

Family Law—California Supreme Court Affirms Constitutionality of Grandparent Visitation Statute Without Requiring Clear and Convincing Evidence—*In re Marriage of Harris*, 96 P.3d 141 (Cal. 2004)

The guarantee of substantive due process under the United States Constitution's Fourteenth Amendment has long been held to protect parents' fundamental interest in the care, custody, and control of their children.¹ The United States Supreme Court has nonetheless decided that sometimes grandparents may visit their grandchildren despite parents' contrary wishes.² In *In re Marriage of Harris*,³ the California Supreme Court considered whether a petition for grandparent visitation under California Family Code section 3104 violated a custodial mother's substantive due process rights.⁴ The court determined that section 3104 was constitutional on its face and as applied to the facts of the case.⁵

Karen Butler and Charles Harris were wed in January of 1994 and separated nine months later, a few days prior to the birth of their daughter, Emily Harris.⁶ In July of 1995, a California superior court dissolved their marriage and granted Emily's mother sole custody.⁷ Shortly thereafter, Emily and her mother moved from California to Maryland.⁸ In August of 1995, Emily's paternal grandparents filed a petition for court ordered visitation with Emily.⁹

1. See U.S. CONST. amend. XIV, § 1 (prohibiting government from compromising liberties absent due process); *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000) (plurality opinion) (noting parental right may qualify as oldest substantive due process right).

2. *Troxel v. Granville*, 530 U.S. 57, 64 (2000) (plurality opinion) (noting nonparental visitation statutes protect important relationships forged between children and nonparents). Statutes extending visitation rights to nonparents are an advent of the latter half of the twentieth century. Jennifer Kovalcik, Note, *Troxel v. Granville: In the Battle Between Grandparent Visitation Statutes and Parental Rights, "The Best Interest of the Child" Standard Needs Reform*, 40 BRANDEIS L.J. 803, 804 (2002) (outlining history of grandparent visitation rights). Grandparent visitation statutes were widely enacted, in part, as a response to the erosion of the nuclear family, which required many grandparents to assume parental roles. *Id.* Today, every state has passed a statute allowing grandparents to petition for visitation with their grandchildren. See *id.* at 804 n.12 (listing non-parental visitation statutes of all fifty states). The statutes vary in terms of who they allow to petition for visitation, and what they require the petitioner to establish. *Id.* at 805-06 (noting some statutes only allow natural grandparents to petition).

3. 96 P.3d 141 (Cal. 2004).

4. CAL. FAM. CODE § 3104 (West 2004) (setting forth requirements grandparents must meet to obtain visitation rights). Section 3104 only limits visitation to grandparents, requires a preexisting relationship with the grandchild, and applies a rebuttable presumption that visitation is not in the child's best interest if the parent with sole custody objects. See *id.* § 3104(a)(1), (f).

5. 96 P.3d at 151-52 (distinguishing Supreme Court's decision in *Troxel*); see also *infra* notes 28-31 and accompanying text (describing Court's holding in *Troxel*).

6. 96 P.3d at 143 (stating Emily's mother claimed her husband abused her during marriage).

7. *Id.* at 144 (describing events following separation of Emily's parents).

8. *Id.* (noting court allowed Emily's mother to relocate to Maryland with Emily).

9. *Id.* (noting Emily's grandparents requested ten days of visitation every other month). At the time that

Emily's father supported the visitation petition.¹⁰

Emily's grandparents' petition for visitation was approved in November of 1995.¹¹ Years later, when Emily was five, her grandparents sought to modify the court's order to allow visitation during the summer, and over the Christmas and Easter holidays.¹² In response, Emily's mother filed a request to terminate the grandparents' visitation rights.¹³ Emily's father, meanwhile, lost all contact with Emily.¹⁴ The trial court ruled against Emily's mother, finding it would be in Emily's best interest to continue her relationship with Grandparents.¹⁵ The court of appeals held the applicable nonparental visitation statute, section 3104, was unconstitutionally applied because the trial court had failed to give any special deference to Emily's mother's decision to terminate visitation.¹⁶

The California Supreme Court reviewed the decision and held that section 3104 was constitutional.¹⁷ The court, however, affirmed the reversal of the trial court upon determining that a bare best interests analysis failed to satisfy section 3104's requirements.¹⁸ The court remanded the case, noting section 3104 requires a presumption in favor of Emily's mother's decision to terminate visitation.¹⁹

superior court granted Emily's mother custody, the parties had agreed to a visitation schedule. *Id.* at 144 (noting parties agreed upon visitation schedule and grandparents' role as parties to litigation). Apparently, this agreement was promptly dishonored, because Emily's grandparents filed a visitation petition less than two weeks after the superior court entered its order. *Id.*

10. 96 P.3d at 152. In this case, Emily's father was alive and able to weigh in on the visitation petition, in contrast to *Troxel* where the father had passed away. *See id.*

11. *In re Marriage of Harris*, 112 Cal. Rptr. 2d 127, 131 (Cal. Ct. App. 2002) (describing Emily's grandparents' struggle to maintain visitation with Emily), *aff'd*, 96 P.3d 141 (Cal. 2004).

