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HOW THE UNITED STATES SUPREME COURT DECISION CHANGES THE CASE FOR GRANDPARENTS' RIGHTS

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BACKGROUND - THE CASE IN THE STATE OF WASHINGTON

Tommie Granville and Brad Troxel, though never married, had two daughters, Isabelle and Natalie. When their relationship ended in 1991, Brad lived with his parents, Jenifer and Gary Troxel. The girls spent their weekend visitations with their father at the Troxel home. Then, in May, 1993, Brad committed suicide. Tommie allowed the girls to continue their relationship with their paternal grandparents with regular visits. However, after Tommie married a man with children of his own, she told the Troxels that their visitation with the girls would be one short visit per month with no overnight stay, as she wanted her new family to bond into a unit. The Troxels filed suit, saying that they wanted to step into Brad's shoes and have the visitation he would have been entitled to, which they described as two

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Grandparents cont.

weekends of overnight visitation per month and two weeks of visitation each summer. *In re Troxel*, 87 Wash. App. 131, 133, 940 P. 2d 698, 698-699 (1977). During the course of the case through the appellate procedure, Ms. Granville's husband, Kelly Wynn, adopted Isabelle and Natalie. 137 Wash. 2d at 6, 969 P. 2d at 23; App. To Pet. For Cert. 76a-78a.

The Washington statute at issue here provides: "Any person may petition the court for visitation rights at any time including, but not limited to, custody proceedings. The court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances." Wash. Rev. Code Section 26.10.160(3). [1]

The trial court issued an oral ruling, entering a visitation decree ordering visitation one weekend per month, one week during the summer, and four hours on both of the paternal grandparents' birthdays. 137 Wash. 2d at 6, 969 P. 2d at 23. Ms. Granville appealed, and the Washington Court of Appeals remanded the case to the Superior Court for a written findings of fact and conclusions of law. On remand, the trial court found that the ordered visitation was in the girls' best interests.

The Washington Court of Appeals reversed the lower court's order and dismissed the Troxel's petition for visitation, stating that the Troxels lacked standing to seek visitation unless there was a pending custody action. The Washington Supreme Court granted the Troxel's petition for review, disagreeing with the Court of Appeals' decision and giving the Troxels standing. However, the Washington Supreme Court agreed with the Court of Appeals decision that the Troxels could not be granted visitation pursuant to Section 26.10.160(3), because the statute was unconstitutional. 137 Wash. 2d at 12, 969 P. 2d at 26-27.

The Washington Supreme Court held that the statute unconstitutionally infringed on the fundamental right of parents to raise their children. The court said that the constitution allows the state to interfere with a parent's right to raise their children only to prevent harm or potential harm to the child. *Id*. At 15-20, 969 P. 2d at 28-30. The Washington Supreme Court also stated that the statute was too broad, allowing any person to petition for visitation at any time with the only condition that the visitation serve the best interest of the child. *Id*. At 20, 969 P. 2d at 30.

The Troxels appealed to the United States Supreme Court, and were granted certiorari in 1999.

THE UNITED STATES SUPREME COURT DECISION, TROXEL V. GRANVILLE, USSC 99-138, DECIDED JUNE 5, 2000

Justice O'Connor announced the judgment of the Court and wrote the plurality opinion, joined by Chief Justice Rehnquist, Justice Ginsburg and Justice Breyer. Justices Souter and Thomas filed concurring opinions, and Justices Stevens, Scalia and Kennedy filed dis-

senting opinions. The judgment of the Washington Supreme Court was affirmed. The grandparents were denied the additional visitation they wanted.

The United States Supreme Court (USSC) grounded their decision on the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution, citing precedence.[2] The opinion states: "In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Troxel et vir. V. Granville,* No. 99-138

The Washington Statute: Justice O'Connor wrote that the Washington statute as applied in the instant case is "breathtakingly broad." *Id.* The statute states that any person may petition the court for visitation rights at any time and visitation may be granted any time the court determines that it is in the best interest of the child. Wash. Rev. Code Section 26.10.160(3). The USSC interpreted that language to mean that any third party seeking visitation can subject a parent's decision concerning visitation to a review by the state court, and found the statute to be unconstitutionally broad.

