# GRANDPARENT VISITATION RIGHTS:

# THE BATTLE RAGES ON

**Brian K. Zoeller**
**Colin E. Flora**

Cohen & Malad, LLP
Indianapolis, Indiana

# Section Two

## Grandparent Visitation Rights:
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## Colin E. Flora

## GRANDPARENT VISITATION RIGHTS IN INDIANA

Indiana Code § 31-17-5 et seq. provides the statutory rules governing the rights of grandparents vis-à-vis their grandchildren. Legislators in the Indiana General Assembly have tried, unsuccessfully, on numerous occasions to alter the existing provisions of the Indiana Code to make grandparent rights more expansive.[1] To date, none of these more expansive changes have been enacted. The most recent attempt sought to expand rights not only to grandparents of the children but also to great-grandparents. This expansion would replace standing case law which interprets I.C. § 31-17-5 et seq. to only apply to grandparents and not to great-grandparents.[2] The ground work for all statutes pertaining to grandparent visitation rights is the Supreme Court of the United States' decision in *Troxel v. Granville*[3] in which the Court held that a Washington statute granting grandparents visitation time was unconstitutional because it acted as an unconstitutional infringement on the parents' fundamental right to make decisions concerning the care, custody, and control of their children.[4]

The most controversial portions of the proposed legislation were the expansion of grandparent rights to great-grandparents, the expansion of the grounds upon which a claim might be brought,[5] and the portion pertaining to fee shifting.[6] The arguments against the extension of

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[1] In 2008 the proposed changes took form in Senate Bill (SB) 48. In 2009 the proposed changes took form in SB 26 and House Bill (HB) 1290. The most recent attempt in 2010 saw similar bills to the 2008 and 2009 bills proposed again in both the House and Senate as HB 1055 and SB 59 respectively.

[2] *Hammons v. Jenkins-Griffith*, 764 N.E.2d 303 (Ind. Ct. App. 2002). The Indiana Court of Appeals has also held that a step-grandparent does not fall within the scope of I.C. § 31-17-5 et seq. in *Maser v. Hicks*, 809 N.E.2d 429 (Ind. Ct. App. 2004).

[3] 530 U.S. 57 (U.S. 2000).

[4] Some commentators have speculated that HB 1055 and SB 59, if passed, would not survive a *Troxel* analysis. See e.g. http://jeannehannah.typepad.com/blog_jeanne_hannah_traver/2010/02/grandparent-visitation-to-be-or-not-to-be.html

[5] SB 59 sought to expand the grounds for standing from requiring that the child be born out of wedlock, the parents' marriage be dissolved, or that the child's parent be deceased to also include if "the grandparent or great-

grandparent rights to great-grandparents are based in the increase for potential litigation. The field for potential litigation against the parents of the child could be expanded by upwards of 200 percent.[7] The arguments against the expansion of grounds upon which a grandparent could bring a claim are vested in both the wealth of the generation comprising the grandparents and fears of the judgment of otherwise intact family units being scrutinized in a court of law.[8] The third primary concern, that of fee shifting, is often categorized by the proponents of the bills as creating an obligation against grandparents for bringing such cases. However, that is not the complete story. The proposed legislation would have required that either party[9] would be liable for the expenses of the other party. This fact in conjunction with the monetary advantages possessed by grandparents over parents could facilitate grandparents using the threat of costly litigation against fit parents to compel a visit even when the reasoning for the parent's denial of such visitation was justified.

The events surrounding the legislations history and ultimate failure are best summarized by Karen Wyle[10] in a statement made on the Indiana Law Blog.[11]

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grandparent has had meaningful contact with the child but, as a result of an estrangement between the parent of the child and the grandparent or great-grandparent, the parent of the child terminated the child's visits with the grandparent or great-grandparent."

[6] SB 59 would permit courts to order a either party in an action seeking visitation rights for grandparents or great-grandparents to pay a reasonable amount to the other party for the costs of attorney fees and mediation to the other party incurred to maintain or defend the action. Synopsis of the bill on the Indiana General Assembly website. http://www.in.gov/apps/lsa/session/billwatch/billinfo?year=2010&session=1&request=getBill&docno=0059&doctype=SB

[7] The increase by adding great-grandparents is that there are a potential of 8 great-grandparents, as compared to the potential of 4 grandparents. Thus the size of the potential litigant pool would increase from 4 to 12.

[8] This point is most clearly articulated in the statement of State Representative Cindy Noe as discussed below.

