

**COLORADO THIRD PARTY VISITATION
OR
REPORTS OF THE DEATH OF THIRD PARTY VISITATION IN COLORADO
HAVE BEEN GREATLY EXAGGERATED**

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- I. Constitutional Law 101
 - A. Due Process Clause
 - 1. Amendment V, United States Constitution – “No person shall be ... deprived of life, liberty, or property, without due process of law....”
 - 2. Amendment XIV, United States Constitution – “No State ... shall deprive any person of life, liberty, or property, without due process of law....”
 - B. Procedural Due Process vs. Substantive Due Process
 - 1. Procedural Due Process – If the government deprives one of an already acquired life, liberty, or property interest, it must use procedures to insure it is acting fairly and accurately.
 - 2. Substantive Due Process – “Substantive due process ... prohibits the government from engaging in conduct which is arbitrary, capricious, or irrational, regardless of the procedures used to implement it.” *In re the Marriage of Smith*, 7 P.3d 1012, 1017 (Colo.App. 1999)
 - a. Rational Basis Test – If government action limits freedom in ordinary social, business, or economic matters, the individual is protected only against arbitrary or unreasonable government regulation.
 - b. Strict Scrutiny – Where fundamental liberty interests are involved government can only regulate

to the extent it has a compelling interest and the regulation is narrowly tailored to address that compelling interest. Fundamental liberty interests include:

- i. Express constitutional rights – e.g. freedom of speech, of assembly, of religion
- ii. Implied constitutional rights – e.g. right to privacy, right to the care, custody and control of one’s child.

3. As Applied v. Facially Unconstitutional

- a. As Applied – Government regulation, under the circumstances in which a person has acted or proposes to act, would be applied to them in an unconstitutional manner. Regulation not completing inoperative.
- b. Facially - Government regulation is facially unconstitutional if there are no conceivable circumstances in which it may be applied in a constitutional manner. Regulation is deemed inoperative.

II. Right to the Care, Custody and Control of One’s Child

- A. Is a Fundamental Liberty Interest. *Troxel v. Granville*, 530 U.S. 57 (2000); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).
- B. Is perhaps the oldest of the Fundamental Liberty Interests. *Troxel v. Granville*, 530 U.S. 57 (2000).

III. *Troxel v. Granville*, 530 U.S. 57 (2000)

- A. Background:
 1. Washington Statute allowed “any person” at “any time” to petition for visitation rights provided it was in the best interests of the child.
 2. Ms. Granville and Mr. Troxel were unmarried couple who had 2 children. The relationship ended in 1991. Mr. Troxel went to

live with his parents and regularly brought his children back to his parent's home (the paternal grandparents). In 1993 Mr. Troxel committed suicide.

3. Ms. Granville sought to limit the paternal grandparents access to the children. The paternal grandparents brought an action under the Washington Statute seeking Court Ordered visitation.
4. Ms. Granville did not seek to cut off visitation entirely but simply disagreed with the paternal grandparents on how much access they should have.
5. Washington Supreme Court found the Washington Statute facially unconstitutional.

B. Justice Sandra Day O'Connor's Plurality Opinion

1. Found that that interest at stake (*i.e.* the right to make decision affecting the care, custody and control of one's child) was a Fundamental Liberty Interest protected by the Due Process Clause of the Constitution (Substantive Due Process).
2. There must be a presumption that a fit parent makes decisions in the best interest of the child. Thus, must give "at least some special weight" to parent's decision regarding third party visitation. *Id.* 70.
3. Where the parent is a fit parent "there will normally be no reason for the state to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of the parent's children." *Id.* at 68.
4. "We do not consider the primary constitutional question ..., whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation. We do not, and need not, define today the precise scope of the parental due process right in the visitation context." *Id.* at 73. Thus, the states were left to define the precise scope of the due process right in third party visitation cases.
5. Found the Washington Statute unconstitutional on an "as applied" basis.

C. Justice Clarence Thomas' Concurring Opinion

1. Criticizes both the parties and the Court for not addressing what standard should be applied in reviewing third party visitation statutes.
2. Because fundamental liberty interests are involved he would apply strict scrutiny test.
3. Found that Washington did not have a legitimate interest, much less a compelling interest, “in second-guessing a fit parent’s decision regarding visitation with third parties.” *Id.* at 80.

D. Justice John Paul Stevens Dissenting Opinion

1. Questions why the Court took the case in the first place.
2. While recognizing parent’s fundament right believed that a balance had to be reached with a child’s right interest in continuing associations with important third parties.

E. Justice Anthony Kennedy’s Dissenting Opinion

1. Would remand case finding that the Washington Supreme Court misconstrued the Federal Constitution to require a showing of harm in order to award third party visitation.
2. Recognized the burden to parents in litigating third party visitation case could be “so disruptive of the parent-child relationship that the constitutional right of a custodial parent to make certain basic determinations for the child’s welfare becomes implicated.” *Id* at 101.

