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ALL FOR THE LOVE OF A CHILD: THE CURRENT
STATE OF CALIFORNIA'S GRANDPARENT
VISITATION STATUTE IN LIGHT OF *TROXEL V.*
GRANVILLE

Michael Varela*

I. INTRODUCTION

Imagine this scenario: a single mom is raising her child without any help or support from the father but with enormous help from her own parents, the child's grandparents. The mother dies and the father then decides that the child should no longer be able to visit her maternal grandparents, to whom she has become significantly attached. What will then happen to the child when she is separated from those family members whom she has grown to love and rely upon and forced to live with a father she does not know at all? Someone should do something to make sure that this does not happen.

Unfortunately, this scenario occurs frequently in our changing society. "In 1996, children living with only one parent accounted for twenty-eight percent of all children under age eighteen in the United States."¹ Fortunately, for the child in such a situation, states have adopted nonparental visitation statutes in response to this change.² One such nonparental visitation statute relevant to the above scenario is the grandparent visitation statute. Such a statute allows grandparents to petition a court to order parents to let

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1. *Troxel v. Granville*, 530 U.S. 57, 64 (2000) (plurality opinion) (citing U.S. DEPT. OF COMMERCE, BUREAU OF CENSUS, CURRENT POPULATION REPORTS, 1997 POPULATION PROFILE OF THE UNITED STATES 27 (1998)).

2. *Id.* at 64.

grandparents visit their grandchildren.³ Recently, these statutes have come under sharp criticism from parents who demand that the courts respect their personal visitation decisions.⁴ The culmination of this criticism led to the United States Supreme Court's landmark decision in *Troxel v. Granville*,⁵ which greatly enhanced the parents' position.⁶

In *Troxel*, the United States Supreme Court granted certiorari to determine the constitutionality of Washington State's grandparent visitation statute upon the petition of Tommie Granville, a mother who believed that the statute violated her rights as a parent.⁷ In a plurality opinion,⁸ the

3. All fifty states have passed grandparent visitation statutes. See ALA. CODE § 30-3-4.1 (1999); ALASKA STAT. § 25.20.065 (Michie 1995); ARIZ. REV. STAT. § 25-409 (1999); ARK. CODE ANN. § 9-13-103 (Michie 1998); CAL. FAM. CODE § 3104 (West 2001); COLO. REV. STAT. ANN. § 19-1-117 (West 1999); CONN. GEN. STAT. § 46b-59 (1995); DEL. CODE ANN. tit. 10, § 1031(7) (1998); FLA. STAT. § 752.01 (2000); GA. CODE ANN. § 19-7-3 (1999); HAW. REV. STAT. § 571-46.3 (1999); IDAHO CODE § 32-719 (Michie 1996); 750 ILL. COMP. STAT. 5/607 (1999); IND. CODE § 31-17-5-1 (1999); IOWA CODE § 598.35 (1997); KAN. STAT. ANN. § 38-129 (1998); KY. REV. STAT. ANN. § 405.021 (Michie 1998); LA. REV. STAT. ANN. § 9:344 (West Supp. 1999); ME. REV. STAT. ANN. tit. 19-A, § 1803 (West 1998); MD. CODE ANN., FAM. LAW § 9-102 (1999); MASS. GEN. LAWS ch. 119, § 39D (1999); MICH. COMP. LAWS § 722.27b (1999); MINN. STAT. § 257.022 (1999); MISS. CODE ANN. §§ 93-16-1, 93-16-3 (1999); MO. REV. STAT. § 452.402 (1999); MONT. CODE ANN. § 40-9-102 (1999); NEB. REV. STAT. § 43-1801 to 1803 (1999); NEV. REV. STAT. § 125C.050 (1999); N.H. REV. STAT. ANN. § 458:17-d (1999); N.J. STAT. ANN. § 9:2-7.1 (West 1999); N.M. STAT. ANN. § 40-9-2 (Michie 1999); N.Y. DOM. REL. LAW §§ 72, 240 (McKinney 1999); N.C. GEN. STAT. §§ 50-13.2(b)(1), .2A, .5(j) (1999); N.D. CENT. CODE § 14-09-05.1 (1999); OHIO REV. CODE ANN. §§ 3109.051, 3109.11, 3109.12 (Anderson 1999); OKLA. STAT. tit. 10, § 5 (2001); OR. REV. STAT. § 109.121 (1998); 23 PA. CONS. STAT. §§ 5311-5314 (1999); R.I. GEN. LAWS §§ 15-5-24.1, .3 (1996); S.C. CODE ANN. § 20-7-420(33) (Law. Co-op. 1999); S.D. CODIFIED LAWS § 25-4-52 (Michie 1999); TENN. CODE ANN. § 36-6-302 (1999); TEX. FAM. CODE ANN. § 153.433 (West 1999); UTAH CODE ANN. § 30-5-2 (1999); VT. STAT. ANN. tit. 15, §§ 1011-1016 (1999); VA. CODE ANN. § 20-124.1 (Michie 1999); WASH. REV. CODE § 26.09.240 (1986); W. VA. CODE §§ 48-2B-1 to 48-2B-9 (1999); WIS. STAT. § 767.245 (1998); WYO. STAT. ANN. § 20-7-101 (Michie 1999).

4. See, e.g., *Punsky v. Ho*, 87 Cal. App. 4th 1099 (Ct. App. 2001) (holding that the trial court erroneously applied a presumption that visitation with the grandparents was in the child's best interest when a fit mother was willing to schedule visitation with the grandparents).

5. *Troxel*, 530 U.S. at 57.

6. See *id.* at 69-76.

7. *Id.* at 65.

8. Justice O'Connor wrote the opinion and she was joined by the Chief Justice, Justice Ginsburg, and Justice Breyer. Justice Souter and Justice Thomas both concurred in the judgment and filed separate opinions. Justice Stevens, Justice Scalia, and Justice Kennedy dissented and filed separate opinions.

