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Defining the Family in the Millenium: The Troxel Follies

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Defining the Family in the Millennium: The *Troxel* Follies

JOHN DEWITT GREGORY*

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I. INTRODUCTION

Family autonomy, with its concomitant parental authority, is an aspect of family privacy that American law has protected for several generations. At least for most of the last century, the rights of natural parents to be free, for the most part, from state intervention in relationships with their children was recognized generally as state policy. Also, the law afforded substantial and significant constitutional protection to parental rights. The

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common law neither countenanced nor contemplated intervention in parent-child relationships by persons who were not related to the child by blood. Even grandparents, who not only are blood relatives, but also are often considered to be members of the extended family, were considered legal strangers who enjoyed no rights under the common law with respect to their grandchildren.

This Article addresses the ways in which the law—primarily state law—has significantly redefined the American family in its response to third-party claims against parents for visitation rights with the children of those parents. Part II briefly addresses statutory and case law relating to visitation by grandparents, the most favored group of petitioners for visitation rights, and stepparents who have not fared nearly as well. After placing third-party visitation in its constitutional context, Part II also examines how the courts have treated “coparent” claims of a right to visitation, brought by former companions of natural parents who insist that they are *de facto* parents, parents by estoppel, psychological parents, and the like. It describes and analyzes the evolving law in this area from the earliest decisions when such coparent claims were routinely rejected, to the most recent cases, several of which have recognized such claims without any readily apparent statutory authority.

Part III, summarizes the several opinions in *Troxel v. Granville*,¹ the first third-party visitation case (in this instance concerning grandparents) that the United States Supreme Court has decided.² Finally, Part III also reviews some state court decisions subsequent to *Troxel*, and assesses whether the Supreme Court’s decision has had or is likely to have any significant impact on state law in the areas of grandparent or other third-party visitation rights.

1. 530 U.S. 57 (2000).

2. The Supreme Court’s silence with respect to the issue of third party visitation may be surprising in light of the welter of statutes and judicial observations on the subject. See generally John DeWitt Gregory, *Blood Ties: A Rationale for Child Visitation by Legal Strangers*, 55 WASH. & LEE L. REV. 351 (1998); John DeWitt Gregory, *Whose Child Is It, Anyway: The Demise of Family Autonomy and Parental Authority*, 33 FAM. L.Q. 833 (1999).

II. THE CONVENTIONAL LEGAL TREATMENT OF THIRD-PARTY VISITATION CLAIMS

A. Stepparents and Grandparents

Petitions for rights of visitation by stepparents generally arise in one of two contexts. In a number of cases, the stepparent's marriage to the child's natural parent has ended in divorce. In other cases, the stepparent seeks visitation after the death of the custodial parent.³

Statutes in every state give grandparents standing to petition for rights to visitation under a variety of circumstances.⁴ In about one-third of the states, statutes either provide explicit authority for stepparent visitation or contain language authorizing third-party visitation that is broad enough to apply to stepparents.⁵ These statutes are a mixed bag at best. They do not take a uniform approach and are frequently unclear. In only a handful of jurisdictions do the statutes contain explicit provisions that address stepparent visitation,⁶ and most of them authorize both grandparent and stepparent visitation claims.⁷ The Kansas statute, for example, states that "[g]randparents and stepparents may be granted visitation rights."⁸ The statutory language in Oregon is couched in far broader terms, affording standing to petition or intervene in custody or visitation proceedings to anyone "who has established

3. See MARGARET M. MAHONEY, STEPFAMILIES AND THE LAW 129 (discussing stepparent visitation right disputes).

4. See *Troxel*, 530 U.S. at 73 n.1.

5. See MAHONEY, *supra* note 3 at 130 (citing Elaine D. Ingulli, Grandparent Visitation Rights: Social Policies and Legal Rights, 87 W. VA. L. REV. 295 (1985)).

6. See, e.g., CAL. FAM. CODE § 3101 (West 1994); KAN. STAT. ANN. § 60-1616 (1994 & Supp. 1996); LA. CIV. CODE ANN. art. 136(B) (West 1999); N.H. REV. STAT. ANN. § 458:17(VI) (1992 & Supp. 2001); OR. REV. STAT. § 109.119(1) (2001); TENN. CODE ANN. § 36-6-303 (2001); VA. CODE ANN. § 16.1-241 (Michie 2000); WIS. STAT. ANN. § 767.245(1) (West 2001).

7. See, e.g., KAN. STAT. ANN. § 60-1616(b) (1994 & Supp. 1996); N.H. REV. STAT. ANN. § 458:17(VI) (1992 & Supp. 2001); OR. REV. STAT. § 109.119(1) (1995); VA. CODE ANN. § 20-124.1 (Michie 2000); WIS. STAT. ANN. § 767.245(1) (West 2001).

8. KAN. STAT. ANN. § 60-1616(b) (1994 & Supp. 1996).

emotional ties creating a child-parent relationship . . . with a child” and expressly including, among others, stepparents and grandparents.⁹ The Louisiana statute, unlike any of the others, gives identical visitation rights to stepparents and stepgrandparents.¹⁰

Not surprisingly, all of the statutes contain, either expressly or implicitly, the overall requirement that visitation be in the best interest of the child.¹¹ In addition, some state laws impose additional conditions for the court to grant a third-party’s petition for visitation. Under the statute in Virginia, for example, a petitioner for visitation must have a “legitimate interest.”¹² Among those who can satisfy this statutory requirement are stepparents, former stepparents, grandparents, and other family members and blood relatives.¹³ The statute in Tennessee requires not only that visitation be in the child’s best interest, but also, as a condition of granting visitation rights, that the stepparent provide or contribute to the support of the child.¹⁴

In several states, while the statutes do not expressly provide for stepparent visitation, they are broad enough to give stepparents standing to seek court awarded visitation.¹⁵ In Alaska, for example, the court may order visitation by a child’s grandparent “or other person if that is in the best interests of the child.”¹⁶ The Connecticut statute permits the court to grant visitation “to a third

9. OR. REV. STAT. §109.119(1) (2001).

10. LA. CIV. CODE ANN. art. 136(B) (West 1999).

11. *See, e.g.*, CAL. FAM. CODE § 3101(a) (West 1994) (describing best interest of the child as always critical). The California statute provides: “Notwithstanding any other provision of law, the court may grant reasonable visitation to a stepparent, if visitation by the stepparent is determined to be in the best interest of the minor child.” *Id.*

12. VA. CODE ANN. § 20-124.2(B) (Michie 2000).

13. *Id.* § 20-124.1.

14. TENN. CODE ANN. § 36-6-303(a) (2001).

15. ALASKA STAT. § 25.24.150(a) (Michie 2000); ARIZ. REV. STAT. ANN. § 25-803(C) (West Supp. 2001); CONN. GEN. STAT. ANN. § 46b-56(a) (West 1995 & West Supp. 2001); HAW. REV. STAT. § 571-46(7) (1999); MINN. STAT. ANN. § 257.022(2b) (West 1998 & West Supp. 2002); MO. STAT. § 452.375 (West Supp. 2002); N.C. GEN. STAT. § 50-13.1(a) (1999); OHIO REV. CODE ANN. § 3109.05(B)(1) (West 1997); WASH. REV. CODE ANN. § 26.09.240 (West 1997).

16. ALASKA STAT. § 25.24.150(a) (Michie 2000).

party, including but not limited to, grandparents.”¹⁷ Finally, almost any party with a close relationship with the child may request visitation in Arizona under the statute that governs paternity and maternity proceedings.¹⁸

There are relatively few reported cases that involve stepparent visitation, especially when compared with the number that address visitation by grandparents. Although the courts have not always been consistent in granting visitation to stepparents, for the most part they have found one rationale or another for doing so. Similarly, in the case of so-called lesbian coparents, courts have granted visitation even when the applicable visitation statute provides no basis for doing so.

