

**GRANDPARENTS, WHERE THEY STAND NOW:
TROXEL, AN ANALYSIS OF
THE U.S. SUPREME COURT RULING**

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I. INTRODUCTION

This article will discuss the holding in the U.S. Supreme Court case Troxel v. Granville, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49, 68 USLW 4458 (U.S. 2000), (hereafter “Troxel”). This article will also discuss the affects of the opinion and holding in Troxel on other state grandparent visitation statutes including the Texas Family Code statute allowing grandparents to petition for court-ordered visitation.

The big question raised by Troxel, which is not answered very conclusively by the U.S. Supreme Court, is whether the Due Process Clause of the Fourteenth Amendment creates a situation where all third party visitation statutes that do not require a showing of harm or unfitness of the parent are unconstitutional. Following Troxel, it has become apparent that state courts seem to hedge on the question of facial constitutionality raised by third party visitation statutes.

II. TROXEL V. GRANVILLE

In Troxel, the U.S. Supreme Court found a broad Washington statute allowing a third party to petition for visitation rights with a child unconstitutional. In their decision, the U.S. Supreme Court stated that a judge cannot ignore the wishes of a fit parent when determining if visitation should be awarded to a third party. The U.S. Supreme Court found that “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 inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning rearing of that parent’s children...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.” Troxel at 68.

In Troxel, paternal grandparents petitioned for visitation rights under a Washington statute 26.10.160(3), which stated “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 § 26.10.160(3) (West 1994). The trial court ordered visitation for the grandparents, and the mother appealed to the Washington Supreme Court which reversed, finding the statute was overly broad and therefore unconstitutional under the Fourteenth amendment of the U.S. Constitution.¹ The U.S. Supreme Court

¹ All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny

granted certiorari and affirmed the decision of the Washington Supreme Court.

A. The Facts

Brad Troxel was the father of the two children at interest in the case. Tommie Granville, the mother of the two children, and Troxel were not married, but both participated in the rearing of the children. Shortly after Troxel committed suicide, a dispute arose between Granville and the paternal grandparents regarding the grandparent's visitation rights with the two children. Granville never denied the grandparent's visitation with the two children, but only wanted to limit the amount of visitation that the grandparents were requesting. The grandparents then petitioned the state for court-ordered visitation rights with the children.

B. The Decision

In reviewing the Washington statute 26.10.160(3), the U.S. Supreme Court looked at whether the statute, as applied to Granville and her family, violated the Due Process Clause of the Fourteenth Amendment. The U.S. Supreme Court found that the statute was too broad in that it allows a judge to ignore the wishes of the parent without any showing that the parent is unfit. The decision for third party visitation was based solely on the judge's determination of the child's best interest and ignored the

to any person within its jurisdiction the equal protection of the laws. U.S.C.A. Const. Amend. 14. Section 1, Due Process.

parent's determination of the child's best interest. The U.S. Supreme Court would not consider whether Due Process requires *all* third party visitation statutes to have a proof of harm as a precedent to visitation, but only found the Washington statute unconstitutional.

III. ARGUMENTS ASSERTED IN TROXEL

A. Fundamental Right

The liberty or right at interest in Troxel is the interest of parents in the care, custody, and control of their children. This is perhaps the oldest of the fundamental liberty interests recognized by the U.S. Supreme Court. Troxel at 65. For many years the U.S. Supreme Court has upheld a parent's right to nurture and control the upbringing of their children. See Meyer v. Nebraska, 262 U.S. 390 (1923) (the U.S. Supreme Court found the Due Process Clause protects a parent's right to "establish a home and bring up children"), Pierce v. Society of the Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510 (1925) (the U.S. Supreme Court found a statute unconstitutional which interfered with a parent's right to direct the upbringing and education of children under their control), Wisconsin v. Yoder, 406 U.S. 205 (1972) (the history and culture of Western civilization reflect a strong tradition of parental concern for the nurturing and upbringing of their children). There is an extensive precedent which relies on the Due Process Clause of the Fourteenth Amendment's protection of parent's fundamental right to make these decisions regarding their children.

