THIRD PARTY

VISITATION IN VIRGINIA

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I. Introduction

Though the statutory foundation and the basic principles in the case law are the same as for third party custody, the case law regarding third party visitation in Virginia follows a different set of precedents. The third party custody cases follow *Bailes*, a 1986 Virginia Supreme Court opinion, while the third party visitation cases follow *Troxel v. Granville*, a 2000 opinion by the United States Supreme Court.

II. Statutory Basis

The statutory basis for third party visitation includes Code of Virginia §20-124.2.B. ("The court shall give due regard to the primacy of the parent-child relationship but may upon a showing by clear and convincing evidence that the best interest of the child would be served thereby award custody or visitation to any other person with a legitimate interest.")

"'Person with a legitimate interest' shall be broadly construed and includes, but is not limited to grandparents, stepparents, former stepparents, blood relatives and family members provided any such party has intervened in the suit or is otherwise properly before the court. The term shall be broadly construed to accommodate the best interest of the child…." Code of Virginia §20-124.1.

III. *Troxel v. Granville*

The seminal case regarding third party visitation is *Troxel v. Granville*, 530 U.S. 57; 120 S. Ct. 2054; 147 L. Ed. 2d 49 (2000), concerning the constitutionality of Washington Code §26.10.160(3). That section permitted any person to petition for visitation rights at any time, and authorized the Washington courts to grant visitation rights whenever visitation might serve the child's best interests. *Troxel* involved the paternal grandparents' petition for the right to visit their deceased son's daughters. The girls' mother did not oppose limited visitation, but objected to the amount sought by the grandparents. The trial court ordered more visitation than the mother agreed to and the mother appealed.

The Washington Court of Appeals reversed and dismissed the grandparents' petition, a holding that was affirmed by the Washington Supreme Court, which declared § 26.10.160(3) unconstitutional in infringing on parents' fundamental rights to rear their children. The court held that the federal constitution permits a state to interfere with this right only to prevent harm or potential harm to the child. The Washington code section was too broad in permitting any person to petition at any time with the only requirement being that visitation served the child's best interests.

The United States Supreme Court affirmed. "The visitation order in this case was an unconstitutional infringement on [the mother's] fundamental right to make decisions concerning the care, custody, and control of her two daughters."

IV. Reported Decisions

a. *Thrift v. Baldwin*, 23 Va. App. 18, 473 S.E.2d 715 (1996).

In *Thrift*, the biological paternal grandparents of three adopted children petitioned the juvenile and domestic relations district court for visitation over the objection of the adoptive parents. Although the juvenile court granted visitation, the circuit court, on appeal, concluded that the adoption of the children severed the tie between the grandparents and the children, thereby depriving the grandparents of the legal standing to seek visitation.

The Virginia Court of Appeals reversed, holding that the term "party with a legitimate interest" used in Code of Virginia §16.1-241(A) includes parties who not only possess

legal rights with respect to a particular child or children, but also any parties having a "cognizable and reasonable interest in maintaining a close relationship" with the child or children. Furthermore, the statute expressly identifies "grandparents and other blood relatives" as parties with a legitimate interest. The Court concluded that, although the adoption of the children extinguished the legal grandparental relationship, the blood relationship between the grandparents and the children continued, and thus afforded the grandparents standing to seek visitation pursuant to the statute.

b. *Williams v. Williams,* 256 Va. 19, 501 S.E.2d 417 (1998).

In affirming the Washington State Supreme Court holding, the United States Supreme Court in *Troxel* cited *Williams v. Williams.* In *Williams,* the child's grandparents obtained court-ordered visitation over the parents' united opposition. The trial court determined that the child would benefit from continued contact with the grandparents and ordered visitation.

The Virginia Court of Appeals reversed. While it found Code of Virginia §20-124.2(B) to be constitutional, it held that to interfere with the primacy of the constitutionally protected parental rights, the court would have to find that a denial of nonparent visitation would be detrimental to the child's welfare. The Virginia Supreme Court affirmed. It found no need to remand the case to the trial court because there was no allegation of proof in the case that denial of grandparent visitation would be harmful to the child.

c. *Dotson v. Hylton*, 29 Va. App. 635, 513 S.E.2d 901 (1999).