Court affirmed the judgment of the Washington Supreme Court, holding that Washington's grandparent visitation statute interfered with Tommie Granville's fundamental right to rear her children.⁹ In its narrow opinion, the United States Supreme Court left open many questions regarding the precise constitutional boundaries of grandparent visitation statutes.¹⁰ Because of the narrow holding, the "standards and criteria for ordering grandparent visitation are still open questions, and the legal policies governing this area of family law are still evolving."¹¹

This comment will attempt to address the many issues a court faces when deciding the constitutionality of grandparent visitation statutes. Part II will discuss the United States Supreme Court's decision in *Troxel v. Granville*,¹² emphasizing the procedural background of the case and its disposition along with a more specific, detailed discussion of the origins of a parent's fundamental right to rear one's children. Furthermore, Part II will discuss several state court cases involving grandparent visitation statutes, with a specific emphasis on two California appellate decisions.¹³ Part III will consider whether any changes need to be made to California's grandparent visitation statute, California Family Code section 3104, in light of the *Troxel* decision.¹⁴ Using the cases in Part II, Part IV will analyze the constitutionality of California's grandparent visitation statute in light of these recent court decisions.¹⁵ Finally, Part V will ask the California Legislature to amend California Family Code section 3104 so as to further a parent's fundamental right to raise her child, as dictated by *Troxel*.¹⁶

9. *Troxel*, 530 U.S. at 60-63.

10. *In re Marriage of Harris*, 92 Cal. App. 4th 499, 509 (Ct. App. 2001), review granted and opinion superceded by 37 P.3d 379 (2002).

11. *Punsly v. Ho*, 105 Cal. App. 4th 102, 115 (Ct. App. 2003).

12. *Troxel*, 530 U.S. at 60; see discussion *infra* Part II.

13. *Lopez v. Martinez*, 85 Cal. App. 4th 279 (Ct. App. 2000); *In re Marriage of Harris*, 92 Cal. App. 4th at 499.

14. See discussion *infra* Part III.

15. See discussion *infra* Part IV.

16. *Troxel*, 530 U.S. at 65; see discussion *infra* Part V.

II. BACKGROUND

A. United States Supreme Court Cases and the Fundamental Right to Make Decisions Concerning the Care, Custody, and Control of One's Children

A fundamental reason for becoming a parent is so one may raise a child to be the best adult possible. Every parent has different methods of achieving this goal, and every parent should have unfettered discretion in accomplishing this goal. Because society recognizes parental freedom as an important aspect of an adult's life, the United States Supreme Court has held it to be one of the fundamental rights and liberties protected by the Due Process Clause of the Fourteenth Amendment.¹⁷

In 1923, the Supreme Court decided *Meyer v. Nebraska*,¹⁸ the first case to establish a liberty interest in a parent's upbringing of his or her child.¹⁹ In *Meyer*, the Court reviewed a Nebraska statute²⁰ that criminalized someone for teaching any person any language other than the English language.²¹ Under this statute, Meyer was convicted after he taught German to a ten-year-old child "who had not attained and successfully passed the eighth grade."²² On appeal, the Nebraska Supreme Court affirmed his conviction and held that the statute did not conflict with the Fourteenth

17. See, e.g., *Meyer v. Nebraska*, 262 U.S. 390, 399, 401 (1923) (holding that the liberty right of the Due Process Clause of the Fourteenth Amendment includes the right of the individual to establish a home and bring up children).

18. *Id.* at 390.

19. See *id.*

20. The statute provides in pertinent part:

Section 1. No person, individually or as a teacher, shall, in any private, denominational, parochial or public school, teach any subject to any person in any language other than the English language.

Section 2. Languages, other than the English language, may be taught as languages only after a pupil shall have attained and successfully passed the eighth grade as evidenced by a certificate of graduation issued by the county superintendent of the county in which the child resides.

Id. at 397 (quoting 1919 NEB. LAWS, ch. 249).

21. *Id.* at 397.

22. *Id.* at 396-97.

Amendment,²³ but was a valid exercise of the state's police power.²⁴ The court reasoned that the enactment of such a statute came reasonably within the police power²⁵ of the state because the purpose of the statute was to make the English language the "mother tongue of all children reared in the state."²⁶

Meyer then petitioned the United States Supreme Court, which overturned the conviction and declared the statute unconstitutional because it unreasonably infringed upon the liberty²⁷ guaranteed to Meyer by the Fourteenth Amendment.²⁸ First, the Court found that Nebraska had a legitimate interest in the education and acquisition of knowledge of its citizens.²⁹ However, the Court also noted that Meyer's right to teach in a language other than English and the right of parents to instruct their children fall within the liberties protected by the Fourteenth Amendment.³⁰ The Court then reasoned that because the mere knowledge of the German language does not harm anyone, the statute arbitrarily infringed upon a right guaranteed by the Constitution.³¹ Finally, the Court noted that an individual's liberty interest guaranteed by the Fourteenth Amendment includes "the right . . . to marry, establish a home, and bring up children."³²

23. Section I of the Fourteenth Amendment provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

24. *Meyer*, 262 U.S. at 397.

25. Police power has been defined as "[t]he inherent and plenary power of a sovereign to make all laws necessary and proper to preserve the public security, order, health, morality, and justice." BLACK'S LAW DICTIONARY 1178 (7th ed. 1999).

26. *See Meyer*, 262 U.S. at 397-98 (discussing the state supreme court decision in *Meyer v. Nebraska*, 107 Neb. 657 (1922)).

27. Liberty has been defined as "[f]reedom from arbitrary or undue external restraint, esp. by a government." BLACK'S LAW DICTIONARY 930 (7th ed. 1999).

28. *Meyer*, 262 U.S. at 403.

29. *Id.* at 400.

30. *Id.*

31. *Id.* at 403.

32. *Id.* at 399.

Similarly, in *Pierce v. Society of Sisters*,³³ the Court declared unconstitutional an Oregon statute that charged a parent or other person with a misdemeanor for refusing to send a child between the ages of eight and sixteen years within his or her custody to a public school.³⁴ Applying the same reasoning as *Meyer*, the Court declared that the statute "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."³⁵ The Court then stated that the "fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only."³⁶ Finally, the Court 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."³⁷

In the late 1970s, the Court again reinforced the fundamental right of a parent to raise his or her child in *Quilloin v. Walcott*³⁸ and *Parham v. J.R.*³⁹ In *Quilloin*, the Court struck down a Georgia adoption law, stating that "we have recognized on numerous occasions that the relationship between parent and child is constitutionally protected."⁴⁰ Later, in *Parham*, the Court overturned a Georgia statute⁴¹ because it violated the parents' Fourteenth Amendment due process rights.⁴² The Court reasoned that historically, the law accorded parents broad authority over minor children,

33. 268 U.S. 510 (1925).

