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LAW AND THE FAMILY

**"GRANDPARENT VISITATION RIGHTS, NEW YORK STATE  
AND THE CONSTITUTION"**

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LAST YEAR we reported in The New York Law Journal that the United States Supreme Court granted certiorari to *Troxel v. Granville*, [FN1] an appeal involving the constitutionality of Washington's nonparent visitation statute.

We said that where a decision relating to a child is involved, regulations imposing a burden on it may be justified only by compelling state interests, because the right to rear a child is protected by the Due Process clause of the Fourteenth Amendment. We suggested that when the natural parents are alive, the state's compelling interest is sufficient to allow it to determine, in the "best interest of the child", the extent to which the child's contacts with its natural family should be interfered with, only upon a showing of harm to the child.

We concluded that a grandparent visitation statute which applies the "best interest" analysis, and does not require a showing of harm to the child before state interference can be authorized, is unconstitutional.

The 'Troxel' Case

In *Troxel v. Granville*, [FN2] the Supreme Court held that the grandparent visitation order issued by the Washington Superior Court was an unconstitutional infringement on the mother's fundamental right to make decisions concerning the care, custody, and control of her two daughters, and that the Washington statute, as applied in this case, was unconstitutional. The Supreme Court rested its

decision on "the sweeping breadth" of the Washington statute and the application of its "broad, unlimited power". The Court cautioned that it did 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 or potential harm to the child as a condition precedent to granting visitation.

Section 26.10.160(3) of the Revised Code of Washington permits "[a]ny person" to petition a superior court for visitation rights "at any time," and authorizes that court to grant such visitation rights whenever "visitation may serve the best interest of the child." Jennifer and Gary Troxel petitioned for the right to visit their grandchildren, Isabelle and Natalie Troxel. Respondent Tommie Granville, the children's mother, opposed the petition.

Tommie Granville and Brad Troxel never married but had a relationship that ended in June 1991. They had two daughters. Jennifer and Gary Troxel were Brad's parents. After Tommie and Brad separated, Brad lived with his parents and regularly brought his daughters to their home for weekend visitation. Brad committed suicide in May 1993. The Troxels continued to regularly see the girls. However, in October 1993, Tommie Granville informed the Troxels that she wished to limit their visitation to one short visit per month.

In December 1993, the Troxels commenced an action in the Washington Superior Court to obtain visitation rights. Wash. Rev. Code, s26.10.160(3) 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."

The Troxels requested two weekends of overnight visitation per month and two weeks of visitation each summer. Granville did not oppose visitation, but asked the court to order one day of visitation per month with no overnight stay. In 1995, the Superior Court entered a visitation decree ordering visitation one weekend per month, one week during the summer, and four hours on both of the petitioning grandparents' birthdays.

Granville appealed, during which time she married. The Washington Court of Appeals remanded the case to the Superior Court. On remand, the Superior Court found that visitation was in the children's best interests. Approximately nine months after the remand order was entered, Granville's husband formally adopted the children.

The Washington Court of Appeals reversed the Superior Court's visitation order and dismissed the Troxels' petition for visitation, holding that nonparents lack standing to seek visitation under s26.10.160(3) unless a custody action is pending.

## Decision Based on U.S. Constitution

The Washington Supreme Court affirmed. It found that the plain language of s26.10.160(3) gave the Troxels standing to seek visitation, irrespective of whether a custody action was pending. It agreed with the Court of Appeals' conclusion that the Troxels could not obtain visitation pursuant to s26.10.160(3). It rested its decision on the federal Constitution, holding that s26.10.160(3) unconstitutionally infringed on the fundamental right of parents to rear their children. The Washington Supreme Court found that the Constitution permits a State to interfere with that right only to prevent harm or potential harm to a child. Section 26.10.160(3) failed that standard because it did not require a showing of harm. And, by allowing "'any person' to petition for visitation of a child at 'any time,'" the Washington visitation statute was too broad. The Washington Supreme Court held that "[p]arents have a right to limit visitation of their children with third persons," and that between parents and judges, "the parents should be the ones to choose whether to expose their children to certain people or ideas."

The United State Supreme Court affirmed in a 4-3 opinion written by Justice Sandra Day O'Conner, in which Chief Justice William H. Rehnquist, Justice Ruth Bader Ginsburg and Justice Stephen G. Breyer joined. It held that s26.10.160(3), as applied here, violated the U.S. Constitution.

Justice O'Connor pointed out that the Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law," and that the Court has long recognized that the Amendment's Due Process Clause, like its Fifth Amendment counterpart, "guarantees more than fair process." It also includes a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests." She noted that the liberty interest at issue, the interest of parents in the care, custody, and control of their children, "is perhaps the oldest of the fundamental liberty interests recognized by this Court." She also pointed out the "extensive precedent", whereby "the court has recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children." In light of this, she concluded that "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."