12. *In re Marriage of Harris*, 112 Cal. Rptr. 2d 127, 132 (Cal. Ct. App. 2002) (noting Emily's grandparents sought five weeks of visitation per year), *aff'd*, 96 P.3d 141 (Cal. 2004). The request to modify the visitation schedule was made in anticipation of Emily beginning school. *Id.* at 131-32.

13. *In re Marriage of Harris*, 112 Cal. Rptr. 2d 127, 132 (Cal. Ct. App. 2002), *aff'd*, 96 P.3d 141 (Cal. 2004). In late 1996, Emily's mother disappeared with Emily, only to be found living in Utah with a new husband. *Id.* at 131 (noting Emily's mother held in contempt of court as result). In support of her request to terminate visitation, Emily's mother argued that visitation harmed Emily's relationship with her new family. *Id.* at 132 n.4 (recounting portion of mother's declaration in response to grandparents' modification motion). This was Emily's mother's second request to terminate visitation. *Id.* at 131-32 (describing Emily's grandparents' substantial efforts to maintain visitation with Emily).

14. 96 P.3d at 169 (Brown, J., concurring in part and dissenting in part) (noting Emily's father had not seen his daughter for five years). Emily's father's parental rights were terminated after the commencement of this case, in October of 2002. *Id.* at 146 (taking judicial notice of termination).

15. *In re Marriage of Harris*, 112 Cal. Rptr. 2d 127, 132 (Cal. Ct. App. 2002) (stating court awarded twenty four days visitation over the summer and five days in December), *aff'd*, 96 P.3d 141 (Cal. 2004). The trial court recognized that visitation had some harmful effects, but found that the benefits to Emily outweighed any harm. *Id.* at 133 (recounting trial court's opinion).

16. *In re Marriage of Harris*, 112 Cal. Rptr. 2d 127, 143 (Cal. Ct. App. 2002) (noting court must grant special weight to fit parent's decision), *aff'd*, 96 P.3d 141 (Cal. 2004); *see also infra* notes 28-31 and accompanying text (noting *Troxel* requires presumption that parents make decisions their children's' best interest).

17. 96 P.3d at 151-52 (sustaining constitutionality of section 3104 facially and as applied).

18. *Id.* at 154 (stating best interest analysis ignores rebuttable presumption under section 3104(f)).

19. *Id.* (commanding trial court to employ rebuttable presumption that visitation contravenes Emily's best

A parent's due process rights depend, in part, upon the depth of the emotional bond they have cultivated with their child.²⁰ Courts recognize that parents who have emotional ties with their children will naturally want to make decisions in their best interests.²¹ Marriage also gives rise to parental rights, because it creates a legal tie between parent and child.²² Upon divorce, parents who lose custody do not also lose all of their parental rights.²³ A parent's right is rarely trumped by the state's interest in child welfare or the child's own constitutional rights.²⁴

Grandparents seeking visitation against parents' wishes must establish that it is in the child's best interest to be granted visitation rights.²⁵ The best interest standard has been criticized for being indeterminate, thereby allowing

interest); *see also* CAL. FAM. CODE § 3104(f) (West 2004) (instituting rebuttable presumption visitation contravenes child's best interest where parent in sole custody objects). Although the court found that section 3104 was constitutional as applied to the facts, the case was remanded because the trial court failed to employ the rebuttable presumption required under section 3104(f). 96 P.3d at 151-52; *see also infra* notes 41-43 and accompanying text (criticizing logic behind court's conclusion of facial validity).

20. *See* Solangel Maldonado, *When a Father (or Mother) Doesn't Know Best: Quasi-Parents and Parental Deference After Troxel v. Granville*, 88 IOWA L. REV. 865, 921 (2003) (illustrating rationale behind due process parental right). *Compare* *Lehr v. Robertson*, 463 U.S. 248, 261-62 (1983) (recognizing constitutional rights of unwed fathers engaged in raising children), *and* *Stanley v. Illinois*, 405 U.S. 645, 651-52 (1972) (extending Constitutional protections to unmarried father who raised his children), *with* *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (applying bare best interest standard to father out of wedlock who never had custody). *But see* Steven L. Novinson, *Post Divorce Visitation: Untying the Triangular Knot*, 1983 U. ILL. L. REV. 121, 132-33 (1983) (arguing biological relationship carries weight in parental rights analysis).