The Superior Court of Pennsylvania appears to be the first appellate court to render a decision addressing stepparent visitation rights. In *Spells v. Spells*,¹⁹ the court found that the best interest of the child was the primary concern in disputes between natural parents and stepparents. The court stated:

It is our belief that a step[parent] may not be denied the right to visit his stepchildren merely because of his lack of a blood relationship to them. Clearly, a step[parent] and his young stepchildren who live in a family environment may develop deep and lasting mutual bonds of affection. Courts must acknowledge the fact that a stepfather (or stepmother) may be the only parent that the child has truly known and loved during its minority. A stepparent may be as devoted and concerned about the welfare of a stepchild as a natural parent would be. Rejection of visitation privileges cannot be

17. CONN. GEN. STAT. § 46b-56(a) (West 1995 & West Supp. 2001).

18. ARIZ. REV. STAT. ANN. § 25-803(A) (West Supp. 2001). The Arizona Court of Appeals has limited the statutory language in two respects. In *Hughes v. Creighton*, 798 P.2d 403, 405-06 (Ariz. Ct. App. 1990), the court first denied visitation to a party who had not established paternity; and second, the court limited visitation rights to noncustodial parents, grandparents, great-grandparents, and stepparents, despite the fact that the plaintiff's relationship with the child was *in loco parentis*. *Id.*

19. 378 A.2d 879 (Pa. Super. Ct. 1977).

grounded in the mere status as a stepparent.²⁰

Accordingly, the court remanded the matter for the trial court to decide whether it would be in the best interests of the children involved to grant visitation rights to their stepfather.²¹

The rationale that courts have relied on most frequently in granting visitation rights to stepparents is the *in loco parentis* doctrine, together with the essential requisite that visitation must be in the best interests of the child.²² Some courts, however, have not required any *in loco parentis* requirement and have considered only what is in the best interest of the child in deciding stepparent visitation cases.²³ Typical of this latter approach is the decision of the Alabama Court of Civil Appeals in *Shoemaker v. Shoemaker*.²⁴ The court found no common law or legislatively granted right of a former stepparent to enjoy visitation with a former stepchild.²⁵ Nevertheless, because there was no statutory bar to granting visitation rights to a former stepchild, the court held that a trial court could grant visitation when such visitation would be in the child's best interests.²⁶ It should be noted, however, that the court expressly limited the question of when visitation would be in the child's best interests. The court stated:

It may be questioned whether the best interests of a child would be served if the exercise of visitation by a former stepparent was against the wishes of the natural parent To force a former stepparent's (legally a mere "non-parent") visitation upon a natural parent or the former stepchild, over either's objection, would appear to be a detriment to the best interests of the child.²⁷

20. *Id.* at 881.

21. *Id.* at 883-84.

22. *See generally* Gregory, *supra* note 2; *see also* Gregory, *supra* note 2 at 364, n.111 (citing stepparent visitation cases in which petitioning stepparents' *in loco parentis* relationship with the child is a relevant factor).

23. *Id.* at 364 & n.112.

24. 563 So. 2d 1032 (Ala. Civ. App. 1990).

25. *Id.* at 1034.

26. *Id.*

27. *Id.*

Accordingly, the court in *Shoemaker* denied visitation rights to the former stepparent in the absence of a showing that those rights would advance the best interests of the child.²⁸ Decisions by appellate courts in both Florida²⁹ and Maryland³⁰ are consistent with the view in *Shoemaker* that the best interests of the child are the paramount concern in stepparent visitation cases.

A reading of the cases confirms the view of stepparent visitation cases that Professor Katharine Bartlett voiced more than a decade and a half ago.³¹ Professor Bartlett observed:

The few courts that have awarded stepparent visitation or stepparent custody have had to strain both common and statutory law to reach such results. In visitation cases, courts sometimes have disregarded the absence of a statute granting visitation rights to nonparents and have assumed jurisdiction to allow such visitation simply because the stepparent had physical custody of the child at the date of the petition for custody or visitation. Other courts have invoked the *in loco parentis* doctrine, ignoring the common law rule that such status ends with the dissolution of the stepparent's marriage.³²

28. *Id.*

29. *See* *Wills v. Wills*, 399 So. 2d 1130–31 (Fla. Dist. Ct. App. 1981) (finding that when the record shows that visitation is in the child's best interest, the trial court's discretion is broad enough to grant an order of visitation with a nonparent).

30. *See* *Evans v. Evans*, 488 A.2d 157, 162 (Md. 1985) ("While an *in loco parentis* status may affect the court's determination as to the best interests of the child, that relationship need not exist under Maryland law before visitation rights may be granted."); *See also* *Rhinehart v. Nowlin*, 805 P.2d 88, 92–93 (N.M. Ct. App. 1990) (concluding that trial courts have power and discretion to grant visitation rights to stepmother when such rights are in best interests of children).

31. *See* Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 912–19 (1984).

32. *Id.* at 914–15 (citations omitted).

The courts have been far more receptive to visitation petitions by grandparents. At common law, grandparents enjoyed no greater rights to visitation than other legal strangers. Now, however, benefited by statutes in every state, grandparents occupy the most favored position among groups that seek visitation rights with children who are not their own offspring.³³ A leading academic commentator has stated that, "[s]ince these statutes are the product of a combination of the lobbying efforts of grandparent groups and the sentimentality of the state legislatures, they take so many different forms and limit visitation to so many kinds of circumstances that it is extremely difficult to classify them."³⁴ The statutes vary significantly in both language and the scope of the rights they provide. The single common element among these grandparent visitation statutes is that almost all of them, like the third-party visitation statutes just discussed, either explicitly or implicitly are based on the best interests of the child.

In some instances, the language of the governing provisions are so broad as to permit a court to award visitation rights to grandparents whenever the court finds that it would be in the child's best interests.³⁵ Another group of statutes requires that before the courts grant visitation rights, the grandparent and the child must have established a substantial relationship.³⁶ The unique New York provision allows grandparents to petition for visitation "where circumstances show that conditions exist which equity would see fit to intervene."³⁷ A few statutes, however, prohibit visitation rights when granting them would interfere with the

33. See Catherine A. McCrimmon & Robert J. Howell, *Grandparents' Legal Rights to Visitation in the Fifty States and the District of Columbia*, 17 BULL. AM. ACAD. PSYCHIATRY & L. 355, 355-56 (1989) (observing that "access to grandparents, regardless of other legal situations, is not considered the child's legal right").

34. HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 19.7, at 828 (2d ed. 1988) (citation omitted).

35. See, e.g., CONN. GEN. STAT. ANN. § 46b-59 (West 1995); HAW. REV. STAT. § 571-46(7) (Michie 1999); S.C. CODE ANN. § 20-7-420(33) (Law. Co-op. Supp. 2001).

36. See, e.g., IOWA CODE ANN. § 598.35 (West 2001); KAN. STAT. ANN. § 38-129(a) (1994).

37. N.Y. DOM. REL. LAW § 72 (McKinney 1999).

parent-child relationship.³⁸

In still another variation, some statutes set out limiting circumstances that must exist before a court may permit grandparent visitation. For example, statutory provisions in some jurisdictions permit grandparent visitation when the child's parents are divorced or in the process of divorcing,³⁹ or when one or both of the child's parents has died.⁴⁰ Legislative enactments in a few states recognize grandparent petitions in cases in which a court has terminated the parental rights of either parent or both parents.⁴¹ Grandparents in still other states may seek court ordered visitation when they have been denied visitation unreasonably for a specific length of time,⁴² or when the grandparent and the child have lived together for a time period defined by the statute.⁴³

For the most part, state courts have routinely applied statutory mandates relating to visitation by grandparents.⁴⁴ In recent years, however, the statutes have come under attack in several jurisdictions, by both natural parents opposing visitation and grandparents alleging that visitation was improperly denied. In both kinds of litigation, the parties, in the context of opposing arguments as to whether visitation was in the best interest of the child, have relied on state constitutions and the United States Constitution. The decision of the Supreme Court of Kentucky in *King v. King*,⁴⁵ granting a petition for grandparent visitation rights

38. MINN. STAT. ANN. § 257.022(1) (West 1998); NEB. REV. STAT. § 43-1802(2) (1998); 23 PA. CONS. STAT. ANN. § 5311 (West 2001).

39. See, e.g., ALASKA STAT. § 25.24.150(a) (Michie 2000); GA. CODE ANN. § 19-7-3(b) (1999).

40. See, e.g., COLO. REV. STAT. ANN. § 19-1-117(1)(c) (2001); FLA. STAT. ANN. § 752.01(1)(d) (West 1997); MISS. CODE ANN. § 93-16-3(1) (2001); OHIO REV. CODE ANN. § 3109.11 (Banks-Baldwin Supp. 1997); TEX. FAM. CODE ANN. § 153.433(2)(A) (Vernon Supp. 1998).

41. See, e.g., GA. CODE ANN. § 19-7-3(b) (1999); MISS. CODE ANN. § 93-16-3(1) (2001).

42. See, e.g., MO. ANN. STAT. § 452.402(1)(3) (West 1997).

43. See, e.g., N.M. STAT. ANN. § 40-9-2(C)-(D) (Michie 1999); 23 PA. CONS. STAT. ANN. § 5313(a) (2001).

44. See, e.g., *Sightes v. Barker*, 684 N.E.2d 224, 232 (Ind. Ct. App. 1997) (upholding grandparent visitation statute because "it is rationally related to furthering the legitimate state interest in fostering relationships between grandparents and their grandchildren").

