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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re the Marriage of KAREN and CHARLES ERIK HARRIS.	
KAREN BUTLER, Appellant, v. CHARLES ERIK HARRIS et al., Respondents.	D036144 (Super. Ct. No. D391902 TXA)

APPEAL from an order of the Superior Court of San Diego County, Thomas Ashworth III, Judge. Reversed.

Law Offices of Jeffrey W. Doeringer, Family Law Appellate Associates, Jeffrey W. Doeringer, for Appellant.

Karen A. Wyle, Julie E. Mumma, Guralnick & Gilliland and Anne L. Rauch for Coalition for Restoration of Parental Rights as Amicus Curiae on behalf of Appellant.

Martha Matthews, Mark D. Rosenbaum, Charles A. Bird, Jordan C. Budd, Joan H. Hollinger, Shannon Minter and Shannan Wilber for the ALCU Foundation of Southern

California, ACLU Foundation of San Diego and Imperial Counties, Child Advocacy Program Law School – Boalt Hall, National Center for Lesbian Rights and the Youth Law Center as Amici Curiae on behalf of Appellant.

Law Offices of Paul W. Leehey, Paul W. Leehey for Respondents.

William Wesley Patton as Amicus Curiae on behalf of Respondents.

David Borges; Law Offices of Gollub & Golsan, Lorraine Gollub; Cooper-Gordon, Freida Gordon; Dawn Gray; and Stephen Temko for the Association of Certified Family Law Specialists as Amicus Curiae upon the request of the Court of Appeal.

Lawrence E. Fluharty for the Los Angeles Chapter of the National Association of Counsel for Children as Amicus Curiae.

Myron Dean Quon and Patricia M. Logue for Lambda Legal Defense and Education Fund, Inc. as Amicus Curiae.

Karen Butler, the mother of Emily Harris, appeals an order granting and extending visitation to Emily's paternal grandparents, Charles Harris, Jr., and Leanne Harris, and directing Butler to allow her daughter to travel alone on airline flights to accomplish the visitation. Butler asserts the visitation order must be reversed because the statute that authorized it – Family Code [1] section 3104 – is unconstitutional, both facially and as applied.

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1 All statutory references are to the Family Code unless otherwise specified.

In addressing Butler's constitutional claims, we solicited amicus curiae briefs on the following question:

> "Where there are no allegations of unfitness of the custodial parent and the custodial parent objects to grandparent visitation, does the best interest standard set forth in [] section 3104 comport with the constitutional rights of due process and privacy provided by the United States and California Constitutions?"

We reverse, finding the application of section 3104 violated Butler's due process rights under both the United States and California Constitutions. Applying the decision of the United States Supreme Court in *Troxel v. Granville* (2000) 530 U.S. 57 (*Troxel*), we find section 3104 does not per se violate the Due Process Clause of the Fourteenth Amendment. However, we hold in order for the statute to meet due process requirements under the California Constitution, when a fit custodial parent opposes visitation, the statute must be construed to require grandparents to show by clear and convincing evidence that the parent's decision would be detrimental to the child. We do not reach the constitutional challenges based on the right to privacy.

FACTUAL AND PROCEDURAL BACKGROUND

Butler met Charles Erik Harris in October 1993 while she was in the Navy. They were married on January 12, 1994. Butler claimed Harris was emotionally and physically

abusive to her, and on October 16, they separated.[2] On October 26, 1994, Butler gave birth to their daughter, Emily Hope Harris.

On July 21, 1995, the trial court, per stipulation of the parties, granted Butler sole legal and physical custody of Emily, following the recommendation of a clinical psychologist appointed by the court. The stipulation also provided that Butler could permanently move to Maryland with Emily on or after August 5, 1995. Harris was to have supervised visitation contingent on his undergoing psychotherapy, drug testing and enrollment in Narcotics Anonymous.

On August 25, 1995, Harris's parents, Charles, Jr., and Leanne Harris (the Harrises or Grandparents), were joined as parties to the action after stipulating they would not interfere with Butler's scheduled move to Maryland. On November 20, 1995, by stipulated order, the trial court granted Grandparents visitation in Maryland. Grandparents were granted four seven-day visits during 1996, six seven-day visits during 1997, and six ten-day visits during 1998. None of the visitations was to be an overnight visit unless Butler and Grandparents mutually agreed.

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[2] According to Butler, her husband assaulted her on numerous occasions, including the following incidents: When they returned from their honeymoon, Harris left her stranded at the airport without money and when she arrived home, he hit her in the head. Harris twice in one day pushed Butler, who was pregnant at the time, out of a dingy into San Diego Bay. When Butler walked away after Harris accused her of flirting with other men, Harris punched Butler's thighs until they were black and blue. When Butler was six months pregnant, Harris kicked her in the stomach during an argument. Shortly before their daughter's birth, Harris tried to strangle Butler after she told him she was going to leave him; he then threw all of her personal papers into San Diego Bay.

Grandparents visited Emily in Maryland in November 1995, January 1996 and April 1996. Grandparents and Butler disagreed over whether Grandparents should be allowed to have unsupervised visitation with Emily away from Butler's home. On April 29, 1996, Butler filed an order to show cause seeking to terminate Grandparents' visitation rights.

On October 30, 1996, the trial court declined to terminate Grandparents' visitation, finding they are "entitled to continue their right under the law and under the Court's existing orders to have visitation with their granddaughter, Emily." The court modified the existing order to allow Grandparents a maximum of four seven-day visits per year, with the first two days of each visit to take place in Butler's home or a mutually agreed place to be followed with out-of-home visitation during the remaining days. The court also ordered Butler and Grandparents not to "disparage each other or in any way convey their beliefs and attitudes regarding this case to Emily."