[9] Presumably the losing party.

[10] Karen Wyle is an appellate attorney in Bloomington, IN. She was also author of an amicus curae brief in *Troxel v. Granville*.

> HB 1055 resulted from a House summer study committee; SB 59, from a Senate advisory committee. I know more about the former. That study committee either included or heard from at least one judge and prosecutor. None of the witnesses before that committee opposed that legislation – presumably because none of the many opponents who later emerged (including me) knew about the proceedings. This is an omission we are determined not to repeat.
>
> I and several others with an interest in this issue became involved about the time that SB 59 was passed out of committee. Playing some fierce catch-up, we started with one "Nay" vote in the House committee, proceeded to 6 out of 50 "Nay" votes on the Senate floor, then to a 63-33 vote on the House floor (after some amendments to HB 1055 failed on House voice vote).
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> Around this time, the Family Law Division and Legislative Affairs Committee of the Indianapolis Bar Association came out against the legislation, while an informal consensus in opposition emerged in the ISBA's Family Law section.
>
> After testimony from an IBA representative to the Senate Judiciary Committee, the chair of that committee pulled HB 1055 from consideration. The House Committee on Family, Child and Human Affairs heard SB 59, this time with many more opposition witnesses present (although due to time constraints, most were not allowed to speak). The committee vote this time was 8-3, with several committee members expressing reservations and their wishes for narrowing amendments. Two such amendments were proposed and failed on voice vote on the House floor. The final act was the bill's defeat, 46-53, on 3rd reading, as you saw.

In addition to the insight given by Karen Wyle's account, one of the chief opponents to the bill, State Representative Cindy Noe, authored a press release shortly after her vote against SB 59 which sought to pierce the shroud of the General Assembly.[12] Noe was on the only nay vote in an 8-1 decision to pass the legislation, SB 59, from committee onto the floor. Once on the House floor Noe and those of her mindset voted down the legislation 46-53.[13] Noe's primary point of contention is that the bill was too expansive in allowing intact families to be scrutinized and devastated by needless litigation. Noe also referenced the fact that the Indianapolis Bar

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[11] The complete legislative history, as provided by the General Assembly's website, for SB 59 and HB 1055 is provided in "Appendix A" and "Appendix B" respectively.

[12] Full text of the press release is included in "Appendix C".

[13] A surprising result since the Senate had passed the bill 44-6 and the House had passed the amended House version of the bill 63-33.

Association (IBA) testified in committee that it was opposed to the bill. The IBA's principle bone of contention is that the new legislation would open the floodgates of litigation. While it is not entirely clear how a bill that had garnered so much support in the Senate was defeated in the House, the insight provided by Karen Wyle and State Rep. Cindy Noe offer a means to understand the failure of SB 59 and HB 1055.

# **APPENDIX A**

## LEGISLATIVE HISTORY FOR SENATE BILL 59[14]

**SB 59**

| Date | Chamber | Action |
|---|---|---|
| 01/05/2010 | S | Authored by Senator Steele |
| 01/05/2010 | S | First reading: referred to Committee on Judiciary |
| 01/19/2010 | S | Committee report: amend do pass, adopted |
| 01/19/2010 | S | Senators Randolph and Waterman added as coauthors |
| 01/21/2010 | S | Second reading: ordered engrossed |
| 01/21/2010 | S | Senator Miller added as coauthor |
| 01/25/2010 | S | Third reading: passed; Roll Call 34: Yeas 44 and Nays 6 |
| 01/25/2010 | S | Referred to the House |
| 01/25/2010 | S | House sponsor: Rep. Stilwell |
| 01/25/2010 | S | Cosponsor: Rep. Messmer |
| 01/26/2010 | S | Senator Hershman added as coauthor |
| 01/26/2010 | S | Senator Taylor added as coauthor |
| 01/26/2010 | S | Senator Miller removed as coauthor |
| 01/26/2010 | S | Senator Miller added as second author |
| 01/26/2010 | S | Senators Landske, Lawson and Wyss added as coauthors |
| 02/02/2010 | H | First reading: referred to Committee on Family, Children and Human Affairs |
| 02/22/2010 | H | Committee report: do pass, adopted |
| 02/24/2010 | H | Second reading: ordered engrossed |
| 02/24/2010 | H | Amendment 1 (Noe), failed; Voice Vote |
| 02/24/2010 | H | Amendment 3 (Noe), failed; Voice Vote |
| 02/25/2010 | H | Third reading: defeated; Roll Call 237: Yeas 46, Nays 53 |

