

Michigan Judicial Institute/ Friend of the Court Bureau Webinar

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Grandparenting Time in Michigan and Friend of the Court Investigations

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Grandparenting Time

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Purpose of the Training

There is no statutory requirement for a Friend of the Court (FOC) to conduct a grandparenting time investigation. However, on occasion the FOC may be ordered to conduct such an investigation and provide information for the court's use in determining grandparenting time. This presentation will focus on the following:

- Requirements to seek a grandparenting time order.
- Rebuttable presumption for denying grandparenting time.
- Grandparenting best interest factors.
- Other factors for the FOC to consider when recommending grandparenting time.

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Grand Parent Definition

MCL 722.21: "Grandparent" means a natural or adoptive parent of a child's natural or adoptive parent.

No statutory definition of "grandparenting time."

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Grandparenting Time History

The United States Supreme ruled in *Troxel v Granville*, 530 U.S. 57; 120 S Ct 2054; 147 L Ed 2d 49 (2000) that fit parents have a fundamental, constitutional right to raise their children and such decisions should special deference or weight. Kind of long fact pattern. Summary: Parents are presumed fit and fit parents can decide not to allow their children to see their grandparents. While grandparenting time statutes are not unconstitutional *per se*, the U.S. Supreme Court requires valid versions of these laws to consider the very high standard of parental fitness.

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Grandparenting Time History- Continued

The Michigan Supreme Court looked at its own grandparenting statute in *DeRose v DeRose*, 469 Mich 320, 666 NW2d 636 (2003). The Supreme Court found that the Michigan statute was “fatally similar” to the Washington statute that was struck down in *Troxel*. The Washington Statute like many state statutes allowed almost anyone to petition the court for parenting time and custody on a “best interests of the children” standard, even over the parent’s objections.

The problem was that there was no provision for the right of fit parents to make decisions regarding the care, custody and control of the minor children.

In 2004, the Michigan Legislature passed an amended grandparenting statute that conformed to the standards in both *Troxel* and *DeRose*. Since the amendments, the Michigan Supreme Court and the Michigan Court of Appeals have upheld the constitutionality of the statutes despite additional challenges from frustrated parents.

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Grandparenting Time -Continued

The statute directs that a “fit” parent’s decision to deny grandparenting time is presumed not to create a “substantial risk of harm to the child’s mental, physical, or emotional health.” To rebut this presumption, the grandparent seeking visitation must prove by a preponderance of the evidence that the parent’s decision to deny grandparenting time does create such a risk. MCL 722.27b(4)(b); see Varran, 312 Mich App at 625 (finding risk of substantial harm where grandparents raised child as their own for several years and evidence showed child “saw his Grandparent”).

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Standing to Seek Grandparenting Time

MCL 722.27b(1): A grandparent may seek grandparenting time if one or more of the following are true:

- (a) **An action for divorce, separate maintenance, or annulment** involving the child's parents is pending before the court.
- (b) **The child's parents are divorced, separated under a judgment of separate maintenance,** or have had their marriage annulled.
- (c) **The child's parent who is a child of the grandparents is deceased.**
- (d) **The child's parents have never been married, they are not residing in the same household, and paternity has been established by the completion of an acknowledgment of parentage under the acknowledgment of parentage act,** 1996 PA 305, MCL 722.1001 to 722.1013, by an order of filiation entered under the paternity act, 1956 PA 205, MCL 722.711 to 722.730, or by a determination by a court of competent jurisdiction that the individual is the father of the child.
- (e) Except as otherwise provided in subsection (13), **legal custody of the child has been given to a person other than the child's parent,** or the child is placed outside of and does not reside in the home of a parent.
- (f) In the year preceding the commencement of an action under subsection (3) for grandparenting time, **the grandparent provided an established custodial environment** for the child as described in section 7, whether or not the grandparent had custody under a court order.

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Standing to Seek Grandparenting Time

A request for grandparenting time is initiated either by filing a motion, if the circuit court has continuing jurisdiction over the child, or if the circuit court does not have continuing jurisdiction, by filing a complaint in the circuit court for the county where the child resides. MCL 722.27b(3).

