THE ENFORCEABILITY OF GRANDPARENT VISITATION ORDERS

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Third-Party Visitation Statutes

Starting about 30 years ago, legislatures across the country began to pass statutes giving standing to grandparents and other third parties to seek visitation of children. A number of these statutes had application only where the parents of the subject children were not married or living together, and living with the children. Within a few years, the trend had completed its march across the country, and today all 50 states have such laws. The original intent of these grandparent visitation statutes was to benefit the subject children through the presumed enriching experiences that were expected to ensue in the relationship between child and grandparent. They were seen as an extension of the public policy considerations that liberalized custody and visitation rules that de-gendered custody presumptions and encouraged minor children's ongoing associations with both parents, similar to the policy statement set forth in Nevada Revised Statute (NRS) 125.460(1). Most were based solely on the familiar "best interest of the child" standard.

Orders entered under these statutes can, perhaps ironically, quickly result in intra-familial conflict when parents, for any number of reasons, oppose visitation of their children by the grandparents. The various arguments, both pro and con, for grandparent and other third-party visitation necessarily invoke cultural notions of the definition of "family," as well as social-psychological and legal issues concerning who should have the power and right of decision making. This area of law is in a state of flux. Practitioners can be called upon to enforce custody and visitation orders under the enforcement provisions of the Uniform Child Custody Jurisdiction and Enforcement Act, NRS 125A.005,

et seq., and the Nevada State Advocate for Missing and Exploited Children. The Missing Children's Clearinghouse in the Office of the Attorney General is tasked with locating and recovering missing children who are detained in violation of a statutory or court-ordered custodial or visitation right. Because of this, pragmatic questions arise as to the constitutionality of the orders themselves when enforcement of an order under a grandparent visitation statute is requested.

A Parent's Fundamental Right to Rear a Child

There is a fundamental constitutional dimension to visitation and custody issues. The United States Supreme Court has ruled numerous times that a parent has a fundamental substantive due process right to the care, custody and control of his or her children; this right is one of the oldest and most fundamental ever recognized by the Supreme Court.[1] By 2000 the Supreme Court had long held that fit parents were presumed to act in the best interests of their children.[2] Because of the clear tension between grandparent visitation statutes that empowered judges to make visitation decisions and the fundamental constitutional right of parents to make these same decisions, undergirded by the *Parham* presumption, the stage was set for resolution of these competing interests.

The Constitutionality of Grandparent Visitation Statutes

In *Troxel v. Granville*, the Supreme Court invalidated the majority of grandparent visitation statutes in existence at that time. That case concerned the Washington state statute that permitted *any person* to seek visitation of a child *at any time* based on the best interest of the child standard. In finding the statute "breathtakingly broad," the Supreme Court found that the statute permitted any third party to subject parental decision making regarding visitation to state court review; it also granted judges veto power over those decisions, based on the judge's simple disagreement with the parent's decision. *Troxel* was clear that the parent-child relationship is the oldest fundamental liberty interest ever recognized by the Supreme Court. A child is not the mere creature of the state; those who nurture a child and direct his or her destiny have the fundamental right to direct the child's upbringing.

Although the *Troxel* court disapproved of the Washington statute on several grounds, its core failing was its failure to accord parental decision making *deference*:

> [A] parent's decision that visitation would not be in the child's best interest is accorded no deference. Section 26.10.160(3) contains no requirement that a court accord the parent's decision any presumption of validity or any weight whatsoever. Instead, the Washington statute places the best-interest determination solely in the hands of the judge.[3]

Therefore, according to the plurality in *Troxel*, without a deference provision, the statute violated the substantive due process rights of the parents. The concurring opinion of Justice Thomas went even further, stating that the government lacks both a legitimate government interest, and a compelling one, in second guessing a fit parent's decision about who the child may visit or socialize with.[4]

Troxel did not overturn all such statutes, however. A number of third party visitation statutes explicitly include the mandatory deference provision. Nevada law, NRS 125C.050(4), is consistent with *Troxel* in mandating deference to the decision making of parents in this regard, and does so to an elevated burden, providing:

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> If a parent of the child has denied or unreasonably restricted visits with the child, there is a rebuttable presumption that the granting of a right to visitation to a party seeking visitation is not in the best interests of the child. To rebut this presumption, the party seeking visitation must prove by clear and convincing evidence that it is in the best interests of the child to grant visitation.[5]

A number of statues from other states meet the *Troxel* standard of deference by the express statutory language. For example, California Family Code § 3104 contains the mandatory deference provision within the statutory language. The Utah statute, Utah Code § 30-5-2, also contains an express statutory deference provision supporting a parent's decision on visitation. The Rhode Island statute provides that the court must find to a standard of clear and convincing evidence that the petitioning grandparent has rebutted the presumption that the parent's decision to refuse the grandparent visitation was reasonable (R.I. Gen. Laws § 15-5-24.3(a)(2)(v)).

