

## **GRANDPARENTS, THIRD PARTIES AND PARENTAL RIGHTS AND RESPONSIBILITIES, LAW & ETHICS**

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Then came there two women unto the king to have an argument settled, "Please my lord," one of them began, "this woman and I live in the same house, I gave birth to a baby while she was with me in the house. Three days later she also had a baby . . . but her baby died during the night . . . Then she got up in the night and took my son from beside me while I was asleep. . ." Then the other woman interrupted, "The living child is mine." "No," the first woman said, "The dead one is yours and the living one is mine." And so they argued back and forth before the king.

I Kings 3:16

### **I. INTRODUCTION AND THESIS**

There are two primary statutes in the state of Colorado which grandparents and third parties may assume visitation, parental rights, and parental responsibilities for minor children. The first is found in the Uniform Dissolution of Marriage Act at C.R.S. §§ 14-10-123, 14-10-123.3. The second is only for grandparents and is found under the Children's Code at C.R.S. § 19-1-117, 19-117.5, and 19-1-117.7.

Case law and other legal developments in this area are increasingly commonplace with the so-called breakdown of the traditional American family, ever-increasing life spans, and the increasing age of the baby boomer generation.<sup>1</sup> After times of crisis, such as in divorce or children born out of wedlock, grandparents are seemingly taking a more active role in the upbringing of their grandchildren's lives.<sup>2</sup>

What has followed has been an expansion in the rights of grandparents and third parties to place them on equal standing, at least statutorily, with biological parents. For the legal practitioner, this creates a plethora of procedural issues. The first is whether to proceed under the Uniform Dissolution of Marriage Act or under the Children's Code. Another complex issue is whether an attorney can represent a parent and a grandparent or third party concurrently. This issue presents an ethical mine field for the practitioner.

The purpose of this article is to (1) summarize the Constitutional history of parental rights, (2) provide a brief history of the development of third parties' rights to visitation<sup>3</sup>, (3) provide a framework of third party visitation statutes, (4) analyze third party rights in Colorado in light of the constitutional history and other state's third party visitation statutes, (5) determine the state of third party rights subsequent the Supreme Court's decision in Troxel v. Granville, and (6) briefly examine the ethical consideration in third party representation and alert legal practitioners as to potential ethical perils.

## II. CONSTITUTIONAL HISTORY OF PARENTAL RIGHTS

Under the common law, grandparents had no legal right to visit their grandchildren.<sup>4</sup> Rather, the grandparent's rights were merely a derivative of the parents' rights; grandparents could only visit with the parent(s) permission.

Courts were reluctant to order visitation against the parents' wishes because the United States Supreme Court has recognized a Fourteenth Amendment fundamental liberty right of parents to rear their children free from state intervention.<sup>5</sup> Some view that granting grandparent rights against the wishes of the parents as an infringement upon this parental autonomy.<sup>6</sup> However, parental autonomy is not absolute. A state may intervene if it is shown that the parent's actions are endanger the child, which constitutes a compelling state interest allowing infringement upon the parent's liberty interest.<sup>7</sup>

In addition, the notion of the child as an individual with separately defined rights has emerged over the past several decades.<sup>8</sup> This trend is moving away from the English common law view that children were to be regarded as chattels of the family.<sup>9</sup>

Finally, the "gray lobby," coalitions of senior citizens and older Americans groups that exert influence in the national political arena, have contributed to the present laws.<sup>10</sup> Individual state grandparent visitation statutes began in 1965, and by 1993, all fifty states had some form of such a statute.<sup>11</sup>

Family law, with a few exceptions of sporadic constitutional issues the United States Supreme Court has accepted, is governed by State law. The U.S. Supreme Court first acknowledged parental rights in Meyer v. Nebraska, 262 U.S. 390 (1923). In Meyers, the Nebraska law regarding teaching a foreign language to a student before eighth grade was challenged. The U.S. Supreme Court held the law violated the Fourteenth Amendment of the Constitution. The Fourteenth Amendment protects one's right to liberty which includes the right "to marry, establish a home *and bring up children* . . ."<sup>12</sup> The right of a parent to instruct their children in a foreign language is a liberty interest protected by the Constitution.

The liberty interest in Meyers was reaffirmed three years later in Pierce v. Society of Sisters, 268 U.S. 510 (1925). In Pierce, the Supreme Court held the Oregon Compulsory Education Act was an, "unreasonable interference with the liberty interest of parents . . . to direct the upbringing and education of children under their control."<sup>13</sup> In essence, the Court stated that a parent has the right to direct his/her child's destiny.<sup>14</sup>

Family autonomy and parental authority was further bolstered by the U.S. Supreme Court in Wisconsin v. Yoder, 406 U.S. 205 (1972). Yoder considered an Amish parent's conviction of violating the Wisconsin Compulsory School Attendance Law mandating attendance until the age of sixteen. The parents found the curriculum of the school disagreeable with the religious beliefs of the Old Order Amish.<sup>15</sup> The Court stated that the "history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."<sup>16</sup>

Each of these three decisions, Meyer, Pierce, and Yoder, required a threshold showing of harm before state intervention and intrusion into the family life could be justified. In Pierce, the state's claim of the "improvement of the opportunities for development of the children was not a sufficient justification for the state intrusion caused by mandatory public school attendance."<sup>17</sup> In Yoder, the state's claim of a *parens patriae* power to require a certain level of education of its citizenry, regardless of the wishes of their parents, failed when the Court "measured the validity of the use of *parens patriae* power against harm to the child . . . and not in relation to the desirability of providing a benefit to the child."<sup>18</sup> Yoder acknowledged the potential for parents to act in a manner not in the best interest of their children, but nevertheless held that if the parent's upbringing of the child does not "jeopardize the health or safety of the child, or have a potential for significant social burdens," the state may not interfere.<sup>19</sup>

### **III. HISTORY OF THE DEVELOPING THIRD PARTY VISITATION RIGHTS**

Natural parents have a constitutionally protected right to the custody of their minor children, albeit that right is not absolute. In an attempt to preserve the parent-child relationship subsequent a marital dissolution, visitation rights developed in response to the separate households of the parents'. In determining both custody and visitation, the guidepost for the courts is the best interest of the child. Generally, visitation will be awarded to the non-custodial parent unless it would endanger or jeopardize the minor child.

