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# "*In Re Washington*: Constitutionality of Grandparent and Third-Party Visitation in Franklin County"

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## A) Ohio's third-party visitation statutes

1) R.C. 3109.051 – "other interested persons," "best interest"

2) R.C. 3109.11 – the "deceased parent" statute

3) R.C. 3109.12 – the "unmarried woman" statute

## B) *Troxel v. Granville*, 530 U.S. 57 (2000) - Washington state's third-party visitation statute is unconstitutional "as applied."

1) The Court found the Washington statutory scheme defective because: 1) it permitted the trial court to order visitation to a third party without giving "special weight * * * to [a fit parent's] determination of [her child's] best interests," *id.* at 69; 2) it permitted the trial court to "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," *id.* at 67; and 3) it permitted a trial court to order visitation even when there was "no allegation that [the parent] ever sought to cut off visitation entirely," *id.* at 70.

2) "breathtakingly broad"

3) No clear consensus amongst the lower courts as to the meaning or effect of *Troxel*, but closest thing is this: The central concern of *Troxel* is the parent's fitness–if the residential parent is fit, there will normally be no reason for the State to interfere with that parent's decisions regarding third-party visitation. Accordingly, two questions must be answered before a court can order third-party visitation: 1) is the custodial parent fit, and if so, 2) are her concerns and visitation decisions unreasonable? See *Troxel*, 530 U.S. at 68-73.

## C) Changes to Ohio's statutes after *Troxel*

Apparently in response to *Troxel*, R.C. 3109.051 was amended in March of 2001 to specifically require the trial court to consider the wishes of the parent, as one of the sixteen "best interest" factors (including the catch-all "[a]ny other factor in the best interest of the child")

## D) Important early Ohio cases

*Oliver v. Feldner*, 2001-Ohio-3535 (*Oliver I*)

*Oliver v. Feldner*, 2002-Ohio-3209, 149 Ohio App.3d 114 *(Oliver II*) – R.C. 3109.11 & R.C. 3109.12 were unconstitutional as applied, when mother was a fit parent. There are some indications in *Oliver II* that the Seventh District might have found the statutes facially unconstitutional if the issue had been properly presented.

*In Re Frazier*, 2003-Ohio-1087

## E) The Tenth District – *In Re Washington*, 2004-Ohio-6981

In *Washington*, the Franklin County Court of Appeals upheld R.C. 3109.12 against both facial and as-applied challenges.

Facts: Grandmother filed visitation petition as to one of two grandchildren. Mother objected, but ultimately failed to appear at hearing before magistrate. Based on grandmother's testimony alone, without any input from mother, magistrate awarded visitation. Mother filed objections, including objection to visitation based on *Troxel*. Trial court overruled objections, based on mother's failure to appear at hearing before magistrate. Mother appealed, arguing that the magistrate and trial court committed abuse of discretion by failing to continue hearing on motion, and that R.C. 3109.12 and R.C. 3109.05(D) were both facially unconstitutional and unconstitutionally applied.

<u>Facial Challenge</u>

"Although the trial court can consider any factor it deems relevant, [pursuant to R.C. 3109.051(D)(15)] consideration of the parent's wishes regarding the requested visitation is mandatory. In light of *Troxel*, we interpret this provision to require the trial court to give special weight to that factor in making the visitation determination. *So interpreted, R.C. 3109.12 does create, in essence, a presumption that a fit parent acts in the best interest of the child.* We reach this conclusion even though the statute also identifies other factors that the trial court must consider." *In Re Washington*, 2004-Ohio-6981 at ¶23.

Applied Challenge

"Although the trial court may have been aware that appellant opposed [the paternal grandmother's] visitation request in some manner, it could not give appellant's wishes any special weight or deference because there was no evidence of appellant's wishes [because appellant failed to appear and give testimony]." *Id.* at ¶27.

THE TENTH DISTRICT'S WARNING:

**"R.C. 3109.12 may be vulnerable to an as-applied challenge in another case where there is evidence of the parent's wishes if the trial court failed to grant special weight to a fit parent's decision or failed to apply a rebuttable presumption that a fit parent acts in the best interest of the child."** *Id*. at ¶27, citing *Oliver v. Feldner,* 149 Ohio St.3d 114, 2002-Ohio-3209.

THE UPSHOT:

The key case is probably still *Oliver*, as all of the District Courts of Appeals addressing the issue agree that trial courts must give special weight to a fit parent's visitation wishes. However, as of December 2004, there are several districts on record specifically finding Ohio's third-party visitation statutes facially constitutional:

*Baker v. Baker*, 2003-Ohio-731 at ¶¶7-8 (Ohio App. 12 Dist)

*In Re Talkington*, 2004-Ohio-4215 at ¶¶30-1 (Ohio App. 5 Dist)

*Spivey v. Keller*, 2004-Ohio-6667 at ¶12 (Ohio App. 3 Dist)

## F) Future directions

1) Legislation - 125 H.B. 144 appears to have died with the last G.A., but might be back!

2) Ohio Supreme Court
*Estate of Harrold v. Collier*, Nos. 2004-1492 & 2004-1647 (Dec. 1, 2004)

3) United States Supreme Court