

Parent Prevails Over Grandparents on Child Visitation

by Kristine Kim

The eagerly anticipated decision in *Troxel v. Granville*, widely known as the “grandparents’ rights case,” was handed down by the U.S. Supreme Court’s on June 5.¹ Commentators had been hypothesizing for months as to how the Court would rule on the Washington state statute which gave anyone, related or unrelated, extensive rights to seek court-ordered visitation with children over the objections of the parents. Although the facts in *Troxel* specifically concerned grandparent visitation, the case was of great interest to other groups wishing to establish or preserve relationships with children. In a 6-3 vote, the justices struck down the statute as a violation of substantive due process, with Justice O’Connor, for the plurality, describing it as “breathhtakingly broad.”

The case grew out of a complaint from Gary and Jenifer Troxel, a couple in Anacortes, Washington, whose son Brad was the unmarried father of two young daughters. The Troxels had had an ongoing relationship with their granddaughters, Isabelle and Natalie. Brad

committed suicide in 1993, and after his death the Troxels and Tommie Granville, the girls’ mother, were unable to agree on continued visitation. The grandparents wanted to have the girls with them overnight on two week-ends per month and for two weeks during the summer, while the mother wished to limit visits to one day per month with no overnight stay.

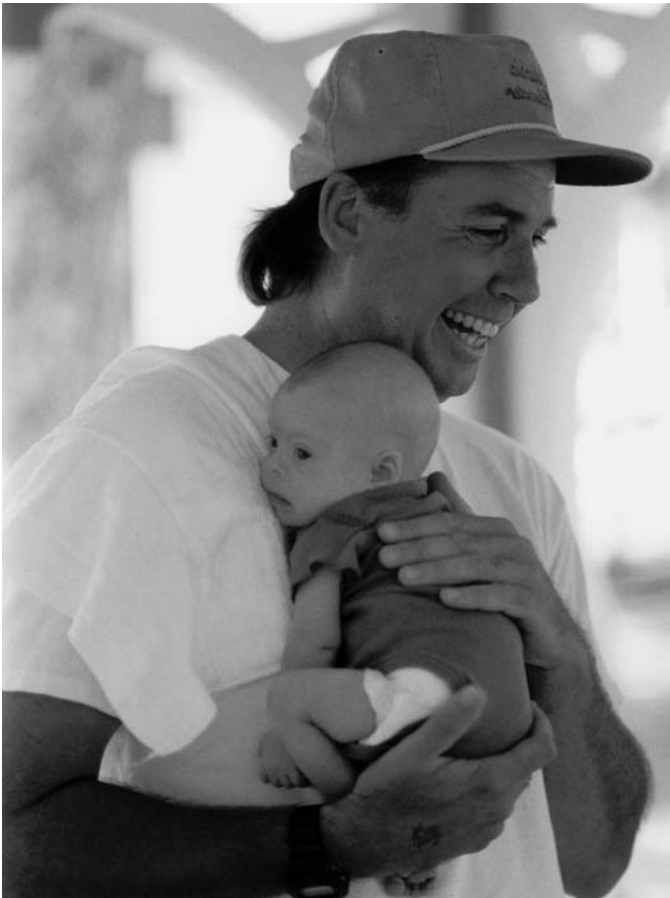
In December of 1993, the Troxels filed a petition for visitation in state court. The trial court sided with them and ordered visitation for one weekend a month, a week each summer, and four hours on each of the grandparents’ birthdays. The trial judge described the grandparents as having a “large, loving family,” and said that the girls would “benefit from spending quality time” with them. The mother and her new husband appealed and won the case in the Court of Appeals² as well as in the State Supreme Court.³ In turn, the Troxels sought review by the U.S. Supreme Court.

² *In re Troxel*, 940 P.2d 698, 87 Wash. App. 131 (1997).

³ *Troxel v. Granville*, 969 P.2d 21, 137 Wash. 2d 1 (1998).

¹ *Troxel v. Granville*, 2000 WL 712807 (U.S.S.C. 2000).





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Washington Supreme Court Decision

It has long been recognized that parents have the primary authority to control the upbringing of their children. Indeed, the U.S. Supreme Court has accorded this principle constitutional dimensions.⁴ Third parties seeking visitation rights have traditionally not stood on equal footing with the parents, but the Washington legislature, in enacting the law challenged in this case, attempted to level the field. The statute permitted “any person” to petition the court for visitation rights “at any time” and authorized the court to grant such petitions whenever “visitation may serve the best interest of the child.”⁵

The Washington Supreme Court rejected the law, finding that the statute failed when tested against the constitutional rights of parents to privacy and autonomy. The state’s high court further held that the U.S. Constitution requires that, for a court to order visitation with a non-parent, that party must satisfy a “harms test,” that is, show that the child would be harmed by the parent’s decision to limit visits.