Dotson v. Hylton was decided after *Williams* but before *Troxel.* In *Dotson*, the mother and father were divorced and joint custody was granted to the parties. Subsequently, the father was sentenced to ten years in the penitentiary, the mother moved for sole custody, and the father and the intervenor paternal grandmother requested visitation. The mother was granted sole custody and, after considering the statutory factors in Code of Virginia §20-124.3, the trial court ordered visitation as being in the child's best interests.

The Court of Appeals affirmed. The trial court was not required to follow the holding of *Williams v. Williams* that a court could not interfere with a parent's constitutional right to raise a child unless the state has a compelling interest. In *Williams*, both parents objected to visitation by the grandparents and the family was intact. In this case the parents had separated and disagreed

regarding visitation by the grandparent. The parent-child relationship has primacy, but the trial court may award visitation under these facts to a grandparent upon a showing, by clear and convincing evidence, that the best interests of the child will be served.

d. *Griffin v. Griffin*, 41 Va. App. 77, 581 S.E.2d 899 (2003).

In *Griffin*, the husband and wife were married in 1996 and separated in 1997. While separated the wife had sexual relations with the husband and another man and conceived a child, which she represented to the husband as his. The husband established a relationship with the child. The wife moved in with her mother in 1999, but continued to allow the husband to visit the child until a paternity test revealed that the husband was not the child's father. The husband filed an action seeking visitation rights, the trial court awarded visitation, and the wife appealed.

The Court of Appeals reversed. It held that, absent a showing of actual harm to a child, the constitutional liberty interests of parents take precedence over the best interests of the child. Also, Code of Virginia §20-124.2(B) requires clear and convincing evidence before visitation may be awarded to a nonparent. The evidence in this case went no further than supporting the inference that the child would grieve the loss of the emotional attachment he had for the mother's estranged husband, and could be emotionally hurt if visitation with him ended. While that might satisfy a trial court's "subjective notions of 'best interests of the child,'" it fell far short of satisfying by clear and convincing evidence the actual harm test.

e. *Yopp v. Hodges*, 43 Va. App. 427, 598 S.E.2d 760 (2004).

In *Yopp v. Hodges*, the mother and the child lived with the maternal grandparents for the first year and a half of the child's life. The mother moved to a residence immediately adjacent to the maternal grandparents' home, but the child continued to live with the maternal grandparents until the age of four and a half. When the child reached five years of age, the mother married and the child stayed with the mother only occasionally. The grandparents still cared for him a majority of the time, ensuring that he got to school, preparing his dinner, and helping him with homework. The relationship between the mother and grandparents deteriorated, and the mother denied the grandparents' request to take the child to the beach. The grandparents petitioned for visitation rights. The mother allowed the child to see the grandparents only one

weekend per month. She said the grandparents badgered the child and consumed alcohol in his presence, and she said the grandfather had a violent temper. The child's father expressly requested that the maternal grandparents be granted visitation, and the child's guardian *ad litem* also recommended visitation.

The trial court ruled that *Troxel* is inapposite because this case involves two fit parents who disagree about visitation issues. *Dotson* controls. Visitation with the grandparents is in the best interests of the child. Evidence established that the grandparents played a significant part in the child's life until the mother limited contact. The child loves his grandparents and cries when taken away. The grandparents are a source of stability that is lacking in the mother's household. The Court of Appeals affirmed.

f. *Surles v. Mayer*, 48 Va. App. 146, 628 S.E.2d 563 (2006).

In *Surles*, the parties were involved in a relationship for four years but never married. The mother had had a son by another man and Mr. Surles served as the primary father figure. The couple also had their own daughter. When the parties separated, they shared joint legal custody of their daughter and the mother had primary physical custody of the daughter. The son would occasionally accompany the daughter on visits with Mr. Surles. The mother relocated to Florida, and Mr. Surles petitioned for visitation with her son. The trial court granted the mother's motion to strike the petition for visitation because Mr. Surles was not a party in interest.