Visitation rights of third party, non-parents, is a relatively new concept in American jurisprudence. Due to the decline of the traditional family, visitation rights of third parties, stepparents, cohabiting non-married parents, lesbian mothers, gay fathers, grandparents, day-care providers, or foster parents, and people with a biological but not a legal relationship to children, has evolved from within the parental rights of custody and visitation. Much has contributed to this development; multiple marriages and divorces, the increased bearing of children outside of marriage, long-term cohabitation relationships among couples with alternative sexual preferences, geographical separation from extended family members, the changing social and economic role of women, and new reproductive technologies. As a result, new concepts in the law have arisen, such as "de facto" parentage, "equitable" parentage, "constructive" parentage, parentage "by estoppel" and expanded parental rights to persons acting "in loco parentis." Courts have also faced circumstances where a child actually has more than one mother and one father due to new reproductive technology; genetic paternity testing has made multiple mothers and fathers possible for a child under traditional biological or legal definitions.<sup>20</sup>

In 1985, the national survey of family law, published in the *Family Law Quarterly*, stated that the enactment of grandparent visitation rights was a "recent phenomenon."<sup>21</sup> Eight years later, every state in the Union adopted statutes providing for either grandparent visitation or visitation rights of third parties.<sup>22</sup> At common law, parents alone had the right to control with whom their children were to be associated. Today, courts, in recognition of the changing definition of "family," are moving away from the common-

law rule that natural parents alone have the right to exclusive custody and control of their children and in some circumstances, are awarding custody and visitation to third parties, “in the best interest of the children.”<sup>23</sup>

#### **IV. FRAMEWORK OF THIRD PARTY VISITATION STATUTES**

Although all fifty states have enacted third party visitation statutes, such statutes do not guarantee that the third party will have visitation. Rather the party must prove that such visitation would be in the best interest of the child. The two fundamental differences and potential issues in visitation legislation concern: 1) whether there must be a showing of harm prior to permitting interference with parental autonomy, and 2) whether this consideration is altered when the child is no longer a part of the traditional nuclear family. The latter concern presents itself as a threshold distinction among various non-parent visitation statutes: *e.g.* whether there must be an initial showing of disruption to the family unit, such as a divorce, death of a parent, or adoption, before the state may intrude by granting non-parent visitation rights.

Some state statutes are drafted with an expansive reach, permitting non-parents to attain visitation rights even when the child's family is intact. There is no prerequisite of family disruption and a court may grant visitation rights upon the sole inquiry of the child's best interests. However, it is these broadly inclusive statutes that the courts are finding unconstitutional under both State and the Federal Constitutions.<sup>24</sup>

Numerous courts have interpreted state statutes to require a showing of harm, a threat of harm to the child, or parental unfitness before permitting state interference. In support, these courts cite the line of cases from the United States Supreme Court mentioned herein. For example, in Colorado, the grandparent visitation statute provides for such visitation or parenting time rights upon the death of a parent, the divorce of the parents, or the placement of the child with a person other than the natural parents.<sup>25</sup> In Georgia, the grandparent visitation statute provides for visitation rights upon the death of a parent, the commencement of any custody case, or the termination of the grandparent's child's parenting rights.<sup>26</sup> In Iowa, however, the statute allows for grandparent visitation rights upon the filing of a petition for dissolution of marriage by the child's parents, the divorce of the parents, the death of a parent, the placement of the child in a foster home, a divorce followed by the award of custody of the child to the parent who is not the child of the grandparent, or the issuance of a final adoption decree to the spouse of the child's custodial parent.<sup>27</sup>

In contrast, some state statutes have been interpreted to merely require a demonstration that third party visitation would be in the best interest of child. The best interest of the child constitutes a compelling state interest. For example, the Connecticut and Kentucky statutes permit the court to grant visitation to any person when doing so is in the best interest of the child. The Florida grandparent visitation statute permits the courts to grant visitation whenever a child is living with both married natural parents but where either or both parents have used their authority to prohibit a relationship between the child and the grandparents.<sup>28</sup>

##### **A. THIRD PARTY RIGHTS PURSUANT TO COLORADO LAW**

In Colorado, case law has established the need to show the child is endangered in order to infringe on the custodial parent's rights.<sup>29</sup> In addition, the best interest of the child standard is specifically defined in C.R.S. Section 14-10-124, which provides one safeguard against judicial abuse of discretion.

### **1. C.R.S. Section 14-10-123**

Grandparents or any third party may obtain standing to seek visitation pursuant to C.R.S. § 14-10-123.<sup>30</sup> This statute, unlike C.R.S. § 19-1-117, may be used to petition the court for visitation and parental rights and responsibilities. To obtain standing under the statute, the child must not be in the physical care<sup>31</sup> of the parent, or the non-parent must have had physical care of the child for six months or longer, and the petition must be filed within six months of the termination of the non-parent's physical care of the child. Of course, use of this statute requires the non-parent to give notice to the child's parent, guardian, or person allocated parental responsibilities, who may appear and be heard.

