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# Legal Matters®

## More grandparents seek visitation

It's natural for grandparents to want to be a part of their grandchildren's lives. But in some families, hard feelings can develop, and one or both parents may decide to exclude grandparents from seeing the children. Do grandparents have a right to go to court and demand "visitation"?

That's a very difficult question, and the answer depends a great deal on the state where everyone lives and particularly on the specific family circumstances. But it's a question that's coming up more and more often, as grandparents – and in some cases, other family members – try to use the court system to gain visiting rights.

This issue frequently arises where there has been a divorce, and the parent who gets custody wants to limit the children's exposure to the other parent's family. The issue can also come up when one parent passes away, and the surviving parent doesn't get along with his or her in-laws.

As a general rule, parents have a right under the U.S. Constitution to raise their children as they see fit, which includes deciding how they spend their time and with whom they spend it. So even though grandparents love their grandchildren and want to visit them, this might not be enough to win them visitation.

Some 15 years ago, a grandparent visitation case went all the way to the U.S. Supreme Court. Tommie Granville and Brad Troxel lived in the state of Washington and had two little girls. After Brad committed suicide, Tommie told Brad's parents that she wanted to limit their



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visitation to one short visit per month. Brad's parents filed a lawsuit.

At the time, Washington had a very broad law that allowed *anyone* to obtain visitation (grandparents, other relatives, even complete strangers) if a judge decided that it was in the children's "best interests." A judge ruled for Brad's parents, saying that spending time with grandparents is generally in a child's best interests, and there was no good reason not to let Brad's parents see the two girls more often.

But the U.S. Supreme Court sided with the girls' mother. The court said that Tommie had a constitutional right to raise her children as she

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### School bus must go to both parents' homes

A school bus must pick up and drop off children at both of their divorced parents' homes, the Pennsylvania Supreme Court recently decided.

In this case, the father and mother shared legal custody of their daughter, alternating on a weekly basis.

Until 2010, the school district had provided bus transportation to both homes. But that year, in order to

cut costs, the district announced that it would only bus students to one location. As a result, the school would only bus the girl to and from her mother's home, since her mother's address was listed on the school paperwork.

The father – who ended up having

to hire a nanny to drive his daughter in the morning – sued the district.

According to the court, if both parents live in the district, the student spends equal time with each parent, and a bus already serves each neighborhood, the district could accommodate the child without adding further costs.

### Child stays in daycare, not with family members

Some people might assume that it's always better for a small child to be raised by family members, such as grandparents, rather than being in daycare. But a Pennsylvania appeals court recently awarded custody to a father, even though it meant the child would spend a lot of time in daycare instead of with the mother's parents.

In this case, the wife's parents lived in the couple's home. When the couple had a child, the wife's mother became the primary caretaker.

Conflict soon broke out over the wife's parents' alleged attempt to keep the husband from bonding with his new child. As a result, the couple agreed that the grandparents would move out, and they did.

However, the wife went with them. She took the child, and filed for divorce the next day.

When the husband sought custody, the wife allegedly responded by making false accusations that he had abused and injured the child.

The court awarded custody to the father, saying that doing so was appropriate given the mother's and her parents' misbehavior. It said that giving custody to the father "might

be of significant benefit to child at this time, and might make mother realize that her lack of cooperation and attempts at alienation will not be rewarded."

Although this meant that the child would be in daycare much of the time, the court said this could be a positive thing. Specifically, "it will be beneficial for the child to be in contact with other children on a regular basis and to be among adults other than [the mother's] family members."

### Facebook page becomes weapon in custody battle

Social media sites are among the latest weapons that spouses are using to gain leverage in divorce and custody battles. A recent case from New York illustrates how.

A father who was fighting for custody of a four-year-old boy went to court with details from his wife's Facebook page. The page was full of photos and status updates showing her sight-seeing in Italy and eating seafood in Boston, which the father used to claim that she was frequently traveling out-of-state while he was busy raising their son.

The mother objected, arguing that the court shouldn't be able to look at the profile because she kept it private and because she had "unfriended" her husband before they separated.

But a judge sided with the father, saying the amount of time each parent spent with the child could be important to the custody issue, and the Facebook page was relevant evidence.

This goes to show that anyone who is involved in a divorce needs to be very careful with social media, because what you publish about yourself could potentially be used against you in a dispute over custody or property division.

### Living rent-free didn't increase child support payments

Even though a woman was living with her mother and got free room and board, the value of what she received wasn't "income" in deciding how much child support she had to pay, the Virginia Court of Appeals recently decided.

The husband had primary custody of the couple's children, while the wife paid support. The husband argued that the wife was effectively saving \$1,200 a month by living with her mother, based on what she was paying in living expenses before she moved in with her. He argued that this \$1,200 should be added to her "income" in calculating her child support bill.