The Court of Appeals held that, while Mr. Surles was a "person with a legitimate interest" within the meaning of Code of Virginia §20-124.1 and thus had standing to pursue visitation with the boy, he failed to establish that, in the absence of visitation, the boy would suffer actual harm. Accordingly, it affirmed the denial of Mr. Surles' petition for visitation with the boy.

g. *O'Rourke v. Vuturo*, 49 Va. App. 139, 638 S.E.2d 124 (2006).

In *O'Rourke v. Vuturo*, the husband and wife were married in September 1995. After approximately five years of marriage, the wife informed the husband that she was pregnant by another man. The couple agreed to continue the marriage and that the husband would raise the child as his own. The child was born in March 2001. Husband was named the father on the birth certificate, and for the first three years of her life the husband raised the daughter as his own. In

March 2004 the wife moved out of the marital residence and in with the child's biological father. The husband and wife were divorced and the husband was granted visitation rights. In May 2005 the wife and the child's biological father were married. They changed the child's name and tried to end contact between the former husband and the child. Proceedings regarding the child continued. Husband originally filed for custody. Wife sought custody as well and sought to deny her former husband visitation. The trial court heard from five experts, and awarded visitation to the former husband.

The Court of Appeals held that the evidence supported the trial court's conclusion that the child would suffer actual harm if the former husband, not the child's biological father but the father who raised the child for the first three years of her life, was denied visitation. The evidence also supported the finding that visitation was in the child's best interest in that the child had developed a close bond with the former husband, believing him to be her father. The biological father, on the other hand, had asked the mother to terminate the pregnancy, and saw the child only about 25 times for an hour or two each time over a three year period. The court properly admitted evidence of non-medical doctors on the issue of whether the child would suffer actual harm if visitation were denied. Here the injury was psychological and the witnesses' education, employment experience, and professional knowledge and skills regarding bonding qualified them as experts.

h. *Rice v. Rice*, 49 Va. App. 192, 638 S.E.2d 702 (2006).

In *Rice* the child was the daughter of divorced parents. The father was not permitted contact with the child as a result of his sexual abuse of her. In 2004 the juvenile court granted visitation to the paternal grandparents. The mother appealed to the circuit court, and a *de novo* hearing was held. The circuit court denied the grandparents' petition for visitation, applying the best interests of the child standard (apparently because the father supported the grandparents' petition for visitation).

The Court of Appeals affirmed. The trial court did not err in finding that it was in the child's best interest to allow the mother the right to make the decisions about how things were handled with the child, as it was clear that the child was suffering with problems and difficulties. The Court of Appeals did not reach the issue of whether the trial court should have used the

actual harm test of *Williams* and *Griffin* rather than the best interests test, as the grandparents were unsuccessful under even the more lenient best interests test.

i. *Stadter v. Siperko*, 52 Va. App. 81, 661 S.E.2d 494 (2008).

In *Stadter*, the mother and her girlfriend, who were involved in a cohabiting lesbian relationship, agreed to have a child through artificial insemination of the mother. The parties shared prenatal responsibilities and expenses throughout the pregnancy, and shared parenting responsibilities after the birth of the child, with the mother providing primary care and the girlfriend providing substantial financial support. The girlfriend did not legally adopt the child, nor did the parties enter into any agreement concerning the girlfriend's parental rights. The parties later separated, and the girlfriend was awarded temporary, supervised visitation by the juvenile and domestic relations district court. On appeal, the circuit court found that, although the girlfriend was "a party with a legitimate interest" in the child, she failed to prove by clear and convincing evidence that the child would suffer actual harm if visitation were not awarded. The girlfriend appealed and argued that, where a biological parent has actively encouraged a parent-child relationship with a cohabiting partner who assumed parental responsibilities for a length of time sufficient to establish a bond with the child, the partner should be afforded the status of *de facto* or psychological parent, thus placing the partner on the same footing as the biological parent for purposes of seeking visitation.