In November 1996, Grandparents attempted to arrange a visit with Emily the following month but were unable to contact Butler. When Grandparents arrived in Maryland on December 1, 1996, Butler and Emily were no longer living there. Butler had moved to Utah, where she married Mark Butler, a widower with six children, in 1997.

Eventually, through the services of private investigators, Grandparents were able to locate Butler and Emily in Brigham City, Utah. Grandparents successfully sought to have Butler found in contempt of court for failing to comply with court orders to keep Grandparents advised at all times of her address and telephone number and to allow

Grandparents visitation with Emily on December 1, 1996. The court ordered Butler to pay Grandparents $7,555 for their attorney fees and expenses in connection with the contempt proceeding.

On February 9, 1999, Grandparents sought to modify the visitation order to allow overnight visitation and visitation in California. On May 21, 1999, the trial court issued an order providing:

> "Until the child starts public school, the paternal grandparents shall have four 7-day weeks with the child. The first week to occur after this hearing shall occur at a place selected by the paternal grandparents within the state of Utah. The child shall have overnights with the grandparents . . . .
>
> "All subsequent visits with the paternal grandparents may occur at the grandparents' home in San Diego County. Either of the grandparents or another adult familiar to the child shall travel with the child to and from the grandparents' residence in San Diego County."[3]

As Emily approached school age, Grandparents' efforts to work out a new visitation plan with Butler were unsuccessful as Butler wanted to await the results of the *Troxel* case then pending in the United States Supreme Court.

On May 26, 2000, Grandparents sought modification of the visitation order to allow them two weeks during August, one week during Christmas/New Year, one week during Easter and one week in June. Grandparents also sought (1) relief from having to

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[3] "The order also provi ded Grandparents "shall have reasonable telephone contacts with the child [] at least once a week," and directed Butler to acknowledge all correspondence and gifts sent to Emily by Grandparents within one week of receipt and report Emily's response.

travel to Utah to pick up Emily and (2) permission to take Emily out of state and to other areas of California to visit paternal relatives.

During the pre-hearing mediation conference, Butler acknowledged Emily enjoys spending time with Grandparents and there is a significant emotional attachment. Butler said she did not intend to prevent Grandparents from having contact with Emily but does not want the court to order visitation. Grandparents believed a court order is the only way to assure their contact with Emily. In recommending the court continue Grandparents' visitation, the mediator stated he believed "the minor benefits from contact with the paternal grandparents and that it is in her best interest to continue to have contact with them." The mediator also said Grandparents have gone through "extraordinary lengths . . . to establish and maintain a relationship with the minor."

In a responsive declaration to Grandparents' modification motion, Butler asked for an end to court-ordered visitation, stating it is disruptive and intrusive to the Butler family. Butler said the visits to California uprooted Emily from her new family, and the Grandparents' excessive gift-giving hindered Butler's efforts to integrate Emily into the family.[4]

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4 The declaration read in part: "It is not fair to our children, Emily included, for my husband and me to be subject to this constant intrusion by the Harrises. We are making every effort to create a secure family environment for our children who now number eight . . . . By singling Emily out, making her feel as though she belongs with the Harrises and not with her family is not fair to her. They complain if she shares her gifts with her siblings. We have every right to teach Emily our values and if sharing is one of our values, then so be it . . . . [¶] . . . . I have some fears that as Emily grows and the Harrises having continuing access to her that they will try to cause an ever-widening gap between Emily and her family . . . . [¶] The Harrises constantly remind Emily she is a

Grandparents did not submit any declarations, but through counsel argued it is in Emily's best interest not to cut off her relationship with them: Grandparents "love and adore" their grandchild, with whom they have had significant contact since birth. Further, they "have taken extraordinary steps and have demonstrated a great commitment to having a relationship with . . . Emily."

The trial court found Butler's request for an end to court-ordered visitation was properly before it. However, the court ruled in favor of Grandparents, finding "that based upon the circumstances of this case it is in the best interests of the minor child that the [p]aternal [g]randparents continue to be involved with their minor grandchild[]." The court specified the following visitation for Grandparents: 12 days in August of each year; 12 days in June of each year, and from December 26 to December 31 of each year. The court also ruled (1) beginning in December 2000, Grandparents do not have to accompany Emily on her airplane flights between Utah and San Diego, and (2) Grandparents may take Emily to visit other relatives in and/or out of California.[5]

(*footnote continued from previous page*)
Harris, not a Butler. Almost every item or craftwork that is given to her has [']Emily Harris['] on it. Emily wants to be a Butler. She has seven siblings who have the name Butler. Why should she be different? Emily is showered with gifts from the Harrises. We cannot keep up with their extravagance and it is not fair to the other children . . . . [¶] I believe that if the Harrises persist in their demands for Emily's time, they will destroy the feeling of belonging that every child needs in order to feel safe and secure with her family in her home. It concerns me that my child feels that I have no control over what happens to her."

[5] Pending this appeal, we ordered Emily to be accompanied by one of the Grandparents during any travel.

The court said it firmly believed Emily will be "better off" having a relationship with Grandparents, who have demonstrated "remarkable tenacity in the face of little or no cooperation." The court went on:

> "I can't remember grandparents [who] have gone to the extremes that they have to maintain a relationship with the child. I am sure the mother and relatives believe that their sole purpose is to aggravate her but that isn't what I believe here. I think, in part, it is to preserve what they feel is the Harris heritage and to keep that alive with the child. I also think they truly love this child and they care about the child and they want to continue to have that relationship and that it is very important to them.
>
> "I think presently, at least, that it is in the best interest of this child to continue to have a significant relationship with the grandparents so I don't agree by the way there is any realistic possibility that if I leave this to the mother's good graces, essentially as the parent, that she would do anything to encourage the relationship in spite of what she says. Her actions are absolutely contrary to that . . . ."