### **2. C.R.S. Section 19-1-117**

C.R.S. Section 19-1-117 provides standing only for grandparents and is limited to visitation rights. This statute may only be invoked when there has been a disruption in the child's family, presumably which would cause a disruption in the grandparent's visitation rights. Specifically, a grandparent will have standing when there is, or has been, a case concerning the allocation of parental responsibilities, which may include a dissolution of marriage or legal separation, if the parental responsibilities have been allocated to one other than the parent, or the child no longer resides with the parent, or the parent, who is the child of the grandparent, has died. A petitioner only has the right to seek visitation pursuant to the statute once every two years. Again, the grandparent must give notice to the person with current parental responsibilities.

After the grandparent establishes standing, the rights are determined based upon the best interests of the child as delineated in C.R.S. Section 14-10-124.

However, in Colorado, a grandparent's standing is terminated when the child is adopted. There is a public policy consideration of giving a child a new identity and fresh start when adopted by a stranger.<sup>32</sup>

### **3. Recent Colorado Case Law**

*L.L. v. People.*, 2000 CJ C.A.R. 5349, 99 SC 799 (September 18, 2000)

Petitioner, L.L. was a mother of two children of whom she had intermittent custody since 1994. After four year of involvement with the courts and the Department of Health and Human Serviced, the court held a hearing on permanent guardianship and found that the Petitioner was unable to provide a stable and permanent for the children. The Court transferred custody of the children to DHS with permanent legal guardianship with the foster parents whom the children previously resided.

Although the trial court did not articulate the burden of proof, the record suggested that the Court used a preponderance of the evidence standard. Petitioner argued that when a parent is deprived of significant parental rights, due process requires a finding governed by the clear and convincing standard.

Held: while the clear and convincing standard is constitutionally mandated in a terminating of parent-child relationship, a preponderance of the evidence is sufficient for dependency and neglect proceedings. Due process rights are not violated when the majority of parental rights are terminated or suspended pursuant to findings of fact made under a preponderance of the evidence standard.

*United States of America v. Alahmad*, 211 F.3d 538 (10<sup>th</sup> Cir. May 1, 2000)

Brittney Alahmad was the child of Christy Farrell and Mike Alahmad. A Colorado State court awarded legal custody of the child to Alahmad and granted Farrell and Farrell's mother, Leslie Collins-Pottebaum, liberal visitation rights. Alahmad took Brittney out of the country. He was then ordered by the court not to take the child from Colorado without leave of court. When Alahmad violated this court order, the Colorado state court transferred permanent custody of Brittney to Collins-Pottebaum. Alahmad was later indicted under the International Parental Kidnapping Crime Act. Held: the District Court did not err in finding that Collins-Pottebaum enjoyed visitation rights under the state court order. The Act specifically provides that "parental rights" are rights to the physical custody of the child, including "visitation rights." Additionally, Alahmad's equal rights claim had no merit in that the state had a rational basis in protecting the shared visitation rights of parents and grandparents. The federal government, in its prosecution of Alahmad, was simply aiding the enforcement of a valid state court order. Thus, the district court did not commit judicial error in failing to dismiss Alahmad's indictment.

## **V. THE WASHINGTON NON-PARENT VISITATION STATUTE; PRELUDE TO TROXEL V. GRANVILLE**

The issue of non-parent visitation rights was recently addressed by the United States Supreme Court in Troxel v. Granville. (Addressed below) The Washington Supreme Court case, previously named Custody of Smith v. Stillwell, 969 P.2d 21 (Wash. 1998), *cert. granted sub. Nom. Troxel v. Granville*, 120 S.Ct. 11 (1999), examines the Washington statutes, §§ 26.10.160(3)<sup>33</sup> and former 26.09.240<sup>34</sup> to determine whether the petitioners had standing and whether the statutes violated the parents' constitutionally protected right to raise their children absent state interference.

The Washington Supreme Court held the statutes violated the constitutionally protected interests of the parent's. The statutes, as written, permit "any person, at any time, to petition for visitation without regard to relationship to the child, without regard to changed circumstances, and without regard to harm,"<sup>35</sup> provided that it is in the best interest of the child. The Court reasoned that the best interests of the child standard is an insufficient justification for overriding parents' fundamental rights and did not rise to the level of a compelling state interest.<sup>36</sup> Additionally, the court admonished that the statutes created an increased possibility of frivolous visitation claims and disapproved of the lack of protections afforded to families. As such, the Washington Court held the visitation statutes as unconstitutional, as they "impermissibly interfere with a parent's fundamental interest in the care, custody and companionship of the child."<sup>37</sup>

## **VI. TROXEL V. GRANVILLE AND THE SUBSEQUENT STATE OF THIRD PARTY RIGHTS**

On June 5, 2000, the U.S. Supreme Court decided Troxel v. Granville, 120 S.Ct. 11 (1999), in which the parties sought visitation rights pursuant to Washington Rev. Code § 26.10.160(3), which permits “[a]ny person” to petition for visitation rights “at any time” and authorizes the Washington courts to grant such rights whenever visitation would be in the child’s best interest.

Petitioners, Troxel, requested the right to visit their deceased son's children. Respondent, Granville, the children's mother, did not oppose all visitations, but objected to the amount of time sought Troxels. The Washington Superior Court ordered more visitation than Granville found acceptable so she appealed. The Washington Court of Appeals reversed and dismissed the Troxel's petition. The Washington Supreme Court affirmed the reversal for the reasons stated *supra*.