Applying the Facts of the Case: The USSC stressed the fact that the Troxels did not allege, and no court found, that Ms. Granville was an unfit parent. This is an important fact, as there is a presumption that fit parents act in the best interests of their children. *Parham v. J.R.*, 442 U.S. at 602.[3]

Additionally, the Court held that the trial court used very slender findings to determine the best interest of the children. The opinion states: "...this case involves nothing more than a simple disagreement between the Washington Superior Court and Granville concerning her children's best interests." *Id.*

Finally, the USSC was particularly concerned that the court gave no deference at all to Granville's determination of the best interests of her daughters and that the trial court gave no weight to the fact that Ms. Granville was allowing visitation prior to the filing of any action. The opinion pointed out that many other States provide that courts may not award visitation unless a parent has denied visitation to the third party. *Id.*[4]

Considering all of these factors together, the USSC found that "the visitation order in this case was an unconstitutional infringement on Granville's fundamental right to make decisions concerning the care, custody and control of her two daughters." *Id.*

Parameters of this decision: The USSC did not address the question of whether the Due Process Clause requires all nonparental visitation statutes to

include a showing of harm or potential harm to the child as a condition precedent to grant visitation. Also, the opinion states: "Because much state-court adjudication in this context occurs on a case-by-case basis, we would be hesitant to hold that specific nonparental visitation statutes violate the Due Process Clause as a *per se* matter." *Id.*[5]

NEVADA LAW

Currently, third party visitation is addressed by NRS 125C.050, which is written in a much narrower manner than the Washington statute in question. The Nevada statute limits the people who can petition for visitation to great grandparents and grandparents of the child or a person with whom the child has "established a meaningful relationship". NRS 125C.050(1) and (2). The petition can only be filed if the parents are divorced or separated, if one of the natural parents is deceased, or if the parental rights of one of the natural parents has been relinquished or terminated. NRS 125C.050(1)

Also, the statute requires that the court find the visits to be in the best interests of the child, and gives guidelines on what factors the court should consider. NRS 125C.050(3)

Nevada case law has upheld the rights of parents to make decisions regarding who should have visitation with their children. The current leading case in this matter is *Steward v. Steward*, 111 Nev. 295, 890 P. 2d 777 (1995), where the divorced parents agreed that the paternal grandparents should not have visitation. The Nevada Supreme Court reversed the district court's ruling that the grandparents should have visitation, interpreting the statute to have created a presumption against the court ordering visitation when the divorced parents agree that it would not be in the child's best interests. *Id.* Further, the Nevada Supreme Court specifically held that the statute set up a presumption that the court should not interfere with the decisions of natural parents. *Id.*[6]

NRS125C.050 complies with the requirements set out by the USSC in *Troxel* in the following manner:

- It is not as broad as the Washington statute. It limits the people who can petition for visitation and it limits the circumstances under which such a petition can be filed.
- It allows a third party petition for visitation to occur only when the family of the child is no longer considered to be intact; e.g. when the parents separate or divorce, when one of the parents dies, or when parental rights have been terminated.
- As interpreted by the Nevada Supreme Court, the statute requires deference to the parents' wishes.

It appears that if the Legislature decides to revise NRS 125C.050 to reflect the USSC's decision in *Troxel*, there are only two changes that may be needed. The first would be to incorporate language that specifically requires the court to defer to the natural parents' wishes as long as they are fit parents. The second would be to add language requiring that visitation be denied by the parent(s) before a petition can be filed.

HOW TROXEL WILL CHANGE FUTURE LITIGATION IN NEVADA OVER GRANDPARENTS' VISITATION RIGHTS.

The facts in *Troxel* seem surprisingly unique, considering that the USSC granted certiorari. The Washington statute was much broader than statutes on the same subject in other states. The case itself was unusual, in that there was only one fit parent whose decision had to be considered. Most of the time, the cases involve divorced parents who disagree over whether the grandparents should see the children, or they involve egregious circumstances in which parental rights have been terminated.

Therefore, it appears that there should be little change in the administration of Nevada law in the area of third-party visitations as a result of the decision from the USSC. Attorneys arguing the cases should address the due process issue, the deference to parents' wishes, and whether or not visitation has been denied by the parents, in addition to the other necessary requirements of NRS 125C.050. Any court order reflecting consideration of those points will comply with the USSC decision.

CONCLUSION

It is somewhat surprising that the USSC granted certiorari on this case. The constitutional issue of due process has been well settled and was followed by the Washington Supreme Court. The facts of the case were not typical. The Washington statute

was not typical. The USSC stated that they hesitate to declare all third-party visitation statutes unconstitutional because of the fact specific, case-by-case nature of this area of law.

Therefore, the decision appears to have little impact on the way Nevada deals with third-party visitation. The statute could be slightly revised and the arguments and decisions written with more precision in the areas of due process, deference to parental decisions and whether or not visitation has been denied, but no major changes should be necessary.

NOTES

[1] The Washington Revised Code, Section 26.10.160 addresses all visitation limitations. Subsection 3 addresses third party visitation, and this is that subsection in its entirety.