34. *Id.* at 530-31.

35. *Id.* at 534-35.

36. *Id.* at 535.

37. *Id.*

38. 434 U.S. 246 (1978).

39. 442 U.S. 584 (1979).

40. *Quilloin*, 434 U.S. at 255.

41. The Georgia statute stated:

[t]he superintendent of any facility may receive for observation and diagnosis . . . any individual under 18 years of age for whom such application is made by his parent or guardian . . . [i]f found to show evidence of mental illness and to be suitable for treatment, such person may be given care and treatment at such facility and such person may be detained by such facility for such period and under such conditions as may be authorized by law.

Parham, 442 U.S. at 588 (citing GA. CODE ANN § 88-503.1 (1975)).

42. *Id.* at 620-21.

consistent with Western civilization's concept of the family.⁴³ In addition, the Court declared that the concept of family presumes that parents are mature and possess the ability to make life decisions that children cannot make for themselves.⁴⁴ "More important, [the law] historically has recognized that natural bonds of affection lead parents to act in the best interests of their children."⁴⁵

Despite the extensive Supreme Court precedent forbidding state action because it impermissibly intrudes upon a parent's fundamental right to "establish a home and bring up children,"⁴⁶ states have successfully passed laws that do interfere with such liberty rights.⁴⁷ For example, in *Prince v. Massachusetts*,⁴⁸ the Court reviewed the constitutionality of a Massachusetts law that criminalized any parent or guardian for permitting a minor to sell literature in public areas.⁴⁹ In upholding the statute, the Court declared that the rights of parenthood are not beyond limitation by the states.⁵⁰ Upon a showing of harm or potential harm to the child, "[t]he state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare."⁵¹ Therefore, state legislation appropriately designed to reach certain kinds of harm, such as the effects of child employment, is within the state's police power, even if it goes against the parent's claim of control over the child.⁵²

B. Grandparent Visitation Statutes and the United States Supreme Court's Decision in Troxel v. Granville

1. Procedural Background of Troxel

The controversy in *Troxel* arose when Jenifer and Gary

43. *Id.* at 602.

44. *Id.*

45. *Id.*

46. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

47. *See, e.g., Jacobson v. Massachusetts*, 197 U.S. 11, 12 (1905) (holding that a statute that required all persons to submit to small pox vaccination did not violate one's right to care for his own body and health as he sees fit because the vaccination was necessary for the public health).

48. 321 U.S. 158 (1944).

49. *Id.* at 159-60.

50. *Id.* at 166.

51. *Id.* at 167.

52. *Id.* at 168-69.

Troxel petitioned a Washington superior court, under section 26.10.160(3) of Washington's Revised Code,⁵³ for the right to visit their grandchildren, Isabelle and Natalie Troxel, to the displeasure of Tommie Granville, the children's mother.⁵⁴ Tommie Granville and Brad Troxel were involved in a relationship that ended in June 1991.⁵⁵ The two never married, but they had two daughters, Isabelle and Natalie.⁵⁶ After Tommie and Brad separated, Brad lived with his parents⁵⁷ and brought Isabelle and Natalie to his parents' home for regular weekend visits.⁵⁸ When Brad committed suicide in 1991, Jenifer and Gary continued to visit their grandchildren regularly; however, in October 1993, Tommie informed Jenifer and Gary that she wished to limit their visitation with her daughters to one short visit per month.⁵⁹ In December 1993, Jenifer and Gary petitioned for visitation rights with Isabelle and Natalie under Washington's grandparent visitation statute.⁶⁰

In favor of Jenifer and Gary, the Washington Superior Court entered "a visitation decree ordering visitation one weekend per month, one week in the summer, and four hours on the birthday of each of the Troxels."⁶¹ Because this ruling gave Jenifer and Gary significantly more visitation time with their grandchildren than Tommie liked, she appealed.⁶²

At the appellate level, the court reversed the visitation order, dismissed Jenifer and Gary's petition for visitation, and held that nonparents lack standing to seek visitation unless a custody action is pending.⁶³ In making its decision, the appellate court determined that under Washington's

53. The pertinent part of the statute states, "any person may petition the court for visitation rights at any time, 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." WASH. REV. CODE § 26.10.160(3) (1996); *see also* Troxel v. Granville, 530 U.S. 57, 60 (2000) (discussing the Washington visitation statute).

54. *Troxel*, 530 U.S. at 60.

55. *Id.*

56. *Id.*

57. Brad's parents, Jenifer and Gary Troxel, are the petitioners and paternal grandparents of Isabelle and Natalie. *Id.*

58. *Id.*

59. *Id.* at 60-61.

60. *Troxel*, 530 U.S. at 61.

61. *In re* Visitation of Troxel, 940 P.2d 698, 699 (Wash. Ct. App. 1997).

62. *Id.*

63. *Id.*

current nonparental visitation statutes, the legislature intended "that a custody proceeding be in effect before third parties could petition for visitation."⁶⁴ Jenifer and Gary then sought review by the Washington Supreme Court.⁶⁵

The Washington Supreme Court divided the issues involved in the case into two parts.⁶⁶ First, the court addressed whether "a nonparent petitioner has standing, pursuant to [Revised Code of Washington section] 26.10.160(3) or former RCW 26.09.240, to petition for visitation with a child outside the context of custody or dissolution proceedings."⁶⁷ Second, the court determined whether the statute impermissibly violates a parent's fundamental right to raise his or her children as he or she sees fit.⁶⁸ For the first issue, the Washington Supreme Court reversed the appellate court and held that under the statute, any person could petition the court for visitation rights at any time.⁶⁹ For the second issue concerning the constitutional challenges to the visitation statute, the court reviewed a long line of U.S. Supreme Court cases concerning a parent's right to raise his or her children and held that the Washington statute impermissibly interfered with "a parent's fundamental interest in the care, custody, and companionship of the child."⁷⁰ According to the court, the U.S. Constitution permits a state to interfere with parental rights only to prevent harm or potential harm to a child.⁷¹ The Washington statute failed to satisfy this requirement because it required no initial showing of harm.⁷² Furthermore, the court held that because the statute allowed any person to petition for compulsory visitation of a child at any time, it swept too broadly; the court should not make "significant decisions concerning the custody of children merely because it could make a 'better' decision."⁷³

64. *Id.* at 700-01.

