative caregivers for a child in foster care.**

In all custodial placements by DHS in foster care or adoption, preferential consideration should be given to an adult relative over a nonrelated caregiver, if the relative caregiver meets all relevant child protection standards, and it is in the best interest of the child to be placed with the relative caregiver.

c.) **9-28-108. Placement of juveniles.**

A relative of a juvenile placed in the custody of DHS must be given preferential consideration for placement if the relative meets all required child protection standards, and it is in the best interest of the juvenile to be placed with the relative. If a relative inquires about the placement of a juvenile in his or her home, the DHS should discuss the following 2 options with the relative considering the placement of the juvenile: (1) Becoming a department foster home; or (2) Obtaining legal custody of the juvenile. For placement with a relative, the juvenile and his or her siblings or step-siblings may be placed in the home of a relative of the juvenile on a provisional basis no more than 6 months pending the home of the being opened as a regular foster home. If the home of the relative is not fully licensed as a foster home after 6 months of the placement of the juvenile and any siblings or step-siblings in the home: (1) DHS will remove the juvenile and any siblings or step-siblings from the relative's home and close the provisional foster home of the relative; or (2) The court will remove custody of the juvenile and any siblings or step-siblings from DHS and grant custody to the relative.

4.) **GUARDIANSHIP³**

In some situations, a grandparent may be able to petition a court for a guardianship over the minor child. A child under the age of 18 is considered an "incapacitated person" for purposes of guardianships. A person who is a resident of Arkansas, 18 or more years of age, of sound mind, not a convicted and unparoled felon, is qualified to be appointed guardian of a child. The parents, or either of them, are preferred over all others for appointment as guardian of the person of the child.

However, the court will consider the most suitable person who is willing to serve as guardian of the child considering: (1) any request contained in a will or other written instrument executed by the parent or by the legal custodian of a minor child for

³ Ark. Code Ann. § 28-65-204.

the appointment of a person as guardian of the minor child; (2) any request for the appointment of a person as his or her guardian made by a minor 14 years of age or over; (3) any request for the appointment of a person made by the spouse of an incapacitated person; and (4) the relationship by blood or marriage to the person for whom guardianship is sought. The guardianship order may make provisions for visitation and child support as in cases involving child custody.

Prior to the appointment of a guardian, the court will take into consideration any request made by the incapacitated person concerning his or her preference regarding the person to be appointed guardian. This request may be made to the court by any means, but there shall be no necessity that the incapacitated person appear before the court for the purpose of indicating his or her preference. When a minor has attained 14 years of age, his or her guardian may be removed on petition of the minor to have another person appointed guardian if the court is satisfied that the person chosen is suitable, qualified, and competent and that it is for the best interest of the minor that such a person be appointed.

A recent Arkansas Supreme Court guardianship decision held that parents may petition for removal if there is a guardianship order which was not premised upon a finding that the natural parent was unfit. The burden rests upon the guardian to show it should be continued.⁴ The court reasoned:

"A fit parent who consented to a guardianship puts forth sufficient evidence, and meets the burden going forward, by revoking consent and informing the court that the conditions necessitating the guardianship no longer exist. This is because a fit parent is presumed to act in his or her child's best interest. *Troxel v. Granville*, 530 U.S. 57 (2000); *Linder v. Linder*, 348 Ark. 322, 72 S.W.3d 841 (2002). Requiring any more from a fit parent would violate that parent's constitutional right to make decisions concerning the care, custody, and control of that parent's children. Thus, a fit parent is presumed to act in the child's best interest when consenting to the guardianship and, later, when terminating the guardianship."

5.) NOTICE

a.) 9-28-107. Notice when juvenile transferred to custody of department.

The Department of Human Services must exercise due diligence to identify and provide notice to all grandparents of the juvenile who is transferred to the custody of the department. The notice must be provided within 30 days after the juvenile is transferred to the custody of the department. It must state:

⁴ *In the Matter of the Guardianship of S.H.*, 2015 Ark. 75, No. CV-14-475 (2-26-15).

- That the juvenile has been or is being removed from the parent;
- The option to participate in the care of the child, placement with the child, and visitation with the child;
- That failure to respond to the notice may result in loss of these options;
- The requirements to become a provisional foster home and the additional services and supports that are available for children in a foster home; and
- That if kinship guardianship is available, how the relative could enter into a kinship guardianship agreement with the department.

The department is not required to provide notice under a grandparent if the grandparent has (1) a pending charge or past conviction or plea of guilty or nolo contendere for family or domestic violence; or (2) a true finding of child maltreatment in the Child Maltreatment Central Registry.

b.) 9-27-325. Hearings — Generally.

DHS must provide to foster parents and preadoptive parents of a child in department custody notice of any proceeding to be held with respect to the child. Relative caregivers must be provided notice by the original petitioner in the juvenile matter. The court must allow foster parents, preadoptive parents, and relative caregivers an opportunity to be heard in any proceeding held with respect to a child in their care.

However, foster parents, adoptive parents, and relative caregivers shall not be made parties to the proceeding solely on the basis that the persons are entitled to notice and the opportunity to be heard. Foster parents, preadoptive parents, and relative caregivers have the right to be heard in any proceeding.

