

# LEGISLATIVE RESEARCH UNIT

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## GRANDPARENT VISITATION AND CUSTODY

Your Springfield office asked whether grandparents have rights to visit their grandchildren, and how old a child must be to decide whether to live with grandparents in Illinois. What we found is described below.

### Grandparents' Visitation

The Illinois Marriage and Dissolution of Marriage Act says that a grandparent, great-grandparent, or sibling may petition for visitation of a minor if "there is an unreasonable denial of visitation by a parent" and any one of the following is true:

- (1) The other parent is dead, or has been missing at least 3 months.
- (2) Either parent is legally incompetent.
- (3) Either parent has been confined in jail or prison for the last 3 months before a petition is filed.
- (4) The parents are divorced or "have been legally separated" (the law does not say how recently or for how long); or there is a pending divorce proceeding involving at least one of the parents, or another court proceeding involving custody or visitation of the minor—if in each such case at least one parent does not object to visitation.

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- (5) The minor was born out of wedlock; the parents are not living together; and the petitioner is an ancestor of the mother, or of the adjudicated father (or is a sibling of the minor).<sup>1</sup>

Grandparent visitation rights terminate if the child is adopted.<sup>2</sup> It is rebuttably presumed that a fit parent's visitation decisions regarding grandparents are not harmful to the child; a grandparent petitioning for visitation with a minor has the burden of proving that the parent's decisions are harmful to the minor.<sup>3</sup>

The provisions just described were added by two acts that took effect in 2005 and 2007.<sup>4</sup> The first of those acts replaced subsection 607(b)(1), which had listed the following conditions in which a grandparent could petition for visitation with a grandchild:

- (1) the parents are not currently cohabiting on a permanent or indefinite basis;
- (2) one parent has been absent from the marital abode, at a place or place unknown to the other spouse, for more than 1 month;
- (3) one of the parents is deceased;
- (4) one of the parents joins the petition with the grandparents; or
- (5) a sibling is in state custody.

The Illinois Supreme Court held subsection 607(b)(1) unconstitutional in two cases described below.

*Lulay v. Lulay* (2000)

Michael and Kily Lulay divorced, and Michael's mother (Gail Lulay) petitioned under subsection 607(b)(1) for visitation rights to their three children. Michael and Kily had joint custody of the children, and both objected to Gail's petition.<sup>5</sup> Citing earlier Illinois Supreme Court cases, and a then-recent U.S. Supreme Court case,<sup>6</sup> the Illinois Supreme Court held subsection 607(b)(1) unconstitutional to the extent it would allow visitation over both parents' objections. The Court said that allowing a court to order visitation infringed on Michael and Kily's fundamental right to make decisions about the upbringing of their children.

*Wickham v. Byrne* (2002)

Paul Byrne and Elizabeth Wickham Byrne were married and had a child, known as "J.B." Elizabeth died and Paul agreed to allow visitation by her mother, Virginia. Elizabeth's will requested frequent visitation between J.B. and Virginia. Paul often drove J.B. to Virginia's home (a 50-minute trip). Virginia requested more time with J.B., and asked Paul to leave J.B. for overnight visits. Paul refused, and Virginia filed a petition under subsection 607(b)(1) for mandatory overnight visitation with J.B. on two full weekends per month.<sup>7</sup>

The court said that parents' right to make decisions about the care, custody, and control of their children without unwarranted state intrusion is a fundamental right protected by the Fourteenth Amendment to the U.S. Constitution. The court acknowledged that state interference is justified to protect the health, safety, and welfare of children (such as by requiring immunizations), but held that the state should not interfere with a *fit* parent's decision to limit or deny grandparent visitation. The court presumed that a fit parent's decision would be in the best interest of the child. The court held subsections 607(b)(1) unconstitutional on its face for infringing on a fundamental right of parents.

In a later case with similar facts, the Illinois Supreme Court affirmed a trial court's decision to disallow a grandparent's petition for visitation, again holding subsection 607(b)(1) unconstitutional on its face.<sup>8</sup>

We found no reported case on the validity of the provisions added in 2005 and 2007. It will not be possible to rely with confidence on those provisions until the Illinois courts have ruled on their validity.

**Probate Act Provision**

Subsection 11-7.1(a) of the Probate Act of 1975 allows grandparents of a minor, both of whose parents are deceased, to be granted visitation rights unless it is shown that visitation would be harmful to the child's best interests. Such visitation is not to be granted if the minor has been adopted after the death of both parents, unless the adoption was by a close relative as defined in that subsection.<sup>9</sup> We found no case challenging the validity of those provisions.

**Child Custody**

The Illinois Marriage and Dissolution of Marriage Act says that in a divorce case in which child custody is at issue, the court is to consider (among several other things) each child's wishes as to custody.<sup>10</sup> The Act also says that the judge may

interview the child in the judge's chambers (with counsel for both parties present unless they both agree otherwise) regarding the child's wishes for custody.<sup>11</sup> But the Act does not give minor children a right to choose with whom to live.

This letter is a response to a request for legislative research. It is not an opinion on the application of any laws to particular facts.

We hope this information is helpful. Please let us know if we can be of further assistance.

Sincerely,



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#### Notes

1. 750 ILCS 5/607(a-5)(1).
2. 750 ILCS 5/607(a-5)(2).
3. 750 ILCS 5/607(a-5)(3).
4. P.A.'s 93-911 (2004, eff. Jan. 1, 2005) and 94-2026 (2006, eff. Jan. 1, 2007).
5. *Lulay v. Lulay*, 193 Ill. 2d 455, 739 N.E.2d 521 (2000).
6. *Troxel v. Granville*, 530 U.S. 57 at 60-61, 120 S. Ct. 2054 at 2057-58 (2000).
7. *Wickham v. Byrne*, 199 Ill. 2d 309, 769 N.E.2d 1 (2002).
8. *Schweigert v. Schweigert*, 201 Ill. 2d 42, 772 N.E. 2d 229 (2002).
9. 755 ILCS 5/11-7.1(a), first paragraph.
10. 750 ILCS 5/602(a)(2).
11. 750 ILCS 5/604(a).