65. *In re Smith*, 969 P.2d 21, 24 (Wash. 1998) (consolidating *In re Troxel* with *Smith v. Stillwell-Smith*).

66. *Id.* at 23.

67. *Id.*

68. *Id.*

69. *Id.* at 27.

70. *Id.* at 31.

71. *In re Smith*, 969 P.2d at 28-30.

72. *Id.*

73. *Id.* at 31.

2. *The United States Supreme Court Decision*

In June 2000, a divided Court upheld the Washington Supreme Court's decision invalidating section 26.10.160(3) of the Revised Code of Washington.⁷⁴ In a plurality decision, the Court concluded that because the statute did not give deference to a parent's decision on how to raise his or her child, the statute impermissibly interfered with a parent's fundamental right.⁷⁵

Writing for the Court, Justice O'Connor first discussed a long line of Supreme Court cases⁷⁶ that found a fundamental right and liberty interest of parents to make decisions concerning the upbringing of their children.⁷⁷ Such a fundamental right should not be disturbed so long as a parent adequately cares for his or her children.⁷⁸ The Court then explained that as applied to Tommie, a fit parent, the Washington statute "unconstitutionally infringes on that fundamental, parental right."⁷⁹ The Court reasoned that the language of the statute effectively permitted any third party seeking visitation to subject to state court review any decision by a parent concerning visitation of his or her children.⁸⁰ Once a party files a visitation petition in court and a judge has the matter before him or her, the court accords no deference to a parent's decision that visitation would not be in the child's best interest.⁸¹ This procedure impermissibly allows any state court in Washington to "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."⁸² Because the record revealed that the superior court based its order on the judge's decision and not on any special factors that might justify that state's interference with Tommie's parental rights, the statute as applied exceeded the bounds of the Federal Constitution.⁸³

Although the Supreme Court delved into an extensive

74. *Troxel v. Granville*, 530 U.S. 57, 63 (2000).

75. *Id.* at 69-73.

76. *See supra* Part II.A.

77. *Troxel*, 530 U.S. at 66.

78. *Id.* at 68-69 (citing *Reno v. Flores*, 507 U.S. 292, 304 (1993)).

79. *Id.* at 67.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Troxel*, 530 U.S. at 69.

discussion on parental rights cases, the Court left unresolved several key questions concerning nonparental visitation statutes.⁸⁴ First, the Court did not consider the primary constitutional question passed by the Washington Supreme Court—“whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation.”⁸⁵ Second, the Court did not announce the standard of review⁸⁶ to apply in protecting the parent’s liberty interest in visitation matters from impermissible state interference.⁸⁷ The Court merely held that lower courts must accord some weight to a parent’s own determinations when confronted with a situation where a fit parent’s decisions are under review.⁸⁸ Finally, in declaring the Washington statute unconstitutional as applied to Tommie, the Court warned the lower courts to exercise caution before declaring nonparental visitation unconstitutional per se.⁸⁹ As the plurality noted, “the constitutionality of any standard for awarding visitation turns on the specific manner in which that standard is applied.”⁹⁰

C. Grandparent Visitation Statutes and State Court Cases Subsequent to Troxel

1. California Cases

State courts have been left with the laborious task of filling in the gaps left open by the *Troxel* decision.⁹¹ The California Fourth Appellate District attempted to grapple with these questions in *In re Marriage of Harris*,⁹² now on

84. See *In re Marriage of Harris*, 92 Cal. App. 4th 499, 509-10 (Ct. App. 2001).

85. *Troxel*, 530 U.S. at 73.

86. Standard of proof has been defined as “[t]he degree or level of proof demanded in a specific case, such as ‘beyond a reasonable doubt’ or ‘by a preponderance of the evidence.’” BLACK’S LAW DICTIONARY 1413 (7th ed. 1999).

87. *Troxel*, 530 U.S. at 73.

88. *Id.* at 70-73.

89. *Id.* at 73.

90. *Id.*

91. See, e.g., *Linder v. Linder*, 348 Ark. 322, 324 (2002) (analyzing the Arkansas grandparent visitation statute in light of *Troxel v. Granville*); *L.B.S. v. L.M.S.*, 826 So. 2d 178 (Ala. Civ. App. 2002) (analyzing Alabama’s grandparent visitation statute in light of *Troxel v. Granville*).

92. *In re Marriage of Harris*, 92 Cal. App. 4th 499 (Ct. App. 2001), review

appeal to the California Supreme Court.⁹³ In *Harris*, the California Supreme Court is reviewing the constitutionality of California's grandparent visitation statute, section 3104 of the California Family Code.⁹⁴ This statute grants visitation rights to grandparents only when they have a preexisting relationship with their grandchild "that has engendered a bond such that visitation is in the best interest of the child."⁹⁵

granted and opinion superceded by 37 P.3d 379 (2002).

93. *Id.*

94. *Id.* at 502.

95. CAL. FAM. CODE § 3104 (West 2001). This statute provides in full:

Prerequisite findings for grant of visitation rights to grandparent

(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

In addition, the statute directs the court to balance the interest of the child in visiting with his or her grandparent against the right of the parents to exercise their parental authority.⁹⁶ Finally, the statute provides a rebuttable presumption that grandparent visitation is not in the best interest of the child if the parent objects.⁹⁷

In *Harris*, the controversy began when Karen Butler and Charles Harris divorced in 1995, and Karen obtained sole legal and physical custody of their daughter Emily.⁹⁸ Disagreeing with the court order, Charles' parents joined as parties to the action, and the judge, by stipulated order, granted visitation rights with Emily.⁹⁹ Karen petitioned to terminate the grandparents' visitation rights; however, the trial court refused to do so based on the best interest of the child.¹⁰⁰ The court stated that "based upon the circumstances of this case it is in the best interests of the minor child that the paternal grandparents continue to be involved with their grandchild."¹⁰¹ Following this decision, Karen appealed the order on the ground that the statute was unconstitutional, both facially and as applied.¹⁰²

The three-judge appellate court reversed the visitation

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 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.

