GRANDPARENT VISITATION

By Mitchell A. Jacobs and David L. Marcus *

The issue of grandparent visitation is often highly emotionally charged, especially considering that it often arises after the death of one of the parents. In fact, the public policy concerns involved with this issue are so significant that it warranted consideration by the United States Supreme Court in Troxel v. Granville (2000) 530 U.S. 57, 120 S.Ct. 2054. Few family law issues are so controversial that they rise to that level.

California's nonparental visitation statute was recently tested by the Court in Punsly v. Ho, (March 20, 2001) 2001 DJDAR 2761. Applying Troxel, the Court held that California's statute was unconstitutionally applied in that case to award grandparents visitation. As of March 26, 2001, no petition for rehearing or review was filed. The Court restricted a grandparent's right to court ordered visitation based on the presumption that a fit parent's decision to restrict grandparent visitation and to agree to non-court ordered visitation is in the best interest of the child.

1

The child at issue was born in 1990. The parents divorced in 1992. The father died in 1996. After the father's death, the paternal grandparents continued to regularly spend time with the child approximately every two months. Mother lived in San Diego, and the grandparents lived in Los Angeles. Generally, mother drove the child to Los Angeles for the visits, or they met in a Newport Beach restaurant. The child often spoke on the phone with the grandparents.

For the last few months of 1998 and the first three months of 1999, the grandparents did not see their grandchild because the mother would not allow it. The grandparents retained an attorney, and proposed a visitation schedule. Mother objected to the schedule, and proposed a schedule with more limited visits.

The grandparents then filed an action under Family Code Section 3102 for visitation. In pertinent part, that section provides, "If either parent of an unemancipated minor child is deceased, the children, siblings, parents, and grandparents of the deceased parent may be granted reasonable visitation with the child during the child's minority upon a finding that the

2

visitation would be in the best interest of the minor child.”

Counsel was appointed for the child, who made recommendations to the Court for visitation. The Court presented two options to the mother: either agree with the proposed visitation schedule, or continue mediation. The mother, to end the litigation, stipulated to the proposed schedule. The orders included visitation one Sunday every other month in San Diego. If the child was ill, visits were to be rescheduled. Weekly telephone visits were also ordered. Also, orders called “ancillary orders” were issued, requiring mother to regularly inform the grandparents about the child’s school schedule, teachers and counselors and to authorize the school to communicate directly with the grandparents about the child. Mother was ordered to encourage the visits with the grandparents, and all parties were enjoined from making disparaging comments about the other in the presence of the child.

On appeal, the mother challenged the constitutionality of Section 3102 as applied to her. She was allowed to raise this challenge even though in the trial court she never raised this objection. The Court found that her stipulation to the

3

visitation schedule was not truly voluntary because her only choice was either to agree, or to continue with mediation and ultimately litigation. Additionally, after the trial court issued its order, the United States Supreme Court issued the Troxel opinion. That opinion held a Washington State nonparental visitation statute unconstitutional (as discussed below). The Supreme Court's decision to hear the Troxel case shows the important public policy issues involved in grandparent visitation.

Troxel also involved the paternal grandparent's request for visitation after their son died. The Court first pointed out that Troxel acknowledged the competing interests of allowing grandparents visitation (every state has a grandparent visitation statute), and that forcing this visitation over the objection of a parent "can place a substantial burden on the traditional parent-child relationship." Punsly v. Ho at 2762 (quoting Troxel).

The Washington State statute in Troxel in essence allowed "any person" to petition for visitation in the best interest of the child, whether or not there has been a change of circumstances. The Court analyzed Troxel as making three

4

determinations, upon which it concluded that the Washington State statute was unconstitutional. First, there was no finding that the mother was an unfit parent, contrary to the presumption that parents act in the best interest of their children. Second, no special weight was given to the mother's determination of the child's best interest. Instead, she in effect had the burden of disproving a presumption that visitation with the grandparents was in the child's best interest. Third, the trial court did not give any weight to the mother's voluntarily agreement to some visitation. The grandparents simply wanted more visitation than the mother would allow. Based on these three facts, the Court in Troxel held that the dispute was nothing more than a simple disagreement between the Washington Superior Court and the mother, and there was no reason to give the Court preference over the mother.

