When Should Third Parties Get Custody or Visitation?

BY DANIEL R. VICTOR & KERI L. MIDDLEDITCH

When courts must decide whether to award custody to a third party, the judge must engage in careful and constitutionally framed analysis to balance the rights of the parents versus what is in the child's best interests.

Prior to June 2000, states had only twenty-year-old case law to support the proposition that, "fit parents act in the best interests of their children." *Parham v. J.R.*, 442 U.S. 584, 99 S.Ct. 2493 (1979).

This problem was further complicated by the fact that absolutely no jurisprudence identified whether a judge could award custody of a child to a nonparent without giving any deference or "weight" to the parent, simply as a matter of biology. In most states, statutes instructed judges to award custody based on a straightforward best-interest analysis.

The competing interests of parents' due process rights and best-interests determinations finally garnered attention in Justice Sandra Day O'Connor's plurality opinion in *Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054 (2000), in which the U.S. Supreme Court ruled that state laws must afford fit parents the presumption that they will act in the best interests of their children before engaging in a general best-interests analysis when there is a competing third-party.

Prior to *Troxel*, a significant line of cases supported the position that a court's sole inquiry must be to determine which custodian would serve the best interests of the child. *V.C. v. M.J.B.*, 163 N.J. 200, 748 A2d 539 (2000); *Borsdorf v. Mills*, 49 Ala. App. 658, 275 So. 2d 338 (1973). The best interests of the child ceased being the court's only consideration when the Court recognized and affirmed in *Troxel* a parent's right to the care, custody, and control of a child, absent a showing of unfitness or failure to protect the child's welfare.

However, *Troxel* left to the states the responsibility of defining "parental fitness." Even more important for purposes of litigating third-party custody cases, each state is responsible for drafting and interpreting the language of "giving deference" to a fit parent. States are now in the process of examining and adjudicating these issues that are making their way through the court system. At this point, discrepancies in the laws are not causing conflicts, but rather an absence of jurisprudence that ultimately will lead many state legislatures back to the drafting table to address ambiguities in third-party custody and visitation statutes.

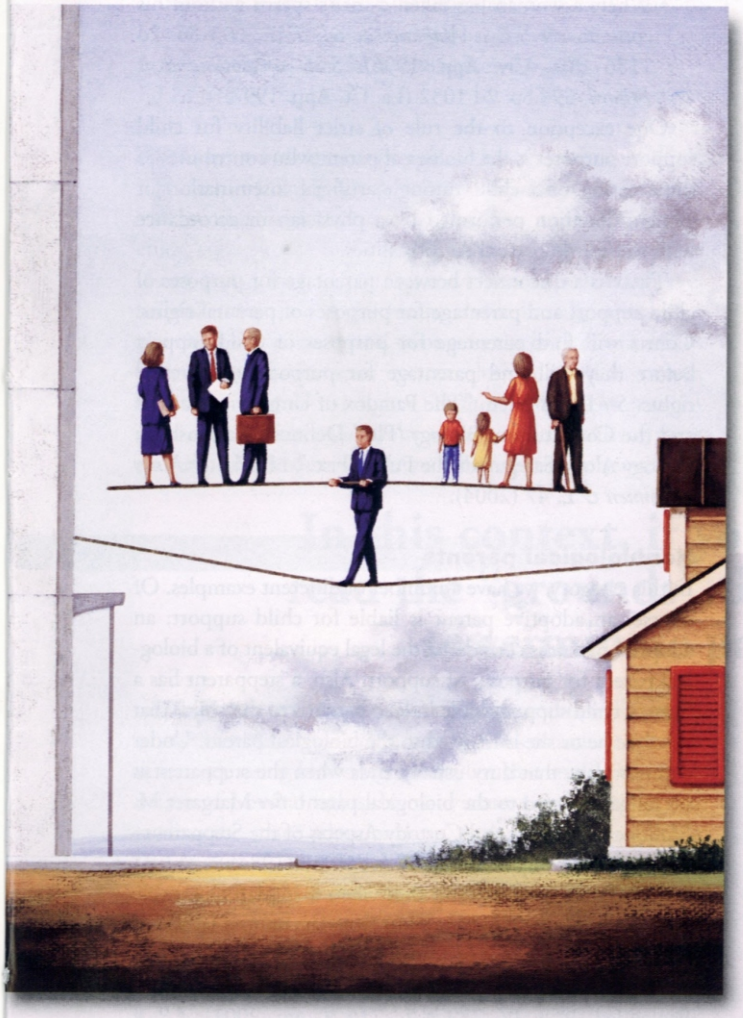
One example of how a lack of clear direction in third-party custody law made for a divided decision is *Hunter v. Hunter*, 2008 WL 747126 (2008), which was recently decided by the Michigan Court of Appeals and has since been taken up by the Michigan Supreme Court. The trial court awarded custody to a paternal aunt and uncle over the children's mother, because the court found the mother unfit and thus was not entitled to the constitutional protection afforded in *Troxel*, which places the burden of proof on a third-party competing against a parent for custody.