Id.

96. *Id.*

97. *Id.* at (e)-(f).

98. *In re Marriage of Harris*, 92 Cal. App. 4th at 503.

99. *Id.* at 504.

100. *Id.* at 506.

101. *Id.* (quoting the decision of the trial court).

102. *Id.* at 502.

order awarded to the grandparents and declared that the statute as applied to the facts of the case violated Karen's due process rights under the United States Constitution.¹⁰³ The appellate court reversed the decision because the trial court did not accord any material weight to the child rearing decision by Karen, a fit parent.¹⁰⁴ The trial court's decision thus violated Karen's due process right to make decisions concerning the upbringing of her daughter.¹⁰⁵ Despite this ruling for Karen, the court found that the statute did not violate the Due Process Clause of the Fourteenth Amendment *per se*.¹⁰⁶

In reaching its decision that the statute was not *per se* unconstitutional, the appellate court noted three important features of the California statute that distinguish it from the Washington statute in *Troxel*.¹⁰⁷ First, the more narrowly drawn California statute "offers far more protection for parental autonomy and liberty than the Washington statute" because California's statute limits visitation rights to grandparents who have a strong preexisting relationship with the grandchild and only allows these grandparents to petition in very defined circumstances.¹⁰⁸ Second, the court noted that California's statute "at least implicitly recogniz[es] the presumption that fit parents act in their children's best interest."¹⁰⁹ The statute "provides deference to parental autonomy by setting forth a rebuttable presumption that parent-opposed visitation is not in the best interests of the child."¹¹⁰ Third, California's statute permits "courts to give special deference to parental autonomy by directing the court to 'balance[] the interest of the child in having visitation' against 'the right of the parents to exercise their parental authority.'"¹¹¹

Finally, the court said that in order for the statute to guarantee parental autonomy under the California Constitution, the statute must be read to require a

103. *Id.* at 503.

104. *In re Marriage of Harris*, 92 Cal. App. 4th at 519.

105. *Id.*

106. *Id.* at 503.

107. *Id.* at 513-14.

108. *Id.* at 513.

109. *Id.*

110. *In re Marriage of Harris*, 92 Cal. App. 4th at 514.

111. *Id.* (quoting CAL. FAM. CODE § 3104(a)(2) (West 2001)).

grandparent to prove by “clear and convincing evidence that the child will suffer harm if visitation is not ordered.”¹¹² The court noted that this requirement gives sufficient constitutional deference to a parent’s decision regarding the upbringing of her children.¹¹³ Additionally, the clear and convincing quantum of proof is consistent with California’s policy of “parental preference in adjudicating the competing rights of parents and third parties, who assert an interest in the parents’ child.”¹¹⁴

In a case similar to *Harris*, the California Second Appellate District Court upheld the constitutionality of California’s grandparent visitation statute in *Lopez v. Martinez*.¹¹⁵ The court reasoned that because California’s statute “explicitly limits the situations and circumstances in which grandparents can petition for visitation rights,”¹¹⁶ the California statute is not so broad as to be unconstitutional.¹¹⁷ Also, the court noted that the statute does not ignore a parent’s constitutionally protected autonomy, for the statute always provides “a rebuttable presumption in favor of the parents when the parents conclude visitation is not in the best interests of the child.”¹¹⁸ Because the statute only allows for a grandparent to petition for visitation in certain situations and because it “makes clear a court must accord extreme deference to parental authority while considering the best interest of the child,” the statute is per se constitutional.¹¹⁹

112. *Id.* at 515.

113. *Id.* at 515-19.

114. *Id.* at 516.

115. 85 Cal. App. 4th 279, 287 (Ct. App. 2000).

116. The *Lopez* court stated:

[T]he California statute only allows a petition to be filed when some disruption to the nuclear family has already occurred, whether it be a marital spat resulting in one spouse never moving out of the family residence, a custody proceeding pursuant to a separation, or an absent, unmarried parent, and makes clear a court must accord extreme deference to parental authority while considering the best interest of the child.

Id. at 288.

117. *Id.* at 287-88.

118. *Id.*

119. *Id.*

2. Other State Court Decisions

In light of *Troxel*, courts in other states have examined their grandparent visitation statutes using similar reasoning to that used by the California courts.¹²⁰ For example, the Tennessee Supreme Court in *Hawk v. Hawk*¹²¹ held the Tennessee grandparent visitation statute¹²² unconstitutional because it applied to married parents' decisions to deny grandparents visitation with their grandchildren.¹²³ The court reasoned that because the statute did not first mandate an initial showing of harm or potential harm to the child before the state could intervene, it violated a fit parent's due process rights to raise his or her child.¹²⁴

In addition, the Connecticut Supreme Court in *Roth v. Weston*¹²⁵ declared Connecticut's grandparent visitation statute¹²⁶ unconstitutional as applied to the facts of the case.¹²⁷

120. See, e.g., *Linder v. Linder*, 348 Ark. 322, 324 (2002) (holding the Arkansas grandparent visitation statute unconstitutional because it does not give the parent's decision presumptive or special weight in deciding whether grandparent visitation is in the best interest of the child); *L.B.S. v. L.M.S.*, 826 So. 2d 178, 186 n.5 (Ala. Civ. App. 2002) (holding the Alabama grandparent visitation statute constitutional so long as the courts give great weight to a parent's decision regarding grandparent visitation).

121. 855 S.W.2d 573 (Tenn. 1993).

122. TENN. CODE ANN. § 36-6-301 (1985) (current version at TENN. CODE ANN. § 36-6-302 (1995)). This statute allows a court to order "reasonable visitation" with grandparents if "it is in the best interests of the minor child." *Hawk*, 855 S.W.2d at 576 (citing TEN. CODE ANN. § 36-6-301 (1985)).

123. *Hawk*, 855 S.W.2d at 575.

124. *Id.* at 580-82.

125. 789 A.2d 431 (Conn. 2002).