The Due Process Clause provides a

heightened protection against government interference with certain fundamental rights and liberties. The U.S. Supreme Court found that it is “cardinal that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.” Troxel at 65. By allowing the State to interfere with a parent’s decision regarding who can have visitation with their children and for what duration is an infringement upon the fundamental constitutional right of parents to make decisions regarding the upbringing of their children. See Lulay v. Lulay, 739 N.E.2d 521, 250 Ill.Dec 758 193 Ill.2d 455 (Ill. Oct 26, 2000).

B. Strict Scrutiny

Although the plurality opinion in Troxel does not articulate a standard of review under which they apply the Washington statute, most courts pre-Troxel and post-Troxel apply strict scrutiny to infringements of fundamental rights. See Tully v. Edgar, 171 Ill. 2d 297, at 304-305 (1996); Lulay. If a statute infringes upon a fundamental constitutional right, the court will examine the statute under the strict scrutiny standard. To withstand this standard, a statute must serve a compelling state interest, and be tailored narrowly to serve that compelling state interest.

In Troxel, the U.S. Supreme Court found that the state’s interest in protecting the children does not outweigh a fit parent’s interest in the care, custody, and control of their children. As the U.S. Supreme Court has recognized, it is foremost “with us that the custody, care

and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations that state can neither supply nor hinder.” Prince v. Massachusetts, 321 U.S. 158, 166, 88 L. Ed. 645, 652, 64 S. Ct. 438, 442 (1944). The state should not impose its judgment over the judgment of a parent who is found to be fit, and therefore a statute which promotes a state’s power over a parent’s fundamental liberty interest in raising their children serves no compelling state interest. Troxel at 59.

The second requirement of the strict scrutiny standards is that the statute must be narrowly tailored to fit the compelling state interest. Tully at 304. Since the U.S. Supreme Court found because there is no compelling state interest served by this statute, the issue of narrowness does not really need to be addressed. But the U.S. Supreme Court did find the Washington third party visitation statute to be breathtakingly broad, allowing “*any person*” to petition the court for “visitation rights at *any time*,” and the court may grant the request for visitation when it finds it “may serve the best interest of the child.” WASH. REV. CODE Section 26.10.160(3) (West 1994) (emphases added). Once the visitation petition has been filed with the court and the matter is placed before a judge, a parent’s decision that visitation would not be in the child’s best interest is accorded no deference. Should the judge disagree with the parent’s estimation of the child’s best interests, the judge’s view prevails. Thus, in Washington, a court can disregard and overturn any decision by a fit custodial parent concerning visitation

whenever a third party affected by the decision files a visitation petition, based solely on the judge's determination of the child's best interests. If the U.S. Supreme Court had found a compelling state interest, the broadness of the statute would have undoubtedly caused it to fail the strict scrutiny test.

C. Fit Parent Presumption

The U.S. Supreme Court relies on a presumption that fit parents act in their child's best interest. Troxel at 58. So long as the parent adequately cares for their child, there will normally be no reason for the state to inject itself into the private realm of the family. The decision of Washington's lower court directly contravened the traditional presumption that a fit parent will act in the best interest of their child. In that respect, the lower court's presumption failed to provide any protection for Granville's fundamental constitutional right to make decisions concerning the rearing of her own children.

D. No Denial of Visitation

The U.S. Supreme Court also addressed the fact that Granville never sought to cut off visitation entirely, but instead asked that the duration of any visitation order be shorter than what the petitioners requested. Troxel at 71. The lower court gave no weight to Granville having agreed to some visitation even before the filing of the visitation petition or subsequent court intervention. Significantly, many other states expressly provide by statute that courts may not award visitation unless a parent has denied

visitation to the concerned third party.²

IV. STATE LAWS AND JUDICIAL REACTIONS POST-TROXEL

A. Mixed Reaction to Troxel Decision

In state courts, the quest to understand and apply the decision in Troxel to their own third party visitation statutes has begun. States have followed different paths in deciding what to do with Troxel, some choosing to follow the tone of the decision in Troxel and some declining to extend the U.S. Supreme Court's ruling in Troxel.