By a 6-3 vote, the U.S. Supreme Court determined that the Washington Statute, as applied to Granville and her family, violated her due process right to make decisions concerning the care, custody, and control of her children. Because the Supreme Court's decision rested on the statute's sweeping breadth and specific application to Granville, the Court did not consider whether the Due Process Clause requires all non-parent visitation statutes to necessarily include a showing of harm, or potential harm, to the child as a condition precedent to granting third party visitation.

Far from a clear enunciation of the law on the constitutional issues relating to third-party visitation, the multiplicity of opinions created by the decision raises more questions than it answers. Six separate decisions were issued by the Justices expressing a variety of opinions not only about the constitutional issue presented, but also on whether that issue should have been addressed at all. The primary decision is a plurality, rather than a majority, which raised more uncertainty than is revealed by a mere reading of the plurality.

Among the questions raised by the plurality holding are: What is the applicable constitutional standard in analyzing third-party visitation statutes? What is the hierarchy, if any, among different classes of third parties seeking visitation? Do grandparents have just as much, or just as little, right as any other relative or other third party non-parent to visit their children's children? Will any general third-party visitation statute withstand constitutional scrutiny? Even the "simply" question of whether a state may constitutionally authorize grandparent visitation is not answered by the Supreme Court's decision. More importantly, under a statute more clearly drawn and less broadly worded, such as Colorado's, could a court constitutionally order grandparent visitation under exactly the same circumstances as the Washington trial court in Troxel?

A strict reading of the Troxel opinion indicates that a parent's right to determine the persons with whom a child visits is up to that parent, and the state cannot interfere with that right on a mere determination that the child's best interests would be served by such third-party visitation. A closer reading, however, indicates that the decision reaches little further than invalidating one state statute which granted exceedingly broad powers to the courts in an area of protected fundamental interests, under the specific facts as presented in Troxel. The boundaries of the legislatures will have to wait for another case to clear the quagmire.

#### **A. STATE OF COLORADO THIRD PARTY RIGHTS AFTER TROXEL**

The Colorado statutes have yet to be challenged under the Due Process Clause since the Troxel decision was rendered. However, unlike the Washington statutes, the Colorado statutes have requirements for standing, i.e. physical custody with a non-parent and/or a previous action regarding parental responsibilities, which arguably imply a necessary element of harm or potential harm to the child.

There is a recent Colorado case in which a mother appealed an order granting custody of her daughter to the grandparents. See In re the Custody of A.D.C., 969 P.2d 708 (Colo.App. 1998). In A.D.C., the grandparents obtained standing pursuant to C.R.S. § 14-10-123. Prior to the commencement of the action, the mother had voluntarily placed the child in the physical custody of the grandparents for approximately four months; the grandparents had physical custody of the child at the time the petition was filed. The Court held that the only standard after the grandparents' standing was established, was the best interests of the child.<sup>38</sup> Interestingly, the Court specifically denounced the parental preference doctrine as applied to the domestic relations code.

In Colorado, choosing a statute to obtain standing in grandparent/third-party rights cases can be done by a simple application of the facts to the statutory criteria. The domestic relations statute requires a more specific set of factual circumstance, but it can enable a petitioner to obtain a full range of parental rights. The statute under the Children's Code is only for grandparents, and it can only achieve a visitation order.

## **B. OTHER JURISDICTIONS**

Brice V. Brice, 133 Md.App. 302, 754 A.2D 1132 (2000): The Maryland Court of Appeals held the Maryland grandparent visitation statute unconstitutional as applied, but not facially unconstitutional. There, the biological mother allowed less contact than the grandparents desired. There was no allegation by the grandparents of mother's unfitness.

Gestl v. Fredrick, 133 Md.App. 216, 754 A.2d 1087 (2000): The same week as Brice, *supra*, was decided, another division of the Maryland Court of Appeals considered whether the UCCJA permitted a same-sex partner of the biological mother to petition for custody and visitation in an interstate dispute. The Court concluded that Maryland's laws which permit one acting as a parent the opportunity to prove that "exceptional circumstances" warrant an award of custody to a non-biological parent, even if the child was still in the custody of the biological parent, was constitutional under the Troxel holding. However the Court cautioned that extra care must be taken in considering the "exceptional circumstances" in a manner that protects the fundamental interest of a parent to make custody decisions.

In re G.P.C., 2000 WL 1140260 (Mo.App. E.D. 2000): The Missouri court of Appeals held the Missouri grandparent visitation statute facially constitutional and as applied. In Missouri, a grandparent can not petition for custody unless they have been "unreasonably" denied visitation for a period of 90 days. The petitioning party must prove that the visitation is in the child's best interest. In this case, the parents, who were still married, objected to the grandparent's visitation. The Court awarded two hours of

supervised visitation every three months. The Court concluded that the visitation awarded was a miniscule intrusion into the parent's lives.

Rubano v. Diczno, 2000 WL 1459789 (R.I. 2000): The Rhode Island Supreme court concluded that a biological mother does not have an absolute right to prevent all third parties from acquiring parental rights. An unrelated caregiver can develop a parent-like relationship that could be significant to warrant a legal recognition of parental rights and responsibilities. In this case, a same-sex couple became parents but separated four years later. The biological mother refused to allow her partner visitation.

In re Richardson, 2000 WL 869450 (Va. Cir. Ct. 2000): Here, former foster parents sought visitation pursuant to the Virginia statute which allowed persons with a legitimate interest to petition for visitation. The Court determined there must be a showing of harm to the child without such requested visitation. Such requirement of harm saved the statute from constitutional attack. The Court determined that even if the visitation would be in the best interest of the child, the Court could not abridge the father's fundamental rights to parent his child and determine non-parental visitation.