126. CONN. GEN. STAT. § 46b-59 (1999). This statute provides:

Court may grant right of visitation to any person. The Superior Court may grant the right of visitation with respect to any minor child or children to any person, upon an application of such person. Such order shall be according to the court's best judgment upon the facts of the case and subject to such conditions and limitations as it deems equitable, provided the grant of such visitation rights shall not be contingent upon any order of financial support by the court. In making, modifying or terminating such an order, the court shall be guided by the best interest of the child giving consideration to the wishes of such child if he is of sufficient age and capable of forming an intelligent opinion. Visitation rights granted in accordance with this section shall not be deemed to have created parental rights in the person or persons to whom such visitation rights are granted. The grant of such visitation rights shall not prevent any court of competent jurisdiction from thereafter acting upon the custody of such child, the parental rights with respect to such child or the adoption of such child and any such court may include in its decree an order terminating such visitation rights.

Id.

The court reasoned that “to the extent that the trial court, pursuant to the statute, permitted third party visitation contrary to the desires of a fit parent and in the absence of any allegation and proof by clear and convincing evidence that the children would suffer actual, significant harm if deprived of the visitation,” the statute must be declared unconstitutional.¹²⁸

III. IDENTIFICATION OF THE PROBLEM

As previously noted, “the standards and criteria for ordering grandparent visitation are still open questions, and the legal policies governing this area of family law are still evolving.”¹²⁹ Despite uncertainty in this area of the law, the California legislature has succeeded in drafting a grandparent visitation statute that takes into account a parent’s autonomy in the upbringing of his or her child, while looking out for the best interests of a child who might need her grandparents to take an active role in her life.¹³⁰ The question still remains whether the California statute is constitutional in light of the recent United States Supreme Court decision in *Troxel*. An analysis of subsequent cases interpreting *Troxel* can help those parents or grandparents understand why California’s statute will most likely withstand any constitutional challenges.

IV. ANALYSIS

A. Section 3104 of the California Family Code and Limitations of Standing to Grandparents

The Washington statute in *Troxel* had constitutional problems because of its breadth, for it allowed any person to petition for visitation rights at any time.¹³¹ Additionally, it authorized a court to grant visitation upon a simple showing that visitation furthered the child’s best interest.¹³² In two specific ways, the California grandparent visitation statute

127. *Roth*, 789 A.2d at 434.

128. *Id.*

129. *See Punsly v. Ho*, 105 Cal. App. 4th 102 (Ct. App. 2003); *see also* discussion *supra* Part II.

130. CAL. FAM. CODE § 3104 (West 2001).

131. *Troxel v. Granville*, 530 U.S. 57, 67 (2000).

132. *Id.*

has averted this problem.¹³³ First, the statute does not grant all third parties an independent avenue to visitation rights.¹³⁴ The statute allows only grandparents to petition for visitation outside of a custody proceeding, since the statute specifically refers to grandparents and not simply “any person” as in the Washington statute.¹³⁵ Additionally, the California statute does not allow a grandparent to petition a court for visitation in any and all situations.¹³⁶ Unless the family unit has experienced some type of disruption, (e.g. the married parents are currently living separate and apart) the California statute will not allow a grandparent to move forward with his or her petition.¹³⁷

California appellate courts have pointed to these important distinguishing aspects of section 3104 of the California Family Code as reasons why the statute would withstand any facial challenges under the Federal Due Process Clause.¹³⁸ Specifically in *Harris*, the Fourth Appellate District Court noted that “[i]nstead 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 grandchild that has engendered a bond such that visitation is in the best interest of the child.’”¹³⁹ The court then stated that through this provision, the California legislature has “‘properly chosen to minimize the occasions in which a child must be exposed to state-involved conflicts.’”¹⁴⁰ The Second Appellate District Court made a similar observation in *Lopez* by noting that, because the California statute “explicitly limits the situations and circumstances in which grandparents can petition for visitation rights,” it is not “so ‘breathhtakingly broad’ as to be unconstitutional.”¹⁴¹ Because of these factors, the court

133. CAL. FAM. CODE § 3104(a)-(b).

134. *Id.*

135. *Id.* (stating specifically the findings for a grant of visitation rights to grandparents); see also WASH. REV. CODE § 26.10.160 (1996).

136. CAL. FAM. CODE § 3104(b).

137. *Id.*

138. See, e.g., *In re Marriage of Harris*, 92 Cal. App. 4th 499 (Ct. App. 2001); *Lopez v. Martinez*, 85 Cal. App. 4th 279 (Ct. App. 2000).

139. *In re Marriage of Harris*, 92 Cal. App. 4th at 513 (citing CAL. FAM. CODE § 3104(a)(1)).

140. *Id.* (quoting *Lopez*, 85 Cal. App. 4th at 286 (emphasis added)).

141. *Lopez*, 85 Cal. App. 4th at 287.

decided that the statute was narrowly tailored to withstand a federal due process challenge.¹⁴²

B. Section 3104 of the California Family Code and the Obstacles Grandparents Must Overcome

As *Troxel* primarily held, any nonparental visitation statute must at least give deference to fit parents' decisions regarding their children, for the law presumes that fit parents act in the best interest of their children.¹⁴³ Section 3104 of the California Family Code meets this requirement because it includes a rebuttable presumption that grandparent visitation is not in the child's best interest if the natural or adoptive parents object.¹⁴⁴ In addition, the statute gives deference to a single parent's decision when a court has awarded to that parent sole legal and physical custody of the child.¹⁴⁵ In effect, the California statute mandates that courts side with the parents in a situation where, absent extenuating circumstances, the court disagrees with the fit parent's decision that grandparent visitation is not in the child's best interest.¹⁴⁶

Once again, the California appellate courts identify these aspects of California's grandparent visitation statute as reasons why the statute meets the Constitution's due process requirements.¹⁴⁷ In *Harris*, the court noted that California's grandparent visitation statute and its rebuttable presumption require a court to assume that a parent's opposition to grandparent visitation is in the child's best interest.¹⁴⁸ This requirement avoids the constitutional problem of permitting a state to infringe upon parental autonomy because a state judge believes he or she could make a better decision.¹⁴⁹ Because the California statute respects parental autonomy by establishing a rebuttable presumption in favor of parents, the statute avoids the unconstitutional possibility of giving a judge's opinion equal or greater weight

142. *Id.* at 287-88.

143. *Troxel v. Granville*, 530 U.S. 57, 67-75 (2000).