U.S. Supreme Court Decision: Plurality Opinion

The U.S. Supreme Court, in upholding the Washington Supreme Court decision, emphatically reasserted that parents, not judges or grandparents, have the fundamental right to decide what is best for their children. By limiting government intrusion into “the private realm of the family,” the Court reaffirmed the fundamental role of parents to make decisions about their children’s lives. Although the high court agreed on the outcome, however, the six justices in the

majority wrote three separate opinions, and the three dissenters were divided as well.

Justice O’Connor wrote for the plurality:⁶ “So long as a parent adequately cares for his or her children . . . 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.” O’Connor warned that judges must tilt the scales in favor of parents. In the case of an intergenerational dispute, O’Connor said the decision as to “what is beneficial [for the child] in any specific case is for the parent to make in the first instance.”⁷

O’Connor, along with several of the five authors of both concurring and dissenting opinions, left it to the states to specify conditions under which people other than parents may ask a judge to order visitation.⁸ Notably, the justices did not try to define what relationships those people needed to have with the children involved, or who could be considered a parent. O’Connor pointed out that she was making her decision at a time when the traditional notion of a nuclear family was quickly being replaced by a wide variety of situations. “The demographic changes of the past century make it difficult to speak of an average American family The composition of families varies greatly from household to household.”⁹

O’Connor thought it significant to point out that neither the Troxels nor any court had accused Tommie Granville-Wynn of being an unfit mother. As a result, it was wrong to impose upon her the burden of proving that seeing the Troxels would be contrary to her children’s “best interests,” the standard used in most states to determine parental visitation rights.

Furthermore, O’Connor pointed out, Granville-Wynn had never opposed visitation altogether. In this case, the problem was that when the trial court intervened, “it gave no special weight at all to Granville’s determination of her daughter’s best interests [I]t appears that the Superior Court applied exactly the opposite presumption.” O’Connor found it especially problematic that 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.” In this respect, the “court’s presumption failed to provide any protection for Granville’s fundamental constitutional right to make decisions concerning the rearing of her own daughters.” Essentially, the trial judge substituted his own biased notion of “best interests,” over that of the mother’s determination. The plurality deemed this an “unconstitutional infringement on Granville’s fundamental right to make decisions concerning the care, custody, and control of her two daughters.”¹⁰

Justices Souter and Thomas concurred separately. Justice Souter agreed that Washington state’s law “sweeps too broadly and is unconstitutional.” He said, however, that the Court should have limited its analysis, by simply affirming the state supreme court’s invalidation of the statute based on its text alone, and not based on its application to a particular case.¹¹ Justice Thomas, however, countered that he would go further and entirely bar states from “second-guessing a fit parent’s decision regarding visitation with third parties.” He also said that if fundamental rights were at stake, the government could step in only if it had a compelling reason. Thomas’ rationale seems much more protective of parents’ rights.

⁶ O’Connor’s plurality opinion was joined by Chief Justice Rehnquist and Justices Ginsburg and Breyer, while Justices Souter and Thomas wrote separate concurring opinions.

⁷ Troxel v. Granville, 2000 WL 712807 at 8 (U.S.S.C. 2000). (Official citations are currently unavailable.)

⁸ See generally *id.* at 9.

⁹ See generally *id.* at 5.

¹⁰ *Id.* at 8.

¹¹ *Id.* at 11.

⁴ See, e.g., Meyer v. Nebraska, 262 U.S. 390 (1923) and Pierce v. Society of Sisters, 268 U.S. 510 (1925).

⁵ Wash. Rev. Code § 26.10.160(3).