The motion or complaint must be accompanied by an affidavit setting forth facts supporting the requested order. MCL 722.27b(4)(a). MCL 722.27b(4)(b) requires grandparents "must prove by a preponderance of the evidence that the parent's decision to deny grandparenting time creates a substantial risk of harm to the child's mental, physical, or emotional health."

However, grandparents may file regardless of whether a parent has denied grandparenting time. *Varran v Granneman*, 312 Mich App 591, 880 NW2d 242 (2015) (holding that MCL 722.27b(1) does not require parental denial and that MCL 722.27b(4)(b) was enacted to fix a constitutional defect, not to set forth requirements for seeking grandparenting time). But see *Falconer v Stamps*, 313 Mich App 598, 886 NW2d 23 (2015) (improper for trial court to award grandparenting time sua sponte because court presumed mother would unreasonably deny grandparenting time).

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Where is the Grandparenting Time Case Filed

MCL 722.7b(3): A grandparent seeking a grandparenting time order shall commence an action for grandparenting time, as follows:

(a) **If the circuit court has continuing jurisdiction over the child**, the child's grandparent shall seek a grandparenting time order by filing a motion with the circuit court in the county where the court has continuing jurisdiction.

(b) If the circuit court **does not have continuing jurisdiction over the child**, the child's grandparent shall seek a **grandparenting time order by filing a complaint** in the circuit court for the county where the child resides.

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Where is the Grandparenting Time Case Filed-Simplified

1. Court had continuing jurisdiction over the child; motion must be filed.
2. No continuing jurisdiction-file complaint in county where child resides.
3. Complaint with affidavit; grandparent must give notice to parent who has custody or parenting time. Parent(s) may file opposing affidavit.

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Grandparenting Time Filing Requirements

MCL 722.27b(4): All of the following apply to an action for grandparenting time under subsection (3):

(a) **The complaint or motion for grandparenting time filed under subsection (3) shall be accompanied by an affidavit setting forth facts supporting the requested order.** The grandparent shall give notice of the filing to each person who has legal custody of, or an order for parenting time with, the child. **A party having legal custody may file an opposing affidavit.** A hearing shall be held by the court on its own motion or if a party requests a hearing. At the hearing, parties submitting affidavits shall be allowed an opportunity to be heard.

(b) **In order to give deference to the decisions of fit parents, it is presumed in a proceeding under this subsection that a fit parent's decision to deny grandparenting time does not create a substantial risk of harm to the child's mental, physical, or emotional health.** To rebut the presumption created in this subdivision, a grandparent filing a complaint or motion under this section must prove by a preponderance of the evidence that the parent's decision to deny grandparenting time creates a substantial risk of harm to the child's mental, physical, or emotional health. If the grandparent does not overcome the presumption, the court shall dismiss the complaint or deny the motion.

(c) If a court of appellate jurisdiction determines in a final and nonappealable judgment that the burden of proof described in subdivision (b) is unconstitutional, a grandparent filing a complaint or motion under this section must prove by clear and convincing evidence that the parent's decision to deny grandparenting time creates a substantial risk of harm to the child's mental, physical, or emotional health to rebut the presumption created in subdivision (b).

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Grandparenting Time Case Law

The definition of a fit parent set forth in Troxel will be read into MCL 722.27b to determine an award of grandparenting time. In *Geering v King*, 320 Mich App 182, 906 NW2d 214 (2017), the trial court improperly found that both biological parents, who objected to the grandparent's motion, were unfit. The court of appeals reversed the award, holding that the trial court's finding of both parents to be unfit was against the great weight of evidence.

The statute creates a presumption that a fit parent's decision to deny grandparenting time does not create a substantial risk of harm to the child's mental, physical, or emotional health. Guardians and custodians are not afforded this presumption as the statute specifically uses the term parent. *Book-Gilbert v Greenleaf*, 302 Mich App 538, 547, 840 NW2d 743 (2013) ("permitting guardians or custodians to derive the benefit of the fit-parent presumption would require us to rewrite the statute").