The court acknowledged the visitation creates practical problems for the Butler family, but concluded the difficulties did not justify cutting off Grandparents' visitation. The court said:

> "I understand all the problems with the pregnancy, with the unity of the family and all of the things that the mother has expressed. They are valid, practical problems that are raised by having a continued relationship with the father or his family for this child. I just think that the rewards for the child are greater than any deficits that we have."

DISCUSSION

I. *Background*

We begin by noting the obvious. In the vast majority of families, grandparents are actively engaged in the lives of their grandchildren, providing beneficial and nurturing

guidance in a variety of roles that have the approval and support of the grandchildren's parents. Thus, conflicts over grandparent visitation requiring court intervention are not typical. They do arise, however, when relationships between grandparents and *their* children and/or children's spouses go awry. Consequently, as noted by the Supreme Court in *Troxel*, *supra*, 530 U.S. at pages 73-74, fn. *, all 50 states have enacted legislation allowing grandparents to petition for court-ordered visitation with their grandchildren.

In recent years, the parents of grandchildren have challenged the constitutionality of these statutes in a number of states. (See, e.g., *King v. King* (Ky. 1992) 828 S.W.2d 630; *Hawk v. Hawk* (Tenn. 1993) 855 S.W.2d 573; *Brooks v. Parkerson* (Ga. 1995) 454 S.E.2d 769; *Campbell v. Campbell* (Utah 1995) 896 P.2d 635.) Most notably, one such lawsuit reached the United States Supreme Court: *Troxel*, *supra*, 530 U.S. 57, in which a plurality of the high court found application of a State of Washington nonparental visitation statute unconstitutionally infringed on the mother's fundamental rights as a parent.

Troxel v. Granville

In *Troxel*, the parents of the deceased father of two children were granted increased visitation pursuant to an order issued under Washington's nonparental visitation statute, which allows any person to petition the court for visitation rights at any time and provides visitation rights may be granted to any person when it may serve the child's best

interest.[6] The children's mother had wanted to limit the paternal grandparents' visitation to once a month; however, the trial court found more extensive visitation with the grandparents was in the children's best interest even though there were no allegations or findings that the mother was an unfit parent. (*Troxel, supra*, 530 U.S. at pp. 61, 68 [120 S.Ct. at pp. 2058, 2061].)[7]

A plurality of the United States Supreme Court found the Washington statute, as applied, unconstitutional because of the "sweeping breadth" of the "statute and the application of that broad, unlimited power in this case[.]" (*Troxel, supra*, 530 U.S. at p. 73 [120 S.Ct. at p. 2064].) The "breathtakingly broad" language of the statute in effect allows "any third party seeking visitation to subject any decision by a parent concerning visitation of the parent's children to state-court review." (*Id*. at p. 67 [120 S.Ct. at p. 2061].) Yet the statute does not require a court to give a parent's decision concerning visitation "any presumption of validity or any weight whatsoever," leaving it exclusively to the judge to determine the best interest of the child. (*Ibid*.) "Should the judge disagree

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[6] The Washington statute provides: "'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.'" (*Troxel, supra*, 530 U.S. at p. 61 [120 S.Ct. at pp. 2057-2058], quoting Wash. Rev. Code, § 26.10.160(3).)

[7] The trial court made only two formal findings in support of the visitation order, namely (1) the grandparents are part of a large loving family located in the area and can provide the children access to cousins and music opportunities and (2) the children would benefit from spending quality time with the grandparents. (*Troxel, supra*, 530 U.S. at pp. 61-62, 72 [120 S.Ct. at pp. 2058, 2063].)

with the parent's estimation of the child's best interests, the judge's view necessarily prevails. Thus, in practical effect, in the State of Washington a court can disregard and overturn *any* decision by a fit custodial parent concerning visitation . . . based solely on the judge's determination of the child's best interests." (*Ibid*.)

The plurality faulted the trial court for not according any special weight to the mother's determination of the children's best interest and for presuming the grandparents' request for visitation should be granted absent any adverse impact. (*Troxel, supra,* 530 U.S. at p. 69 [120 S.Ct. at p. 2062].) The plurality said the trial court effectively and erroneously had assigned to the mother the burden of disproving visitation would be in the best interest of her children, rather than properly requiring the grandparents to establish by some method that, in disallowing visitation, the mother was not acting in the best interest of her children. (*Ibid*.) "The decisional framework employed by [trial court] directly contravened the traditional presumption that a fit parent will act in the best interest of his or her child." (*Ibid*.)

In considering nonparental visitation petitions, *Troxel* teaches that courts must presume "that fit parents act in the best interests of their children." (*Troxel, supra*, 530 U.S. at p. 68 [120 S.Ct. at p. 2061].) "Accordingly, so long as a parent adequately cares for his or her children (i.e., is fit), 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 that parent's children." (*Id*. at pp. 68-69 [120 S.Ct. at p. 2061].)

Troxel further requires a court hearing a grandparent visitation case to give special weight to a parent's determination on what is in his or her child's best interest. (*Troxel, supra*, 530 U.S. at p. 69 [120 S.Ct. at p. 2062].)

> "In an ideal world, parents might always seek to cultivate the bonds between grandparents and their grandchildren. Needless to say, however, our world is far from perfect, and in it the decision whether such an intergenerational relationship would be beneficial in any specific case is for the parent to make in the first instance. And, if a fit parent's decision of the kind at issue here becomes subject to judicial review, the court must accord at least some special weight to the parent's own determination." (*Id*. at p. 70 [120 S.Ct. at p. 2062].)