Instead, the trial court found that "a parent is unfit when his or her conduct is inconsistent with the protected parental interest or the parent has neglected or abandoned the child." Because the court did not define "inconsistent," what constitutes "unfitness" remains elusive.

Although a majority of the Michigan Court of Appeals affirmed the custody decision, the court recognized a legislative gap by acknowledging the dissenting opinion's concern that Michigan's Child Custody Act does not contain any legal standards or criteria governing its determination of parental fitness. The appellate court wrote, "Although we find no error in the trial court's finding that defendant is an unfit mother, we appreciate our dissenting colleague's concerns regarding the statutory criteria for determining when a noncustodial parent is unfit and therefore not entitled to the presumption that parental custody is in the children's best interests." *Id.* The Michigan Supreme Court recognized this defect in Michigan's Child Custody Act and has granted leave for the *Hunter* case in order to address this deficiency. It is suspected that the Michigan Supreme Court will

instruct the state legislature to amend the Child Custody Act so as to give trial courts guidance when deciding third-party custody cases. The Supreme Court will likely hear the case during the spring term in 2009.

Other states are now wrestling with this dilemma as the "changing realities of the American family," referred to by Justice O'Connor in *Troxel*, find their way into courtrooms across the country. Some examples of how states have defined unfitness in their jurisprudence include: "Persistent neglect," *Jenae K.*, 196 Wis. 2d 16, 539 N.W.2d 104 (1995); "Extraordinary circumstances," *Litz v. Bennum*, 111 Nev. 35, 888 P.2d 438 (1995); and "Immoral conduct adversely affecting the child's interests," *Carter v. Taylor*, 611 So. 2d 874 (1992).



In the end, each "definition" of unfitness is subject to judicial interpretation and the facts and circumstances of each individual case. Take, for example, the finding by a Tennessee appeals court that the trial court erred by awarding custody to the children's grandparents when the record did not establish that awarding custody to the father, "posed a risk of substantial harm" to the children. *Elmore v. Elmore*, 173 S.W.3d 447 (2004).

This begs the question: How much harm can parents inflict on their children before the harm becomes "substantial?" Isn't any amount of harm to a child "inconsistent with the parental interest" protected by the Constitution? The answers to these questions are important as more and more third parties gain standing across the country to petition for custody and visitation of minor children.

Third-party visitation cases are similar to third-party custody cases in that fit parents are entitled to constitutional protection in the form of a presumption that their decisions to deny visitation will generally be upheld, except when denial poses a risk of harm to the child.

In these cases, typically involving grandparents whose child is deceased and a surviving parent who precludes the child from having contact with the grandparents, the third-party must first rebut the presumption that a "fit" parent's decision to deny contact would present a risk of harm to the child before the court can begin a best-interests analysis. Once again, it is unclear what circumstances will lead to a finding that a child is at risk of harm if contact with a third party is not maintained.

Because the burden of rebutting the parental presumption is on the third party, litigation of these cases is almost inevitable, as parents do not often concede they are unfit.

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Furthermore, proving a risk of emotional or mental harm to a child requires the expert testimony of a mental health professional, making cases like these even more expensive to litigate than a case in which the court investigates only what is in a child's best interests.

The best place to turn for help in these cases is the state legislature, which has the power to include specific language in its third-party custody and visitation statutes, giving courts direction in the form of defining degrees of parental unfitness and describing conditions that by their nature would pose a risk of harm to a child. Not only should such direction be offered to reduce litigation by narrowing the number of cases meeting the statutory criteria, but also to initiate a nationwide discussion so that all 50 states may follow a similar framework in evaluating cases involving third parties. **FA**

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