## VII. ETHICAL DISCUSSION

The predominant question presented by the grandparent and non-parents visitation statutes is whether an ethically prudent attorney is able to represent a grandparent or a third party as well as a parent.

Colorado Rules of Professional Conduct, Rule 1.7, pertains to conflicts of interests.<sup>39</sup> Of course, an attorney cannot represent two clients who have a direct and present conflict of interest. However, this Rule provides that a lawyer may represent two parties who may have a *potential* conflict of interest so long as the lawyer reasonably believes the representation will not adversely affect either client and the clients consent after consultation. The consultation must specifically include an explanation of the advantages and risks involved in the attorney's dual representation.

This raises the question of the likelihood that a conflict will arise in the future, and if it does, whether the adverse effect of the dual representation would affect the lawyer's professional judgment. If the risk of an adverse effect is minimal, dual representation is proper. Common representation is permissible where the clients are generally aligned in interest although there is some difference of interest among them.<sup>40</sup>

One precaution is that a lawyer's advice might tend to favor the parent rather than the grandparent/third-party. This may be good advice, but not for both clients. Despite the trend against the parental preference doctrine, there is a possibility for discretionary use of this doctrine in applying the best interest standard. Colorado case law raises concerns that any voluntary relinquishment of parental rights by the natural parent can further rebut the parental preference doctrine, leaving the only consideration to be the best interest of the child.

A big area of potential conflict between the grandparent and parent in Colorado is that the grandparent's right to standing automatically terminates upon completion of an adoption, regardless of whether adoption is by strangers or by a natural relative.<sup>41</sup> There have even been cases where adoptions by paternal grandparents have totally cut off the rights of the maternal grandparents.<sup>42</sup> However, the grandparent's rights are not automatically divested by adoption by the natural parent's new spouse.<sup>43</sup>

In one Colorado case, a father could not collect all his attorney fees, because the court found that his attorney fees were shared with the grandparent, whose interests appeared to be identical.<sup>44</sup> Dual representation may complicate attorney's fee awards and may strengthen an opponent's argument against paying attorney fees.

In another Colorado case, the court limited contact with the grandparent finding that same would be in the best interest of the child.<sup>45</sup> After this ruling, the grandparent and the parent were immediately in conflict, even if both agreed that grandparent visits would be in the best interest of the child. In that case, the parent would necessarily jeopardize his own rights by supporting the grandparent after the Court finding that the grandparent's interests were diverse to the child's.

Further, the practitioner representing both the grandparent and parent would know if one or the other was financially vulnerable. The risk that the parent would be financially vulnerable would especially be present when the parent must defend against a grandparent after the death of a spouse or a divorce.<sup>46</sup> The attorney would be prohibited from using this to one or the other party's advantage.

C.R.C.P. Rule 1.8(f) presents another area of consideration for the practitioner when a grandparent or other interested third party pays the bill for the parent-client.<sup>47</sup> The Rule provides that a lawyer may not accept compensation from a third party unless the client consents and there is no interference with the lawyer's judgment. Therefore, it is essential to clarify who the client is before accepting a third-party payment arrangement.

Finally, the practitioner knows that an attorney must balance advocacy against the best interests of the child as the attorney has an indirect fiduciary duty to the child. There is evidence that subjecting the child to the tension and rigors of litigation is not in the child's best interests, since litigation places the child into an environment of hostile and conflicting authority figures, which can have detrimental consequences upon the child.<sup>48</sup>

Further disruption may occur to the family because courts usually enforce visitation orders through their powers of contempt. If the parents refuse to obey the order, the ultimate penalty for such parents may be incarceration until they comply. On the other hand, parents may dispute between themselves about obeying the visitation order. Such parental disputes are disruptive to family life and are ultimately unhealthy for the child.

Typically, a visitation order cannot be modified without court approval. The intact family's normal activities, such as moving from one place to another or disciplining the child, may be subject to court approval if they interfere with grandparent visitation. Modification usually means litigation even if it were at the parents' instigation.

Litigation is costly and is disruptive to the family. Thus, the inherent problems of court-ordered visitation may be so onerous that the benefit of grandparent visitation, even when intended to remedy a harm that has been identified by the court, may be canceled out by its overall disruptive impact on the intact family. It is likely that a child is far better off to live in an intact family than to have the intact family break up because of grandparent visitation issues.<sup>49</sup>

The attorney should balance advocacy against the interests of other family members as well to promote the client's long-term interests and be more than a hired gun. Potential ethical pitfalls for the legal practitioner abound. However, it may be beneficial to the families involved to accept the risk of a potential conflict, so long as the appropriate safeguards are put into place, and the necessary steps are taken when, and if, a direct conflict does arise.

## **VIII. SOME CONSIDERATIONS IN REPRESENTING THIRD PARTIES<sup>50</sup>**

### **1. Develop the facts and know the law.**

Most of the cases where the rights of non-traditional parents have been recognized have succeeded because of a careful analysis and preparation of the facts establishing the conduct of the parties and their relationships to the child.

### **2. Seek the help of an expert.**

Evidence on psychological parenting can be developed with the help of an expert who can test, examine and report on attachment, bonding and other significant emotional and relationship factors of both parents, third parties, and the child. If the client is a lesbian or gay partner, the expert can research and testify to the development of children in families with a gay or lesbian parent. A "Brandeis Brief" approach using this expert information will help to address myths about homosexual parents and the fears often associated with rearing a child in a homosexual household.