[14] http://www.in.gov/apps/lsa/session/billwatch/billinfo?year=2010&session=1&request=getBill&docno=0059&doctype=SB

# **APPENDIX B**

## LEGISLATIVE HISTORY FOR HOUSE BILL 1055[15]

**HB 1055**

| Date | Chamber | Action |
|---|---|---|
| 01/05/2010 | H | Authored by Representative Stilwell |
| 01/05/2010 | H | Coauthored by Representatives Summers and Messmer |
| 01/05/2010 | H | First reading: referred to Committee on Family, Children and Human Affairs |
| 01/21/2010 | H | Committee report: do pass, adopted |
| 01/26/2010 | H | Second reading: amended, ordered engrossed |
| 01/26/2010 | H | Amendment 5 (Noe), failed; Voice Vote |
| 01/26/2010 | H | Amendment 3 (Messmer), prevailed; Voice Vote |
| 01/28/2010 | H | Third reading: passed; Roll Call 89: Yeas 63, Nays 33 |
| 01/28/2010 | H | Referred to the Senate |
| 01/28/2010 | H | Senate sponsors: Senators Steele and R. Young |
| 02/01/2010 | S | First reading: referred to Committee on Judiciary |
| 02/11/2010 | S | Senators Taylor and Randolph added as cosponsors |

[15] http://www.in.gov/apps/lsa/session/billwatch/billinfo?year=2010&request=getBill&docno=1055

# **APPENDIX C**

**PRESS RELEASE BY STATE REPRESENTATIVE CINDY NOE**
**Entitled:** *Vote Against Bill was Vote of Confidence for Families*
As published in the Indianapolis Star, March 8, 2010

Recently, I voted against a bill which would have greatly expanded the power of the courts over intact families.

Because the public doesn't often get to hear the floor debate on controversial bills, I wanted to explain to you my opposition.

Currently in Indiana, the biological father and mother are the only people with enforceable visitation rights. Grandparents do not have the right to petition for visitation with their grandchild except in cases of death, divorce or when the child is born out of wedlock.

Senate Bill (SB) 59 would have extended that right to families where the grandparents, and even great-grandparents, feel they have been cut off because of an estrangement with the child's parents-while the parents are still married.

Last week, we voted on it and the measure failed. The final total was 46 voting in support, and 53 against.

I was concerned about this bill from the very beginning. Back in January when the House version of this bill, House Bill 1055, was going through the committee process, I was the only vote against the measure. This bill is not the answer for families where abuse-child abuse, drug abuse or any other kind of abuse-is taking place. Such cases are for Child Protective Services and public safety to oversee.

Instead, it would have meant that two married parents who have decided not to continue contact with a grandparent would have had to face a long and costly litigation process if the grandparent decided to take them to court.

Court cases between family members most often cause psychological, emotional and familial scarring that is nearly impossible to heal. Families would probably be less likely to reconcile after such an ordeal.

The Indianapolis Bar Association testified in committee on Feb. 23 that it was opposed to SB59. In discussions in the House chamber, other representatives also opposed the measure, in part because it would have opened the floodgates for so many people (potentially four grandparents and eight great-grandparents) to bring litigation against one family.

At its core SB59 implied that intact families are no healthier than non-intact families, which is not what we find in the statistics. Children who grow up in a home where the biological mother

and father are still married are more likely to graduate from high school, more likely to go on to higher education, less likely to be incarcerated, etc.

Of course, statistics like this can't possibly diminish the pain of loving grandparents who are cut off from their grandchildren because of an estrangement with the child's parents, especially when the grandparents have served as the child's guardian for any length of time.

There are grandparents who take ongoing care of grandchildren in the parent's absence. When the parents return to reclaim their children, the grandparents, who in the eyes of the child have taken on the role of a parental figure, are suddenly shut out. This causes suffering for all parties, especially the children.

This is why I offered amendments to SB59 which would have narrowed the scope of its reach, but still allowed grandparents in this situation to petition for visitation. Unfortunately, those were not accepted by the House.

This bill, as constructed, was too far-reaching and too broad. It was highly invasive and promoted prolonged litigation in family structures led by a married couple. The threshold for bringing legal action against an intact, married couple was just far too low.

Please feel to contact my office if you would like to discuss this issue with me further. I can be reached by email at h87@in.gov and by phone at (317) 232-9677.

Sincerely,

State Rep. Cindy Noe