The Dissents

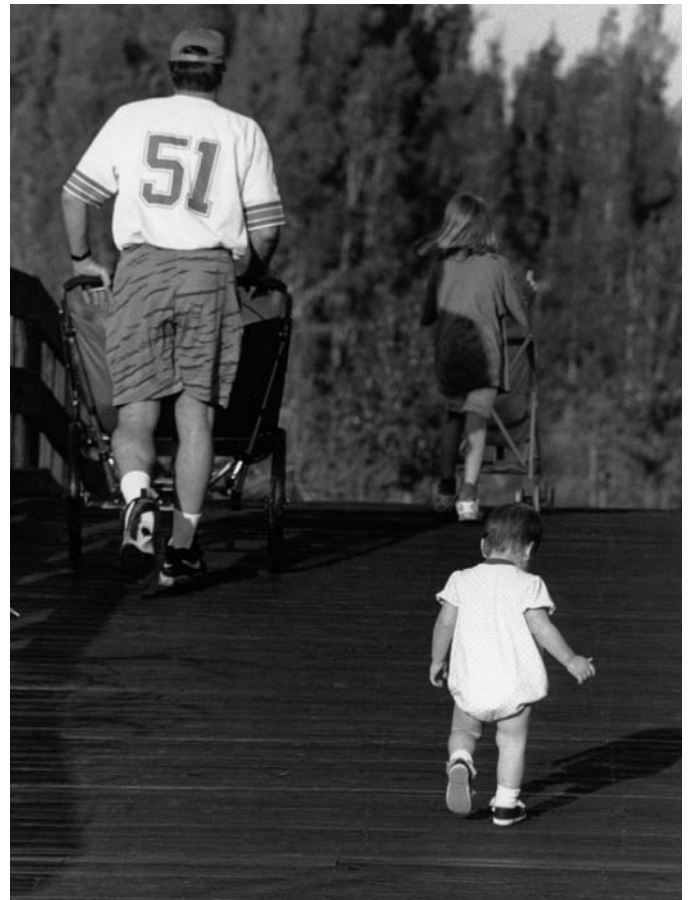
Justices Stevens, Scalia, and Kennedy each wrote a dissenting opinion. Justice Scalia said he agreed as a personal matter that the parents' rights should prevail but said that nothing in the Constitution allowed him to strike down the state's law. Justice Kennedy agreed that a "custodial parent has a constitutional right to determine without undue interference by the state how best to raise, nurture and educate the child." But he urged caution and opposed giving parents an "absolute veto" over visitation orders.

Justice Stevens' main contention was that the Court should not have reviewed the state law, but that it should have left it to the state legislature to revise and redraft. Furthermore, only Stevens squarely took the side of the grandparents, arguing that the Washington law was not constitutionally objectionable.¹² The rights of a parent "with respect to her child have ... never been regarded as absolute, but rather are limited by the existence of an actual, developed relationship with a child, and are tied to the presence or absence of some embodiment of family."¹³ He emphasized the parent's interest in a child must always be considered in light of the state's interest in protecting the child. Stevens said that children also have a fundamental liberty interest in preserving intimate relationships that must be factored into the equation. He did not clarify what balancing standard he thought was appropriate, but he did go as far as to say that the Constitution allows states to "consider the impact on a child of possibly arbitrary parental decisions that neither serve nor are motivated by the best interest of the child."

Significance of *Troxel v. Granville*

Because of its specific facts, the case has been perceived primarily as a test of grandparents' rights. In fact, the decision has been heralded in the media as a huge setback to grandparents' rights. It is true that, at first glance, the ruling seems to cast some doubt on the validity of court-ordered grandparent visitation laws in every state. Although the Supreme Court declined to declare all such laws unconstitutional, its holding amounted to a warning to local judges: they must give "special weight" to the wishes of parents. Speaking for the plurality, Justice O'Connor said, "[t]he Constitution 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."¹⁴ It is important to note, however, that the Washington state law at issue in *Troxel* was unusual for its breadth. Since the Supreme Court limited its ruling to the way the law was specifically applied in this case, and explicitly stated that it was not interested in addressing issues that were not presented, the decision will probably have limited impact in most states.

The extraordinarily broad language in the Washington state statute turned the case into a debate between groups promoting the rights of parents and those advocating state involvement in upholding the best interests of children. The ruling won praise from conservatives and liberals alike, with most giving a stamp of approval to the Supreme Court's cautious analysis. Even grandparent-rights groups celebrated the ruling, because the Court stopped short of striking narrower visitation statutes in other states.¹⁵ In reality, the



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door is still open for grandparents to seek visitation privileges.¹⁶ Although judges have been forewarned, outcomes will still largely depend on the facts of each case.