However, the high court's narrow holding left several issues unresolved. The plurality declined to decide whether a showing of harm or potential harm is required before nonparental visitation can be ordered. (*Troxel, supra*, 530 U.S. at p. 73 [120 S.Ct. at p. 2064].) Although calling for deference or special weight to be given to a parent's decision regarding his or her child's visitation, *Troxel* does not spell out exactly how much deference is required; it did not announce the standard of review that should be applied in protecting the parent's liberty interest in visitation matters. (*Id*. at pp. 73-74 [120 S.Ct. at p. 2064].) Thus, by implication, *Troxel* abstained from applying the strict scrutiny standard of review usually utilized when a state action infringes on enjoyment of a fundamental right.[8]

Finally, *Troxel* teaches courts should be cautious before declaring nonparental visitation per se unconstitutional. Notwithstanding the "breathtakingly broad" language

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8 Justice Thomas called for a strict scrutiny analysis. (*Troxel, supra*, 530 U.S. at p. 80 [120 S.Ct. at p. 2068] (J. Thomas opn.).)

of the Washington statute, the plurality chose not to declare the statute unconstitutional on its face. As the plurality noted, "the constitutionality of any standard for awarding visitation turns on the specific manner in which that standard is applied and that the constitutional protections in this area are best 'elaborated with care.' [Citation.] Because much state-court adjudication in this context occurs on a case-by-case basis, we would be hesitant to hold that specific nonparental visitation statutes violate the Due Process Clause as a per se matter." (*Troxel, supra,* 530 U.S. at p. 73 [120 S.Ct. at p. 2064], fn. omitted.)

The Fundamental Right to Parent is Constitutionally Protected

A parent's right to raise his or her children without undue state interference is not specifically enumerated in the text of the United States Constitution; rather, the right stems from common law interpretations of the Due Process Clause of the Fourteenth Amendment, which provides: "No state shall . . . deprive any person of life, liberty, or property, without due process of law[.]"

A parent's fundamental liberty interest in the care, custody and control over his or her children is guaranteed by the Fourteenth Amendment. (*Troxel, supra*, 530 U.S. at p. 65 [120 S.Ct. at pp. 2059-2060].) It "is perhaps the oldest of the fundamental liberty interests recognized by this Court." (*Ibid*. [120 S.Ct. at p. 2060].)

A long line of Supreme Court cases acknowledges the fundamental right of parents to raise their children as they see fit. In *Meyer v. Nebraska* (1923) 262 U.S. 390, 399 [43 S.Ct. 625, 626], the United States Supreme Court held that

> "[w]hile this court has not attempted to define with exactness the liberty thus guaranteed [by the Fourteenth Amendment], ... [w]ithout doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."

The high court has reiterated the right of a parent to raise his or her children. In *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary* (1925) 268 U.S. 510, 534-535 [45 S.Ct. 571, 573], the Supreme Court voided a law that prohibited parents from choosing private education over public schooling for their children, reasoning the law would "unreasonably interfere[] with the liberty of parents . . . to direct the upbringing and education of [their] children[.]" The high court further noted that the "child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." (*Id*. at p. 535 [45 S.Ct. at p. 573].) In *Wisconsin v. Yoder* (1972) 406 U.S. 205 [92 S.Ct. 1526] the Supreme Court, on the basis of First Amendment protections and "the fundamental interest of parents, as contrasted with that of the State," upheld the right of Amish parents to withdraw their children from public schools after the eighth grade in order to educate them according the Amish beliefs. (*Id*. at pp. 207, 232 [92 S.Ct. at pp. 1529, 1541].) The Court noted: "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." (*Id*. at p. 232 [92 S.Ct. at pp. 1541-1542].)

By contrast, there is no constitutionally-based fundamental liberty interest afforded to grandparents.

To bypass the well-established common law tradition that basic decisions regarding family contact lie with the parents, grandparents have turned to legislatures throughout the country to pass laws providing for grandparent visitation.

California's Grandparent Visitation Statute

Section 3104, the statute at issue here, specifically grants grandparents the right to petition for visitation of their grandchildren under certain circumstances.[9]

A grandparent's right to visitation is purely statutory. (*White v. Jacobs* (1988) 198 Cal.App.3d 122, 124-125 ["The number and specificity of statutes providing for adjudication of grandparents' rights of visitation belie any general or inherent rights of grandparents or authority of superior courts to mandate visitation with a grandchild over that child's parents' objection"].)

Section 3104 requires "a preexisting relationship between the grandparent and the grandchild that has engendered a bond such that visitation is in the best interest of the child" and directs the court to "[b]alance[] the interest of the child in having visitation with the grandparent against the right of the parents to exercise their parental authority." (§ 3104, subd. (a).) The statute further provides there is a rebuttable presumption that

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9 Under California law, grandparents can also seek visitation under section 3103, which pertains to, among other things, dissolution proceedings, and 3102, which grants certain relatives of a deceased parent of a minor child, including the minor's grandparents, the right to seek visitation.

grandparent visitation is not in the best interest of the child if the parent objects to the visitation. (§ 3104, subds. (e) & (f).)[10]

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10 Section 3104 reads as follows:

"(a) On petition to the court by a grandparent of a minor child, the court may grant reasonable visitation rights to the grandparent if the court does both of the following: [¶] (1) Finds that there is a preexisting relationship between the grandparent and the grandchild that has engendered a bond such that visitation is in the best interest of the child. [¶] (2) Balances the interest of the child in having visitation with the grandparent against the right of the parents to exercise their parental authority.

