Grandparents Have No Constitutional Rights to Custody and Visitation

The Effect of *Troxel v Granville* on Michigan Law

By Anne Argiroff and Ann Routt

Editor's Note: This month's column was written in response to the Feb 2001 Bar Journal *article "Grandparents Have Rights!"*

In *Troxel v Granville*, 530 US 57, 120 S Ct 2054 (2000), the United States Supreme Court found the state of Washington's third-party (non-parent) visitation statute unconstitutional, declaring that parents have "perhaps the oldest of the fundamental liberty interests recognized by this Court,"—the right to determine the care, custody, and control of their children. Contrary to inaccurate reports in the media, the Supreme Court did not hold other grandparent visitation laws constitutional. As Justice O'Connor wrote for the majority:

> *The extension of statutory rights in this area to persons other than a child's parents, however, comes with an obvious cost. For example, the state's recognition of an independent third-party interest in a child can place a substantial burden on the traditional parent-child relationship. . . . [O]ur terminology is intended to highlight the fact that these statutes can present questions of constitutional import.* (Emphasis added.)

Troxel made no finding, or even suggestion, that there are any constitutionally-based rights of custody or visitation for third parties and emphasized only the long-standing constitutional liberty interest between fit parents and children. It has long been recognized that third-party intrusions fly "directly in the face of constitutionally protected rights of parents to associate with and raise their children." Victor, Robbins and Bassett, *Statutory Review of Third-Party Rights Regarding Custody, Visitation and Support*, Family Law Quarterly, No 1, Spring 1991, p 19 (noting that there are no inherent rights of third parties to request custody or visitation of another person's child). Id. at 19.

As stated in *Troxel*, the constitutionality of any standard for awarding third-person access to children turns on the specific manner in which that standard is applied and that the constitutional protections in this area are best "elaborated with care."

Troxel is the first time our highest Court has applied constitutional scrutiny and protections for parents in the context of a state court visitation proceeding. The case constitutes binding Supreme Court precedent and, as with all precedential cases, its holding and reasoning would apply to challenges to other third-party statutes. See Savage, David, "Parents First," *ABA Journal*, August 2000, p 38. A number of states have found similar statutes affecting visitation and custody unconstitutional.[1]

Case History

Tommie Granville and Brad Troxel had two daughters, Isabelle and Natalie. They were not married and their relationship ended in 1991. After the separation, Brad lived with his parents, (the Troxels), and had visitation with the children. Brad committed suicide in 1993. Tommie did not oppose continuing visitation with the paternal grandparents, but wanted more limited visitation than the Troxels did. The Troxels filed for visitation under the statute ultimately at issue before the United States Supreme Court, Wash. Rev. Code Section 26.10.160(3), which allowed the trial courts to award visitation to any person, regardless of whether there is a pending custody action, whenever it may serve the "best interest of the child."

The Washington State Supreme Court, using a constitutional analysis, did not focus on the issues of standing and whether there was a pending action. What was at issue was the scope of the state's authority, specifically, the authority of the trial court (the state) to award visitation contrary to the determination of a fit parent and in violation of the parental presumption that parents act in the best interest of their children. The Washington Supreme Court found the statute unconstitutional on its face, stating that fit parents have a right to limit their children's contact with third parties, and between parents and judges, parental decisions prevail. *Troxel*, 120 S Ct at 2058–2059 (discussing Washington Supreme Court decision).

The United States Supreme Court Decision

In a 6–3 decision, the United States Supreme Court affirmed the judgment of the Washington Supreme Court. The primary opinion (authored by Justice O'Connor) found the statute violated the Due Process Clause. As did the Washington Supreme Court, Justice O'Connor applied a constitutional analysis, emphasizing the fundamental constitutional liberty interest of fit parents to determine how to raise their own children and the constitutionally protected relationship between natural parent and child. *Troxel*, 120 S Ct at 2060.

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The Court's analysis did not rely on standing arguments, the marital status of the parents, or on whether there was a pending custody case. Instead, the Court focused on the role of the state in substituting its judgment for that of fit parents and on the inappropriateness of employing the best interest standard, stating:

> *"[S]o long as a parent adequately cares for his or her children (i.e. is fit) there will normally be no reason for the state to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children."* Plurality Opinion, O'Connor, 120 S Ct at 2060.