The Court of Appeal held that Troxel applies to this case even though the Washington State statute is much broader than Section 3102. It applies because Troxel concerns the circumstances in which the government can properly infringe on a parent's fundamental right to raise their children and determine with whom they associate. Because Section 3102 potentially infringes on this fundamental right, the "strict scrutiny" test

5

applies: "The statute must serve a compelling state interest, and it must be narrowly tailored to serve that interest." Punsly v. Ho at 2763. The Court of appeal applied the three factors examined by the Troxel Court as a guide to applying the strict scrutiny test.

First, there was no finding that the mother was unfit. The grandparents conceded that this was not an issue. The child's attorney, the Family Court Services counselor, and the school counselor all indicated that mother and child shared a close relationship, and that the child was well adjusted and functioned "exceptionally well" at school and home.

Second, the mother ultimately proposed a non-court ordered visitation schedule, even though she would not allow visitation for six months (late 1998 to early 1999). The grandparents attempted to distinguish Troxel because for a time period the mother tried to entirely stop visitation, and only proposed a schedule after they retained an attorney. The Court interpreted Troxel broadly on this point, holding that "before a court may intervene, the parent must be given an opportunity to voluntarily negotiate a visitation plan. Consequently, it is irrelevant when or why [mother] proposed her own visitation

6

schedule. The important consideration here is that she did."
Id. at 2763.

Mother proposed more limited visitation before and after the grandparents filed their petition. Mother was not willing to agree to court ordered visitation, but would informally agree to one Sunday visit every three months in San Diego, and telephone calls. Mother reasoned that she wanted to minimize the drive for the child, and wanted the grandparents to exert more effort to visit in San Diego. Mother also wanted visitation to be more flexible to allow for the child's activities, and she did not want to be subject to contempt for any missed visits. Prior to filing the petition, grandparents visited the child only one time in San Diego. The child's attorney stated that mother expressed no desire to stop the visits with the grandparents, and she valued the relationship between the child and grandparents.

Third, in determining the best interest of the child, the Court did not apply the presumption that the mother's proposal, as a fit custodial parent, was presumed to be in the best interest of the child. Instead, the court presumed that visitation with the grandparents was in the best interest of the

7

child. The Court disagreed with mother's reasons for wanting to limit visitation. The opinion presents two example. Mother objected to the grandparent's inappropriate language in the presence of the child, but the Court was not concerned by the language. The Court found that the mother and/or child was exaggerating the issue. Also, the Court stated that a court order was required to create a bond between child and the grandparents since a strong bond did not exist.

With its three-part test, this case provides guidance to both parents and grandparents. Parents should raise the issue of the constitutionality of Section 3102 in the trial court. If possible, they should obtain declarations from teachers, counselors and similar professionals stating that the child is well adjusted and doing well, and has a close relationship with the parent. They should be ready to defend against any claims that they are unfit. They should also propose a reasonable visitation plan, and unless the grandparents are truly unfit, the parents should acknowledge the importance of the child-grandparent relationship.

The task for the grandparent is much more difficult. The wisest choice is to remain friendly with the parent. If that is

8

not possible, then in light of this opinion from a litigation standpoint they must attack the fitness of the parent. This is an option many grandparents may not wish to pursue, especially considering that one of the child's parents may have recently died. They must also demonstrate that it is in the child's best interest to visit with the grandparents more than the parent will allow. Without showing that the parent is unfit, this is a difficult task considering that the parent's determination of the best interest of the child is presumed correct. The grandparent should consider enlisting the help of an expert mental health professional. Whatever strategy is taken, the grandparents should be advised that in light of this opinion it appears to be difficult for a grandparent to obtain court ordered visitation. Even with a sympathetic trial Court (the trial court announced that he also was a grandparent), the grandparents in <u>Punsly</u> only were awarded by the trial court one day every two months.

* Mitchell A. Jacobs, a certified family law specialist in Los Angeles, limits his practice to marital dissolution and other family law matters. David Marcus, an attorney with the Law Offices of Mitchell A. Jacobs, also practices

9

exclusively in the area of family law.

Dailyjrn\grandparent.punsly

10