The Child Advocacy Perspective

The significance of this case is evident in the sheer number of different interest groups and organizations interested in the outcome. Because the law at issue was so broad, it opened the door for a myriad of parties with competing agendas to file amicus briefs¹⁷ urging support of their particular view regarding whether, and if so under what circumstances, the state should be allowed to intervene against parental decisions. Some of the alliances thus created were quite unusual; for example, the National Association of Evangelicals and Gay and Lesbian Advocates and Defenders both supported the respondent mother. The child advocacy perspective was represented by the National Association of Counsel for Children (NACC), which asked the court to recognize a child's right to non-parental relationships.

¹⁶ All 50 states have statutes that provide for grandparent visitation in some form. These statutes permit grandparents and sometimes others to seek out court-ordered visitation under various circumstances. See *id.* at 9, n. *.

¹⁷ Amici included Grandparents United for Children's Rights, the Grandparent Caregiver Law Center of the Brookdale Center on Aging, AARP, Generations United, the National Conference of State Legislatures, Council of State Governments, National Association of Counties, National League of Cities, International City/County Management Association, and U.S. Conference of Mayors in support of the petitioners; and the Center for the Original Intent of the Constitution, Center for Children's Policy Practice & Research at the University of Pennsylvania, ACLU, ACLU of Washington, American Center for Law and Justice, Christian Legal Society, National Association of Evangelicals, Institute for Justice, Alabama Family Alliance, Minnesota Family Institute, Domestic Violence Project, Pennsylvania, Florida, Iowa, and Missouri Coalitions Against Domestic Violence, Northwest Women's Law Center, Connecticut Women's Education and Legal Fund, National Center for Lesbian Rights, Women's Law Center of Maryland, Lambda Legal Defense and Education Fund, Gay and Lesbian Advocates and Defenders, and Coalition for the Restoration of Parental Rights in support of the respondent.

¹² See *id.* at 17 (Stevens, J., dissenting). Specifically, Stevens said, "[T]he Washington law merely gives an individual 'with whom a child may have an established relationship' the procedural right to ask the State as arbiter, through the entirely well-known best-interests standard, between the parent's protected interests and the child's. It seems clear to me that the Due Process Clause of the Fourteenth Amendment leaves room for States to consider the impact on a child of possibly arbitrary parental decisions that neither serve nor are motivated by the best interests of the child."

¹³ *Id.* at 16.

¹⁴ *Id.* at 9.

¹⁵ *Id.* at 9. Specifically, the Court said, "[b]ecause much state-court adjudication in this context occurs on a case-by-case basis, we would be hesitant to hold that specific non-parental visitation statutes violate the Due Process Clause as a per se matter."

NACC¹⁸ agreed with the Washington Supreme Court that the challenged statute was an “unconstitutional incursion on the fundamental rights of children and their parents to family privacy and autonomy” The amicus brief also emphasized, however, that the fundamental rights of families should not be determined solely by biology, and that court-ordered visitation privileges for non-parents may sometimes be justified based on the compelling interest of the state in promoting children’s welfare. The authors of the NACC brief suggested as a cure for the “overbreadth and vagueness flaws in the Washington law” that “such a visitation statute should properly include some threshold interest to confer standing for court intervention” based on an existing, significant relationship with the child, or a compelling state reason to “monitor a child’s status.” They added that where a third-party applicant has no such relationship with the child, the threshold burden should be “a showing that the child would be harmed if visitation is not allowed.”¹⁹

Arguing that “clear acknowledgment that children have a constitutional right to a parent is long overdue,” the brief’s authors urged the Court to affirm the “constitutionally protected liberty interests of children,” especially a child’s “fundamental liberty interest” in a relationship with a parent. They pointed out that the “right to parent” has repeatedly been recognized by the Court as a “fundamental liberty interest” but that a parallel right on the part of children has not. A “competing constitution-based right” of a child to a relationship with a parent is entitled to co-equal status and proper strict scrutiny analysis, NACC contended. In fact, counsel argued, a child’s right to a familial relationship, whether with a biological or a de facto parent, is “more compelling than the counterpart ‘right to parent’ of an adult.” Inasmuch as children are an especially vulnerable population, “the state is often the only societal mechanism available to protect their interests,” and when parents’ and children’s interests conflict, “the legal system should protect the child’s interests.”

Following the Court’s decision, NACC’s Executive Director, Marvin Ventrell, expressed his satisfaction with the result: “[t]he high court has . . . struck a reasonable balance between the competing interests of child welfare and family autonomy.”²⁰ Joan Hollinger, family law professor at U.C. Berkeley School of Law and another of the brief’s authors, said the decision is especially significant for what it did not do. “The Court did not limit the term ‘parent’ to ‘biological’ or ‘natural.’ There is no reference to ‘blood relatives,’ and the idea of a traditional nuclear family was not part of any of the Justices’ opinions. That was a very important non-statement — definitely, it’s a good sign.” According to Hollinger, the case represents the Court’s acknowledgment that “families are different and kids grow up in many different contexts.”