B. Maine's Grandparents Visitation Act

Shortly after the Troxel decision, in Rideout v. Riendeau the Maine Supreme Court found the Maine Grandparents Visitation Act (hereafter "the Act") allowing grandparents to petition for visitation rights was tailored narrowly enough to pass the strict scrutiny test. See Rideout v. Riendeau, 761 A.2d 291, 2000 ME 198 (Me. Nov. 13, 2000). The Maine Supreme Court's decision relied on both the purpose and the language of the Act. Only a particular subsection of the Act was before the court, and therefore the court had no reason to evaluate the remaining subsections.³ As

² See e.g., Miss Code Ann. § 93-16-3(2)(a) (1994); Ore. Rev. Stat. § 109.121(1)(a)(B) (1997); R.I. Gen. Laws § 15-5-24.3(a)(2)(iii-iv) (Supp. 1999).

³The section before the Maine Supreme Court was § 1803(1)(B). A grandparent of a minor child may petition the court for reasonable rights of visitation or access if: There is sufficient existing relationship between the grandparent and the child.

for the subsection in question, the court felt it could be applied in a manner consistent with the Due Process Clause, and was therefore constitutional.

The Act was enacted to allow certain grandparents to seek access to their grandchildren. The specific subsection in question states that a grandparent may petition for reasonable visitation if there is an existing relationship between the grandparent and the grandchild. The Maine Supreme Court found that the State demonstrated that it has a “compelling interest in providing a forum in which a grandparent, who has acted as a parent to the child at issue, may seek continuing contact with the child.” Rideout at 17.

The State finds the Act is narrowly tailored to serve the identified compelling state interest. The Maine Supreme Court used several aspects of the Act in their analysis. A grandparent must first establish standing before litigation may commence on a petition. 19-A M.R.S.A. §§ 1803(1), 1803(2)(A)-18003(2)(C). Next, the court may consider any objection of the parents concerning an award of rights of visitation or access by the grandparents. 19-A M.R.S.A. § 1803(2)(D). Last, the court may not grant visitation if doing so would significantly interfere with any parent-child relationship or with the parent’s rightful authority over the child. 19-A M.R.S.A. §1803(3). These requirements provide protection against foundationless invasions into an intact family’s life. The court felt these requirements were enough to preserve the constitutional protection afforded parents

Grandparent Visitation Act, 19 A.M.R.S.A. §§ 1801-1805 (1998).

in controlling the rearing and upbringing of their children.

The court concluded that in this specific case, where the grandparents had raised the children and acted as the children’s parents for a significant period of time, the Act served a compelling state interest in addressing the relationship between the children and the people who had cared for them as parents. The Act is also narrowly tailored as to accomplish the compelling interest. It may be applied in this case without violating the constitutional rights of the parents.

C. Illinois Marriage and Dissolution of Marriage Act

An Illinois Court in Lulay v. Lulay (hereafter “Lulay”), also followed the Troxel opinion by setting out the explicit fundamental right which a parent has over a grandparent. See Lulay v. Lulay, 739 N.E.2d 521(Ill. Oct 26,2000). The Illinois statute that allowed grandparents to seek reasonable visitation privileges was Section 607(b)(1) of the Illinois Marriage and Dissolution of Marriage Act.⁴ In Lulay, the court stated:

“By allowing the State to interfere with a parent’s decision regarding who can have visitation with their children

⁴Section 607(b)(1) of the Illinois Marriage and Dissolution of Marriage Act provides: “(b)(1) The court may grant reasonable visitation privileges to a grandparent, great-grandparent, or sibling of any minor child upon petition to the court by the grandparents, great-grandparents, or on behalf of the sibling, with notice to the parties required to be notified under Section 601 of this Act, if the court determines that it is in the best interests and welfare of the child, and may issue any necessary orders to enforce such visitation privileges. 750 ILCS 5/607(b)(1) (West 1998).

and for what duration is an infringement upon the fundamental constitutional right of parents to make decisions regarding the upbringing of their children.”