The Virginia Court of Appeals affirmed the circuit court, refusing to adopt a *de facto* parent doctrine. The Court noted that the adoption of such a doctrine in other states is simply "the means by which those states give effect to the general principle that actual psychological harm to the child will overcome the *Troxel* presumption in favor of a biological parent in visitation cases." The Court concluded that the "person with a legitimate interest" and "actual harm" standards already in place in Virginia provide a similar and sufficient legal framework for the protection of a child who might suffer actual harm as a result of the denial of visitation with a nonparent, and therefore need not be rewritten to recognize a *de facto* parent doctrine.

j. *Damon v. York*, 54 Va. App. 544, 680 S.E.2d 354 (2009).

In *Damon*, the mother allowed her then-girlfriend to move in with her and the child when the child was approximately six years of age. The girlfriend and the mother were subsequently married in Canada, and lived together in Virginia with the child for almost two

years. Prior to the end of the mother's and the girlfriend's relationship, the child's father and her maternal grandmother gained custody of the child based on evidence of neglect found by the local Department of Social Services. The court ordered the father and the maternal grandmother to prevent all contact with the girlfriend. After the mother's relationship with the girlfriend ended, and approximately two years since having any contact with the child, the girlfriend petitioned the juvenile and domestic relations district court for visitation. The juvenile court denied the visitation, as did the circuit court on appeal, finding that the girlfriend was not a "person with a legitimate interest" having standing to seek visitation over the objection of the child's biological parents.

The Virginia Court of Appeals affirmed. Pursuant to Code of Virginia §20-124.1, the girlfriend was required to prove that she was a grandparent, stepparent, former stepparent, blood relative or family member, or assert some persuasive ground for being treated as a "functional equivalent" of one of those categories. Because her marriage to the mother in Canada was void in all respects under Virginia law, she had no legal family or stepparent relationship with the child. Furthermore, having been a girlfriend of the mother and having lived with the child for only twenty-one months was not sufficient to establish her status as a "functional equivalent" of one of the enumerated categories of §20-124.1. Although the girlfriend testified that she "stepparented the child" for those twenty-one months, the trial court did not err in accepting mother's contradictory evidence that the girlfriend was, "at best, a mere adult presence in the child's life."

V. Unpublished Decisions

a. *Davidson v. Davidson*, 2009 Va. App. LEXIS 381, Va. Ct. of Appeals, Rec. No. 0305-09-3 (September 1, 2009).

The trial court did not err in denying visitation of the child to the father's wife who had been helping the father raise the child for approximately four years. Despite evidence that the child referred to the wife as "mommy," and despite evidence that during her marriage to the father the wife made medical decisions for the child, disciplined the child, and for all purposes acted as the child's mother, the wife was not a party to the father's prior custody petition or award and was never awarded any custody or visitation rights by the court. Thus, the wife bore

the burden of proving that the child would suffer actual harm if visitation were denied. The wife's evidence of her close bond with the child was insufficient to meet that burden.

b. *Wise v. Valezquez*, 2008 Va. App. LEXIS 489, Va. Ct. of Appeals, Rec. No. 3094-07-2 (November 4, 2008).

The trial court did not err in granting grandmother's petition to amend a prior visitation consent order without first applying the actual harm standard. Granting the petition did not actually expand the scope of grandmother's visitation beyond that set forth in the initial consent order. In fact, the grandmother received the same amount of visitation while the father received greater discretion to determine the timing of that visitation. Because visitation was not expanded, application of the actual harm test was unnecessary.

The trial court did not err in failing to explicitly find that the visitation it awarded to the grandmother was in the child's best interests. The trial court stated that the child had "become integrated into and part of her [maternal extended] family," and that "the case involves a deceased mother and more than an emotional bond…[t]here's a relationship that's been established here that maintains ties to [the child's] heritage and memory of her mother." The Court of Appeals found that, based on the child's age, memory, identity, development, heritage, and significance of relationships with the mother's family in the mother's absence, the trial court implicitly made a finding regarding the best interests of the child when making its statements on the record.

c. *Merritt v. Gray*, 2004 Va. App. LEXIS 415, Va. Ct. of Appeals, Rec. No. 2003-03-4 (September 7, 2004).