A grandparent is entitled to notice and must be granted an opportunity to be heard in any dependency-neglect proceeding involving a grandchild who is twelve 12 months of age or younger when: (1) The grandchild resides with this grandparent for at least 6 continuous months prior to his or her first birthday; (2) The grandparent was the primary caregiver for and financial supporter of the grandchild during the time the grandchild resided with the grandparent; (3) The continuous custody occurred within 1 year of the date the child custody proceeding was initiated; and (4) Notice to a grandparent is given by the department. A grandparent is entitled to notice and must be granted an opportunity to be heard in any dependency-neglect proceeding involving a grandchild who is 12 months of age or older when: (1) The grandchild resides with this grandparent for at least 1 continuous year regardless of age; (ii) The grandparent was the primary caregiver for and financial supporter of the grandchild during the time the grandchild resided with the grandparent; and (3) The continuous custody occurred within 1 year of the date the child custody proceeding was initiated. However, this statute clarifies that “grandparent” does not mean a parent of a putative father of a child.

B. Grandparents' rights when parental rights HAVE been terminated

Under Arkansas law, grandparents' rights are derivative of their son's or daughter's parental rights.⁵ If a natural parent consents to the adoption of his or her child by another person, the consenting parent's relatives lose their legal right to visitation because such rights are derivative of the consenting parent's rights and likewise are terminated when the parent's rights are ended.

C. Uniform Deployed Parents Custody and Visitation Act⁶

This act concerns custody and visitation matters when a parent or an individual who has custodial responsibility for a child is deployed for military service. Under this act, parents of a child may enter into a temporary agreement granting custodial responsibility during deployment. The agreement is temporary and typically terminates after the deploying parent returns from deployment. A court may not issue a permanent order granting custodial responsibility without the consent of the deploying parent.

This custodial responsibility may be allocated to a nonparent, such as a grandparent. If it is in the best interest of the child, a court may grant caretaking authority to a nonparent who is an adult family member of the child or an adult with whom the child has a close and substantial relationship. A nonparent who has caretaking authority or decision-making authority has standing to enforce the agreement until the agreement is terminated.

II. Controlling federal law affecting grandparents' rights

A. Parental Kidnapping Prevention Act (1980)

This Act requires that each state give full faith and credit to child custody decrees from other states

B. The Visitation Rights Enforcement Act (1998)

This was a major improvement in achieving a uniform state visitation law making provisions for grandparent visitation consistent from state to state. The Act states that grandparents can visit their grandchildren anywhere in the United States as long as they have visitation rights in one state. This law does not impose a federal decision about a grandparent's visitation rights in any state. It calls for reciprocal recognition of grandparents' rights once a state has established those rights. The Uniform Child Custody Jurisdiction and Enforcement

⁵ See Burt v. Arkansas Dep't of Health & Human Servs., 261 S.W.3d 468, 470-71 (Ark. App. 2007); Vice v. Andrews, 945 S.W.2d 914 (Ark. 1997); Suster v. Arkansas Dep't of Human Servs., 858 S.W.2d 122, 124 (Ark. 1993).

⁶ See Ark. Code Ann. § 9-21-101 et seq.

Act (UCCJEEA) that requires counts in the state where a child resides to recognize and enforce valid child custody orders from another state. (Has been adopted by all states).

C. U.S. Supreme Court – *Troxel v. Granville* (2000)

In 2000, the Supreme Court of the United States decided a case, *Troxel v. Granville*, concerning a statute in Washington that allowed “[a]ny person” to petition a superior court for visitation rights “at any time,” and authorized that court to grant such visitation rights whenever “visitation may serve the best interest of the child.” The case centered around the constitutionally protected fundamental liberty of parents regarding the care, custody, and control of their children. The Court concluded that the visitation statute in Washington unconstitutionally infringed on the fundamental parental right because it was “breathhtakingly broad”. The Court said that the statute placed the best-interest determination solely in the hands of the judge, and failed to provide any protection for a parent’s fundamental constitutional right to make decisions concerning the rearing of a child.

The Court distinguished the Washington grandparent visitation statute with other states’ statutes that do not contravene “the traditional presumption that a fit parent will act in the best interest of his or her child.” These statutes are similar to each other in that they create a rebuttable presumption that grandparent visitation is not in the child’s best interest if parents agree that visitation rights should not be granted, or they require the court to find that the visitations would not interfere with the parent-child relationship.

. Nationwide, enactment of nonparental visitation statutes have attempted to recognize that children should have the opportunity to benefit from relationships with statutorily specified persons such as grandparents. The cost of this is a substantial burden on the traditional parent-child relationship. The liberty interest of parents in the care, custody and control of their children is perhaps the oldest fundamental liberty interests recognized by this Court. This case and similar decisions by state courts have caused several state legislatures to consider bills that would modify or completely revise the visitation rights in those states. A number of courts have recently determined that state statutes providing visitation to grandparents are unconstitutional.

D. Fostering Connections to Success and Increasing Adoptions Act (2008)

This modified requirements for a State Plan to require notice to relatives when children are placed in foster care. It provides that within 30 days after the removal of a child from the custody of the parent or parents of the child, the State must exercise due diligence and provide notice to all grandparents. The notice must (1) specify that the child has been or is being removed from the custody of the parent or parents of the child; (2) explain the options the relative has under Federal, State, and local law to participate in the care and placement of the child, including any options that may be lost by failing to respond to the notice; (3) describe the requirements to become a foster family home and the additional services and supports that are

available for children placed in such a home; and (4) if the State has elected the option to make kinship guardianship assistance payments, describe how the relative guardian of the child may subsequently enter into an agreement with the State to receive the payments.