45. 828 S.W.2d 630 (Ky. 1992).

over the constitutionally based opposition of a child's parents, is an early and clear example.⁴⁶

In *King*, the child's paternal grandfather sought visitation with his female granddaughter after the child's married parents, because of a family dispute, denied the grandfather's request for visitation with the child.⁴⁷ The Kentucky Supreme Court identified two issues in the case: first, whether the governing statute, under which a court could grant reasonable visitation to a grandparent if visitation was in the child's best interest, was unconstitutional, and second, whether the trial court's finding that the grandparent's visitation was in the child's best interest was erroneous.⁴⁸

The lower court upheld the statute on both constitutional grounds and as a matter of state policy and summarily rejected the parents' contention that "the statute . . . constitute[d] an unwarranted intrusion into the liberty interest of parents to rear their children as they see fit."⁴⁹ The parents' argument rested on the long line of cases decided by the United States Supreme Court that protect family autonomy and parental authority.⁵⁰ Time and again, beginning with *Meyer v. Nebraska*,⁵¹ where the Court explicitly recognized the right "to marry, establish a home and bring up children" as a "liberty" guaranteed by the Fourteenth Amendment, the Court has given strong support to family autonomy.⁵² Further endorsing this principle in *Pierce v. Society of Sisters*,⁵³ the Court, in the course of its decision enjoining the enforcement of the Oregon Compulsory Education law against two private educational institutions, stated:

Under the doctrine of *Meyer v. Nebraska*, we think it entirely plain that the [statute] unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children

46. *Id.* at 633.

47. *Id.* at 630-31.

48. *Id.* at 631.

49. *Id.* at 631.

50. *Id.* at 631-32.

51. 262 U.S. 390 (1923).

52. *Id.* at 399 (1923).

53. 268 U.S. 510 (1925).

under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.⁵⁴

In its decision in *Wisconsin v. Yoder*,⁵⁵ some fifty years after *Meyer* and *Pierce*, the Court affirmed a Wisconsin judgment overturning the criminal conviction of Old Order Amish parents for violations of the state's compulsory education law.⁵⁶ The Court in *Yoder*, referring to *Pierce* as "perhaps the most significant statements of the Court in this area,"⁵⁷ stated:

[T]his case involves the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children. The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This . . . is now established beyond debate as an enduring American tradition.⁵⁸

In subsequent decisions the Court has, again and again, endorsed parental authority and reaffirmed the principle of family autonomy.⁵⁹

54. *Id.* at 534–35 (citation omitted).

55. 406 U.S. 205 (1972).

56. *Wisconsin v. Yoder*, 406 U.S. 205, 207 (1972).

57. *Id.* at 232.

58. *Id.*

59. *See Santosky v. Kramer*, 455 U.S. 745, 753–54 (1982) (holding that natural parents are entitled to due process at state initiated parental rights termination proceedings); *Smith v. Org. of Foster Families*, 431 U.S. 816, 847–49 (1977) (setting out required procedures for removing children from foster homes); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 645–46 (1974) (holding that mandatory termination proceedings against pregnant public school

These constitutional precedents did not persuade the Supreme Court of Kentucky in *King v. King*.⁶⁰ Citing *Meyer v. Nebraska* with seeming approval, the court purported to recognize "the right to rear children without undue governmental interference."⁶¹ The court in *King* insisted, however, that the "right is not inviolate," noting that, under the law, parents must provide for their children's education.⁶² The court also cited laws requiring inoculation of children against disease, restraint of children in motor vehicles, and regulation of children with respect to employment.⁶³ Having thus disposed summarily of constitutional arguments, the Kentucky court turned to the Kentucky grandparent visitation statute before it and, in language that would be risible if there were less at stake, concluded:

This statute seeks to balance the fundamental rights of the parents, grandparents and the child. At common law, grandparents had no legal right to visitation. However, the General Assembly determined that, in modern day society, it was essential that some semblance of family and generational contact be preserved. If a grandparent is physically, mentally and morally fit, then a grandchild will ordinarily benefit from contact with the grandparent. That grandparents and grandchildren normally have a special bond cannot be denied. Each benefits from contact with the other. The child can learn respect, a sense of

teachers violate due process); *Stanley v. Illinois*, 405 U.S. 645, 657-58 (1972) (holding that state statute that allows removal of children from unwed father's custody upon death of mother violates father's due process rights); *May v. Anderson*, 345 U.S. 528, 534 (1953) (holding that a Wisconsin decree does not bind an Ohio court in habeas corpus proceeding attacking the rights of the mother to retain possession of minor children); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (stating that certain areas of family life exist which the state cannot enter); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (holding that state statute providing for sterilization of criminals violates their rights).

60. 828 S.W.2d 630 (Ky. 1992).

61. *Id.* at 631.

62. *Id.*

63. *Id.*

responsibility and love. *The grandparent can be invigorated by exposure to youth, can gain an insight into our changing society, and can avoid the loneliness which is so often a part of an aging parent's life. These considerations by the state do not go too far in intruding into the fundamental rights of the parents.*⁶⁴

Accordingly, the court held that the Kentucky statute was constitutional and that visitation was in the best interests of the child.⁶⁵

A dissenting judge in *King* accurately and eloquently described the opinion of the court's majority:

The opinion of the majority makes little pretense of constitutional analysis but depends entirely on the sentimental notion of an inherent value in visitation between grandparent and grandchild, regardless of the wishes of the parents. The fatal flaw in the majority opinion is its conclusion that a grandparent has a "fundamental right" to visitation with a grandchild. No authority is cited for this proposition as there is no such right.⁶⁶

While *King* is among the most blatant examples of judicial trampling on the constitutional privacy rights of fit parents, it is certainly not the only case in which a state's highest court has rendered a visitation decision supporting grandparents while ignoring or evading the parental autonomy principles enunciated by the Supreme Court. In *Herndon v. Tuhey*,⁶⁷ for example, the Supreme Court of Missouri upheld as constitutional a state statute permitting the court to grant reasonable visitation rights to a grandparent if visitation was denied unreasonably for more than

64. *Id.* at 632 (emphasis added) (citation omitted).

65. *Id.* at 632-33.

66. *Id.* at 633 (Lambert, J., dissenting).

67. 857 S.W.2d 203 (Mo. 1993).

ninety days.⁶⁸ The statute in *Herndon* required that the court determine whether visitation would be in the child's best interest, endanger the child's physical health, or impair the child's emotional development.⁶⁹ The statute permitted the court to grant visitation only "when the court finds such visitation to be in the best interests of the child."⁷⁰ The court declared that the statute was constitutional, rejecting the parents' reliance upon their "basic constitutional right to raise their children as they see fit, free from state intrusion absent a showing of harm to the child."⁷¹

The Missouri court, after acknowledging the parents' constitutional right "to make decisions affecting the family," rejected their argument on the ground that "the magnitude of the infringement by the state is a significant consideration in determining whether a statute will be struck down as unconstitutional."⁷² The court cited *King* with approval and quoted a long portion of the Kentucky Supreme Court's opinion. The court concluded:

Missouri's statute is reasonable both because it contemplates only a minimal intrusion on the family relationship and because it is narrowly tailored to adequately protect the interests of parents and children A court may grant visitation only if it will be in the best interest of the child. If visitation would endanger the child physically, mentally, or emotionally then visitation must be denied.⁷³

The court's reasoning in *Herndon*, as in *King* on which it heavily relied, evoked a strong dissent. The author of the dissenting opinion observed that "[t]he majority opinion's holding rests in actuality upon a trial court's discretion, rather than upon traditional principles of constitutional analysis."⁷⁴ The dissent

68. *Id.* at 206-08.

69. *Id.* at 207.

70. *Id.* (citing MO. ANN. STAT. § 452.402 (West 1997)).

71. *Id.* at 207.

72. *Id.* at 208.

73. *Id.* at 210.

74. *Id.* at 211 (Covington, J., dissenting).

concluded that “[a] best interest test standing alone does not justify intrusion into the parents’ constitutionally protected right of autonomy in child rearing.”⁷⁵

The Supreme Court of Wyoming, in *Michael v. Hertzler*,⁷⁶ upheld that state’s grandparent visitation statute with reasoning that is at least as troubling as the analyses in *King* and *Herndon*. The statute under attack permitted a grandparent to bring an original action against a minor grandchild’s custodian.⁷⁷ The bases for such an action included the death or divorce of the grandparent’s child who is the parent and custodian of the minor child and that custodian’s refusal to permit reasonable visitation to the grandparent, or the grandchild’s residence with the grandparent for more than six consecutive months and the refusal of visitation after the child’s return to the custodial parents.⁷⁸ If either of these bases existed, the court was authorized to grant visitation to the grandparents so long as visitation would be in the best interests of the child and would not substantially impair the rights of the parents.⁷⁹

Typically, the court acknowledged that parental rights are fundamental and, therefore, the constitutional standard to be applied was strict scrutiny.⁸⁰ The court also acknowledged that the father’s right to raise his child was a constitutionally protected liberty interest.⁸¹ Nevertheless, the court ruled that the statute was constitutional in light of the state’s compelling interest in protecting the best interests of the child.⁸² The court concluded:

Following the lead of the courts of our sister

75. *Id.*

76. 900 P.2d 1144, 1145 (Wyo. 1995).