### **3. Attempt alternative dispute resolution.**

It may often be better to settle than to litigate third party visitation cases. Development of the facts and use of an expert can assist in the settlement endeavor. In a non-adversarial setting, it is more likely that the best interests of the child will become the focus rather than the adversarial claims to parental rights. Expert knowledge can assist in informing both the client and the opposing party by addressing not only the harm to the child in cutting off a person with a significant relationship, but also the harm of battling over the issue in court.

### **4. Brief the issue.**

If the case is tried, be sure to brief the key legal issues, not forgetting to address standing, so that the trial court is aware of the law developing around the country and how the

particular state's law fits in with that national scheme. Many trial judges are unaware of the legal developments in this area and have not read cases where non-traditional parents have been given either custody or visitation. Be sure to contact the relevant support or political action groups, who may be willing to assist in the briefing, intervene at the trial level or on appeal, provide copies of unpublished decisions, or even discuss strategy.<sup>51</sup>

## IX. CONCLUSION

While the United States Supreme Court's decision in Troxel v. Granville maybe helpful in securing parental rights, it stops short of addressing instrumental questions within the area of third party visitation. The plurality's concern with the lack of special weight afforded to parents' determinations as to the child's best interest may strengthen support for parents' decisions in the raising of their children. Additionally, the plurality keenly recognized the petty disagreements that may arise in the future between parents, third parties, and the courts, as to what is "better" for a child.

The plurality's failure to address whether a showing of harm is required under the Due Process Clause provides little instruction to state legislatures and courts. Furthermore, by leaving the determination of whether a visitation order unconstitutionally infringes upon parental rights to case-by-case analysis, the doors are wide open to great variations on third party visitation as well as room to argue abuse of discretion by the trial courts.

Then the King said, "Alright, bring me a sword." So a sword was brought to the king then he said, "Cut the living child in two and give half to each of these women." Then the woman who really was the mother of the living child who loved him very much cried out, "O no my lord, give her the child, please do not kill him." But the other woman said, "The child will be neither yours or mine, divide him between us." Then the king said, "Do not kill him, but give the baby to the woman who wants him to live for she is his mother." Word of the king's decision spread quickly through all of Israel and the people were awed as they realized the great wisdom . . . to render a decision with justice.

I Kings 3:24

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<sup>1</sup> Sarah Norton Harping, Comment, *Wide-Open Grandparent Visitation Statutes: Is the Door Closing?*, 62 U. Cin. L. Rev. 1659 (1994).

<sup>2</sup> Rhonda Hillbery, *Grandparents Playing Larger Roles When Their Children Can't Raise Kids*, Minn. Star Trib., Oct. 13, 1994, at A1. See also Michael v. Hertzler, 900 P.2d 1144 (Wyo. 1995).

<sup>3</sup> Visitation, a/k/a parenting time, is used herein interchangeably throughout.

<sup>4</sup> Olds v. Olds, 356 N.W.2d 571 (Iowa 1984).

<sup>5</sup> Lassiter v. Dep't of Soc. Services of Durham County, 452 U.S. 18, 27 (1981).

<sup>6</sup> Hawk v. Hawk, 855 S.W.2d 573 (Tenn.1993).

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<sup>7</sup> Theresa H. Sykora, *Grandparent Visitation Statutes: Are the Best Interests of the Grandparent Being Met Before Those of the Child?* FAM. L.Q., Vol. 30, Number 3, Fall 1996.

<sup>8</sup> Tinker v. Des Moines Sch. Dist., 393 U.S. 503 (1969), In re Gault, 387 U.S. 1 (1967), Brown v. Board of Educ., 349 U.S. 294(1955).

<sup>9</sup> James Knet, Commentaries on American Law (Oliver Wendell Holmes ed., 12<sup>th</sup> ed. Boston, Little Brown (1873).

<sup>10</sup> W. Andrew Achenbaum, *Shades of Gray* at 119 (1983).

<sup>11</sup> *Id.* at FN 6.

<sup>12</sup> Meyer v. Nebraska, 262 U.S. 390 at 399 (1923).

<sup>13</sup> Pierce v. Society of Sisters, 268 U.S. 510 at 534-5 (1925).

<sup>14</sup> *Id.* at 535.

<sup>15</sup> *Id.* at 207, 209.

<sup>16</sup> *Id.* at 232. However, while autonomy in family life is protected by the Constitution, it is not an absolute right. See Hurndon v. Tuhey, 857 S.W.2d 203, 207 (Mo. 1993) (citing Ginsberg v. New York, 390 U.S. 629, 639 (1968) (noting the state's authority to regulate the well-being of children); Prince v. Massachusetts, 321 U.S. 158, 166-67 (1944) (recognizing the state's ability to limit parental freedom by mandating school attendance and regulating child labor)). Moreover, the Court declared that parents have a right to “the companionship, care, custody, and management of his or her children.” Stanley v. Illinois, 405 U.S. 645, 651 (1972) (addressing an unwed father's right to a hearing on his parental fitness before his children could be deemed dependents of the state after the death of the children's mother).

<sup>17</sup> Cynthia L. Green, *Grandparent Visitation Rights: Is the Tide Turning*, 12 *Journal of the American Academy of Matrimonial Lawyers* at 57 -58 (Summer 1994) citing Kathleen S. Bean, *Grandparent Visitation: Can the Parent Refuse?* 24 *J. FAM. L.* 393 at 410 (1985-86).