"(b) A petition for visitation under this section may not be filed while the natural or adoptive parents are married, unless one or more of the following circumstances exist: [¶] (1) The parents are currently living separately and apart on a permanent or indefinite basis. [¶] (2) One of the parents has been absent for more than one month without the other spouse knowing the whereabouts of the absent spouse. [¶] (3) One of the parents joins in the petition with the grandparents. [¶] (4) The child is not residing with either parent. [¶] At any time that a change of circumstances occurs such that none of these circumstances exist, the parent or parents may move the court to terminate grandparental visitation and the court shall grant the termination.

"(c) The petitioner shall give notice of the petition to each of the parents of the child, any stepparent, and any person who has physical custody of the child, by personal service pursuant to Section 415.10 of the Code of Civil Procedure.

"(d) If a protective order as defined in Section 6218 has been directed to the grandparent during the pendency of the proceeding, the court shall consider whether the best interest of the child requires that any visitation by that grandparent should be denied.

"(e) There is a rebuttable presumption that the visitation of a grandparent is not in the best interest of a minor child if the natural or adoptive parents agree that the grandparent should not be granted visitation rights.

"(f) There is a rebuttable presumption affecting the burden of proof that the visitation of a grandparent is not in the best interest of a minor child if the parent who has been awarded sole legal and physical custody of the child in another proceeding or with whom the child resides if there is currently no operative custody order objects to visitation by the grandparent.

"(g) Visitation rights may not be ordered under this section if that would conflict with a right of custody or visitation of a birth parent who is not a party to the proceeding.

"(h) Visitation ordered pursuant to this section shall not create a basis for or against a change of residence of the child, but shall be one of the factors for the court to consider in ordering a change of residence.

"(i) When a court orders grandparental visitation pursuant to this section, the court in its discretion may, based upon the relevant circumstances of the case: [¶] (1) Allocate

II. *Facial Challenges to the Constitutionality of Section 3104*

In considering the constitutionality of a statute, we presume its validity, resolving all doubts in favor of its constitutionality unless there is a clear and unquestionable conflict with a provision of the state or federal Constitutions. (*Clare v. State Bd. of Accountancy* (1992) 10 Cal.App.4th 294, 303.) "Thus, wherever possible, we will interpret a statute as consistent with applicable constitutional provisions, seeking to harmonize Constitution and statute." (*California Housing Finance Agency v. Elliott* (1976) 17 Cal.3d 575, 594.)

Is Section 3104 On its Face Violative of Federal Constitution?

In light of *Troxel*, a facial challenge to section 3104 under the federal Due Process Clause cannot succeed. Section 3104 is much more narrowly drawn and offers far more protection for parental autonomy and liberty than the Washington statute, which the *Troxel* plurality declined to strike down as per se unconstitutional.

Instead of allowing any person to seek visitation, section 3104 is not only limited to grandparents but to grandparents who have a "preexisting relationship . . . [with] the

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(*footnote continued from previous page*)
the percentage of grandparental visitation between the parents for purposes of the calculation of child support pursuant to the statewide uniform guideline (article 2 (commencing with Section 4050) of Chapter 2 of Part 2 of Division 9). [¶] (2) Notwithstanding Sections 3930 and 3951, order a parent or grandparent to pay to the other, an amount for the support of the child or grandchild. For purposes of this paragraph, 'support' means costs related to visitation such as any of the following: [¶] (A) Transportation. [¶] (B) Provision of basic expenses for the child or grandchild, such as medical expenses, day care costs, and other necessities.

"(j) As used in this section, 'birth parent' means 'birth parent' as defined in Section 8512."

grandchild that has engendered a bond such that visitation is in the best interest of the child." (§ 3104, subd. (a)(1).) Instead of allowing petitions at any time, section 3104 limits grandparent petitions to defined circumstances. (§ 3104, subd. (b).)[11] Thus, California's Legislature, in section 3104, "has properly chosen to minimize the occasions in which a child must be exposed to state-involved conflicts[.]" (*Lopez v. Martinez* (2000) 85 Cal.App.4th 279, 286.)

Significantly, instead of the Washington statutory test of whether visitation "may serve the best interest of the child" (Wash. Rev. Code, § 26.10.160(3)) which gives a judge's opinions equal or more weight than the parent's views, section 3104 provides deference to parental autonomy by setting forth a rebuttable presumption that parent-opposed visitation is not in the best interest of the child. (§ 3104, subds. (e) & (f).) These provisions at least implicitly recognize the presumption that fit parents act in their children's best interest. (*Troxel*, *supra*, 530 U.S. at pp. 67-68 [120 S.Ct. at p. 2061].) In cases such as this one, where the parent with sole legal and physical custody objects to grandparent visitation, section 3104 provides for "a rebuttable presumption affecting the burden of proof that the visitation of a grandparent is not in the best interest of a minor child." (§ 3104, subd. (f).) This provision places upon the grandparents "the burden of proof as to the nonexistence of the presumed fact" – that is, when the parent objects, the

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11 For example, if the parents are married, a petition can be filed only if the parents are separated, one is absent for a month or more with whereabouts unknown, a parent joins in the petition, or the child does not live with either parent. (§ 3104, subd. (b).)

grandparents have the evidentiary burden of showing visitation is not contrary to the child's best interest. (See Evid. Code, § 606.)[12]

Finally, section 3104 allows courts to give special deference to parental autonomy by directing the court to "[b]alance[] the interest of the child in having visitation" against "the right of the parents to exercise their parental authority." (§ 3104, subd. (a)(2).) This provision gives courts flexibility in assessing the merits of grandparents' visitation petitions, which is in keeping with the teachings of *Troxel*. "[T]he constitutionality of any standard for awarding visitation turns on the specific manner in which that standard is applied and . . . the constitutional protections in this area are best 'elaborated with care.'" (*Troxel, supra,* 530 U.S. at p. 73 [120 S.Ct. at p. 2064].)