77. *Id.* at 1146 (citing WYO. STAT. ANN. § 20-7-101(a) (Michie 1994) (amended 1997)).

78. WYO. STAT. ANN. § 20-7-101 (Michie 1994) (amended 1997).

79. *Id.* The Wyoming legislature has since amended this statute. *See* WYO. STAT. ANN. § 20-7-101 (Michie 1994). The amended provision retains the best interest child standard but has eliminated the language describing specific conditions under which grandparents may initiate an action for visitation rights. *Id.*

80. *Michael*, 900 P.2d at 1146.

81. *Id.* at 1147.

82. *Id.* at 1148–49, 1151.

jurisdictions, we perceive a compelling state interest in the State of Wyoming which justifies the grandparent visitation statute, perhaps more so. The statute specifically adopts the best interest of the child as a standard which we perceive as representing a compelling state interest in the state's role as *parens patriae*.⁸³

The court went on to state, "in addition to the compelling state interest attaching to the best interest of the children, the compelling state interest exists in maintaining the right of association of grandparents and grandchildren."⁸⁴

In *Martin v. Coop*,⁸⁵ the Supreme Court of Mississippi considered a visitation petition under a statute permitting either parent of the deceased parent of a child to petition for visitation with the child.⁸⁶ The court rejected the surviving parent's assertion that the statute was unconstitutional and held that it "[did] not deprive the parents of their right to raise their children by determining the care, custody and management of the child."⁸⁷

Not all courts are as solicitous of the claims mounted by grandparents against the rights of children's natural parents as the courts in Kentucky and Missouri. Indeed, the highest courts in some jurisdictions have viewed grandparent visitation statutes with as much distaste as the dissenters in *King* and *Herndon*. The decision of the Supreme Court of Tennessee in *Hawk v. Hawk*,⁸⁸ which held that Tennessee's grandparent visitation statute was unconstitutional, is a leading case in this respect.

In *Hawk*, after a number of family disputes, the parents of two minor children ended the children's visitation with their paternal grandparents.⁸⁹ The grandparents sued for visitation under the Tennessee statute that authorized the court to order a minor child's reasonable visitation with grandparents after determining

83. *Id.* at 1149.

84. *Id.* at 1151.

85. 693 So. 2d 912 (Miss. 1997).

86. See MISS. CODE ANN. § 93-16-3(1) (1994 rev. ed.).

87. *Martin*, 693 So. 2d at 915.

88. 855 S.W.2d 573 (Tenn. 1993).

89. *Id.* at 575.

that visitation was in the child's best interests.⁹⁰ The trial court ordered liberal visitation finding that family disputes should not interfere with the relationship between the grandparents and their grandchildren.⁹¹

The Supreme Court of Tennessee reversed the trial court's decision because the statute violated the parents' right to privacy under the Tennessee Constitution "as applied to [a] married couple, whose fitness as parents is unchallenged."⁹² Although the court based its decision on the state constitution, it observed that "the right to rear one's children is so firmly rooted in our culture that the United States Supreme Court has held it to be a fundamental liberty interest protected by the Fourteenth Amendment to the United States Constitution."⁹³

The court in *Hawk* reviewed Supreme Court decisions at considerable length and concluded that while "often expressed as a 'liberty' interest, the protection of 'childrearing autonomy' reflects the Court's larger concern with privacy rights for the family."⁹⁴ Also, the court rejected the grandparents' argument that a finding that visitation is in a child's best interests creates a compelling state interest that outweighs objections to visitation by a fit parent.⁹⁵ Rather, the court read both federal cases and Tennessee cases and statutory law as requiring that state interference with the parent's right to raise children be based on a finding of harm to the welfare of the child.⁹⁶ The court concluded:

[W]ithout a substantial danger of harm to the child, a court may not constitutionally impose its own subjective notions of the "best interests of the child" when an intact, nuclear family with fit, married parents is involved. By holding that an initial showing of harm to a child is necessary before the state may intervene to determine the "best interests

90. *Id.* at 576.

91. *Id.* at 577.

92. *Id.* (citing TENN. CONST. art. I, § 8).

93. *Id.* at 578.

94. *Id.* (citation omitted).

95. *Id.* at 579.

96. *Id.* at 580-81.

of the child," we approve the reasoning of both Tennessee and federal cases that have balanced various state interests against parental privacy rights.⁹⁷

Subsequently, in *Simmons v. Simmons*,⁹⁸ the Tennessee Supreme Court applied the principles in *Hawk* to a case in which the paternal grandparents of a child sought visitation rights over the objections of the child's mother and adopting father. The court repudiated the grandparents' assertion that constitutional protection of family privacy and parental rights was "limited to married, natural parents who have maintained continuous custody of their children and whose fitness as parents has not been challenged."⁹⁹

Consistent with the Tennessee Supreme Court's holdings in *Hawk* and *Simmons*, the Supreme Court of Georgia, in *Brooks v. Parkerson*,¹⁰⁰ struck down Georgia's grandparent visitation statute on constitutional grounds.¹⁰¹ The statute permitted court intervention to "grant any grandparent . . . reasonable visitation rights upon proof of special circumstances which make such visitation rights necessary to the best interests of the child."¹⁰² The court held that the statute was unconstitutional under both the federal and state constitutions "because it does not clearly promote the health or welfare of the child and does not require a showing of harm before state interference is authorized."¹⁰³ In *Herbst v. Sayre*,¹⁰⁴ the Supreme Court of Oklahoma cited and relied upon *Brooks* to buttress its conclusion that Oklahoma's grandparent visitation statute was unconstitutional as applied in a case that

97. *Id.* at 579-80.

98. 900 S.W.2d 682 (Tenn 1995).

99. *Id.* at 684; *see also* *Ellison v. Ellison*, 994 S.W.2d 623 (Tenn. Ct. App. 1999).

100. 454 S.E.2d 769, 790 (Ga. 1995).

101. *Id.* at 774.

102. *Id.* at 770-71 (quoting GA. CODE ANN. § 19-7-3(c) (1988). Georgia has since amended the visitation statute to permit visitation rights for grandparents when a "court finds the health or welfare of the child would be harmed unless such visitation is granted, and if the best interests of the child would be served by such visitation." GA. CODE ANN. § 19-7-3(c) (1999)).

103. *Id.* at 774.

104. 971 P.2d 395 (Okla. 1998).

involved neither harm nor threatened harm to the child, nor unfitness on the parents' part.¹⁰⁵ The Oklahoma court concluded:

Herbst argues for an application of [the statute] which effectively strips parents of the right to make the decisions regarding grandparental visitation and their own children. Any conflict between the fundamental, constitutional right of parents to care for their children as they see fit and the statutorily created right of grandparental visitation must be reconciled in favor of the preservation of the parents' constitutional rights. The relationship between parent and child must be held paramount.¹⁰⁶

The Supreme Court of Florida, in *Beagle v. Beagle*,¹⁰⁷ struck down as unconstitutional an amendment to the state's grandparent visitation statute that required the court to award reasonable visitation rights to grandparents over a natural parent's objection if visitation would be in the child's best interest, without regard to whether the relationship between the child's parents and grandparents was broken.¹⁰⁸ The court, noting that "[o]ur cases have made it abundantly clear that the State can satisfy the compelling state interest standard when it acts to prevent demonstrable harm to a child," held that the amended statute was unconstitutional because it did not show such a compelling state interest.¹⁰⁹ Again, in *Hoff v. Berg*,¹¹⁰ the Supreme Court of North Dakota declared the state's grandparent visitation statute unconstitutional. Virginia's highest court, in *Williams v. Williams*,¹¹¹ reached a similar result after review of a statute that

105. *Id.* at 398–99.

106. *Id.* at 399.

107. 678 So. 2d 1271 (Fla. 1996); *see also* Von Eiff v. Azicri, 720 So. 2d 510 (Fla. 1998).

108. *Beagle*, 678 So. 2d. at 1273 (citing FLA. STAT. ANN. § 752.01(1)(e) (West 1997)).

109. *Id.* at 1276.

110. 595 N.W.2d 285 (N.D. 1999).

111. 501 S.E.2d 417 (Va. 1998).

permitted visitation by grandparents and other non-parents.¹¹² The court stated:

In essence, [the statute] as applied in this proceeding, permits the government to impose its views regarding how a child should be raised upon a child's parents, even though such decisions are parental choices protected by the parents' fundamental rights emanating from the Fourteenth Amendment. [The statute] as applied here, is constitutionally deficient because it does not require that a court, in awarding visitation to the grandparents, make a determination that such visitation is necessary to protect the safety or health of the child.¹¹³

Simply stated, in several of the more recent grandparent visitation cases, a number of state courts have placed a constitutionally required limit on grandparents' visitation rights that impair family privacy by threatening family autonomy and the rights of fit parents to raise their children. Considering themselves bound by long-standing constitutional principles, these courts decline to rely solely and entirely on the best interests of the child doctrine as controlling or outweighing family privacy principles in grandparent visitation cases.