21. *Parham v. J.R.*, 442 U.S. 584, 602-03 (1979) (noting parental rights based upon emotional bond have historical roots in American legal tradition); Maldonado, *supra* note 20, at 925 (stating emotional bond places parents in best position to identify child's needs).

22. *Lehr v. Robertson*, 463 U.S. 248, 263 (1983) (stating marriage provides greatest protection for father's parental rights); *Caban v. Mohammed*, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting) (distinguishing rights of wedded fathers from those of unwed fathers).

23. *Quilloin v. Walcott*, 434 U.S. 246, 255-56 (1978) (deciding noncustodial parent maintains greater parental rights than parent of illegitimate child); *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965) (concluding procedural due process requires notice of impending adoption to noncustodial parent); Joan G. Wexler, *Rethinking the Modification of Child Custody Decrees*, 94 YALE L.J. 757, 814 (1985) (stating noncustodial parents retain some rights after divorce).

24. *See, e.g., Parham v. J.R.*, 442 U.S. 584, 600-04 (1979) (deciding parental right outweighed constitutional interest of child in freedom from confinement); *Wisconsin v. Yoder*, 406 U.S. 205, 233-34 (1972) (plurality opinion) (holding state cannot enforce compulsory school attendance law against parents' religious objections); *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944) (declaring state can only intercede when parent's decision jeopardizes child's welfare); *see also* Laurence C. Nolan, *Beyond Troxel: The Pragmatic Challenges of Grandparent Visitation Continue*, 50 DRAKE L. REV. 267, 280 (2002) (maintaining state can only intercede when parent's decision harms child). *But see* *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 75 (1976) (plurality opinion) (deciding constitutional privacy right enables minor to abort pregnancy without parental consent).

25. *See* Kovalcik, *supra* note 2, at 808 (noting most jurisdictions apply best interest standard to grandparent visitation petitions). Some factors in determining whether grandparent visitation is in the child's best interest are: the emotional bond between the child and the grandparents; the potential for the grandparents to undermine parental discipline; and, the degree to which court proceedings and visitation may disrupt the child's life. *Id.* at 808-09 (outlining difficulties involved in applying best interest standard).

excessive judicial discretion that interferes with parental rights.²⁶ Nevertheless, the presumption that a fit parent's decisions are in their child's best interest continues to protect parental rights.²⁷

In *Troxel v. Granville*,²⁸ the United States Supreme Court held a nonparental visitation statute was unconstitutional as applied because the trial court gave no deference to the parent's decision to limit grandparent visitation.²⁹ The Court, however, did not articulate exactly how much deference courts must give to a fit parent's decision regarding grandparent visitation.³⁰ Instead of promulgating a universal standard, the Court indicated in dicta that courts should examine the validity of nonparent visitation statutes on a case-by-case basis, depending upon how the statute is applied.³¹

Deference can be afforded to a particular litigant by raising the standard of proof, which is calibrated according to the value of the interests at stake in the proceeding.³² The standard of proof reflects a societal judgment as to how the risk of judicial or fact finder error should be allocated among the litigants.³³

26. *Troxel v. Granville*, 530 U.S. 57, 101 (2000) (Kennedy, J., dissenting) (noting indeterminacy of best interest standard complicates parents' efforts to oppose visitation); *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 835 n.36 (1977) (describing best interest standard as "vague"); Judith L. Shandling, *The Constitutional Constraints on Grandparents' Visitation Statutes*, 86 COLUM. L. REV. 118, 123-25 (1986) (arguing bare best interest standard gives judges too much discretion).

27. *Troxel v. Granville*, 530 U.S. 57, 68-69 (2000) (plurality opinion) (holding courts must apply special weight to parents' decision to oppose grandparent visitation); *Parham v. J.R.*, 442 U.S. 584, 603-04 (1979) (accorded deference to parents' decision to commit child to mental hospital); *see also* Maldonado, *supra* note 20, at 921 (discussing courts rationale for presuming parents' decisions further child's best interests).

28. 530 U.S. 57 (2000) (plurality opinion).

29. *Troxel v. Granville*, 530 U.S. 57, 69-70 (2000) (plurality opinion) (holding statute invalid as applied).