But the court said that the wife's rent-free living arrangement wasn't "income" unless she was receiving it in exchange for providing services to the mother, which apparently wasn't the case.



# Spendthrift trust is divided at divorce

A “spendthrift trust” is a trust that is set up to provide children or others with income while protecting them from potentially poor spending decisions. The donor who creates the trust gives a trustee – often a family member, lawyer or financial advisor – authority to decide how often to distribute the trust assets, usually with some guidelines from the donor as to acceptable uses of the money.

Spendthrift trusts protect the beneficiaries from impulsively wasting the assets. They can also protect beneficiaries by making it harder for creditors to collect the assets if a beneficiary has a business failure, lawsuit, or divorce.

But while a spendthrift trust can often protect assets in a divorce, it isn't always foolproof, as a recent Massachusetts case shows.

In that case, a couple got divorced after a decade of marriage. The husband's father had set up a trust for him and his two siblings. Over the course of the marriage, the couple relied on distributions from the trust to keep up an affluent lifestyle while caring for two children with special needs. In fact, when the husband

filed for divorce in 2010, he and his siblings had received \$800,000 apiece in distributions over just the past two years. But a month before he filed, the trustee stopped making any distributions at all to him – while continuing to make distributions to his siblings.

During the divorce, the husband claimed that his interest in the trust wasn't an asset he had to share with his wife, because he had no legal right to distributions and any amount he might receive in the future was speculative.

But the Massachusetts Appeals Court disagreed, and said that even though the trust documents said the husband's interest couldn't be shared with anyone else, the actual pattern of distributions showed that the trust was being manipulated solely for the purpose of depriving the wife of her fair share.

Therefore, the value of the husband's interest in the trust – which was valued at \$2.2 million – had to be divided with his wife.



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## More grandparents are seeking visitation

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thought best, and judges had no authority to simply substitute their child-rearing preferences for hers. The court didn't say that grandparents could *never* get visitation, but it said judges should defer to parents unless the grandparents could show something more than just that visitation would be a nice thing.

What exactly is “something more”? The court didn't say, and that's caused a lot of confusion ever since.

Some states are very strict. For instance, the Utah Supreme Court recently ruled that a parent can cut off grandparent visitation except in “exceptional” cases where doing so would cause “substantial harm” to the child. It refused to allow visitation even though the grandparents in that case claimed they had previously had a “parent-like” relationship to the child and provided day care several days a week.

A new law in Florida expands the rights of grandparents to seek visitation, but the law applies only if both parents are dead, missing or in a persistent vegetative state (or if that's true of one parent and the other parent is a felon).

Some states are much more accommodating to

grandparents, though. For example, a Pennsylvania appeals court recently ordered a father's parents to have extended visitation and Skype visits with their grandchild, even though the father was dead and the mother had married another man who was adopting the child.

And the Kentucky Court of Appeals decided recently that the rules are different if the child is in the custody of someone *other* than the parents. In that case, a mother's parents sought visitation with their grandchild over the objections of a paternal aunt and uncle with whom the child was living. The court said visitation was okay as long as a judge thought it was in the child's best interests.

In some states, the rules can vary depending on whether a parent is married, divorced, or widowed, and whether it's a grandparent seeking visitation or another family member.

Often, the best way to handle these issues is through family mediation, where conflicts can sometimes be resolved and a compromise can be reached to avoid a protracted court battle.

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## Couple weren't 'separated' if they still lived together



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A wife decided that her marriage was over in 2006, but she didn't actually move out of the house she shared with her husband until 2011. So does she have to share the assets she acquired between 2006 and 2011 with her husband?

Yes, according to the

California Supreme Court.

This is an important issue, because many couples continue to live together for some time after their marriage is effectively over. They may do this to minimize the impact of a separation on the children, or because they're not ready to announce to the world that their marriage has ended. Often, the reason is economic – one spouse simply can't afford to move out.

But even if a couple are leading completely separate lives under the same roof – eating separately, sleeping separately and using different areas of the house – a

divorce court may consider them not to be separated in the eyes of the law.

In the California case, the wife announced that she was done with the marriage in 2006, but didn't move out. She filed for divorce at the very end of 2008, declaring a 2006 separation date. In response, the husband declared their separation date as early January 2009. The wife didn't actually move out of the home until July 2011, at which point the husband changed his mind and listed that date as the date of separation.

The California Supreme Court ruled that the separation date was in fact July 2011 – which meant the husband could share in whatever assets the wife had accumulated up to that point.

This case involved an unusual California law, and of course each case depends on the specific facts involved. But the larger point is that if you feel your marriage is over and are contemplating divorce, it's a good idea to talk to a lawyer about how your living arrangements may affect your rights.