The trial court did not err in refusing to apply an actual harm analysis, where the parents of a child did not contest that it was in the child's best interests to have visitation with his maternal grandmother. Although a court may not interfere in a parent-child relationship by ordering visitation with a nonparent over a parent's objection absent a showing of actual harm, the parties here entered into a prior agreement, which was embodied in several subsequent consent orders, that visitation with the grandmother was in the child's best interests. The parents

never voiced opposition to the visitation occurring, only regarding when it was to occur. Thus, the actual harm test need not be applied.

The trial court did not err in holding that the parents waived their constitutional rights, to a limited degree, with regard to the care and control of their child, by entering into consent orders agreeing that visitation with the grandmother was in the best interests of the child. Although parents have a fundamental liberty interest to determine how to raise their children and are therefore entitled to a presumption that they act in their children's best interests, the parents here relinquished that presumption with regard to visitation scheduling when they entered into consent orders which provided for the visitation. The trial court correctly held that, although the presumption would be reinstated if the parents objected to the grandmother having visitation at all, the parents here objected only to the court's holding that they were no longer entitled to unilateral control over the scheduling of the agreed-upon visitation.

d. *Harris v. Boxler*, 2003 Va. App. LEXIS 461, Va. Ct. of Appeals, Rec. No. 0604-03-3 (September 2, 2003).

The trial court did not err in holding that the paternal grandmother and the incarcerated father of the child failed to prove by clear and convincing evidence that visitation with the grandmother would be in the child's best interests. Six weeks after marrying, the mother and father separated. Prior to the birth of the child, the father was convicted and incarcerated for sexually assaulting and abducting the mother. The mother later remarried and the child, almost two years old at the time of trial, had had no relationship with the father or the grandmother since birth. Furthermore, the grandmother had previously rejected the mother's offer to allow the grandmother to visit the child at the mother's home, insisting instead that she be allowed to take the child to visit the incarcerated father.

e. *O'Leary v. Moore*, 2003 Va. App. LEXIS 391, Va. Ct. of Appeals, Rec. No. 3187-02-2 (July 8, 2003).

The trial court did not err in denying the grandmother's petition for visitation based upon an objection by the child's father who was the child's sole surviving parent. The trial court refused to hold that an exception to the *Williams* rule should be created based on the fact that the child's mother was deceased, thereby leaving the family "not intact." The trial court applied the actual harm test and the Court of Appeals affirmed.

VI. Conclusion

The nonparent versus parent visitation cases involve grandparents, ex-stepparents, ex-boyfriends, and ex-girlfriends (heterosexual and homosexual).

Several of the cases in this area focus on the issue of standing pursuant to Code of Virginia § 20-124.1. The Code requirement that "persons with a legitimate interest" be broadly construed has been honored - except in the *Damon* case involving an ex-lesbian girlfriend. The most surprising result of this broad construction is the *Thrift* case in which the biological grandparents were determined to have standing to seek visitation of their grandchildren, even after the legal connection was severed by an adoption.

The third party visitation cases fall under either the *Williams* line of authority in which the actual harm test is applied (in deference to the parent's constitutional right to make child-rearing decisions without state interference), or under the *Troxel* line of authority in which the best interests of the child test is applied (the actual harm test is not required because there is a dispute between the parents effectively nullifying the constitutional presumption).

In several cases the Virginia Court of Appeals has been requested to institute a *de facto* parent rule which would obviate the need for a petitioner who has been in a parental role with the child to meet the actual harm test, but these requests have consistently been rejected.

Absent a prior consent order or having one of the parents as a litigation ally, a nonparent petitioning for visitation will have to meet the actual harm test by clear and convincing evidence. Instead of basing his or her case on a request to change the legal standard (e.g., by requesting a *de facto* parent rule), a nonparent petitioning for visitation should focus on presenting evidence of actual harm in the absence of visitation.

O'Rourke is the only appellate case so far in Virginia in which a nonparent has received visitation by meeting the actual harm test by clear and convincing evidence. A comparison of *O'Rourke* and *Davidson* (in which a stepmother who had bonded with the child was denied visitation) highlights the need for mental health expert testimony to meet the actual harm standard.