B. Other Non-Parents

During the last decade or so, a third group of suitors, who may be denominated as "lesbian coparents" have asserted claims of the right of visitation. These claimants have sought legal recognition of relationships with children that are based, unlike those of stepparents or grandparents, upon neither marriage nor blood. The facts set out by the New York Court of Appeals in *Alison D. v. Virginia M.*,¹¹⁴ the first such case decided by a state's highest court, are both illustrative and prototypic.

112. See VA. CODE ANN. § 20-124.2 (Michie 2000).

113. *Williams*, 501 S.E.2d at 424.

114. 572 N.E.2d 27 (N.Y. 1991).

The parties in *Alison D.*, having begun a relationship and lived together for a period of time, decided to have a child.¹¹⁵ They agreed that Virginia M. would be artificially inseminated and that they would participate together in raising the child.¹¹⁶ After the child's birth, Alison D. shared in birth related expenses and child support and cooperated with Virginia M. in providing child care and making parental decisions.¹¹⁷ After two years and four months, the parties separated, and Virginia M., the natural mother, cut off Alison D.'s visitation with the child. Alison D. commenced a lawsuit seeking visitation rights.¹¹⁸ The New York Court of Appeals, in an opinion that emphasized the fact that Alison D. was not the child's natural parent, refused to recognize her asserted right to visitation.¹¹⁹ The court, interpreting the governing statute, observed:

Traditionally, in this State it is the child's mother and father who, assuming fitness, have the right to the care and custody of their child, even in situations where the nonparent has exercised some control over the child with the parents' consent. . . . To allow the courts to award visitation—a limited form of custody—to a third person would necessarily impair the parents' right to custody and control.¹²⁰

Accordingly, the court dismissed Alison D.'s claims of legal parentage and for visitation rights.

The New York Court of Appeals was not the first court to consider and reject a claim for visitation by a former partner of the

115. *Id.* at 28.

116. *Id.*

117. *Id.*

118. *Id.* at 29.

119. *Id.*

120. *Id.* The New York Domestic Relations Law provides that "either parent may apply to the supreme court for a writ of habeas corpus to have such minor child brought before such court; and on the return thereof, the court . . . may award the natural guardianship, charge and custody of such child to either parent . . . as the case may require." N.Y. DOM. REL. LAW § 70(a) (McKinney 1999 & Supp. 2001–02).

same sex. In two earlier cases, the California Court of Appeals denied visitation rights to women who had cohabited with the natural mother of a child conceived through artificial insemination.¹²¹

In *In re Interest of Z.J.H.*,¹²² the Supreme Court of Wisconsin refused to recognize a coparenting agreement between the plaintiff, Wendy L. Sporleder, and her lesbian former partner, Janice Hermes, and denied visitation rights to Sporleder.¹²³ The parties in *Z.J.H.*, who had lived together for eight years, arranged for Hermes to adopt a child.¹²⁴ They agreed that if they separated, they would resort to mediation to determine the child's physical custody, with liberal visitation rights for the non-custodian.¹²⁵ After the parties separated, Hermes sued for visitation and enforcement of the coparenting agreement.¹²⁶ The circuit court of appeals denied relief, rejecting all of the legal theories that Sporleder advanced.

In its decision affirming the lower court's judgment, the Wisconsin Supreme Court pointed out that in the absence of a showing that a natural parent was unfit, or other extraordinary circumstances, a nonparent could not obtain custody.¹²⁷ The applicable statute allowed visitation petitions "by a grandparent, greatgrandparent, stepparent, or person who has maintained a relationship similar to a parent-child relationship with the child," when visitation is in the child's best interest.¹²⁸ The court cited earlier case law in Wisconsin that had declared that the statute was

121. See *Nancy S. v. Michelle G.*, 279 Cal. Rptr. 212, 219 (Ct. App. 1990) (declining legal recognition of parent-child relationship of nonbiological lesbian coparent); *Curiale v. Reagan*, 272 Cal. Rptr. 520, 522-23 (Ct. App. 1990) (holding that plaintiff lacked standing to assert custody or visitation claim against former partner); see also *West v. Superior Ct.*, 69 Cal. Rptr. 2d 160, 162-64 (1997) (refusing to recognize standing of lesbian former coparent) (citing *Curiale*, 272 Cal. Rptr. at 521-22).

122. 471 N.W.2d 202 (Wis. 1991).

123. *Id.* at 204.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* at 205.

128. WIS. STAT. ANN. § 767.245(1) (West 2001); see *Z.J.H.*, 471 N.W.2d at 208 (explaining legislative intent and pertinent case law), *overruled by In re Custody of H.S.H.- K.*, 533 N.W.2d 419 (Wis. 1995).

applicable only in cases where an underlying legal action affects the family unit. The court found that the parties' agreement was not consistent with the legislative intent of the custody and visitation statutes, and also refused to hold that Hermes was equitably estopped from denying that Sporleder was the child's parent.¹²⁹

Not long after the Wisconsin Supreme Court's unequivocal decision in *Z.J.H.*, however, appellate courts in several states began to recognize visitation claims by lesbian former coparents, sometimes explicitly rejecting both the holdings and the reasoning of earlier cases that had denied such claims. In *A.C. v. C.B.*,¹³⁰ for example, the New Mexico Court of Appeals declined to find that an oral coparenting agreement between the mother of a child conceived by artificial insemination and the mother's female companion was unenforceable as a matter of law.¹³¹ The court explicitly cited and implicitly rejected the holding in *Z.J.H.* that a coparenting agreement was void as against public policy, and remanded the case to the trial court for a hearing on whether visitation was in the best interest of the child.¹³²

In a more surprising development, a mere four years after its decision in *In re Interest of Z.J.H.*,¹³³ the Supreme Court of Wisconsin reconsidered its position on visitation rights for lesbian partners of legal parents and did a complete about-face. In *In re Custody of H.S.H.-K.*,¹³⁴ Sandra Holtzman sought court-ordered custody of or visitation with the child of Elsbeth Knott, her lesbian former partner.¹³⁵ As in its earlier decision, the Wisconsin Supreme Court held that the state's visitation statute did not apply because the legislature intended that the statute apply only in marriage dissolution cases.¹³⁶

Despite the absence of legislative authority to support the decision, the court declared that it was not the legislature's intent

129. *Z.J.H.*, 471 N.W.2d at 211, 212.

130. 829 P.2d 660 (N.M. Ct. App. 1992).

131. *Id.* at 663-64.

132. *Id.* at 664 (citing *In re Interest of Z.J.H.*, 471 N.W.2d 202, 211 (Wis. 1991)).

133. 471 N.W.2d 202 (Wis. 1991).

134. 533 N.W.2d 419 (Wis. 1995).

135. *Id.* at 422.

136. *Id.* at 424.

for the statute to "be the exclusive provision on visitation," nor that "it supplant or preempt the courts' long recognized equitable power to protect the best interest of a child by ordering visitation *in circumstances not included in the statute*."¹³⁷

The court, asserting that it was "[m]indful of preserving a biological or adoptive parent's constitutionally protected interests and the best interest of a child," held that for a trial court to determine whether visitation is in the best interest of a child, a petitioner must prove both her "parent-like relationship" with the child as well as "a significant triggering event justifying state intervention in the child's relationship with a biological or adoptive parent."¹³⁸ The court set out four requirements that a party must satisfy to show that a parent-like relationship exists.¹³⁹ The party must first show that the "biological or adoptive parent consented to, and fostered" the relationship.¹⁴⁰ Second, the child and the parent must have lived in the same household.¹⁴¹ Third, the party must have undertaken, without expecting payment, significant responsibility for such parental obligations as child care, education, development, and contribution toward child support.¹⁴² Finally, the party's parental role must have been for a long enough time to establish "a bonded, dependent relationship parental in nature."¹⁴³

With respect to the requirement of a significant triggering event, the party seeking court ordered visitation must show that the parent substantially interfered with the parent-like relationship and that the party sought a visitation order within a reasonable time after this interference.¹⁴⁴ In sum, the Wisconsin Supreme Court held that if the party seeking visitation proves the four elements of a parent-like relationship, together with a significant triggering event, and a petition for visitation is made within a reasonable time, the trial court may determine whether visitation is in the best

137. *Id.* at 424-25 (emphasis added).

138. *Id.* at 435-36.

139. *Id.* at 435.

140. *Id.*

141. *Id.*

142. *Id.* at 435-36.

143. *Id.* at 436.