Other statutes were brought into constitutional compliance through court action, although appellate decisions are not wholly consistent. North Dakota's statute providing for grandparent visitation that acts on a showing solely under the best interest of the child standard, where grandparent visitation was *presumed* to be in the child's best interest, was ruled unconstitutional by the North Dakota Supreme Court before *Troxel*.[6] The statute was subsequently amended to provide that a court can grant the visitation request only on a finding that visitation is in the child's best interest and that it would not interfere with the parent-child relationship (N.D. Cent. Code § 14-09-05.1(1)). However, the Minnesota statute containing this same presumption supportive of the parent-child relationship (Minn. Stat. § 257C.08(6)(2)(ii)) was held by the Minnesota Court of Appeals to be insufficient under *Troxel's* command of deference for parental decision making. The court held that any grant of grandparent visitation under the Minnesota statute must accord the parent's wishes "special weight," and that the non-interference with the parent-child relationship element must be proved by the petitioner by clear and convincing evidence.[7]

The Arizona grandparent visitation statute is a continuing example of the traditional statutory model as it contains no deference provision (Ariz. Rev. Stat. Ann. § 25-409). After *Troxel*, the Arizona Court of Appeals added two non-statutory elements to the analysis: a presumption that a fit parent acts in his or her child's best interest when making visitation decisions, and the requirement that the judge must give "some special weight" to a fit parent's decision making.[8] This second added element appears to be a watered-down version of *Troxel's*

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deference command and may not, therefore, have brought the statute into constitutional compliance.

Several other statutes from different states that originally permitted a judge to order grandparent visitation solely under the best interest of the child standard were found to be deficient in appellate decisions under state constitutional law. These state law theories included a recognition of the sanctity of the parent-child relationship, the right to privacy and the failure to include a "harm" element. Appellate courts in Georgia and Tennessee, for example, invalidated statutes permitting a court to order grandparent visitation over a parent's objection without finding that the parent's limitation on visitation was harmful to the child.[9] Yet, the constitutionality of these two statutes and others like them is still questionable under *Troxel*, since they were amended in a manner *irrelevant* to the Supreme Court's holding. In *Troxel*, the Supreme Court expressly *reserved* the question of whether or not substantive due process requires a showing of harm, stating: "we do not consider the primary constitutional question passed on by the Washington Supreme Court – whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm…"[10] Because statutes like those in effect in Georgia and Tennessee fail to contain a statutory *deference* element, and neither statute has been interpreted by the state courts to include this mandatory due process provision, they are in conflict with *Troxel*.

This analysis is not exhaustive of all grandparent visitation statutes. It intends to highlight the constitutional standard

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that such statutes must meet, and suggests the wisdom of researching the status of any statute upon which a third party visitation order is grounded before an enforcement remedy is initiated under the UCCJEA, or an enforcement request is forwarded to the Missing Children's Clearinghouse. ■

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1 See, *Troxel v. Granville*, 530 U.S. 57, 68 (2000) ("There will normally be no reason for the State.")
2 *Parham v. J.R.*, 442 U.S. 584 (1979).
3 *Troxel*, 530 U.S. at 67.
4 Id. at 80 (Thomas, J., concurring).
5 See, *Rennels v. Rennels*, ___ Nev. ___, 257 P.3d 396 (2011) recognizing the existence of *Troxel* deference within the presumptive provisions of NRS 125C.050(4).
6 *Hoff v. Berg*, 595 N.W. 2d 285 (N.D. 1999).
7 *In re C.D.G.D. v. Darst*, 800 N.W. 2d 652 (Minn. App. 2011)
8 *McGovern v. McGovern*, 201 Ariz. 172, 33 P.3d 506 (Ariz. App. 2001).
9 *Brooks v. Parkerson*, 454 S.E.2d 769 (Ga. 1995). *Ellison v. Ellison*, 994 S.W. 2d 623 (Tenn. App. 1999); see, Ga. Code Ann. § 19-7-3 (2011); Tenn. Code Ann. § 36-6-307 (2011).
10 *Troxel*, 530 U.S. at 73.