The United States Supreme Court has final authority on the interpretation of the federal Constitution and the constitutionality of any law under the Constitution. (*United States v. Reynolds* (1914) 235 U.S. 133, 148-149 [35 S.Ct. 86, 90, 59 L.Ed. 162, 168]; *Brookes v. City of Oakland* (1911) 160 Cal. 423, 427.) Given the unwillingness of the *Troxel* plurality to invalidate the far broader and less protective Washington nonparental visitation statute on its face, we decline to find section 3104 per se violates a parent's

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12 In cases where both parents oppose visitation, the statute provides for a rebuttable presumption that grandparent visitation "is not in the best interest of the minor child." (§ 3104, subd. (e).) This provision requires the trier of fact to preliminarily assume visitation is not in the child's best interest until contrary evidence is introduced. (Evid. Code, § 604.) The plurality in *Troxel* cited this provision, among others from various states, as an example of a statutory provision that provides some protection for a parent's fundamental constitutional right to make decisions concerning his or her children. (*Troxel, supra*, 530 U.S. at p. 70 [120 S.Ct. at p. 2062].)

federal due process rights.

Is Section 3104 On its Face Violative of California Constitution?

However, we are not constrained from imposing higher standards in interpreting a statute under our state Constitution. (*Committee to Defend Reproductive Rights v. Myers* (1981) 29 Cal.3d 252, 260-262.) Our state Constitution is a document of independent force subject to independent interpretation by state courts. (See Cal. Const. art. I, § 24 ["Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution"]; *People v. Chavez* (1980) 26 Cal.3d 334, 354.) The state's right to impose higher constitutional standards than those required under the United States Constitution cannot be seriously questioned. (*People v. Brisendine* (1975) 13 Cal.3d 528, 548-549.)

Parents have the right to raise their children without undue state interference not only under the United States Constitution; they enjoy parallel protection under our state Constitution. A parent's fundamental liberty interest is protected by the California Constitution, specifically, article I, section 1, which provides: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness and privacy."

California courts recognize parenting is a protected fundamental right. (See *In re Carmaleta B.* (1978) 21 Cal.3d 482, 489, 495-496; *Odell v. Lutz* (1947) 78 Cal.App.2d 104, 106.) Accordingly, our state courts are reluctant to interfere in family matters absent a compelling need. (*In re Marriage of Mentry* (1983) 142 Cal.App.3d 260, 266.) Under

California law, a child's welfare must be threatened before the state may intervene in parental decision-making. "The critical importance in California of the right to parent has been reaffirmed and reaffirmed. [Citations.] It only gives way upon a showing of parental unfitness, detrimental to the child's welfare." (*In re Marriage of Jenkins* (1981) 116 Cal.App.3d 767, 774.) A showing of harm or potential harm is constitutionally required to justify governmental interference with child rearing. (*In re B.G.* (1974) 11 Cal.3d 679, 698.) Against this backdrop, we evaluate section 3104.

As previously discussed, section 3104 does not allow a court to grant grandparent visitation solely upon a finding that it is in the best interest of the child; the statute also provides for a rebuttable presumption affecting the burden of proof that such visitation is not in the best interest if the custodial parent objects to visitation. (§ 3104, subd. (f).) The issue for us is whether the additional deference to parental decision-making supplied by subdivision (f) is sufficient to satisfy the fundamental liberty interest of parents under our state Constitution. As we shall explain, we conclude it is sufficient to pass constitutional muster provided subdivision (f) is read to require clear and convincing evidence that the child will suffer harm if visitation is not ordered. Such a quantum of proof and a finding of detriment are necessary before a statutory right can infringe upon a fundamental liberty interest.

In reaching this conclusion, we are guided by the consistent approach of California courts in recognizing the primacy of parental rights. California law reflects a policy of parental preference in adjudicating the competing rights of parents and third parties, who assert an interest in the parents' child. (See, e.g., § 3041 [parents given top priority in

order of preference for granting custody].)[13] One court has explained the policy rationale:

> "This attitude . . . is predicated, inter alia, on the recognition that a '. . . court cannot regulate by its processes the internal affairs of the home . . . . The vast majority of matters concerning the upbringing of children must be left to the conscience, patience, and self restraint of father and mother. No end of difficulties would arise if judges try to tell parents how to bring up their children.' [Citations.]" (*In re Marriage of Mentry*, *supra*, 142 Cal.App.3d at pp. 266-267, fn. omitted.)

In the area of visitation, custody cases provide useful guidance. Because visitation is "a limited form of custody during the time the visitation rights are being exercised . . . " (*In re Marriage of Gayden* (1991) 229 Cal.App.3d 1510, 1517), the conclusions reached in custody cases are relevant to visitation issues. Just as a custody decision that is rendered contrary to the wishes of parents impacts parental authority, "judicially compelled visitation against the wishes of both parents can significantly affect parental authority and the strength of the family unit." (*Ibid*.)

Custody cases are particularly instructive when one compares the rationale applied in cases where parents oppose each other versus disputes between a parent and a nonparent. Whereas the paramount consideration in a dispute between parents is the best interest of the child, a far different emphasis applies when a parent and a nonparent vie

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[13] The policy of parental preference is also reflected in the early third-party visitation cases. The rights of nonparents must give way to the paramount right of the parent if the visitation creates conflicts and problems. (*In re Marriage of Jenkins*, *supra*, 116 Cal.App.3d at p. 774.) A grandparent's right to visitation is subordinate to the preservation of the parent/child family unit. (See *Adoption of Berman* (1975) 44 Cal.App.3d 687.)

for custody. In such cases, an award cannot be made to the nonparent unless the court finds an award of custody to the parent would be detrimental to the child. (*In re B.G.*, *supra*, 11 Cal.3d at p. 698.) A parent, if not found unfit, has a "natural" and paramount right to custody as against a third party. (*Roche v. Roche* (1944) 25 Cal.2d 141, 143; *In re B.G.*, *supra*, 11 Cal.3d at p. 693.)