Justice O'Connor concluded that the case is nothing more than a disagreement between the trial court and the mother concerning *her* children's best interests.

The Court did not find it necessary to reach the issue of whether a finding of harm is required before allowing state intervention into a family because it found the statute violated due process based in its grant of "broad, unlimited power" to the trial court to substitute its judgment for that of fit parents only by what it considers is in the best interest of the children. *Troxel,* 120 S Ct at 2064.

Implications for Michigan—Third-Party Visitation

Michigan's third-party visitation provisions are as broad as the unconstitutional Washington statute and offer no protections of the fundamental parent-child liberty interest. MCL 722.27(1)(b) provides that if there is a pending custody dispute, a trial court may award parenting time to parents, grandparents, or "others." Michigan's specific grandparenting time statute, MCL 722.27b, also provides that grandparents may seek visitation if there is a pending child custody dispute or a grandparent may seek visitation of a grandchild if his or her child has died.

These provisions differ in no significant way from the Washington statute. Both permit a trial court to award visitation based upon the same "free-ranging" best-interests test condemned in *Troxel.* The "requirement" for both provisions that a child custody dispute is pending before a court is authorized to award third-party visitation is superficial at best. The mere fact of a pending action does not protect the fundamental parent-child liberty interest.

Under Michigan caselaw, a pending custody case can be defined as simply as a pending divorce proceeding between a child's parents. A court in a divorce action must by definition decide between two parents who are on equal footing constitutionally. However, a court's authority to decide between parents, who have the same constitutional rights vis-à-vis each other and their children, does not extend to granting visitation to third parties who have no inherent rights to custody or visitation.

Simply because parents are divorcing does not mean that they are unfit and lose the right to determine what is best for their child. A best interest test alone—comparing parents with third parties, without a showing of harm—is an insufficient basis to grant third parties visitation over the objections of a fit parent or parents, regardless of whether they are in a divorce or custody proceeding. Further, as noted in *Troxel,* the increased financial and emotional burden of third-person involvement in the litigation in itself may constitute an infringement of the parent-child liberty interest.

Whether there was a pending custody action was of no import in the Supreme Court's constitutional analysis. *Troxel* also specifically involved grandparents whose son was dead, and thus factually parallels the language of Michigan's grandparenting time statute. As in *Troxel,* however, that consideration did not render the Washington statute constitutional.

Finally, there is no protection of the fundamental parent-child liberty interest in Michigan's third-party visitation provisions simply because the statutes mention grandparents. Grandparents have no inherent constitutional rights of custody or visitation in grandchildren and cannot argue they are in any sense a protected class. See *Frame v Nehls,* infra (grandparents are not a protected class).

"As we have explained, the due process clause does not permit a state to infringe on the fundamental right of parents to make child-rearing decisions simply because a state judge believes a 'better' decision could be made." *Troxel*, 120 S Ct at 2064.

Implications for Third-Party Custody Cases

The constitutional analysis supporting the *Troxel* decision is all the more compelling in a custody context, where third parties seek to remove the fundamental custody, care, and control from a parent based on a subjective best interest comparison, not based on findings of parental unfitness (which focus on the individual).

> *The best interests of the child is a highly contingent social construction. Although we often pretend otherwise, it seems clear that our judgments about what is best for our children are as much the result of political and social judgments about what kind of society we prefer as they are conclusions based upon neutral or scientific data about what is "best" for children. The resolution of conflicts over children ultimately is less a matter of objective fact-finding than it is a matter of deciding what kind of children and families, what kind of relationships—we want to have.* Weaver-Catalana, Bernadette "The Battle for Baby Jessica: A Conflict of Best Interests," 43 Buffalo Law Review 583 (Fall 1995). [Emphasis added.]