[2] See e.g. *Meyer v. Nebraska*, 262 U.S. 390, 399, 401 (1923) where it was decided that parents have a right to "establish a home and bring up children" and "to control the education of their own." Also, *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535 (1925), *Prince v. Massachusetts*, 321 U.S. 158 (1944), *Stanley v. Illinois*, 405 U.S. 645, 651 (1972), *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972), and *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

[3] See also *Reno v. Flores*, 507 U.S. at 304, which states that as long as a parent is fit, there is no reason for the State to question the ability of that parent to make the best decisions concerning the parent's children.

[4] e.g. Mis.. Code Ann., 93-16-3(2)(a); Ore. Rev. Stat. 109.121(1)(a)(B); R.I. Gen. Laws 15-5-24.3(a)(2)(iii)-(iv).

[5] See, e.g. Fairbanks v. McCarter, 330 Md. 39, 49-50, 622 A. 2d 121, 126-127 (1993); Williams v. Williams, 256 Va. 19, 501 S. E. 2d 417,418 (1988).

[6] At the time of the *Steward* decision, the statute was NRS 125A.340. It has since been revised to the current NRS 125C.050, but *Steward* remains the leading case on the issue of third party visitation.

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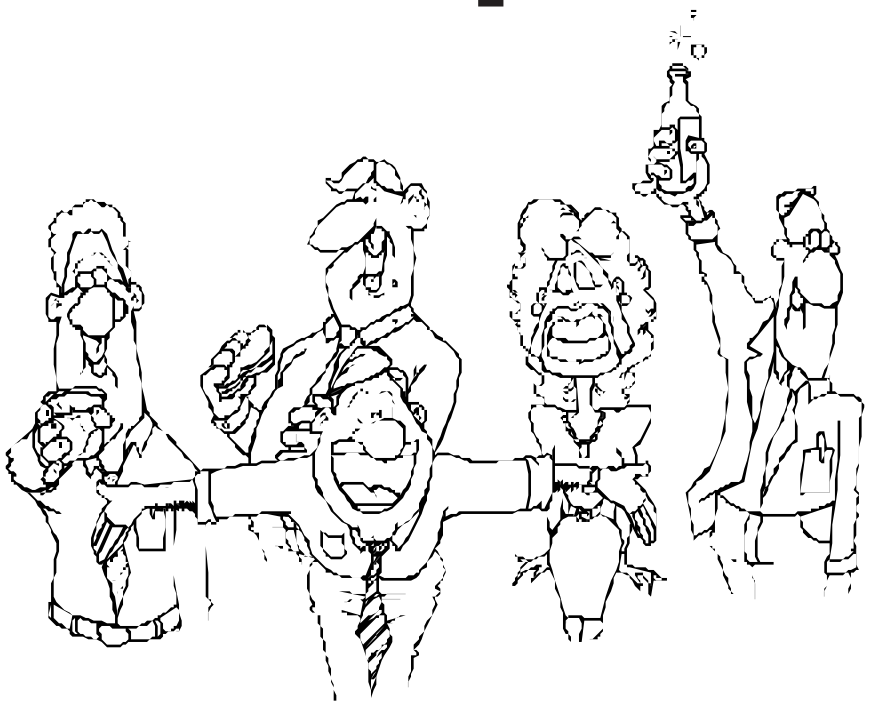

THE "FINANCIAL DIVORCE"

By Susan Davis

What is the "Financial Divorce"? It is the process of bringing a divorcing couple to a position of healthy financial independence to include as little comingled financial obligations as possible.

I am not a family law attorney, nor do I work in the legal world. I can only begin to imagine and empathize with the job that an attorney performs in getting two disappointed, confused, angry, always emotionally driven people through their divorce process. I do not envy the job you must accomplish!

As a loan consultant I am often on the receiving side of a client who has completed their divorce and years later remain financially intertwined with their ex-spouses. Their borrowing potentials are extremely limited and at times they are unable to secure a new mortgage. The situation is sad and completely unnecessary in today's age. In the past decade we have experienced the inception of a whole "new age" of banking products that lend resolution to financial independence for divorcing couples.

What kind of products are these? There are high loan value products designed specifically to pay spousal equities, products for borrowers with good credit but no present employment, and subprime products for borrowers with tremendous credit and debt problems. Fixed second mortgages and equity lines exist to consolidate debts and decrease monthly overhead. Government programs exist that can help borrowers that have experienced a Chapter 7 or 13 bankruptcy providing certain factors are in place.

EDUCATION AND AWARENESS

There is a tremendous need for family law attorneys to educate divorcing clients concerning their financial position and to help provide them with as much individual financial closure for the future as possible. Many couples divorce without realizing that they remain responsible for the mortgage on a piece of real property that they have just quit-claimed to a spouse. They do not know that the note secured on that property limits their own individual borrowing potential. Also, the manner in which the joint mortgage is paid can have serious impact on their credit.