30. *Troxel v. Granville*, 530 U.S. 57, 73 (2000) (plurality opinion) (declining to delineate exact bounds of parents' due process protections). *But see id.* at 80 (2000) (Thomas, J., concurring) (arguing strict scrutiny should apply to state action compromising fundamental parenting rights).

31. *Troxel v. Granville*, 530 U.S. 57, 73 (2000) (plurality opinion) (evinced reluctance to characterize any nonparent visitation statute as facially unconstitutional). *But see* Kristine L. Roberts, *State Supreme Court Applications of Troxel v. Granville and the Courts' Reluctance to Declare Grandparent Visitation Statutes Unconstitutional*, 41 FAM. CT. REV. 14, 27-29 (2003) (arguing *Troxel* does not prohibit facial invalidation of nonparent visitation statutes).

32. *See, e.g.*, *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 280-82 (1990) (upholding clear and convincing evidence requirement for termination of life support); *Schneiderman v. United States*, 320 U.S. 118, 122-23 (1943) (requiring proof by clear and convincing evidence in denaturalization proceedings); Jo-Dee Favre-Jones, Note, *Rivera v. Minnich: Paternity Suits and the Negligible Burden of Proof*, 32 ST. LOUIS U. L.J. 803, 816 (1988) (noting proceedings concerning important individual interests necessitate higher standard of proof). The risk of financial loss requires a lower standard of proof, while the risk of criminal conviction demands the highest. *Santosky v. Kramer*, 455 U.S. 745, 755 (1982) (noting society's minimal concern with outcome of civil disputes over money damages); *Addington v. Texas*, 441 U.S. 418, 423-24 (1979) (illustrating differences between various standards of proof).

33. *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 283 (1990) (deciding party seeking to terminate life support bears risk of erroneous decision); *Santosky v. Kramer*, 455 U.S. 745, 755 (1982) (noting preponderance standard, applicable in civil disputes, allocates risk of error evenly); *In re Winship*, 397 U.S. 358, 370-72 (1970) (Harlan, J., concurring) (discussing how applicable standard of proof reflects assessment of social costs of fact finder error); Linda Lee Reimer Stevenson, Comment, *Fair Play or a Stacked Deck?: In Search of a Proper Standard of Proof in Juvenile Dependency Hearings*, 26 PEPP. L. REV. 613, 620 (1999) (noting beyond reasonable doubt standard places risk of error on society in criminal cases).

Factors such as the importance of the private interests at stake, the permanence of the deprivation of fundamental rights, or other circumstances indicating unfairness, can serve to shift the risk of error away from the potentially prejudiced litigant by imposing a higher standard of proof upon their adversary.³⁴

In *In re Marriage of Harris*, the California Supreme Court considered whether section 3104, which allows grandparents to petition for visitation with their grandchildren despite parents' contrary wishes, comports with the Due Process clause of the Fourteenth Amendment.³⁵ The court determined that section 3104 is facially constitutional because it is more narrowly drawn than the statute considered in *Troxel*, and provides deference to parental choice, which was absent from the statute in *Troxel*.³⁶ In addition, the court decided that section 3104, as it applied in this case, did not violate the constitution because Emily's father supported the grandparent's attempts to visit Emily.³⁷

The California Supreme Court was correct in concluding that section 3104 is constitutional on its face.³⁸ The court's emphasis, however, on the differences between section 3104 and the statute in *Troxel*, missed the mark because the statute in *Troxel* was held to be unconstitutional *as applied*.³⁹ The court, instead, should have focused on the dicta in *Troxel* indicating the Supreme Court's unwillingness to police nonparental visitation statutes based upon their facial validity.⁴⁰

34. *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 283 (1990) (stating irreversibility of decision to terminate life support favors imposition of high standard of proof); *Rivera v. Minnich*, 483 U.S. 574, 579-80 (1987) (comparing significance of interests in paternity suits to termination proceedings); *Santosky v. Kramer*, 455 U.S. 745, 759 (1982) (stating permanency of parental rights termination proceedings militates toward imposing risk of error upon state); *Addington v. Texas*, 441 U.S. 418, 425-26 (1979) (deciding importance of avoiding involuntary confinement militates toward imposing higher standard of proof). If the state is party to a proceeding, courts will also take this into account because the state typically has access to greater legal resources than private litigants, and because an adverse ruling can have especially devastating consequences for private litigants. *Rivera*, 483 U.S. at 580-81 (pointing out absence of state involvement in paternity suits); *Santosky*, 455 U.S. at 763 (noting state's access to trained attorneys, expert witnesses, and other resources). Additionally, if the nature of the proceedings carries a high risk of fact finder error, a higher standard of proof may be required. *Santosky*, 455 U.S. at 762-63 (stressing high risk of error inherent in permanent neglect proceedings); *Addington*, 441 U.S. at 426-27 (noting risk of fact finder decision to civilly commit defendant based upon mere eccentric behavior).