In *In re Clausen*, 442 Mich 648, 502 NW2d 649 (1993), the Michigan Supreme Court specifically rejected a custody attempt by third-party custodians who "maintain[ed] that there is a protected liberty interest in their relationship with the child, which gives them standing." The court found that third parties have no constitutional rights to seek custody of another's child and applied constitutional protections only to the natural parent-child relationship, repeatedly recognizing the "*mutual* due process liberty interest" between natural parent and child. 442 Mich at 687, n 46. The *Clausen* court repeatedly stated that "[t]he mutual rights of the parent and child come into conflict *only when there is a showing of parental unfitness.* As we have held in a series of cases, the natural parent's right to custody is not to be disturbed absent such a showing, sometimes despite the preferences of the child." *Clausen* at 687. (Emphasis added.)

Limited Authority of the Trial Court

There is a common misconception that regardless of standing, a trial court may grant custody or visitation to third persons if it determines that it is in the child's best interest. This is a fallacy. The trial court's authority to award custody is limited by the fundamental constitutional rights as reiterated in *Troxel. Troxel* did not rely on standing arguments, the marital status of the parents, or on whether there was a pending custody case. Instead, the Court focused on the role of the state in substituting its judgment for that of fit parents and on the inappropriateness of employing the best interest standard:

> *"The [trial] judge's comments suggest that he presumed the grandparents' request should be granted unless the children would be "impact[ed] adversely." In effect, the judge placed on Granville, the fit custodial parent, the burden of disproving that visitation would be in the best interest of her daughters....*
>
> *The decisional framework employed by the Superior Court directly contravened the traditional presumption that a fit parent will act in the best interest of his or her child. Plurality Opinion, O'Connor, J., 120 S Ct at 2062.* (Emphasis added.)

Parents must first be proven unfit in appropriate probate proceedings with all the attendant substantive and procedural due process protections before a court may grant custody or visitation to third parties under a best interest analysis. *Bowie v Arder*, 441 Mich 23, 49 n 22 (1992); *In re Clausen*, supra.

Conclusion

With *Troxel*, advocates for the first time have a clear statement from our highest court that third-party visitation and custody statutes must be subjected to constitutional scrutiny. The lesson to be drawn from the case is that the parent-child liberty interest requires a presumption of constitutional proportion—fit parents make decisions that are in the best interests of their children. There must be a compelling state interest to overcome this constitutional presumption.

It is not enough for a court to substitute its view of what is best for children based on a subjective and far-ranging best interests test; there must be special protections before a court may intervene into the care, custody, and control of a child. Protecting the parental presumption safeguards against the bias and subjectivity inherent in third-party domestic cases. A finding of unfitness in an appropriate proceeding, with attendant substantive and procedural protections, is the suitable counterweight to the presumption. While there is always some subjectivity in a fitness standard, its more objective (not comparative) approach protects the fundamental right recognized in *Troxel.* ✦

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FOOTNOTE

1. These cases are both before and after *Troxel*. See e.g. *In the Matter of the Guardianship of Williams*, 869 P2d 661 (S Ct Kan 1994; *Peterson v Rogers*, 445 SE2d 901 (S Ct NC 1994); *In re Paternity of L.K.T.*, 665 NE 910, 912 (Ind Ct App 1996); *In re Marriage of Huber*, 723 NE2d 973, 975–976 (Ind App 2000); *Froelich v Clark*, No 40A01-0008-CV-253; 2001 WL 168171 (Ind App 02/21/2001); *Guardianship of Jenae K*, 539 NW2d 104, 196 Wis 2d 16 (Wis App 1995); *In Re A.R.A.*, 919 P2d 388, 391–392 (Mont 1996); *Litz v Bennum*, 111 Nev 35, 38, 888 P2d 438, 440 (1995); *Carter v Taylor*, 611 So 2d 874, 876 (Miss 1992); *Uhing v Uhing*, 488 NW2d 366, 370–72; 241 Neb 368 (Neb 1992); *Brewer v Brewer*, 533 SE2d 541 (NC App 2000); *Clark v Wade*, No S00A1610, 2001 WL 135672 (Ga 02/16/2001). See also *Frame v Nehls*, 452 Mich 171 (1996) (denying a grandparent equal protection claim on the basis that grandparents are not a protected class and grandparent visitation is not a protected interest).