<sup>18</sup> *Id.*

<sup>19</sup> Wisconsin v. Yoder, 406 U.S. 205 at 234 (1972)

<sup>20</sup> Barbara L. Shapiro, “*Non-Traditional*” *Families in the Courts: The New Extended Family*, *Journal of the American Academy of Matrimonial Lawyers*, Vol. 11, Pg. 117, (Winter 1993).

<sup>21</sup> Doris Freed & Timothy Walker, *Family Law in the Fifty States: An Overview*, 28 *FAM. L.Q.* 369, at 451 (Winter 1985).

<sup>22</sup> Ala. Code § 30-3-4 (1989); Alaska Stat. § 25.24.150 (1993); Ariz. Rev. Stat. Ann. § 25-337.01 (1991 & Supp.1993); Ark. Code Ann. § 9- 13-103 (Michie 1993); Cal. Civ. Code § 197.5 (West 1992), § 4601 (West 1983); Colo. Rev. Stat. § 19-1-117 (Supp.1993); Conn. Gen. Stat. Ann. § 46b-59 (West 1986); Del. Code Ann. Tit. 10, § 950 (Supp. 1992); D.C. Code Ann. § 304 (1966 & Supp. 1977); Fla. Stat. Ann. § 61.13(2)(B)2c (West 1985 & Supp.1993); Ga. Code Ann. § 19-7-3 (1991); Haw. Rev. Stat. § 571-46 (1985 & Supp. 1992); Idaho Code § 32-1008 (1993); Ill. Ann. Stat. Ch. 750, Para. 51607 (Smith-Hurd 1993); Ind. Code Ann. § 31-1-11.7 (Burns 1987 & Supp.1993); Iowa Code Ann. § 598.35 (West 1981 & Supp.1993); Kan. Stat. Ann. § 38-129 (1986); Ky. Rev. Stat. Ann. § 405.021 (Baldwin 1984); La. Rev. Stat. Ann. § 9.572 (West 1991); Me. Rev. Stat. Ann. Tit. 19, §§ 1001- 1004 (West Supp.1993); Md. Code Ann., Fam. Law § 9-102 (1991 & Supp.1993); Mass. Gen. Laws Ann. Ch. 119 § 39d (West Supp.1993); Mich. Comp. Laws Ann. § 722.27 (West 1993); Minn. Stat. Ann. § 257.022 (West 1992); Miss. Code Ann. § 93-16-1 (Supp.1993); Mo. Ann. Stat. § 452.402 (Vernon 1986 & Supp.1993); Mont. Code Ann. § 40-9-102 (1992); Neb. Rev. Stat. § 42-364 (1988); Nev. Rev. Stat. Ann. § 125a.340 (Michie 1993); N.H. Rev. Stat. Ann. § 458.17d (1992); N.J. Stat. Ann. § 9:2-7.1 (West 1993); N.M. Stat. Ann. § 40-9 (Michie 1989); N.Y. Dom. Rel. Law § 72 (Mckinney 1988); N.C. Gen. Stat. § 50-13.2 (1987); N.D. Cent. Code § 14-09-05.1 (1991); Ohio Rev. Code Ann. § 3109.11 (Anderson 1989 & Supp. 1992); Okla. Stat. Ann. Tit. 10 § 5 (West 1987); Or. Rev. Stat. § 109.121 (1990); 23 Pa. Cons. Stat. Ann. §§ 5301-5314 (Supp.1993); R.I. Gen. Laws § 15-5- 24.1 (1988); S.C. Code Ann. § 20-7-420 (Law. Co-Op. 1985); S.D. Codified Laws Ann. §§ 25-4-52 To 25-4-54 (1992); Tenn. Code Ann. § 36-6-301 (1991); Tex. Fam. Code Ann. § 14.03 (West 1986 & Supp. 1994); Utah Code Ann. § 30-5-2 (1989 & Supp.1993); Vt. Stat. Ann. Tit. 15 §§ 1101-1106 (1989); Va. Code Ann. §§ 20-107.2 (Michie 1990 & Supp.1993); Wash. Rev. Code Ann. § 26.09.240 (West 1986 & Supp.1993); W. Va. Code § 48-2b-1 (1992 & Supp.1993); Wis. Stat. Ann. § 767.24 (West 1993); Wyo. Stat. § 20-2-113 (1987).

<sup>23</sup> See *Child Custody & Visitation Law & Practice*, supra note 5, § 16.01 [2], at 16-51. “Courts have found that where exceptional circumstances exist, they have the inherent authority to order visitation for a non-parent where such visitation is in the child's best interests.”

<sup>24</sup> See *In the United States Supreme Court*, 11 Divorce Litig. 206, 207 (1999); Brooks v. Parkerson, 454 S.E.2d 769, 774 (Ga. 1995) (declaring statute unconstitutional under both state and federal constitutions since it was not clear that it furthered the welfare or health of the child and did not require evidence of harm prior to permitting state interference with the family); Steward v. Steward, 890 P.2d 777, 782 (Nev. 1995) (concluding that if the state statute were interpreted to permit grandparent visitation rights over the objections of divorced parents with full legal rights, it would infringe upon the parents' constitutional right to the care and custody of their children); Hawk v. Hawk, 855 S.W.2d 573, 575 (Tenn. 1993) (holding Tenn. Code Ann. § 36-6-301, which permits courts to award grandparent visitation if within the best interests of the child, unconstitutional under the privacy rights guaranteed by the Tennessee Constitution).

<sup>25</sup> C.R.S. § 19-1-117 (2000)

<sup>26</sup> Ga. Code Ann. § 19-7-3 (Michie 1991).