144. *Id.*

interest of the child.¹⁴⁵ The court remanded the case to the trial court for a best interests hearing.¹⁴⁶

The decision of the Supreme Court of Wisconsin, together with later decisions by the highest courts of Massachusetts, New Jersey, and Pennsylvania, may portend that the tide has turned and that courts will become increasingly sympathetic to petitions for court ordered visitation by lesbian former coparents. In *E.N.O. v. L.M.M.*,¹⁴⁷ for example, the Massachusetts Supreme Court held, in a case of first impression, that the Probate Court did not abuse its discretion in granting visitation rights to a de facto parent because visitation was in the best interest of the child.¹⁴⁸ The court conceded that there was no statutory authority whatsoever for granting visitation rights to one claiming to be in a parent-like position.¹⁴⁹ What is more, the court recognized that the best interest standard is amorphous.¹⁵⁰ Nevertheless, following Wisconsin's lead, the court declared that the Probate Court's equity jurisdiction provided authority for a visitation award.¹⁵¹ Accordingly, the court held that the plaintiff who had shared a relationship with the child's natural mother for thirteen years was a de facto parent in a nontraditional family.¹⁵²

The Supreme Court of New Jersey, employing somewhat different reasoning, reached a similar result in *V.C. v. M.J.B.*¹⁵³ The court concluded that plaintiff's functioning as psychological parent was sufficient to satisfy "the 'exceptional circumstances' category (occasionally denominated as extraordinary circumstances) that has been recognized as an alternative basis for a third party to seek custody and visitation of another person's

145. *Id.* at 435.

146. *Id.* at 437; *see also* *J.A.L. v. E.P.H.*, 682 A.2d 1314, 1321–22 (Pa. Super. Ct. 1996) (finding that lesbian former partners lived together in nontraditional family with child and concluding relationship entitled plaintiff to seek parental custody rights).

147. 711 N.E.2d 886 (Mass. 1999).

148. *Id.* at 893–94.

149. *Id.* at 889.

150. *Id.* at 890.

151. *Id.* at 889–90.

152. *Id.* at 892–93.

153. 748 A.2d 539 (N.J. 2000), *cert. denied*, 69 U.S.L.W. 3096 (Oct. 10, 2000).

child.”¹⁵⁴ To determine the circumstances under which a party might establish psychological parenthood, the court, again without statutory authority, applied the same test that established *de facto* parenthood as enunciated by the Supreme Court of Wisconsin in *In re Custody of H.S.H.-K.*¹⁵⁵

The Supreme Court of Pennsylvania has also weighed in on the issue of visitation rights for lesbian coparents in *T.B. v. L.R.M.*¹⁵⁶ The facts in *T.B.* present a virtual mirror image of the cases just discussed in that the plaintiff was the former lesbian partner of a woman whose child was conceived through artificial insemination and who shared the responsibilities of child rearing.¹⁵⁷ After the relationship ended, the plaintiff sought partial custody and visitation with the child.¹⁵⁸ The court conceded that there was a “stringent test for standing in third-party suits for visitation or partial custody due to respect for the traditionally strong right of parents to raise their children as they see fit,” and that “courts generally find standing in third-party visitation and custody cases only where the legislature specifically authorizes the cause of action.”¹⁵⁹ Despite the lack of legislative authority, the court decided that it was proper to allow such an action where a party stood *in loco parentis* to the child.¹⁶⁰

154. 748 A.2d at 549.

155. *Id.* at 551; *see Custody of H.S.H.-K.*, 533 N.W.2d 419 (Wis. 1995); *see also S.F. v. M.D.*, 751 A.2d 9 (Md. Ct. Spec. App. 2000). *But see Titchenal v. Dexter*, 693 A.2d 682 (Vt. 1997).

156. 786 A.2d 913 (Pa. 2001).

157. *Id.* at 914–15.

158. *Id.* at 915.

159. *Id.* at 916.

160. *Id.* The recently published American Law Institute’s *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS*, in its definitions of parent by estoppel and *de facto* parent, appears to accept, in substance and effect, the approach set out in the decisions just discussed in Wisconsin, New Jersey, Massachusetts, and Pennsylvania. *See PRINCIPLES*, sec. 2.03. For a thoughtful and sympathetic treatment of the ALI principles, *see James Herbie DiFonzo, Toward a Unified Theory of the Family: The American Law Institute’s Principles of the Law of Family Dissolution*, 2001 BYU L. REV. 923 (2001).

III. THE DIMENSIONS OF *TROXEL*

A. *The Decision of the Court*

In June of 2000 the Supreme Court of the United States, in *Troxel v. Granville*,¹⁶¹ responded to a constitutionally grounded attack on the grandparent visitation statute of the State of Washington.¹⁶² The Court in *Troxel*, affirming the decision of the Washington Supreme Court, held that the state statute, as applied, was an unconstitutional infringement on “the fundamental right of parents to make decisions concerning the care, custody, and control of their children.”¹⁶³

The parents in *Troxel*, who never married, had two children born out of wedlock.¹⁶⁴ In time, the parents separated and the children’s father regularly visited them in the home of his parents, the children’s paternal grandparents.¹⁶⁵ The children’s father committed suicide, and their mother subsequently decided to limit the paternal grandparents’ visitation to one short visit each month.¹⁶⁶ The grandparents then sued for more liberal visitation under the state grandparent visitation statute.¹⁶⁷ The statute in question provided: “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 interests of the child whether or not there has been any change of circumstances.”¹⁶⁸

In an opinion joined by a plurality of the Court, Justice O’Connor described the statute as “breathtakingly broad,” noting that the statutory 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.”¹⁶⁹ Further,

161. 530 U.S. 57 (2000).

162. *Id.*; see WASH. REV. CODE § 26.10.160(3) (1997).

163. *Troxel*, 530 U.S. at 66–67.

164. *Id.* at 60.

165. *Id.*

166. *Id.* at 60–61.

167. *Id.* at 61.

168. WASH. REV. CODE § 26.10.160(3) (1994).

169. *Troxel*, 530 U.S. at 67.

the statute “places the best-interest determination solely in the hands of the judge,”¹⁷⁰ whose view will prevail, without requiring the court to afford any presumption of validity or, indeed, any weight to a parent’s decision that visitation would not be in the best interest of the child.¹⁷¹ Thus, Justice O’Connor observed, “in practical effect, in the State of 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.”¹⁷²

Turning to the facts in the trial record, the plurality pointed out that there were no special factors to justify state interference with the parent’s “fundamental right to make decisions concerning the rearing of her two daughters.”¹⁷³ There was, for example, neither an allegation nor a finding that the children’s mother was unfit, an important factor because of the “presumption that fit parents act in the best interests of their children.”¹⁷⁴ Not only did the trial court fail to give special weight to the mother’s determination of the best interests of her daughter, but it also effectively placed on a fit parent “the burden of *disproving* that visitation would be in the best interest of her daughters.”¹⁷⁵ Accordingly, the Court determined that “[t]he decisional framework employed by the [Washington] Superior Court directly contravened the traditional presumption that a fit parent will act in the best interest of his or her child.”¹⁷⁶ The plurality concluded:

As we have explained, the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make childrearing decisions simply because a state [trial] judge believes a “better” decision could be made. Neither the Washington nonparental visitation statute

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* at 68.

174. *Id.*

175. *Id.* at 69.

176. *Id.*

generally—which places no limits on either the persons who may petition for visitation or the circumstances in which such a petition may be granted—nor the Superior Court in this specific case required anything more. Accordingly, we hold that [the statute], as applied in this case, is unconstitutional.¹⁷⁷

Lest there be any doubt, the plurality explicitly noted that its decision rested “on the sweeping breadth of [the Washington statute] and the broad unlimited power in this case,” but declined to 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 of harm to the child as a condition precedent to granting visitation.”¹⁷⁸ Rather, because state courts adjudicate visitation standards case-by-case, the Court was “hesitant to hold that specific nonparental visitation statutes violate the Due Process Clause as a *per se* matter.”¹⁷⁹

Concurring in the judgment, Justice Souter pointed out that the Court had “long recognized that a parent’s interests in the nurture, upbringing, companionship, care, and custody of children are generally protected by the Due Process Clause of the Fourteenth Amendment.”¹⁸⁰ He noted, however, that the Court’s earlier decisions had “not set out exact metes and bounds to the protected interest of a parent in the relationship with his child.”¹⁸¹

In a separate opinion, Justice Thomas also concurred in the judgment, and expressed agreement with the plurality “that this Court’s recognition of a fundamental right of parents to direct the upbringing of their children resolves this case.”¹⁸²

177. *Id.* at 72–73.

178. *Id.* at 73.

179. *Id.*

180. *Id.* at 77 (Souter, J., concurring).

181. *Id.* at 78.