The court in Lulay reviews the statute under the strict scrutiny standard, finding the legislature must use the least restrictive means to serve the compelling state interest. The court turns to Troxel to conclude that the liberty interest involved, a parent having the right to raise their child, is a fundamental right, and therefore the strict scrutiny standard should be correctly applied.

In Lulay, the Illinois court further contends that the statute does not serve a compelling state interest and therefore does not satisfy the strict scrutiny test. Id. at 532. Therefore the section 607(b)(1) of the statute is an unconstitutional infringement on the parents fundamental liberty interest in raising their children. But because the court finds that the statute as applied to the facts in the case is unconstitutional, the court does not address the argument on whether section 607(b)(1) is facially unconstitutional. Like Troxel, the decision in Lulay seems to dodge the big question raised in third party visitation statutes: whether the Due Process clause of the Fourteenth Amendment creates a situation where all third party visitations statutes that do not require a showing of harm are unconstitutional .

D. New York’s Domestic Relations Law, Section 72

The New York statute giving grandparents standing to petition for court-ordered visitation was also found

unconstitutional soon after the U.S. Supreme Court’s decision in Troxel. In Hertz v. Hertz, 717 N.Y.S.2d 497, 186 Misc.2d 222, 2000 N.Y. Slip Op. 20530 (N.Y.Sup. Oct. 26, 2000), a Brooklyn Supreme Court ruled that in accordance with the recent holding of the U.S. Supreme Court in Troxel, the New York statute was an unconstitutional infringement on a parent’s fundamental right to make custody decisions affecting their children.

New York Domestic Relations Law Section 72 provides for a special court proceeding allowing grandparents to obtain visitation rights with their grandchildren.⁵ Although the New York statute was narrower than the broad Washington statute in that it only applied to grandparents and not any third person, the New York law was found to be similarly unconstitutional. The New York law contains no provision that would require the court to grant a parent’s decision any presumption of validity instead allowing the court to impose its own best interests standard. Ultimately this allows the court to ignore the wishes of a parent and substitute its own judgment for that of the parent.

Absent allegations that any of the parents involved are unfit, the court should not ignore the wishes of those parents and substitute its own judgment for that of the parent. Hertz at 499. This creates a violation on the parents’ substantive due process rights to make decisions regarding

⁵New York Domestic Relations Law, Section 72 provides: Special proceeding or habeas corpus to obtain visitation rights in respect to certain infant grandchildren.

the care, custody, and control of their children.

V. TEXAS POST-TROXEL

A. Texas Family Code Statute

The Texas Family Code Section 153.433 entitled “Possession of and Access to Grandchild” states that the court “shall order reasonable access to the grandchild by a grandparent if” a grandparent petitions for the right and certain elements of the statute are met TEX.FAM.CODE ANN. § 153.433 (West 1998) (emphasis added).⁶ By using the

⁶ The court shall order reasonable access to a grandchild by a grandparent if:

(1) at the time the relief is requested, at least one biological or adoptive parent of the child has not had that parent's parental rights terminated; and

(2) access is in the best interest of the child, and at least one of the following facts is present:

(A) the grandparent requesting access to the child is a parent of a parent of the child and that parent of the child has been incarcerated in jail or prison during the three-month period preceding the filing of the petition or has been found by a court to be incompetent or is dead;

(B) the parents of the child are divorced or have been living apart for the three-month period preceding the filing of the petition or a suit for the dissolution of the parents' marriage is pending;

(C) the child has been abused or neglected by a parent of the child;

(D) the child has been adjudicated to be a child in need of supervision or a delinquent child under Title 3;

(E) the grandparent requesting access to the child is the parent of a person whose parent-child relationship with the child has been terminated by court order; or

(F) the child has resided with the grandparent requesting access to the child for at least six months within the 24-month period preceding the filing of the petition. TEX. FAM. CODE §

mandatory term “shall,” the statute seems to have a binding effect regarding grandparent visitation. This appears to be in direct conflict with the fundamental right of parents in the care, custody and control of their children.