144. CAL. FAM. CODE § 3104(e).

145. *Id.* § 3104(f).

146. *See In re Marriage of Harris*, 92 Cal. App. 4th 499, 519-21 (Ct. App. 2001).

147. *See supra* Part IV.A.

148. *In re Marriage of Harris*, 92 Cal. App. 4th at 520.

149. *Troxel v. Granville*, 530 U.S. 57, 73 (2001).

than the parent's.¹⁵⁰

Besides mandating that a court give deference to a fit parent's decision concerning the upbringing of his or her child, the California statute also requires that a grandparent prove the existence of a relationship between the grandparent and grandchild that has engendered a bond that places visitation in the child's best interest.¹⁵¹ At first glance, section 3104 seems to contradict the prohibition against a court "substitut[ing] its decision in place of the parent's simply because the state judge believes a better decision could be made."¹⁵² Unlike the Washington statute in *Troxel*, the California statute places the burden on the grandparent, not the parent, to prove that grandparent visitation is in the best interest of the child.¹⁵³ Furthermore, a California court has held that the grandparent should have to prove that visitation is in the best interest of the child by clear and convincing evidence, a level of proof higher than that required by Washington's statute.¹⁵⁴

C. Other State Court Decisions and Their Similarities to Harris and Lopez

In determining the validity of grandparent visitation statutes, other state supreme courts have used reasoning similar to that in *Harris* and *Lopez* to either uphold or strike down their respective grandparent visitation statutes.¹⁵⁵ A review of these court decisions and a comparison of their analyses to the California statute reveal that California's grandparent visitation statute should withstand any constitutional challenge.

As noted above,¹⁵⁶ the Tennessee Supreme Court declared unconstitutional its grandparent visitation statute because it did not require an initial showing of harm to the child as a condition to the state's intervention.¹⁵⁷ The court reasoned that by mandating an initial showing of harm, it was

150. *In re Marriage of Harris*, 92 Cal. App. 4th at 513.

151. CAL. FAM. CODE § 3104(a)(1) (West 2001).

152. *Troxel*, 530 U.S. at 73.

153. *See In re Marriage of Harris*, 92 Cal. App. 4th at 513-15.

154. *Id.* at 518.

155. *See, e.g.*, *Roth v. Weston*, 789 A.2d 431 (Conn. 2002); *Hawk v. Hawk*, 855 S.W.2d 573 (Tenn. 1993).

156. *See supra* Part II.C.2.

157. *Hawk*, 855 S.W.2d at 577-80.

approving the rationale of both “Tennessee and federal cases¹⁵⁸ that have balanced various state interests against parental privacy rights.”¹⁵⁹ The court then declared that by requiring a finding of harm or potential harm to the child before a state could intervene and evaluate the best interests of the child, it was preventing judges from second-guessing parental decisions.¹⁶⁰

Using similar reasoning as the Tennessee Supreme Court, the Connecticut Supreme Court struck down its grandparent visitation statute because it did not require a grandparent, petitioning for visitation, to prove by “clear and convincing evidence that the children would suffer actual, significant harm if deprived of the visitation.”¹⁶¹ The Connecticut court reasoned that a child must be “neglected, uncared-for or dependent,” as those terms have been defined” by statute, to reach the level of emotional harm “that constitutionally could justify overruling a fit parent’s visitation decision.”¹⁶² Additionally, the court required the stricter clear and convincing standard of proof in order to guarantee that a petitioning party will not impermissibly intrude upon parental decision-making.¹⁶³

Section 3104 of the California Family Code specifically avoids the problems noted by the Tennessee and Connecticut Supreme Courts.¹⁶⁴ By requiring that the family unit be “disrupted in some way before even a grandparent may petition for visitation,”¹⁶⁵ the California statute mandates that the grandparent show some type of significant harm or potential harm to the child before he or she can petition for visitation.¹⁶⁶ By limiting grandparent petitions to such narrow circumstances, the “California’s Legislature, in section 3104, has properly chosen to minimize the occasions in which a child must be exposed to state-involved

158. *See, e.g.*, *Prince v. Massachusetts*, 321 U.S. 158, 178 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925).

159. *Hawk*, 855 S.W.2d at 580.

160. *Id.* at 581.

161. *Roth v. Weston*, 789 A.2d 431, 434 (Conn. 2002).

162. *Id.* at 445 (citing CONN. GEN. STAT. §§ 46b-120 & 46b-129 (1999)).

163. *Id.* at 447-50.

164. *See* CAL. FAM. CODE § 3104(b), (e)-(f) (West 2001).

165. *Lopez v. Martinez*, 85 Cal. App. 4th 279, 288 (Ct. App. 2000).

166. *See* CAL. FAM. CODE § 3104(b).

conflicts.”¹⁶⁷ Also, although the California statute does not require clear and convincing evidence of harm to the child, the statute adequately protects parental decision-making by granting parents a rebuttable presumption that visitation is not in the child’s best interest.¹⁶⁸

V. PROPOSAL

In light of the many unanswered questions in *Troxel*, courts cannot easily determine the constitutionality of grandparent visitation statutes.¹⁶⁹ As previously mentioned, the state must delicately balance a child’s interest in maintaining important familial relationships with the parent’s constitutionally protected right of raising the child as the parent sees fit.¹⁷⁰ Section 3104 of the California Family Code has successfully struck such a balance. However, in light of *Troxel*, the California legislature should amend the grandparent visitation statute to include a requirement that in order for a grandparent to overcome the rebuttable presumptions found in section 3104(e)-(f), the grandparent must prove by clear and convincing evidence that visitation is in the best interests of the child.¹⁷¹ By amending the statute to include such a heightened standard of proof, the legislature would ensure that “adequate deference is accorded to a fit parent’s decision that grandparent visitation is not in the best interest of the child,”¹⁷² a requirement for all nonparental visitation statutes.¹⁷³ Although a higher standard of proof may prevent a grandparent from successfully petitioning for visitation rights, even in cases where the child’s interest would be served by visitation, the California legislature still must insert such a provision.¹⁷⁴ Constitutional rights, such as a parent’s right to raise his or her child, require a higher standard of proof before someone can justifiably intrude upon such rights.¹⁷⁵

167. *In re Marriage of Harris*, 92 Cal. App. 4th 499, 513 (Ct. App. 2001).