In keeping with the state policy of parental preference, before making an order granting custody to a nonparent without the parents' consent, a court must make a two-part finding: granting custody to a parent would be detrimental to the child; and granting custody to the nonparent is required to serve the child's best interest. (§ 3041.) As earlier cases make clear, such findings are required to prevent impermissible intrusions into parent decision-making by fit parents.

Likewise, given the strong interest in protecting the fundamental right of parenting, findings in support of a nonparental custody order over a parent's objection must be based on clear and convincing evidence. (*Guardianship of Phillip B.* (1983) 139 Cal.App.3d 407, 421; *Guardianship of Stephen G.* (1995) 40 Cal.App.4th 1418, 1424; *Guardianship of Jenna G.* (1998) 63 Cal.App.4th 387, 394; *Guardianship of Olivia J.* (2000) 84 Cal.App.4th 1146, 1157, but see *Guardianship of Diana B.* (1994) 30 Cal.App.4th 1766, 1777.)

In *In re Marriage of Peters* (1997) 52 Cal.App.4th 1487, 1490, the Court of Appeal explained why there are differing burdens of proof:

> "The degree of burden of proof applied in a particular situation is an expression of the degree of confidence society wishes to require of the resolution of a of question fact. [Citation.] The burden of proof

> thus serves to allocate the risk of error between the parties, and varies in proportion to the gravity of the consequences of an erroneous resolution. [Citations.] Preponderance of the evidence results in the roughly equal sharing of the risk of error. [Citation.] To impose any higher burden of proof demonstrates a preference for one side's interests. [Citation.] Generally, facts are subject to a higher burden of proof only where particularly important individual interests or rights are at stake . . . ."

When constitutional issues are at stake, a heightened evidentiary standard is mandated. (See, e.g., *In re Marriage of Murga* (1980) 103 Cal.App.3d 498, 505 [custody decision cannot be based on parent's religious practices absent clear affirmative showing of harm]; see also *Wendland v. Wendland* (2001) 26 Cal.4th 519, *People v. Englebrecht* (2001) 88 Cal.App.4th 1236.)

Persuaded by the reasoning applied in custody disputes, particularly those between parents and nonparents, and mindful that the right to parent is fundamental, we hold that to comply with article I, section 1, the rebuttable presumption set forth in section 3104, subdivision (f) must be read to require clear and convincing evidence that the child will suffer harm or potential harm if visitation is not ordered. When a fit parent objects to visitation, the grandparent must bear the burden of demonstrating by clear and convincing evidence that the parent's decision regarding visitation would be detrimental to the child. This is so because a parent's decision regarding whether a third-party – even a grandparent – should visit with his or her children is a basic component of parents' fundamental interest in the care, custody and control of their children and requires heightened protection. "Deciding when, under what conditions, and with whom their children may associate is among the most important rights and responsibilities of

parents." (*Hoff v. Berg* (N.D. 1999) 595 N.W.2d 285, 291; see also *Lulay v. Lulay* (Ill. 2000) 739 N.E.2d 521.) Before the state can usurp the decision-making role of fit parents and compel visitation, there initially must be a strong showing of harm or potential harm.

Because the constitutional right of parents to care for their children as they see fit is afforded more protection than the statutory right to visitation of grandparents, it is appropriate to require the higher evidentiary standard of clear and convincing evidence under section 3104. Any conflict between parents' constitutional rights and grandparents' statutory rights must be reconciled in favor of the preservation of the parents' fundamental liberty interest absent a compelling showing of detriment or potential detriment.

Before the state can override a fit parent's child rearing decisions, something more than preponderance of the evidence is called for. A preponderance of the evidence standard is appropriate when "society has a minimal concern with the outcome" of the litigation, as in a suit for money damages. (*Lillian F. v. Superior Court* (1984) 160 Cal.App.3d 314, 322.) But when a constitutional right is at stake, a significant quantum of proof must be required to afford adequate protection of that right. Otherwise, we risk having a court substitute its own views for those of a fit parent. By mandating a grandparent to show by the higher standard of clear and convincing evidence that a fit parent's decision against visitation would be detrimental to the child, we are precluding a court from overriding a parent's child rearing decision merely on the basis of the court's contrary view. As this court recently observed in *Punsly v. Ho* (2001) 87 Cal.App.4th 1099, giving deference to the parent's view of the child's best interest only when the court

agrees with the parent does not protect the parent's constitutional interests at all. (See also *Troxel*, *supra*, 530 U.S. at pp. 72-73 ["[T]he Due Process Clause does not permit a State to infringe on the fundamental right of parents to make childrearing decisions simply because a state judge believes a 'better' decision could be made"].) The higher standard of proof is necessary to assure adequate deference is accorded to a fit parent's decisions about raising his or her children.

In sum, we conclude section 3104 does not infringe upon a parent's fundamental liberty interest under the California Constitution if subdivision (f) of the statute is read to require a grandparent seeking visitation rights over the objection of a fit parent to show by clear and convincing evidence that the parent's decision would be detrimental to the child.

III. *Application of Section 3104 Violated Butler's Constitutional Rights*

Although a statute is facially constitutional, it nevertheless may have been unconstitutionally applied to a specific individual under particular circumstances, unduly infringing upon that person's protected right. (*Boddie v. Connecticut* (1971) 401 U.S. 371, 379-380; *Lammers v. Superior Court* (2000) 83 Cal.App.4th 1309, 1328.)