Essentially, the *Troxel* decision leaves it to the states to experiment with balancing constitutional rights and the reality of changing families. The Court recognized that no specific balancing test will apply under all circumstances, and that different approaches can all reach good results. By declining to adopt a single, fixed notion of “family,” the Court clearly acknowledged the growing number of nontraditional parents,²¹ an especially significant outcome for gay and lesbian families, stepparents, and prospective adoptive parents. The decision may come to be seen as a landmark in recognizing the changing composition of American families.

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¹⁸ Counsel of record on the NACC amicus brief were Robert C. Fellmeth, Director of the Children’s Advocacy Institute at the University of San Diego School of Law; Joan Hollinger, Visiting Professor of Law at Boalt Hall, U.C. Berkeley; Marvin Ventrell, Executive Director of NACC; and Donald N. Duquette, Director of the Child Advocacy Clinic at the University of Michigan School of Law.

¹⁹ National Association of Counsel for Children’s Amicus Curiae Brief, *Troxel v. Granville*, 2000 WL 712807 (U.S.S.C. 2000) (No. 98-138).

²⁰ News Release, “U.S. Supreme Court Decides Rights of Grandparents to Visit Their Grandchildren. Court Adopts Rational[e] of Amicus Curiae Brief of National Organization of Counsel for Children.” NACC Executive Director Marvin Ventrell, Denver, Colorado (June 5, 2000).

²¹ See generally *Troxel* at 5.

Responding to Kinship Caregivers’ Needs for Information & Support

Kinship caregivers — relatives, family friends and neighbors who step in to care for children when their parents cannot do so — are a crucial and often unacknowledged resource for many at-risk children and youth. These caregivers often face not only the challenges of raising a child, but the frustration of dealing with government programs and agencies that are not designed to meet their needs, and may not recognize their central role in the child’s life.

In recent years, kinship caregivers have organized local and statewide support groups, networks, and advocacy organizations. An important function of these groups has been to share information about legal processes, government benefit programs, resources and tools for advocacy. The National Center for Youth Law and the Children’s Defense Fund are working together to support this trend toward organizing and advocacy by and for kinship caregivers. Currently, NCYL and CDF are developing a ‘template’ for state and local organizations to use in creating resource manuals for kinship caregivers. The template will include pre-written sections on laws and programs that are applicable nationwide, and will also provide a framework for local experts to “fill in the blanks” with state-specific information in each chapter.

One reason that kinship caregivers urgently need clear, accurate information is that there are multiple pathways by which kinship care arrangements can be created, each with advantages and disadvantages. Caregivers often have to choose among various options for structuring their relationship with the child, and their choices will affect the degree of authority they have to make decisions for the child, their own and the child’s eligibility for government benefits, and the future relationships among themselves, the child, and the child’s parents.

Children who are found to be abused or neglected, and removed from their parents’ homes by the state child welfare agency, may be placed with relatives under the supervision of the juvenile court. This is often called “formal” kinship care. Also, many children come to live with relatives or family friends without any involvement by the child welfare agency, through adoption or guardianship proceedings, custody proceedings in family court, or simply through informal agreements between parents and caregivers. The NCYL/CDF template project is designed to help kinship caregivers understand all of the forms of kinship care, and the pros and cons of each, and the legal processes involved in creating kinship care arrangements.

The template will also include sections on child support; public benefit programs such as TANF (welfare), food stamps, WIC, and SSI; health and mental health care for children under the Medicaid and EPSDT programs; education issues; child care; housing; and dealing with conflicts among family members and with family violence. The template will also include suggestions on developing local resource guides, lists of documents kinship caregivers should collect, state-specific blank legal forms, and other useful materials.

The goal of this joint NCYL/CDF project is to support local and statewide organizations in providing comprehensive, readable, and reliable information to kinship caregivers. Moreover, by going through the process of developing a kinship caregivers’ manual, organizations may find that they have built a coalition of advocates, service providers, and caregivers that can also engage in ongoing support and advocacy activities.

For more information about this project, please contact Michelle Cheng at NCYL, (510) 835-8098 x3037, mcheng@youthlaw.org, or Mary Bissell at Children’s Defense Fund, (202) 662-3664,