182. *Id.* at 80 (Thomas, J., concurring). Justice Thomas concluded: Our decision in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), holds that parents have a fundamental constitutional right to rear their children, including the right to determine who shall educate and socialize them. The opinions of the

Justice Stevens, in his dissent, while commending the Court's wisdom in "declin[ing] to endorse either the holding or the reasoning of the Supreme Court of Washington," asserted "the Court would have been even wiser to deny certiorari."¹⁸³ Justice Stevens went on to note that the Court's decisions "leave no doubt that parents have a fundamental liberty in caring for and guiding their children, and a corresponding privacy interest—absent exceptional circumstances—in doing so without the undue interference of strangers to them and to their child."¹⁸⁴ Most notably, Justice Stevens further observed:

There is at a minimum a third individual, whose interests are implicated in every case to which the statute applies—the child

. . . .

While this Court has not yet had occasion to elucidate the nature of a child's liberty interests in preserving established familial or family-like bonds, it seems to me extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests, and so, too, must their interests be balanced in the equation. At a minimum, our prior cases recognizing that children are, generally speaking, constitutionally protected actors require that this Court reject any suggestion that when it comes to parental rights, children are so much chattel. The constitutional protection against arbitrary state interference with parental rights

plurality, Justice Kennedy, and Justice Souter recognize such a right, but curiously none of them articulates the appropriate standard of review. I would apply strict scrutiny to infringements of fundamental rights. Here, the State of Washington lacks even a legitimate governmental interest—to say nothing of a compelling one—in second-guessing a fit parent's decision regarding visitation with third parties. On this basis, I would affirm the judgment below.

Id. at 80.

183. *Id.* at 80 (Stevens, J., dissenting).

184. *Id.* at 87.

should not be extended to prevent the States from protecting children against the arbitrary exercise of parental authority that is not in fact motivated by an interest in the welfare of the child.¹⁸⁵

Accordingly, Justice Stevens concluded 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.”¹⁸⁶

Justice Scalia, also dissenting in a separate opinion, recognized the rights of parents to direct their children’s upbringing as among the inalienable rights proclaimed in the Declaration of Independence and also among the “‘othe[r rights] retained by the people’ which the Ninth Amendment says the Constitution’s enumeration of rights ‘shall not be construed to deny or disparage.’”¹⁸⁷ Justice Scalia asserted, nevertheless, that if the Court should vindicate such parental rights, which are not enumerated in the Constitution, it would “be ushering in a new regime of judicially prescribed, and federally prescribed, family law.”¹⁸⁸ Justice Scalia concluded, “I have no reason to believe that federal judges will be better at this than state legislatures; and state legislatures have the great advantages of doing harm in a more circumscribed area, of being able to correct their mistakes in a flash, and of being removable by the people.”¹⁸⁹

The final dissenter, Justice Kennedy, although agreeing with much of Justice Stevens’s opinion, dissented in a separate opinion and averred that he would have remanded the case for further proceedings.¹⁹⁰ Justice Kennedy faulted the Washington court, not only for finding the statute facially unconstitutional, but also for requiring a showing of harm in every case.¹⁹¹ Justice Kennedy objected to the Washington court’s “conclusion that the

185. *Id.* at 86–90 (Stevens, J., dissenting) (citations omitted).

186. *Id.* at 91.

187. *Id.* at 91 (Scalia, J., dissenting) (alterations in original).

188. *Id.* at 93.

189. *Id.*

190. *Id.* at 94–95 (Kennedy, J., dissenting).

191. *Id.*

Constitution forbids the application of the best interests of the child standard in any visitation proceeding,” stating:

My principal concern is that the holding seems to proceed from the assumption that the parent or parents who resist visitation have always been the child’s primary caregivers and that the third parties who seek visitation have no legitimate and established relationship with the child. That idea, in turn, appears influenced by the concept that the conventional nuclear family ought to establish the visitation standard for every domestic relations case. As we all know, this is simply not the structure or prevailing condition in many households.¹⁹²

Noting the “almost universal adoption of the best interests standard for visitation disputes,”¹⁹³ Justice Kennedy counseled that “[t]he protection the Constitution requires . . . must be elaborated with care, using the discipline and instruction of the case law system”¹⁹⁴ with the reminder that “family courts in the 50 states confront these factual variations each day, and are best situated to consider the unpredictable, yet inevitable, issues that arise.”¹⁹⁵

B. *The Impact of Troxel*

In response to the question “What has *Troxel* wrought?” the better part of wisdom suggests that one should offer only the most tentative and speculative response at best. Within months of the Supreme Court’s decision in *Troxel*, state courts loosed a deluge of opinions citing, discussing, and either applying or distinguishing the Court’s holding. One should note that many of the court opinions that cite *Troxel* have the most tenuous relevance, if any at all, to the issue that the Court addressed.¹⁹⁶

192. *Id.* at 98.

193. *Id.* at 100.

194. *Id.* at 101.

195. *Id.*

196. *See, e.g., Cent. Tex. Nudists v. County of Travis*, No. 03-00-00024-

The *Troxel* opinion obscures more than it illuminates the question of whether a given state's grandparent visitation statute, or any third-party visitation statute for that matter, will survive constitutional scrutiny. If one needs evidence beyond the six opinions of the Justices to support this proposition, one finds it in the conflicting state court decisions that purport to apply the teaching of *Troxel*. Decisions by the highest courts in Florida,¹⁹⁷ Illinois,¹⁹⁸ Iowa,¹⁹⁹ Kansas,²⁰⁰ Maine,²⁰¹ Mississippi,²⁰² and Oklahoma²⁰³ are illustrative of the widely variant opinions that purport to rely on *Troxel* or take its holding into account. While space limitations will not permit detailed discussion of all of these cases, the following decisions illustrate the mischief of *Troxel*.

In *Lulay v. Lulay*,²⁰⁴ the maternal grandmother sought visitation with three minor children whose divorced parents had joint custody.²⁰⁵ The applicable statute,²⁰⁶ as interpreted by the court, "permit[ted] a grandparent to file a petition for visitation

CV, 2000 WL 1784344, at *8 (Tex. Ct. App. Dec. 7, 2000) (holding that county park rules that banned children's access to clothing-optional park did not violate parents' due process rights to direct the upbringing of their children); *Cooper v. United States Ski Ass'n*, 32 P.3d 502, 511 (Colo. Ct. App. 2000) (holding that release signed by parent of child who subsequently sustained serious injuries was valid and enforceable against the child).

197. See *Belair v. Drew*, 770 So. 2d 1164 (Fla. 2000). The Florida opinion was unexceptional in light of the court's holdings prior to the *Troxel* decision. See, e.g., *Saul v. Brunetti*, 753 So. 2d 26 (Fla. 2000) (finding to be unconstitutional a statutory provision that allowed grandparent visitation with a child born out of wedlock); *Von Eiff v. Azicri*, 720 So. 2d 510, 516-17 (Fla. 1999) (holding unconstitutional a provision concerning grandparent visitation when one or both of the child's parents are dead); *Beagle v. Beagle*, 678 So. 2d 1271 (Fla. 1996) (finding that a statutory provision relating to grandparent visitation with child living with both parents was unconstitutional).

198. See *Lulay v. Lulay*, 739 N.E.2d 521 (Ill. 2000).

199. See *Santi v. Santi*, 633 N.W.2d 312 (Iowa 2001).

200. See *Kan. Dep't of Soc. and Rehab. Servs. v. Paillet*, 16 P.2d 962 (Kan. 2001).

201. See *Rideout v. Riendeau*, 761 A.2d 291 (Me. 2000).

202. See *Zeman v. Stanford*, 789 So. 2d 798 (Miss. 2001).

203. See *Neal v. Lee*, 14 P.3d 547 (Okla. 2000).

204. 739 N.E. 2d 521 (Ill. 2000).

205. *Id.* at 523.

206. See 750 ILL. COMP. STAT. ANN. 5/607(b)(1) (West 1999).

where the grandparent's own child . . . objects to the visitation."²⁰⁷ The court concluded that the statute, as applied, was "an unconstitutional infringement on [the parents'] fundamental liberty interest in raising their children" and was, therefore, unconstitutional as applied.²⁰⁸

In *Kansas Department of Social and Rehabilitative Services v. Paillet*,²⁰⁹ the decision of the Supreme Court of Kansas is to the same effect as the *Lulay* decision in Illinois. In *Paillet*, as in *Troxel*, the father of the minor child had died suddenly, in *Troxel* by suicide and in *Paillet* in a car accident.²¹⁰ Here, the grandparents sought visitation with their grandchild pursuant to a statute that allowed a court to grant reasonable visitation rights to the grandparents of an unmarried minor child "upon a finding that the visitation right would be in the child's best interests and when a substantial relationship between the child and the grandparent has been established."²¹¹ The court stated:

The trial court made no presumption, as required by *Troxel*, that a fit parent will act in the best interests of his or her child. In this case, the operative presumption seems to have been that a fit parent would not have denied visitation, which justified the trial court's substituting its judgment in determining the child's best interests.²¹²

The court also criticized the decision of the intermediate appellate court as contrary to *Troxel*, stating:

Likewise, the Court of Appeals implicates the presumption that a fit custodial parent makes decisions in the best interests of the child. It would allow a judge to call into question any parental decision which results in rejecting or limiting a

207. *Lulay*, 739 N.E.2d at 534.

