

A New Standard in Grandparent Visitation

The Colorado Supreme Court last year issued yet another ruling on grandparent visitation; *In re Petition of C.A.*, 137 P.3d 318 (Colo. 2006) was decided on June 26, 2006.

The Court overruled the Colorado Court of Appeals holding in *In re Petition of R.A.*, 121 P.3d 295 (Colo.App.2005), again seeking to find a standard that upholds the language and intent of § 19-1-117, C.R.S. while also complying with the U.S. Supreme Court's holding in *Troxel v. Granville*, 530 U.S. 57 (2000).

To provide some background, § 19-1-117, C.R.S. allows grandparent visitation orders to be issued for a grandparent when there is or has been a child custody case or a case concerning the allocation of parental responsibilities relating to that child. Cases concerning the allocation of parental responsibilities relating to children include dissolution of marriage cases, cases where legal custody or parental responsibilities have been given to a party other than the child's parent, or when the child's parent has died. According to the statute, the court shall order grandchild visitation only upon a finding that such visitation is in the best interests of the child. Those who practice family law are very familiar with the best interest of the child standard imposed by § 19-1-117, C.R.S. § 14-10-124(1.5)(a), C.R.S. sets out a number of relevant factors to be considered when determining the best interest of a child.

The 2000 Supreme Court opinion of *Troxel v. Granville*, 530 U.S. 57 (2000) limited grandparent visitation orders in another way by holding that parents' due process rights impose a "special weight," a burden on the grandparent to overcome parental wishes when the court has before it a grandparent visitation petition. In acknowledging the presumption that fit parents act in the best interest of their child and noting that the 14th Amendment guarantees parents a fundamental liberty interest in the care, custody and control of their children, the *Troxel* court held that a fit parent's decision should be given special weight and to do anything less would be unconstitutional state interference.

Colorado Court's interpreted *Troxel* in a number of opinions since 2000, the most recent being *In re Petition of R.A.*, 121 P.3d 295 (Colo.App. 2005), which decided how to implement *Troxel*'s "special weight" requirement. The appellate court established an actual or threatened emotional harm standard, holding that absent a showing of harm or threat thereof, it is not for the State to choose which associations a family must maintain and which the family is permitted to abandon. Therefore, a showing of significant or substantial actual or threatened emotional harm was required for court ordered grandparent visitation.¹

However, the 2006 decision from the Colorado Supreme Court overruled *R.A.*ⁱⁱ The Supreme Court disagrees with the Appellate Court's decision in *R.A.* because neither *Troxel* nor § 19-1-117, C.R.S. requires a significant or substantial showing of harm. Instead *Troxel* requires applying a "special weight" to the parental determination and an identification of special factors upon which the grandparent visitation order is based.

In making its decision, the Colorado Supreme Court first notes that Colorado's statute regarding grandparent visitation is not as broad as Washington's, the statute at issue in *Troxel*. Colorado narrows the scope by limiting grandparent visitation orders to child custody cases or cases where allocation of parental responsibility is an issue, and it prohibits orders for grandparent visitation unless such visitation would be in the best interest of the child.

By focusing on the plain language and legislative intent of § 19-1-117, C.R.S. *C.A.* finds the statute to be consistent with the due process requirements of *Troxel*. While the court agrees "special weight" must be given to parental determination and that adoptive parents should be viewed as natural parents, they disagree with requiring a showing of parental unfitness or substantial and significant harm.

The Supreme Court reasoned that the Court of Appeals had essentially gone beyond the requirements of *Troxel* and the Colorado statute. In doing so, the Colorado Supreme Court adopts Montana's approach to grandparent visitation instead of the Oklahoma approach adopted in *R.A.*, which holds, "the appropriate standard for issuance of an order for grandparent visitation under § 19-1-117 requires:

- (1) A presumption in favor of the parental visitation determination;
- (2) To rebut this presumption, a showing by grandparents through clear and convincing evidence that the parental visitation determination is not in the child's best interests; and
- (3) Placement of the ultimate burden on grandparents to establish by clear and convincing evidence that the visitation schedule they seek is in the best interests of the child."

Also note that if the grandparent is successful in rebutting the presumption in favor of the parent, the burden shifts to the parent to adduce evidence in support of the parental determination. In addition, the court must make findings of fact and conclusions of law identifying the special factors on which it relies in making its decision.

The clear and convincing evidence standard established by *C.A.* is less stringent than the substantial and significant harm standard previously adopted by the court of appeals in *R.A.* While it is noted that the clear and convincing standard also applies in termination of parental rights cases, the standard also seems to provide some sort of middle ground with a little more leeway for grandparents than previously given to them under Colorado law.ⁱⁱⁱ However, even with this less stringent standard, grandparents must still be aware that a simple belief that the child might benefit from grandparent visitation is not enough to show it is in the best interests of the child.^{iv}

ⁱ *In re Petition of R.A.*, 121 P.3d 295 (Colo.App. 2005).

ⁱⁱ *See In re the Matter of the Petitioner for Adoption of C.A., A Child* (Colo. 2006)

ⁱⁱⁱ *See People in re A.M.D.*, 648 P.2d 625, 631 (Colo. 1982); § 19-3-604(1).

^{iv} *See R.A.*