168. *See Lopez*, 85 Cal. App. 4th at 287-89.

169. *See Troxel v. Granville*, 530 U.S. 57, 73 (2000).

170. *See supra* Part IV.

171. *In re Marriage of Harris*, 92 Cal. App. 4th at 517.

172. *Id.* at 518.

173. *Troxel*, 530 U.S. at 72-74.

174. *Lopez v. Martinez*, 85 Cal. App. 4th 279, 288 (Ct. App. 2000).

175. *See Roth v. Weston*, 789 A.2d 431, 437 (Conn. 2002) (citing *Cruzan v. Dir., Mo. Dept. of Health*, 497 U.S. 261 (1990); *Santosky v. Kramer*, 455 U.S.

The clear and convincing evidentiary standard is not mandated by section 3104, but would satisfy *Troxel's* due process requirements for grandparent visitation statutes in several respects. First, as noted in *Harris*, because courts afford more protection to the constitutional right of parental autonomy than to the statutory right of grandparent visitation, section 3104 should require a higher evidentiary standard of clear and convincing evidence.¹⁷⁶ Absent a showing of harm or potential harm to the child, courts must resolve any conflict between parents' constitutional rights and grandparents' statutory rights in favor of the parents' constitutional rights.¹⁷⁷ A court should not rest on a mere preponderance of evidence in deciding to overrule a fit parent's judgment of the child's best interest; it should require clear and convincing evidence.¹⁷⁸ Second, by requiring a grandparent to prove by clear and convincing evidence that a fit parent's decision against visitation would be harmful to the child, section 3104 would preclude a court from overruling a parent's child rearing decision merely because the court has a contrary view.¹⁷⁹ In addition, the statute would then equalize the two competing interests found within grandparent visitation statutes: "the child's interest in the grandparental relationship and the right of the parents to rear their own child as they see fit."¹⁸⁰

Within the grandparent visitation statutes, general policy assumptions, such as a fit parent acts in the best interest of his or her child, apply in most circumstances but not all.¹⁸¹ As the *Lopez* court noted, "[p]olicy assumptions about what *generally* benefits a youngster may not always prove true in specific cases."¹⁸² However, a parent's constitutionally protected due process right should override those few cases where the general presumption does not apply.

In sum, in order to ensure that section 3104 of the

745 (1982); *Miller v. Commissioner of Corr.*, 700 A.2d 1108 (Conn. 1997)).

176. *In re Marriage of Harris*, 92 Cal. App. 4th at 513-15.

177. *See id.*

178. *Id.*

179. *See id.* at 518-19.

180. *See Lopez v. Martinez*, 85 Cal. App. 4th 279, 287-88 (Ct. App. 2000).

181. *Id.* at 288.

182. *Id.* (emphasis added).

California Family Code does not infringe upon parental autonomy, the California legislature should follow the lead of other state legislatures¹⁸³ and the advice of its courts¹⁸⁴ and add the clear and convincing standard of proof to its grandparent visitation statute. Not only would this requirement surpass the constitutional mandates set forth in *Troxel*, but also it would answer one of the questions left open in *Troxel*—the standard of review to apply in protecting the parent's liberty interest in visitation matters from impermissible state interference.¹⁸⁵ Furthermore, the addition of a clear and convincing standard of proof would provide guidance to other courts grappling with the constitutional validity of their state's grandparent visitation statute.¹⁸⁶

VI. CONCLUSION

The *Troxel* Court left many questions unanswered in regards to the specific constitutional requirements for grandparent visitation statutes. When can the state overrule a fit parent's decision regarding the care, custody, and control of her child?¹⁸⁷ Must the grandparent show harm or potential harm to the child before he or she can petition for visitation?¹⁸⁸ What level of proof must the grandparent satisfy in order for a court to grant visitation?¹⁸⁹ The *Troxel* Court only determined that a court must give sufficient deference to a fit parent's decision.¹⁹⁰ The other questions are left unanswered.

The fate of section 3104 of the California Family Code is

183. See, e.g., NEB. REV. STAT. § 40-4-228 (2001) (requiring clear and convincing evidence that visitation will not adversely interfere with the parent-child relationship); R.I. GEN. LAWS § 15-5-24.3 (a)(2)(v) (2002) (requiring clear and convincing evidence to rebut presumption that parent's decision was reasonable); VA. CODE ANN. § 20-124.2 (Michie 1998) (allowing a court to award visitation to any person with legitimate interest upon showing by clear and convincing evidence that the child's best interest is served thereby).

184. See *In re Marriage of Harris*, 92 Cal. App. 4th at 518.

185. See *supra* Part II.B.2.

186. See, e.g., *L.B.S. v. L.M.S.*, 826 So. 2d 178 (Ala. Civ. App. 2002) (holding the Alabama grandparent visitation statute constitutional in light of *Troxel v. Granville*).

187. See *supra* Part II.B.2.

188. See *supra* Part II.B.2.

189. See *supra* Part II.B.2.

190. See *supra* Part II.B.2.

not so uncertain.¹⁹¹ The California Supreme Court will most assuredly uphold the decision by the Fourth Appellate Division Court in *Harris*, especially in regards to the constitutionality of California's grandparent visitation statute.¹⁹² Because the statute adequately protects a parent's fundamental due process right¹⁹³ while guarding a child's best interests,¹⁹⁴ the California Supreme Court will likely uphold the statute.¹⁹⁵

Regardless of the outcome, however, the California legislature should amend the statute to provide for a heightened level of proof that a grandparent must overcome before he or she is allowed to successfully petition for visitation with the grandchild.¹⁹⁶ This amendment will guarantee the parent the constitutionally protected due process right to raise her child as she sees fit.¹⁹⁷ As amended, the statute will not only guarantee that a parent's fundamental rights are protected but also make sure that such a father as described in the opening scenario¹⁹⁸ cannot take a child away from the most important relationship that the child has ever known.

191. *See supra* Part IV.

192. *See supra* Part IV.

193. *See supra* Part IV.

194. *See supra* Part IV.

195. *See supra* Part IV.

196. *See supra* Part V.

197. *See supra* Parts IV.B and V.

198. *See supra* Part I.