The application of section 3104 to Butler here violated her due process rights under both the United States and California Constitutions because the trial court did nothing more than apply a bare-bones best interest test and did not accord the child rearing decision of Butler, a fit parent, any deference or material weight. Because there were no allegations or findings that Butler was an unfit parent, Butler is entitled to a presumption that she will act in her child's best interest and her decisions regarding

visitation must be given deference. (*Troxel*, *supra*, 530 U.S. at pp. 68, 70 [120 S.Ct. at pp. 2061, 2062].)[14] The trial court's best-interest analysis was in contravention of constitutional principles and the statutory mandates of section 3104.

The court's decision was based on its "firm" belief that Grandparents' relationship with Emily is substantially important and beneficial to the child, and, absent court order, would not be continued in any form by Butler. The court's analysis reflected the "'unquestioning judicial assumption' that grandparent-grandchild relationships always benefit children" (*Hawk v. Hawk*, *supra*, 855 S.W.2d at 581, fn. omitted), which is an improper consideration in adjudicating the liberty interest of a fit parent. However well intentioned, a court cannot impose its own subjective notions of the child's best interest over those of a fit parent. The court did not make any findings to support its best interest determination other than Grandparents love Emily and have gone through extraordinary efforts to maintain the relationship with their granddaughter in the face of noncooperation by Butler. Even if we were not to discount Grandparents' persistence, which is irrelevant to a proper analysis, the court's findings are more meager than the "slender findings" the

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[14] We reject Grandparents' assertion on appeal that Butler was not a fit parent because she (1) was unwilling to work out visitation without a court order, (2) attempted to terminate the court-ordered visitation in 1996 and 2000, (3) violated the court order in 1996 and 1997, leading to the finding of contempt, and (4) filed a petition in Utah state court in 2000 to terminate the parental rights of Emily's birth father, Charles Erik Harris. Certainly, we do not condone Butler's violation of the court order when she did not keep the Harrises informed of Emily's whereabouts; however, Butler was sanctioned for this contempt of court. There has been no showing in this record that Butler ever provided less than adequate care for Emily at any time, including the period when she was in violation of the court order.

trial court made in *Troxel, supra*, 530 U.S. at page 72 [120 S.Ct. at p. 2063]. (See fn. 7, *ante*.) There was no showing that it would be detrimental to Emily if Grandparents' visits were cut off. Vague generalizations about the inherent goodness of a loving relationship between grandparents and grandchildren are inadequate to overcome the constitutionally mandated presumption that fit parents act in the best interest of their children as well as the statutory presumption under section 3104, subdivision (f), that visitation is not in the child's best interest if a fit parent objects. As in *Troxel*, "[t]he decisional framework employed by the [trial court] directly contravened the traditional presumption that a fit parent will act in the best interest of his or her child." (*Id*. at p. 69 [120 S.Ct. at p. 2062].)

The court also ignored section 3104, subdivision (f), and its rebuttable presumption, which requires the court to start with the supposition that Butler's opposition to visitation was in Emily's best interest and to place the burden on Grandparents to disprove it. Grandparents were not put to any test whatsoever. In effect, the trial court placed the evidentiary burden on Butler to show the visitation was not in Emily's best interest. This was not only statutory error, it was constitutional error as well because the court "failed to accord the determination of [Butler], a fit custodial parent, any material weight." *Troxel, supra*, 530 U.S. at p. 72 [120 S.Ct. at p. 2063].)

This failure, as in *Troxel*, resulted in an order based on "nothing more" than a disagreement between the court and Butler over whether visitation is in Emily's best interest. (*Troxel, supra*, 530 U.S. at p. 68 [120 S.Ct. at p. 2061].) The trial court acknowledged as much:

- "I really don't agree with the mother . . . . I believe the mother would like nothing better and has made it fairly clear . . . she would like nothing better [than] to cut off [the Harris family]. I think she believes that is what is in the best interest of this child.
- "I don't agree with the mother . . . . I am not questioning her motivation. In other words, I do think she believes that it is best for this child if she provides the family unit and she makes the decisions as to what contact, if any, would exist between other people and this child. I don't think she respects at all the father or the paternal grandparents' rights."
- "I understand all the problems with the pregnancy, with the unity of the family and all of the things that the mother has expressed. They are valid, practical problems that are raised by having a continued relationship with the father or his family for this child. I just think that the rewards for the child are greater than any deficits that we have."

A court cannot reject the parenting decision of a fit parent and substitute its view of what is better for the child simply because it believes it is desirable for a child to maintain contact with his or her grandparents. "[T]he Due Process Clause does not permit a State to infringe on the fundamental right of parents to make childrearing decisions simply because a state judge believes a 'better' decision could be made." (*Troxel*, *supra*, 530 U.S. at pp. 72-73 [120 S.Ct. at p. 2064].)

Application of section 3104 to Butler violated her due process right to make decisions concerning the care, custody and control of her daughter. Accordingly, the

order is reversed. A remand is unnecessary. There was no showing of detriment or potential detriment to Emily if court-ordered visitation is terminated. (See *In re Marriage of Gayden, supra*, 229 Cal.App.3d at p. 1521.)[15]

DISPOSITION

Reversed. Costs on appeal to Butler.

CERTIFIED FOR PUBLICATION

HALLER, J.

WE CONCUR:

KREMER, P. J.

BENKE, J.

15 In light of our disposition, we need not consider Butler's arguments that section 3104 violates a parent's rights to privacy under the United States and/or California Constitutions.