IV. States’ Views of Third Party Visitation Cases:

A. Harm/Parental Unfitness Required

1. Defined – Absent proof of serious harm to the child or that a parent is unfit, third party visitation must be denied.
2. States – *McDermott v. Daougherty*, 385 Md. 320, 869 A.2d 751 (2005); *Parentage of C.A.M.A.*, 154 Wn.2d 52, 109 P.3d 405 (2005); *Richburg v. Richburg*, 895 So.2d 311 (Ala.Civ.App. 2005); *In re Marriage of Harris*, 96 P.3d 141 (Cal. 2004); *In re Marriage of Howard*, 661 N.W.2d 183 (Iowa 2003); *Interest of D.P.O.*, 667 N.W.2d 590 (N.D. 2003); *Moriaty v. Bradt*, 177 N.J. 84, 827 A.2d 203 (2003); *Glidden v. Conley*, 175 Vt. 111, 820

A.2d 197 (2003); Linder v. Linder, 348 Ark. 322, 72 S.W.2d 841 (2002); Roth v. Weston, 259 Conn. 202, 789 A.2d 431 (2002); Blixt v. Blixt, 437 Mass. 649, 808 N.E.2d 1253 (2002); Oliver v. Feldner, 149 Ohio.App.3d 114, 776 N.E.2d 499 (2002); Clark v. Wade, 544 S.E.2d (Ga. 2001); Lulay v. Lulay, 193 Ill.2d 455, 739 N.E.2d 521 (2000); In re Herbst, 1998 OK 100, 971 P.2d 395 (1998); Williams v. Williams, 256 Va. 19, 501 S.E.2d 417 (1998); Beagle v. Beagle, 678 So.2d 1271 (Fla. 1996); Brooks v. Parkerson, 265 Ga. 189, 454 S.E.2d 769 (1995); Hawk v. Hawk, 855 S.W.2d 573 (Tenn. 1993); Turner v. Pannick, 540 P.2d 1051 (Alaska 1975).

3. Not only due process analysis but also the right of privacy. *See Prince v. Massachusetts*, 321 U.S. 158 (1944) (State cannot enter “private realm of family life.”) and *Moriarty v. Bradt, supra* (“Although often expressed as a liberty interest, childrearing autonomy is rooted in the right to privacy.”)

4. Majority View

B. Modified Best Interests Standard

1. Defined – Best interests standard together with “special weight” given to parents’ wishes regarding third party visitation and often a presumption given to parents’ wishes regarding third party visitation.

2. States – *In re Adoption of C.A.*, 137 P.3d 318 (Colo. 2006); *Polasek v. Omura*, 332 Mont. 157, 136 P.3d 519 (2006); *Deem v. Lobato*, 96 P.3d 1186 (N.M.Ct.App. 2004); *Megyese v. Woods*, 808 N.E.2d 1208 (Ind.Ct.App. 2004); *Stacy v. Ross*, 798 So.2d 1275 (Miss. 2001); *State v. Paillet*, 270 Kan. 646, 16 P.3d 962 (2001).

3. Minority View

V. Colorado Third Party Visitation

A. Statutory Authority

1. C.R.S. 14-10-123

a. Is a custody or allocation of parental responsibilities statute.

- b. Gives standing to third party where child is not in the physical care of a parent. C.R.S. 14-10-123(1)(b).
- c. Gives standing to a third party who has had physical care of child for six (6) months and action is brought within six (6) months of the termination of that physical care. C.R.S. 14-10-123(1)(c).

2. C.R.S. 19-1-117

- a. Is a visitation statute.
- b. Limited to grandparents.
- c. Must be a case or have been a case involving custody of the child or allocation of parental responsibilities.

3. C.R.S. 15-14-201 *et. seq.*

- a. Is a guardianship statute.
- b. Standing to individuals who are “interested in the welfare of a minor.”
- c. Only granted if parents consent, parental rights have been terminated or the parents are unwilling or unable to exercise their parental rights.

B. Failed Adoptions

1. C.C.R.S., 892 P.2d 246 (Colo. 1995)

- a. Non-parents had standing under both C.R.S. 14-10-123(1)(b) and C.R.S. 14-10-123(1)(c) as they had child for over six (6) months and child was not in physical care of a parent.
- b. Colorado Children’s Code was inapplicable and parent did not have an automatic statutory right to the return of the child once she changed her mind regarding relinquishment and adoption.