208. *Id.*

209. 16 P.2d 962 (Kan. 2001).

210. *Id.* at 964.

211. *Id.*; see KAN. STAT. ANN. § 38-129 (2000).

212. *Paillet*, 16 P.3d at 970.

grandparent's visitation. The Court of Appeals' decision essentially circumvents the presumption that a fit parent makes decisions in the best interests of his or her child. Such a decision would not allow a fit parent to limit a grandparent's visitation without losing the presumption that the parent is making the decision in the best interests of the child.²¹³

Because the Court in *Troxel* had declined to decide whether particular grandparent visitation statutes were facially violative of due process, the court in *Paillet* found the Kansas statute to be unconstitutional only as applied to the case before it.²¹⁴

The highest courts of Maine²¹⁵ and Mississippi,²¹⁶ each having addressed their states' visitation statutes subsequent to the *Troxel* decision, encountered no apparent difficulty in finding the statutes to be constitutional. In *Rideout v. Riendeau*,²¹⁷ a case of first impression, the Supreme Court of Maine, in the course of addressing an attack on the Maine grandparent visitation statute, emphasized that the Supreme Court, while declaring the Washington statute unconstitutional, "did so on the limited facts and law before it, leaving for another day a constitutional analysis of statutes with more carefully established protections of parents' fundamental rights."²¹⁸ Nevertheless, the Maine court extracted from *Troxel* clear guidance on important points as follows:

First, [t]he liberty interest at issue in this case—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. The fundamental right of parents to direct the care and upbringing of their children does not disappear in the face of a third party's request for

213. *Id.* at 970–71.

214. *Id.* at 971.

215. *See Rideout v. Riendeau*, 761 A.2d 291 (Me. 2000).

216. *See Zeman v. Stanford*, 789 So. 2d 798 (Miss. 2001).

217. 761 A.2d 291 (Me. 2000).

218. *Id.* at 297.

visitation with the children. Second, the best interests of the child standard, standing alone, is an insufficient standard for determining when the State may intervene in the decision making of competent parents. And finally, because of the "presumption that fit parents act in the best interests of their children," trial courts must accord special weight to parents' decisions and objections regarding requests for third-party visitation.²¹⁹

In light of these principles, the Maine court turned to the provision of the Maine statute that permitted a grandparent to petition for visitation when "[t]here is a sufficient existing relationship between the grandparent and the child."²²⁰ The court held that in this case the grandparents had acted as parents of the children for a significant period of time and, therefore, "the Grandparents Visitation Act serves a compelling state interest in addressing the children's relationship with the people who have cared for them as parents."²²¹ Further, the court found that "[b]ecause the Act is narrowly tailored to serve that compelling interest, it may be applied in this case without violating the Constitutional rights of the parents."²²²

Like the provision in Maine, the Mississippi statute that governs grandparent visitation also withstood a challenge on constitutional grounds in the state's highest court in *Zeman v. Stanford*.²²³ In *Zeman*, the father of two minor children was awarded sole custody after the divorce.²²⁴ The children's mother was granted reasonable visitation, which was restricted after her imprisonment in Arkansas for attempted murder and other crimes.²²⁵ From the time of the children's birth, the maternal grandparents enjoyed a relationship with them, including regular

219. *Id.* (citations omitted).

220. *Id.* at 299 (quoting ME. REV. STAT. ANN. tit. 19, § 1803(1)(B) (West 1998)).

221. *Rideout*, 761 A.2d at 303.

222. *Id.*

223. 789 So. 2d 798 (Miss. 2001).

224. *Id.* at 799.

225. *Id.*

Sunday dinners, Christmases, and birthday celebrations with the children's cousins.²²⁶ After the children's father curtailed these visits to one weekend a month, including overnight visitation, the grandparents sued for visitation rights.²²⁷ The trial court granted visitation rights to the grandparents "based on the fact that a viable relationship had been established between the [grandparents] and the children and that it would be in the best interests of the children."²²⁸

The court reviewed its own earlier decision finding the state's grandparent visitation was constitutional.²²⁹ In response to the father's reliance on *Troxel* in support of his challenge to the statute on constitutional grounds, the court stated:

The statute in *Troxel* swept too broadly by permitting any person to petition at any time with the only requirement being that the court find that visitation serves the best interest of the child. In contrast, this Court . . . specifically requires the Chancellor to consider certain factors before awarding visitation in order to ensure that parents are not deprived of their right to rear their children and determine their children's care, custody, and management.²³⁰

Accordingly, the court held that the limitations that it had placed on the statute in the past resulted in a reading of the statute that was not fraught with the excessive breadth of the statute in *Troxel* and that the father's constitutional attack lacked merit.²³¹

In addition to Mississippi, the highest courts of Georgia²³² and Oklahoma²³³ were compelled to revisit the issue of grandparent visitation after the *Troxel* decision, and in each case the court adhered to the position it had assumed prior to *Troxel*.

226. *Id.* at 800.

227. *Id.*

228. *Id.* at 801.

229. *Id.* at 803 (reviewing *Martin v. Coop*, 693 So. 2d 912 (Miss. 1997)).

230. *Id.* (citations omitted).

231. *Id.*

232. *See Clark v. Wade*, 544 S.E.2d 99 (Ga. 2001).

233. *See Neal v. Lee*, 14 P.3d 547 (Okla. 2000).

*Clark v. Wade*²³⁴ involved appeals in two companion cases, in which the trial court, in each case, awarded custody to the father of a child who had lived with grandparents for a substantial period of time.²³⁵ In the course of a lengthy opinion, the court cited its earlier holding that the state's grandparent visitation law was unconstitutional under both the United States and Georgia Constitutions because of its failure to require a showing of harm before a court could grant visitation.²³⁶

The court then noted that "[t]he Supreme Court's decision last term in *Troxel v. Granville* raises the question whether we correctly interpreted federal constitutional law as requiring a showing of harm to the child before a state may intervene in the parent's right to raise his or her family."²³⁷ In response to this question, the court concluded:

In enacting the parent-third party custody statute, the Georgia General Assembly avoided the constitutional defects that the U.S. Supreme Court plurality found in the Washington visitation statute. First, [the Georgia statute] expressly limits third parties who may seek custody to a specific list of the child's closest relatives, including an adoptive parent. Second, the statute defers to the fit parent's decision on custody by establishing a rebuttable presumption in favor of parental custody. What is left open for judicial interpretation is how to determine that an award of custody to the third party "is for the best interest of the child or children and will best promote their welfare and happiness."²³⁸

The court then narrowly construed the statutory best interest of the child standard as meaning "that the third party must

234. 544 S.E.2d 99 (Ga. 2001).

235. *Id.* at 101.

236. *Id.* at 105 (citing *Brooks v. Parkerson*, 454 S.E.2d 769, 773-74 (Ga. 1995)).

237. *Id.* at 105-106.

238. *Id.* at 107 (citations omitted).

prove by clear and convincing evidence that the child will suffer physical or emotional harm if custody were awarded to the biological parent,"²³⁹ and "that an award of custody to [the third party] will best promote the child's welfare and happiness."²⁴⁰

In *Neal v. Lee*,²⁴¹ the Supreme Court of Oklahoma observed that the facts in the case before it were similar to those in *Troxel*, in that in both cases the father of the child was deceased and the mother was the surviving parent.²⁴² The court reaffirmed its decision in *Herbst v. Sayre*,²⁴³ which required a showing of harm or potential harm for the imposition of grandparent visitation despite the objection of fit parents.²⁴⁴ The court observed that it is not clear after *Troxel* whether the United States Constitution requires a showing of harm or potential harm for imposing grandparent visitation over fit parents' objections;²⁴⁵ but the holding in *Herbst*, requiring a showing of harm or potential harm to the child before reaching the child's best interests, is not affected by the Court's decision in *Troxel*.²⁴⁶

It is plain, then, that state courts have neither found agreement with respect to the teaching of *Troxel* nor have they applied it in any way that can be readily characterized. At this point, the most that one can say with any confidence is that *Troxel* has neither advanced nor reinforced long-standing principles of family autonomy and parental authority despite the plurality's citation of earlier cases that established those principles.

239. *Id.* at 108.

240. *Id.*

241. 14 P.3d 547 (Okla. 2000).

242. *Id.* at 549.

243. 971 P.2d 395 (Okla. 1998).

244. *Id.*

245. *Neal*, 14 P.3d at 550.

246. *Id.*