To rebut the presumption, a grandparent must prove by a preponderance of the evidence that the parent's decision to deny grandparenting time creates a substantial risk of harm to the child's mental, physical, or emotional health. If the grandparent does not overcome the presumption, the court will dismiss the action. MCL 722.27b(4)(b). The court may also dismiss the action if two fit parents sign an affidavit stating that they both oppose an order for grandparenting time. MCL 722.27b(5). Even if a parent consents to a grandparenting time schedule, the fit parent presumption must still be applied and rebutted by a preponderance of the evidence. *Zawilanski v Marshall*, 317 Mich App 43, 894 NW2d 141 (2016)

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Grandparenting Time-Rebut Presumption

MCL 722.27b(4): In order to give deference to the decisions of fit parents, it is presumed in a proceeding under this subsection that a fit parent's decision to deny grandparenting time does not create a substantial risk of harm to the child's mental, physical, or emotional health. To rebut the presumption created in this subdivision, a grandparent filing a complaint or motion under this section must prove by a preponderance of the evidence that the parent's decision to deny grandparenting time creates a substantial risk of harm to the child's mental, physical, or emotional health. If the grandparent does not overcome the presumption, the court shall dismiss the complaint or deny the motion.

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Grandparenting Time-Rebut Presumption

If the court finds that a grandparent has met the standard for rebutting the presumption, the court will consider whether it is in the best interests of the child to enter an order for grandparenting time. In determining the best interests of the child, the court will consider the ten factors set forth in MCL 722.27b(6).

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Grandparenting Time-Two Fit Parents Oppose Grandparenting Time

MCL 722.27b(5): **If two fit parents sign an affidavit stating that they both oppose an order for grandparenting time, the court shall dismiss a complaint or motion seeking an order for grandparenting time filed under subsection (3).** This subsection does not apply if one of the fit parents is a stepparent who adopted a child under the Michigan adoption code, chapter X of the probate code of 1939, 1939 PA 288, MCL 710.21 to 710.70, and the grandparent seeking the order is the natural or adoptive parent of a parent of the child who is deceased or whose parental rights have been terminated.

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Grandparenting Time

If the court finds that a grandparent has met the standard for rebutting the presumption described in subsection MCL 722.7b(4), the court shall consider whether it is in the best interests of the child to enter an order for grandparenting time. **If the court finds by a preponderance of the evidence that it is in the best interests of the child to enter a grandparenting time order, the court shall enter an order providing for reasonable grandparenting time of the child by the grandparent by general or specific terms and conditions.**

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Grandparenting Time Considerations

- Is the court requesting an investigation or an ADR session?
- Is there an existing grandparenting time order?
- Who are the parties involved in the dispute (e.g., both parents, maternal grandparents, paternal grandparents)?
- Is there a current parenting time court order for either parent?
- Has either parent or grandparent been involved in a child abuse or neglect case? Is there evidence of domestic violence between the parents or between the grandparents and the parents?

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Grandparenting Time- Considerations

- Are grandparents seeking a grandparenting time court order so that their son or daughter can see the child?
- Was supervised parenting time, agency parenting time, or therapeutic parenting time ordered?
- What is the distance between the grandparent's home and the child's home?
- What are some of the extracurricular activities the child is involved in?

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Grandparenting Time- Investigations-Requirements

- Determine if one or two grandparents are seeking grandparenting time.
- Should address the Grandparenting Time Best Interest Factors MCL 722.7b.
- Need to decide if the parents should be interviewed.
- Should interview the child, if the child is of a sufficient age to express a preference.
- For additional information about how to gather information for a grandparenting time investigation, please see SCAO's Custody and Parenting Time Investigation Manual.

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Grandparenting Time Interviews

- Must decide who should be interviewed; who should attend an FOC ADR session.
- Should both parents be interviewed or required to attend an FOC ADR session.

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Grandparenting Time- Investigations

The FOC should conduct a grandparenting time investigation very similar as how the office would conduct a custody and parenting time investigation (e.g., screen for domestic violence, check with Child Protective Services, criminal background checks). There are a few exceptions.