Law Termed 'Too Broad'

The Court held that s26.10.160(3), as applied, unconstitutionally infringed on that fundamental parental right because it was too broad. Its language effectively permits any third party seeking visitation to subject any decision by a parent concerning visitation of the parent's children to state- court review. Moreover, she noted, "a parent's decision that visitation would not be in the child's best interest is accorded no deference," as s26.10.160(3) contains no requirement that a court accord the parent's decision any weight. Instead, it places the best-interest determination solely in the hands of the judge. In effect, in the State of Washington a court can disregard and overturn any decision by a fit custodial parent concerning visitation whenever an affected third party files a visitation petition, based solely on the judge's determination of the child's best interests.

The Superior Court's order was not founded on any special factors that might justify state interference with Granville's fundamental right to make decisions concerning the rearing of her two daughters. The Troxels did not allege that Granville was an unfit parent. The court pointed out that this aspect of the case is important, for there is a presumption that fit parents act in the best interests of their children, and "so 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 ... question the ability of that parent to make the best decisions concerning the rearing of that parent's children...."

The Court found that the problem here was when the court intervened, it gave no weight to Granville's determination of her daughters' best interests. The Court apparently applied exactly the opposite presumption, employing a decisional framework which "directly contravened the traditional presumption that a fit parent will act in the best interest of his or her child." That presumption failed to provide any protection for Granville's constitutional right to make child-rearing decisions. The Court stated that "if a fit parent's decision of the kind at issue here becomes subject to judicial review, the court must accord at least some special weight to the parent's own determination."

The Court concluded that the visitation order was an unconstitutional infringement on Granville's fundamental rights. The Superior Court failed to accord the determination of a fit custodial parent any material weight. The Due Process Clause does not permit a State to infringe on the right of parents simply because a state judge believes a "better" decision could be made.

New York's Law

New York's Domestic Relations Law (DRL) s72, which gives grandparents an independent right to seek visitation with their grandchildren, may be criticized for

many of the reasons that the Washington statute was declared unconstitutional. It provides, in part:

Where either or both of the parents of a minor child, residing within this state, is or are deceased, or where circumstances show that conditions exist which equity would see fit to intervene, a grandparent or the grandparents of such child may apply to the supreme court ... and ... the court, by order, after due notice ... may make such directions as the best interest of the child may require, for visitation rights for such grandparent or grandparents in respect to such child.

In *Emanuel S. v. Joseph E.*, [FN3] the Court of Appeals held that DRL 72 may be applied to grant "standing" to grandparents to seek visitation with a grandchild when the nuclear family is intact and despite the parents' objection. The threshold issue for seeking grandparent visitation under the New York statute is to establish "standing" to seek visitation by coming within the provisions of "death of one parent, or equitable circumstances exist which equity would see fit to intervene," which permit the Court to entertain the petition. Where both parents are alive, grandparents must establish that "equity would see fit to intervene" before they have the right to attempt to meet the burden of establishing that visitation is in the "best interests" of the child. The Court of Appeals liberally defined these "circumstances" in *Emanuel S.* as a "sufficient existing relationship" that has been fostered by the grandparents.

Like in *Troxel*, the statutory language effectively permits any grandparent seeking visitation, except where the parents are deceased, to subject any parent's decision concerning visitation to state-court review. Moreover, once the visitation petition has been filed and the court determines that the grandparent has "standing," a parent's decision that visitation would not be in the child's best interest is accorded no deference. DRL 72 contains no requirement that a court accord the parent's decision any weight. Instead, it places the best-interest determination solely in the hands of the judge. Therefore, a court can disregard and overturn any decision by a fit custodial parent concerning visitation whenever an affected grandparent files a visitation petition, based solely on the judge's determination of the child's best interests.

## Conclusion

Except where both parents are deceased, the New York statute is not founded on any special factors that might justify the state's interference with a parent's fundamental right to make decisions concerning the rearing of his child. It does not require a showing of unfitness, disregarding the presumption that fit parents act in the best interests of their children. Moreover, the statute fails to provide any protection for a parent's constitutional right to make child-rearing decisions.

It appears to us that the New York statute unconstitutionally infringes on a parent's fundamental right to make decisions concerning the care, custody, and control of his child.

FN(1) 31 Wash 2d 1, 969 P2d 21.

FN(2) \_\_ US \_\_, (# 99-138), 137 Wash 2d 1, 969 P2d 21, affirmed.

FN(3) 78 NY2d 178, 573 NYS2d 36.

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