The right to privacy in family issues has long been recognized by both the U. S. Supreme Court and the Texas Supreme Court.⁷ Child rearing is a privacy right protected by the Due Process Clause of the Fourteenth Amendment.⁸ As a fundamental right, the government cannot infringe upon this right without a compelling state interest, or unless a statute is tailored narrowly.⁹

Although the Texas Family Code § 153.433 is narrow in that it only applies to grandparents, it mandates the granting of visitation rights to grandparent who petition without recognizing the parents beliefs of what is in their child’s best interests. The Texas statute replaces the parents judgment in raising their children for the judgment of the court. Following the holding in the U.S. Supreme Court’s case Troxel, the statute as worded is an unconstitutional infringement on a parent’s right to the custody, care, and control of their children.

B. Texas’ Reaction to the Holding in Troxel

153.433 (Vernon 1996 & Supp. 1999).

⁷See City of Sherman v. Henry, 928 S.W.2d 464, 467-468 (Tex. 1996).

⁸See Bowers v. Hardwick, 478 U.S. 186 (1986).

⁹Id. Tully.

Applying the findings in Troxel to the Texas Family Code, the Beaumont Court of Appeals has expressed that third party visitation statutes are an unconstitutional invasion on parental rights. In Re Aubin, (hereafter “Aubin”) the Court of Appeals in Beaumont found the mother’s decision on whether her children have any contact with third parties was an exercise of her fundamental right as a parent, which is protected by the Due Process Clause. See In Re Aubin, 29 S.W.3d 199 (Tex.App. -Beaumont 2000). The court stated:

“Absent a finding, supported by evidence, that the safety and welfare of the children is significantly impaired by the denial of the Burks’ [a third party’s] visitation. Aubin’s decision regarding whether the children will have any contact with the Burks [a third party] is an exercise of her fundamental right as a parent.”

As the U.S. Supreme Court found in Troxel, the Due Process Clause does not permit a state to infringe on the fundamental rights of parents to make child-rearing decisions simply because a state judge believes a better decision could be made.

VI. WHAT DOES TROXEL MEAN TO THE PRACTICING FAMILY LAW ATTORNEY?

As a practicing family law attorney in Texas, you should be very aware of problems that may present themselves in the event a client comes to you with custody issues. The decision in Troxel may apply to many different fact

situations, and as an attorney you should be aware when to look to Troxel for guidance. Some situations in which Troxel may apply are:

- The grandparents have court ordered visitation rights.
- The grandparents want court-ordered visitation rights.
- Your client’s spouse is deceased, but the grandparents of the deceased spouse want to remain in the grandchildren’s lives.
- Your former spouse does not have visitation rights, but may attempt to seek these rights through the grandparents.
- For a length of time the grandparents helped to raise the grandchildren, and want visitation or access to the children to be ordered by the court.
- The parents agree they do not want the grandparents to obtain access to the children, but the grandparent wants this privilege.

VII. CONCLUSION

In Troxel, the U.S. Supreme Court concluded that the statute, as applied to the facts of the case, is an unconstitutional infringement on the mother’s fundamental liberty interest in raising her children. The U.S. Supreme Court found the Washington statute is unconstitutional as applied because it equates grandparents with natural parents and allows courts to determine custody disputes between them utilizing solely the best interest standard, without first determining detriment to the child. The statute is an unconstitutional infringement on a parent’s fundamental

right in the care, custody, and control of their children, which is perhaps the oldest of the fundamental liberty interests recognized by the Supreme Court.

The U.S. Supreme Court rests their decision on both the points that there is no compelling state interest served with this statute and the Washington statute is overwhelmingly broad. The U.S. Supreme Court refuses to address whether the Due Process Clause of the Fourteenth Amendment requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation.

The effect of Troxel on the Texas Family Code's grandparent access statute is yet to be determined. Texas courts appear to be following the decision in Troxel, yet like many other states, they have not yet reached the bigger question of whether the grandparent visitation statutes are facially unconstitutional.