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Grandparenting Time- Investigations

- Don't have to address the established custodial environment. Just make sure that any recommendations does not change the established custodial environment.
- Don't have to address the best interest factors in the Child Custody Act: MCL 722.23.
- Don't have to determine parenting time.
- Don't have to determine child support.

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Grandparenting Time-Best Interest Factors

A court shall make a record of its analysis and findings of the following factors:

- (a) The love, affection, and other emotional ties existing between the grandparent and the child.
- (b) The length and quality of the prior relationship between the child and the grandparent, the role performed by the grandparent, and the existing emotional ties of the child to the grandparent.
- (c) The grandparent's moral fitness.
- (d) The grandparent's mental and physical health.
- (e) The child's reasonable preference, if the court considers the child to be of sufficient age to express a preference.

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Grandparenting Time-Best Interest Factors-Continued

- (f) The effect on the child of hostility between the grandparent and the parent of the child.
- (g) The willingness of the grandparent, except in the case of abuse or neglect, to encourage a close relationship between the child and the parent or parents of the child.
- (h) Any history of physical, emotional, or sexual abuse or neglect of any child by the grandparent.
- (i) Whether the parent's decision to deny, or lack of an offer of, grandparenting time is related to the child's well-being or is for some other unrelated reason.
- (j) Any other factor relevant to the physical and psychological well-being of the child.

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Challenges Addressing Grandparenting Time Best Interest Factors

The parent(s) may have no idea regarding information relevant to the Grandparenting Time Best Interest Factors.

Examples:

Describe how the grandparent shows kindness, love, affection and courtesy towards the child. Describe the rituals or routines that foster interaction between the child and the grandparent.

The parent(s) may not be able to answer these questions.

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Possible Questions to Ask Parents Regarding Grandparenting Time

- Describe the relationship your child has with his/her grandparents?
- How frequent has the child seen his or her grandparents?
- Have the grandparents attended any school or extracurricular activities?
- How would you describe your relationship with the grandparents?
- What are your concerns about the grandparent having grandparenting time?
- How do you believe the child feels about having grandparenting time with his or her grandparent?

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Possible Questions to Ask Parents Regarding Grandparenting Time

- Are you aware of any criminal activity that the grandparents have been involved with?
- How would you describe your relationship with the grandparents?
- How do you usually communicate with the child's grandparents?
- Is there currently a parenting time order for your child?
- What do you believe a reasonable grandparenting time order would be?

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Grandparenting Time

MCL 722.7b(7): If the court has determined that a grandparent has met the standard for rebutting the presumption described in subsection (4), the court may refer that grandparent's complaint or motion for grandparenting time filed under subsection (3) to alternative dispute resolution as provided by supreme court rule. **If the complaint or motion is referred to the friend of the court for alternative dispute resolution and no settlement is reached through friend of the court alternative dispute resolution within a reasonable time after the date of referral, the complaint or motion shall be heard by the court as provided in this section.**

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Grandparenting Time and FOC ADR

Grandparenting Time Dispute can be referred to the FOC MCL 722.7b(7).

The FOC ADR process should be used that is provided for in the FOC ADR plan. All requirements set forth in MCR 3.224 should still be met.

That would include:

- Objecting to FOC ADR.
- Cases Exempt.
- Domestic violence screening.
- Opening statement.
- Use of SCAO forms.

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Grandparenting Time and Mediation

Parties fail to reach an agreement-MC 280.

If parties failed to reach an agreement-MC 280;

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Grandparenting Time and Facilitative and Information- Gathering Conference

FOC 125-Summary Report. Will have to mark the appropriate boxes. Because the established custodial environment and custody factors are not in dispute-indicate not in dispute. Add sheets to the FOC 125 to address the Grandparenting Time Best Interest Factors.

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Custody, Parenting Time, ADR Google Group

If interested in joining the Custody, Parenting Time, and ADR Google Group contact:

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Grandparenting Time

- Questions?

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Contact Information

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