Many people believe that if a credit card is given to a spouse in a divorce settlement it is no longer their obligation. Of course, the banks continue to report the payment history to the three main credit bureaus in the country until the account is officially closed. Again, if the account becomes delinquent both individual's credit scores are adversely affected. The bottom line is that many couples are unaware that the legal terms of a divorce settlement do not supersede any earlier dated joint financial application or commitments.

EXAMPLES AND RESOLUTIONS

1. An attorney referred a client to me to refinance the mortgage on a primary residence that she was receiving in her divorce. The property held a joint first mortgage utilizing the husband's VA benefits. The couple had experienced a Chapter 7 bankruptcy 1-1/2 years prior to the divorce. Both spouses thought they would not be able to get another mortgage for a seven-year period of time. This fact is no longer true.

The resolution for this couple is as follows: The spouse can be placed in a government FHA loan. The spouse must establish that it has been at least 18 months from the bankruptcy discharge date, that the spouse has established three healthy credit lines for over six months, and that the cause of the bankruptcy can be adequately explained and documented as no longer an element in the borrower's life. After a period of two years, with re-established credit lines, the other spouse will also be able to apply for another VA benefit loan and receive approval. This couple accomplished financial independence because of the existence of flexible products in

place to help them.

2. A realtor referred a client to me for a new home mortgage. He had perfect credit with the exception of one credit card that had ten late payments. His credit scores were very low as a result of this one account. He informed me that the card belonged to his ex-wife. It was listed in the settlement agreement as her obligation and that the card belonged to her for the duration of his marriage. At no time did he have possession of a card from this account. I explained to him that the divorce agreement would not have any influence with the bank or the credit bureaus if his name was on this account. I contacted the bank that issued the card and discovered that my client's ex-wife included his name, social security number, and monthly income on the credit card application. Unfortunately for my client, he was legally responsible for this obligation and his credit rating had been significantly damaged.

The resolution for this client consisted of placing him in a 2-year fixed subprime loan product at an interest rate of 9.75%. Needless to say, it was not what he had in mind for a mortgage, but it allowed him to purchase a home and receive the benefits of a tax deduction. It also afforded him time to close the account and have his credit scores rebound to good health. In 24 months he will be able to refinance to a healthy 8% loan product.

3. The following referral came to me from another attorney. The husband was concerned about quitclaiming two pieces of real property to his wife with his name still on the mortgages. The wife was concerned about satisfying the monthly financial obligation associated with three credit card accounts that she was receiving in the divorce. After reviewing the parties' overall financial picture, the sizable equity in the marital residence provided the parties with an acceptable resolution. Banks always offer borrowers the most favorable interest rate on a primary, owner-occupied home mortgage.

There presently exists a few cash-out refinance products that are "specifically" available to pay spousal equities in a divorce situation. The wife was able to secure this product in a consolidation loan. It left her with a 90% loan on the primary residence secured by a first trust deed. Her monthly financial payments were reduced by $550 and the husband now had his own borrowing potential available for his individual mortgage needs. They are financially severed, thereby decreasing the chances of on-going emotionally-charged disputes.

4. The following is a referral case I wish to share with you simply to increase the awareness level of how important it is that clients are educated and guided through financial closure. This is a client I remain in touch with and am hoping to help in the future. This young lady quitclaimed a home to her ex-husband in her divorce three years ago. It was never explained to her that she remained responsible for the joint mortgage until it was paid off. Approximately one year after the divorce, her ex-husband sold the home in a "contract of sale", leaving the original mortgage in place. Subsequently, the couple that purchased the home from the husband failed to make timely mortgage payments. My client was completely unaware that her credit was being destroyed until she attempted to secure a new mortgage of her own. She thought the mortgage had been paid off and closed at the time of the sale. Her ex-spouse felt it was his home and that he owed his ex-wife no explanations.

The bank was not sympathetic to her position. The bank's perspective is that they do not approve of a loan being transferred in a sale, without a formal assumption. However, they presently have four people to meet this obligation and they do not want the property. A bank will only move to acquisition as a last resort. This young lady is in this position solely due to lack of knowledge and awareness.

BENEFITS OF FINANCIAL CLOSURE

In conclusion, I would like to emphasize the significant benefits to a complete financial closure at the time of the divorce. Complete financial separation avoids expending time and money on post-divorce motions, and allows the parties to get on with their lives. It also benefits the children who will not be put in the position of hearing their parents discuss these unnecessary post-divorce issues. This will assist everyone to contribute to a more positive post-divorce family environment.

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