- c. Court essentially applied modified best interests of the child standard; *i.e.* Best interests of the child standard applied but recognized a presumption in favor of the parent.
- d. Rejected application of harm or parental unfitness standard.
- e. Intrastate case

2. *In re the Interest of A.J.C.*, 88 P.3d 599 (Colo. 2004)

- a. Jurisdictional and standing case.
- b. Finds that *C.C.R.S.*, *supra* applies to a failed adoption in an interstate case.
- c. Because interstate must analyze Colorado's UCCJEA, other state's child custody jurisdiction act, Parental Kidnapping and Prevention Act, Interstate Compact for Placement of Children., and Uniform Adoption Act.
- d. Where no best interests hearing held out of state custody decree not entitled to Full Faith and Credit.
- e. Recognizes and relies heavily on the child's right to a hearing on best interests.

C. Parent vs. Psychological Parent

1. *C.C.R.S.*, *supra*.

2. *In re: E.L.M.C.*, 100 P.3d 546 (Colo.App. 2004)

- a. For third party visitation purposes the fact that the litigants were homosexual was irrelevant. Rather, the relevant issue was a parent vs. a psychological parent.
- b. Psychological parent had standing only pursuant to C.R.S. 14-10-123(1)(c) as child remains in physical care of a parent. Further, this statute does not require the child to be in the "exclusive" care of the petitioning party.

- c. Reaffirms modified best interest test of *C.C.R.S.*, *supra* and specifically rejected a parental unfitness and harm test. Did accord, however, presumption to parent.
- d. Strict Scrutiny test applies.
- e. Limited to an as applied argument.
- f. Trial Court's granting of parental responsibilities to non-parent did not violate parent's due process rights as applied to the facts of this specific case.
 - i. Non-parent had previously been allocated parental responsibilities.
 - ii. Numerous facts supporting the parties intention that they would both be considered parents and would raise the child together.
- g. Refuse to define the exact definition of what is a psychological parent as non-parent in this case would meet the definition in even the most stringent definition.
- h. Parent and non-parent are not on equal footing.

D. Grandparent Visitation (C.A.'s long journey through the Colorado Court system)

1. Facts:

- a. After biological parents die, maternal aunt and uncle obtain guardianship over the subject child and eventually petition to adopt.
- b. Parental grandparents "conditionally" object to adoption and request grandparent visitation.
- c. Trial Court grants adoption but also orders grandparent visitation.

2. *In re the Petition of R.A.*, 66 P.3d 146 (Colo.App. 2002)

- a. C.R.S. 19-1-117 is constitutional on its face. Had to read into the statute a requirement that gave “special significance” to parents’ wishes regarding grandparent visitation. *In re Custody of C.M.*, 74 P.3d 342 (Colo.App. 2003)
 - b. Remanded the case back to trial court to apply the “special significance” standard.
3. *In re the Petition of R.A.*, 121 P.3d 295 (Colo.App. 2005)
- a. Different panel than *R.A. I, supra*
 - b. Adoptive parents are the same as natural parents. C.R.S. 19-5-211.
 - c. Applies the majority view requiring harm or parental unfitness before a Court can grant grandparent visitation.
 - d. Important that parents had indicated that they did not plan on denying visitation.
 - e. Do not remand the case.
4. *In re the Adoption of C.A.*, 137 P.3d 318 (Colo. 2006)
- a. Overrule the Court of Appeals and adopt the minority view of modified best interests.
 - b. To Order grandparent visitation:
 - i. Presumption in favor of the parental visitation determination.
 - ii. To rebut the presumption must show through clear and convincing evidence that parental determination is not in the best interests of the child.
 - iii. Burden of proof is on the grandparents.
 - iv. Court must make findings of fact and conclusions of law identifying the “special factors” It relied in granting grandparent visitation.

c. Dissent would have simply affirmed the trial court.

5. Equal Protection issues

a. C.R.S. 19-1-117(1)(c) includes in the definition of case involving allocation of parental responsibilities where the child's parents have died. (*i.e.* C.A. case).

b. Grandparent visitation statute has been used to block a custodial/kinship adoption. *In re Petition of M.G.*, 58 P.3d 1145 (Colo.App. 2002)

VI. Duty of Support

A. *In re Marriage of Conradson*, 43 Colo.App. 432, 604 P.2d 701 (1979)

1. C.R.S. 14-10-115 only refers to parents owing a duty of support.

2. In establishing child support award “factors to be considered do not include the financial resources of a non-parent with whom the child is living.”

B. But See:

1. *N.A.H. v. S.L.S.*, 9 P.3d 354 (Colo. 2000)

a. Best interests not genetics is dispositive of paternity

b. Does a psychological parent have a duty of support?

2. *Bonifas v. Bonifas*, 879 P.2d 478 (Colo.App. 1994)

a. Non-parent no duty to support under C.R.S. 14-10-115

b. Could have a duty to support under a contractual basis.

3. *People in Interest of P.D.*, 41 Colo.App. 109, 580 P.2d 836 (1978)

a. Person who voluntarily undertakes custody of child in Dependency and Neglect case would have support obligation.

- b. However, person who voluntarily undertakes custody of child can have his custody and correlating support obligation terminate any time he/she so desires