35. 96 P.3d at 149 (considering Emily's mother's constitutional claim).

36. *Id.* at 151 (illustrating differences between section 3104 and statute in *Troxel*); *see also supra* note 4 (describing some of section 3104's prerequisites).

37. 96 P.3d at 152 (deciding visitation supported by one parent cannot infringe upon parental right). *But see id.* at 161 (Chin, J., concurring in part and dissenting in part) (characterizing Emily's father's support for visitation as "legally irrelevant"); *id.* at 169 (Brown, J., concurring in part and dissenting in part) (arguing Emily's father's estrangement from his daughter rendered his support for visitation insignificant).

38. *Id.* at 151 (describing section 3104 as narrow enough to pass constitutional muster).

39. *Id.* (arguing section 3104 lacks constitutional infirmities of *Troxel* statute).

40. *See supra* notes 28-31 and accompanying text (illustrating *Troxel's* adoption of case-by-case approach to nonparental visitation statutes' constitutionality); *see also Roberts, supra* note 31, at 15 (noting state courts reluctance to uphold facial challenges to nonparent visitation statutes since *Troxel*).

In concluding section 3104 was constitutional as applied, the court gave too much weight to Emily's father's support for the grandparents' visitation petition.⁴¹ As the court correctly pointed out, Emily's father retained some parental rights by virtue of his status as a noncustodial parent.⁴² In attaching such great importance to Emily's father's opinion, however, the court ignored the poor quality of Emily's father's relationship with her, which is an important factor in ascertaining the extent of his parental rights.⁴³

Finally, despite Justice Chin's argument to the contrary in his concurring and dissenting opinion, the majority's failure to require the grandparents to prove their case by clear and convincing evidence was not in error.⁴⁴ Justice Chin was well-founded in noting that the best interest standard generates a high risk of fact finder error, which militates toward imposing a heightened standard of review.⁴⁵ Although Justice Chin may have been correct in determining that the proceedings placed Emily's mother's fundamental rights as a parent at stake, erroneously infringing upon her parental rights would not bring about the dire and irreversible consequences which necessitate imposition of a heightened standard of proof.⁴⁶

In *In re Marriage of Harris*, the California Supreme Court considered whether grandparents' right to petition for visitation with their grandchildren under section 3104 contravenes parents' rights, which are protected by the Due Process Clause of the Fourteenth Amendment. In ascertaining the facial validity of section 3104, the court failed to recognize that, under *Troxel*, a nonparent visitation statute cannot be declared facially invalid under any circumstances. In ascertaining section 3104's validity as applied, the court mistakenly afforded deference to an estranged father's support for visitation. In large part, the court failed to correctly apply the protections that the Due Process Clause affords to parental rights.

Nicholas G. Keramaris

41. See 96 P.3d at 163 (Chin, J., concurring in part and dissenting in part) (characterizing majority's conclusion as unfounded in precedent).

42. *Id.* at 152 (distinguishing noncustodial parent from parent possessing no parental rights); *supra* notes 22-23 and accompanying text (noting noncustodial parent maintains legal ties to child).

43. *Supra* notes 20-21 and accompanying text (noting emotional bond justifies assumption parents act in child's best interests). The dissenting judges should have argued that Emily's father's unfamiliarity with his daughter rendered him incapable of adequately ascertaining her best interests. See Maldonado, *supra* note 20, at 924 (arguing parent's ability to identify child's needs undergirds parental right).

44. See 96 P.3d at 168 (Chin, J., concurring in part and dissenting in part) (concluding section 3104 requires proof by clear and convincing evidence).

45. *Id.* (Chin, J., concurring in part and dissenting in part) (characterizing best interest standard as vague and subject to judicial manipulation); *supra* note 26 and accompanying text (setting forth criticism of best interests standard); see also *supra* notes 34 and accompanying text (listing some factors that lend towards imposition of heightened standard of review).

46. 96 P.3d at 167 (Chin, J., concurring in part and dissenting in part) (emphasizing fundamental character of parental right); *supra* notes 32-34 and accompanying text (describing factors considered in determining applicable standard of proof).