<sup>27</sup> Iowa Code Ann. § 598.35 (West 1981 & Supp.1993).

<sup>28</sup> Conn. Gen. Stat. Ann. § 46b-59 (West 1986); Fla. Stat. Ann. § 752.01(E) (1993). Florida's statute also provides for grandparent visitation rights under particular family circumstances such as death of a parent or divorce of the parents.

<sup>29</sup> In re Oswald, 847 P.2d 251 (Colo.App. 1993).

<sup>30</sup> C.R.S. Section 14-10-123 provides as follows:

(1) A proceeding concerning the allocation of parental responsibilities is commenced in the district court or as otherwise provided by law: ... (b) by a person other than a parent, by filing a petition seeking the allocation of parental responsibilities for the child in the county where the child is permanently resident or where the child is found, but only if the child is not in the physical care of one of the child's parents; (c) by a person other than a parent who has had the physical care of a child for a period of six months or more, if such action is commenced within six months of the termination of such physical care . . .

<sup>31</sup> The Colorado Supreme court has adopted a literal definition of "physical custody" which factors in the amount of time a child has spent in the actual, physical possession of a non-parent and the psychological bond a non-parent develops with a child. See In re Custody of C.C.R.S., 892 P.2d 246 (Colo. 1995).

<sup>32</sup> In re Adoption of Ridenour, 574 N.E.2d 1055, 1062 (Ohio 1991).

<sup>33</sup> Section 26.10.160(3) of the Washington Revised Code provides that: "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 interest of the child whether or not there has been any change of circumstances." Wash. Rev. Code Ann.' 26.10.160(3) (West 1997).

<sup>34</sup> Until the 1996 amendment, section 26.09.240 of the Washington Revised Code provided:

"The court may order visitation rights for a person other than a parent when visitation may serve the best interest of the child whether or not there has been any change of circumstances. A person other than a parent may petition the court for visitation rights at any time. The court may modify an order granting or denying visitation rights whenever modification would serve the best interests of the child." (Wash. Rev. Code Ann. 26.09.240 (West 1997)).

<sup>35</sup> Custody of Smith v. Stillwell, 969 P.2d 21, at 23 (Wash. 1998), *cert. granted sub nom. Troxel v. Granville*, 120 S. Ct. 11 (1999).

<sup>36</sup> See Id. at 30.

<sup>37</sup> Id.

<sup>38</sup> In re the Custody of A.D.C., No. 95 DR 2175. See also In re Custody of C.C.R.S., 892 P.2d 246 (Colo. 1995).

<sup>39</sup> Rule 1.7 Conflict of Interest: General Rule:

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyers' responsibilities to another client or to a third person, or by the lawyers' own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

(c) For the purposes of this Rule, a client's consent cannot be validly obtained in those instances in

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which a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances of the particular situation.

<sup>40</sup> Colorado Rules of Professional Conduct, Rule 1.7, Committee Comment, amended October 17, 1996, effective January 1, 1997.

<sup>41</sup> People in Interest of N.S., 821 P.2d 931 (Colo.App. 1991).

<sup>42</sup> People in the Interest of N.S., 821 P.2d 931 (Colo.App. 1991).

<sup>43</sup> In re Aragon, 764 P.2d 419 (Colo.App. 1988).

<sup>44</sup> In the Interest of D.R.V., 885 P.2d 351 (Colo.App. 1994)

<sup>45</sup> Id.

<sup>46</sup> Catherine Bostock, *Does the Expansion of Grandparent Visitation Rights Promote the Best Interests of the Child? A Survey of Grandparent Visitation Laws in the Fifty States*, 27 Colum. J.L. Soc. Probs. 319 at 361 (1994).

<sup>47</sup> Rule 1.8. Conflict of Interest: Prohibited Transactions

....(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client consents after consultation;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) Information relating to the representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents one or more clients shall not participate in making an aggregate settlement of the claims of or against the clients... unless each client consents after consultation, including disclosure of the existence and nature of all the claims or please involved and of the participation of each person in the settlement.

<sup>48</sup> Strouse v. Olson, 397 N.W.2d 651, 655.

<sup>49</sup> Laurence C. Nolan, *Honor thy Father and Mother: But Court-Ordered Grandparent Visitation in the Intact Family?* BYU Journal of Public Law, Volume 8, Pg. 51 at 65, January 1993.

<sup>50</sup> Barbara L. Shapiro, "Non-Traditional" Families in the Courts: *The New Extended Family*, Journal of the American Academy of Matrimonial Lawyers, Vol. 11, Pg. 117 at 147 - 48, (Winter 1993).

<sup>51</sup> Some key groups include: Lambda Legal Defense and Education Fund, 666 Broadway, 12th Floor, New York, New York 10012; (212) 995-8585; National Center for Lesbian Rights, 1663 Mission, Suite 550, San Francisco, California 94103, (415) 621-0674; Lesbian Mothers National Defense Fund, P.O. Box 21567, Seattle, Washington 98111, (206) 325-2643; Gay & Lesbian Advocates & Defenders (GLAD), P.O. Box 218 Boston, MA 02111, (617) 426-1350; Gay & Lesbian Parents Coalition International, P.O. Box 50360, Washington, D.C. 20004, (202) 583-8029; Stepparents: Stepfamily Association of America, 215 Centennial Mall S., Ste. 212, Lincoln, NE 68508, (402) 477-7837; Grandparents: Grandparents Rights Organization (GRO), c/o Richard Victor, Esq. Victor, Robbins & Bassett, 555 South Woodward Ave., Suite 600, Birmingham, MI 48009, (313) 646-7177.