



P.A.C.E.

Parents And Children for Equality

Bulletin



Number 4

The "Best Parent" is Both Parents

June 2000

Ohio's Grandparents' Visitation Rights After *Troxel v. Granville*

On June 5, 2000, a badly fractured U.S. Supreme Court handed down its decision in the widely publicized "grandparents' rights case", *Troxel v. Granville* (530 U.S. 2000). The question for the Court was whether the Washington statute (§26.10.160(3)) under which the paternal grandparents of two minor children had received court ordered visitation of the children constituted an unconstitutional interference with parental rights.

The Court's six to three decision upheld the decision of the Washington Supreme Court that the statute was in violation of the U.S. Constitution. Writing for the plurality of the court, Justice O'Connor described the Washington statute as "breathtakingly broad" —noting that it allowed "'any person to petition the court for visitation rights at any time' and that the court may grant such visitation rights whenever 'visitation may serve the best interest of the child'" (emphasis in original).

The plurality decision faulted the Washington statute on two counts: first, it put no restrictions on *who* may petition the court for visitation rights; and, second, it gave *no* deference to the decisions of the parent concerning what was in the best interest of the children. In effect, once a party—any party—petitioned the court for visitation rights, the court was to substitute its judgment concerning the best interest of the children for that of the parent. This, Justice O'Connor wrote, was an unconstitutional infringement on parental rights.

In a future, special edition of the *PACE Bulletin* the implications of this decision for parental rights will be

examined in detail. Here, the concern is solely with the implications for Ohio grandparents (and other non-parents) in seeking visitation rights.

Ohio law concerning non-parental visitation differs from the Washington statute the Court declared unconstitutional in several respects. First, ORC §3109.051(B)(1)(b) requires that the court find that the person petitioning for visitation "has an interest in the welfare of the child". Much turns on the meaning Ohio courts give to 'interest'. If this is interpreted as a subjective state of *caring about*, then the Ohio statute, like the Washington statute, grants very broad standing to petition for visitation rights. However, 'interest' is often construed to have a narrower meaning. In this narrower sense, one has an interest in a legal matter only if one's well-being is significantly affected by the outcome of that matter.

Second, Ohio law contains 15 statutorily prescribed considerations the court *must* take into account when considering an award of visitation rights to non-parents (ORC §3109.051(D)). The Washington code contains no such guidance to the court. As a result, the grounds for determining that non-parental visitation would be in the best interest of the children are left completely unspecified by Washington law.

On the other hand, Ohio law does not contain any explicit, *de jure* presumption in favor of the custodial parents' determination of whether non-parental visitation would be in the best interest of the child. The O'Connor decision suggests that, in the opinion of the four justices who concurred, this alone might

be sufficient to render the statute unconstitutional.

The uncertainty of the applicability of the Troxel decision to Ohio's non-parental visitation law virtually ensures that there will be continued disputes over Ohio's statute. Until the legislature acts to clarify Ohio law, it is the responsibility of Ohio courts to interpret the legislative intent of §3109.051 in a Constitutional manner. But clearly this is an issue that calls out for legislative action to make Ohio law more *clearly* constitutionally compliant.

While such a statutory revision would include a presumption in favor of the decisions of the custodial parent, it must also recognize the significant interest of grandparents and other relatives in continued companionship with children. Normally, that interest is protected by the voluntary choices of the custodial parents. However, the death of one parent (as in the Troxel case) or divorce can result in inadequate protection of children's relationship with their extended families.

For more information on this issue—including links to the Troxel decisions and further analysis—and for past issues of the *PACE Bulletin* visit our web site at www.PACEgroup.org.

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—Don Hubin, *Bulletin* editor

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Parents and Children for Equality, Columbus Chapter, P.O. Box 16066, Columbus, OH 43216
(614)475-4292

www.PACEgroup.org