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COLUMN: FAMILY LAW CORNER: CALIFORNIA'S GRANDPARENTS' RIGHTS

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TEXT:

[*40] **HEADLINES RECENTLY TRUMPETED THE** United States Supreme Court's ruling against a set of Washington state grandparents who had sought court-ordered visitation with their granddaughters. (*Troxel v. Granville*, 2000 Daily Journal D.A.R. 5831.) The headlines undoubtedly caused anxiety amongst grandparents in California who, since the 1993 advent of *Family Code* § 3104, have had a statutory right to seek court-ordered visitation with their grandchildren. But, as will be seen, the Supreme Court's decision in *Troxel* should probably have no ill effect on the carefully crafted *Family Code* § 3104.

The Facts

The relevant facts in *Troxel* are few and simple. Tommie Granville and Brad Troxel had two daughters. Jennifer and Gary Troxel are Brad's parents, and thus, are the grandparents of Tommie and Brad's two daughters.

Sometime after the birth of the two daughters, Brad died. After an initial period during which Tommie and the Troxels had a mutually agreeable visitation schedule for the Troxels to see their grandchildren, a dispute arose about that visitation schedule.

The Troxels sought a visitation order in the Washington state trial court under a Washington state statute which said that the court could grant visitation to "any person" "at any time" whenever "visitation may serve the best interest of the child." (*Revised Code of Washington* § 26.10.160(3).) There was never an allegation or a finding that Tommie was an unfit mother.

The trial court granted visitation to the Troxels. The case worked its way through the Washington state appellate system and ultimately to the United States Supreme Court. The Supreme Court found that the Washington state statute was unconstitutional as applied.

[*41] Are the California Grandparent Visitation Statutes Constitutional?

The faults that the Supreme Court found in the Washington statute do not appear to exist in the California grandparent visitation statute of *Family Code* § 3104.

Justice Sandra Day O'Connor, writing for a four-member plurality of the Court stated the substantive component of the due process clause of the 14th Amendment, "provides heightened protection against government interference with certain rights and liberty interests." (Citing *Washington v. Glucksberg*, 521 U.S. 702 (1997), and referring to *Reno v. Flores*, (1993).)

Justice O'Connor said: "The 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."

Justice O'Connor found several problems with the Washington statute. She wrote that when there is no finding that a particular parent is unfit, then the fundamental right of that parent (to raise the child as she deems proper) creates a constitutionally mandated presumption that the parent's decisions about the upbringing of the child are in the best interest of her child. The Washington statute does not mention such a presumption and the Washington trial court did not apply such a presumption.

California's grandparent visitation statute explicitly recognizes this presumption in stating the following: "There is a rebuttable presumption that the visitation of a grandparent is not in the best interest of a minor child if the natural or adoptive parents agree that the grandparent should not be granted visitation rights." (*Family Code* § 3104(e)).

Additionally: "There is a rebuttable presumption affecting the burden of proof that the visitation of a grandparent is not in the best interest of a minor child if the parent who has been awarded sole legal and physical custody of the child in another proceeding or with whom the child resides if there is currently no operative custody order objects to visitation by the grandparent." (*Family Code* § 3104(f)).

The *Troxel* plurality also found that the statute as applied allowed for the trial court to substitute its own judgment regarding grandparent visitation if it felt that its judgment was "better" than that of a fit parent. Justice O'Connor [*42] dealt with this issue by stating: "The Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made."

California's statute contains strong protections against a trial court substituting its own judgment over that of a fit parent just because the trial court believes its judgment to be "better." California's statute recognizes the constitutionally mandated presumption that the parents' decision regarding grandparent visitation is the correct decision. Properly applied, such a presumption should effectively block California trial courts from being able to substitute their own judgment regarding grandparent visitation for that of a fit parent.

Justice O'Connor based the plurality decision partially on the "breathtakingly broad" wording of the Washington statute, which allowed "any person" to be awarded visitation rights "at any time" if doing so would "serve the best interest of the child." Despite the breadth of the subject statute, Justice O'Connor only ruled that the statute was unconstitutional as applied, and did not find the statute to be facially invalid. Justice O'Connor found the trial court's findings to be "slender" and she found that the trial court did not utilize what she found to be a constitutionally mandated presumption in favor of the fit mother's decision.

In a concurring option, Justice Souter opined that the statute was facially invalid. He said, ". . . the statute's authorization of 'any person' 'at any time' to petition and to receive visitation rights subject only to a free-ranging best-interest of the child standard . . . sweeps too broadly. . . ."

Justice Thomas agreed with the plurality, but hinted that he would like to review the footing of substantive due process in general. Justices Stevens and Kennedy dissented and wanted the case remanded for further findings. Justice Scalia thought that the matter was an issue for the states, and he dissented.

The plurality and all of the other opinions in *Troxel* (with the exception of that of Justice Scalia) recognized a strong, enforceable, fundamental liberty interest in parents being able to raise their children as they see fit. This interest appears to strongly protect a parent's decisions regarding grandparent visitation, but only to a point. As Justice O'Connor stated, ". . . we would be hesitant to hold that specific nonparental visitation [*43] statutes violate the due Process Clause as a per se matter."

California's grandparent visitation statute, *Family Code* § 3104, is replete with safeguards that should make its application constitutional. The statute requires that, before a trial court can grant visitation rights to a grandparent, it must "(1) Find . . . that there is a preexisting relationship between the grandparent and the grandchild that has engendered a bond such that visitation is in the best interest of the child;" and "Balance . . . the interest of the child

in having visitation with the grandparent against the right of the parents to exercise their parental authority." When these requirements are combined with the earlier-mentioned presumptions in favor of parental decisions regarding grandparent visitation, the California statute should pass constitutional muster.

Other Third-Party Visitation Statutes May Be Unconstitutional

On the negative side, it is possible that *Troxel* renders *Family Code* § 3100(a) unconstitutional as this statute permits reasonable visitation rights "to any other person having an interest in the welfare of the child." This generalized wording of *Family Code* § 3100(a) mimics the Washington statute which was described as "breathtakingly broad."

Additionally, it would appear that *Family Code* § 3102, which permits visitation to relatives (including grandparents) of deceased parents' minor children, would be similarly struck down by the *Troxel* dictum, particularly since the *Troxel* facts are closest to *Family Code* § 3102. If *Family Code* § 3102 is overturned, then there would be no legislative safeguard to permit visitation of the deceased parent's children, with surviving parents and siblings of the deceased parent.

As the Supreme Court did not mandate that all nonparental visitation statutes include a showing of harm or potential harm to the grand-children at issue, future cases will interpret the extent of the high court's ruling.