

TRAVERSING THE CHANGING LANDSCAPE IN THIRD PARTY CUSTODY AND VISITATION CASES



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ORS 109.119– Who Is Entitled to Relief?



Any person, including a related or nonrelated foster parent, stepparent, grandparent or relative by blood or marriage

Who has established emotional ties creating

A child-parent relationship

OR

An ongoing personal relationship



ORS 109.119(10)(a) : Parent-Child Relationship Defined

Time

- a relationship that exists or did exist, **in whole or in part**, within the six months preceding the filing of an action
- which relationship continued on a day-to-day basis
- **Entire six months? Or part of six months?**

Place

- a person having physical custody of a child or residing in the same household as the child

Acts

- supplied, or otherwise made available to the child, food, clothing, shelter and incidental necessities
- provided the child with necessary care, education and discipline
- through interaction, companionship, interplay and mutuality, that fulfilled the child's psychological needs for a parent as well as the child's physical needs

NOT

Unrelated foster parent for less than 12 months

Providing child care while parent works.

Jensen v. Bevard, 215 Or App 215, 218, (2007)




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ORS 109.119(10)(e): Ongoing Personal Relationship Defined



- a relationship with substantial continuity for at least one year,



- through interaction, companionship, interplay and mutuality

ORS 109.119(2) – The Hurdle



The Presumption: “[T]here is a presumption that the legal parent acts in the best interests of the child.”

Findings of Fact Required: “[T]he court shall include findings of fact supporting the rebuttal of the presumption”



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ORS 109.119(2) & -(3)

How to Obtain Visitation Rights



- Rebut presumption by preponderance of the evidence (“greater weight of the evidence”)
- Visitation in child’s best interests

- Rebut presumption by clear and convincing evidence (the facts are “highly probable”)
- Visitation in child’s best interests

ORS 109.119: Comparison of Rebuttal Factors in Visitation and Custody Cases – Non Exclusive Factors/Totality of the Evidence



Factor	Visitation ORS 109.119(4) (a)	Custody ORS 109.119(4) (b)
The petitioner/intervenor is or recently has been the child's primary caretaker	X	X
The legal parent is unwilling or unable to care adequately for the child		X
Circumstances detrimental to the child exist if relief is denied (psychological, emotional or physical harm)	X	X
The legal parent has fostered, encouraged or consented to the relationship between the child and the petitioner/intervenor	X	X
Granting relief would not substantially interfere with the custodial relationship	X	
The legal parent has unreasonably denied or limited contact between the child and the petitioner /intervenor	X	X
The legal parent has fostered, encouraged or consented to the relationship between the child and the petitioner/intervenor	X	X



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ORS 109.119: Procedural Considerations



- Motion to Intervene
- ORCP 33 governs

- Petition for visitation or custody

What about dormant cases?

Troxel v. Granville, 530 US 57 (2000)

Dissents –
J. Scalia (substantive
due process not
triggered)
J. Kennedy (no harm
to child required)

“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 persona when visitation may serve the best interests of the child whether or not there has been any change in circumstances.” RCW 26.10.160 (3) (1994).

“Special weight”
given to parent’s
decision.

J. O’Connor, Chief
Justice Rehnquist,
J. Ginsburg, J.
Breyer

Washington
statute
unconstitutional
on face because
court supplants
parent. J. Souter

Strict scrutiny
applied to any
infringement on
parent’s
childrearing
rights. J. Thomas



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Modification Proceedings: Epler & Epler & Graunitz



In the underlying divorce between Mother and Father, both parents stipulated that paternal Grandmother have custody of granddaughter. Grandmother had custody for most of the child's life, including the 5 years prior to Mother's modification motion. Mother filed to modify custody and argued that she was entitled to the *Troxel*/ORS 109.119 birth parent presumption. The trial court denied Mother's motion finding she had failed to prove a "change of circumstances" and that even if she had, the best interests of the child required that Grandmother retain custody.

Mother appealed, and the Court of Appeals upheld the trial court, finding:

* When a biological parent stipulates to custody to a third party in an ORS Ch. 107 proceeding and then seeks to modify such judgment, ORS 107.135 applies and such parent will be required to demonstrate a substantial change of circumstances. Such stipulation serves as a rebuttal to the *Troxel* presumption.



Modification Proceedings: Epler & Epler & Graunitz



- * ORS 107.135 does not expressly apply to modification proceedings in ORS 109.119 actions; rather, ORCP 71(C) and the court's inherent authority applies. The *Troxel* presumption does not apply to ORS 109.119 modifications.
- * The parental fitness standard in *Troxel* third-party cases is broader than the parental fitness standard in ORS Ch. 419B juvenile court termination cases. (but broader than in Ch. 419B juvenile dependency cases)

The Supreme Court affirmed the Court of Appeals, but for different reasons, holding:

- * Because the custody to Grandmother was pursuant to a Ch. 107 dissolution proceeding that this case is not governed by the psych parent statute, ORS 109.119, but rather the modification statute, ORS 107.135
- * “Mother is not entitled to the *Troxel* presumption that her custody preference is in the child's best interest (at least as to the facts of this case).”
- * Mother was not prejudiced when she was held to the substantial change in circumstances rule.



ORS 109.119: Narrowing of Third Party Custody Rights



Peak of Third Party
Rights: pre-
O'Donnell-Lamont

Can deprive parent of
custody on bases less
egregious than parental
termination case, but
unclear what will satisfy
standard.

See, e.g., Winczewski

Downward Trending:
State v. Wooden (2002)
onward
(fit parent prevails)



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ORS 109.119(4)(a)(A):
Third Party Is Or Recently Has Been Primary Caretaker



- Factor “focuses on the interest in **continuity of caregiving** and relationship between parent and non-parent.” *O’Donnell-Lamont*, 337 Or at 111.
- Important in: *GJL v. AKL*,



ORS 109.119(4)(b)(A): Parent is Unwilling or Unable to Care Adequately for Child



- “[C]onsideration of this factor does not allow the court to substitute its judgment for that of a parent in determining that the nonparent is *better* able to care for the child.” *O’Donnell*, 337 Or at 110 (emphasis in original).
- Where father is a prior felon, has committed domestic violence, and used illegal drugs, he made “great effort to change his past behaviors,” and therefore is able to care for child. *Dennis*.
- Third party must show that risky behavior is continuing. Drug use, exposure to domestic violence, emotional issues, exposure to gangs in past insufficient. *Nguyen*.
- Job as truck driver, residential instability, drug use, personal shortcomings as parent not factors. *Mulheim*.
- Mother’s independence and recent history of caretaking weighs in her favor. *Sears*.
- Where there is no evidence parent engages in risky behavior in children’s presence, this factor is non-persuasive. *Dennis; Strome*.
- Previous 10 months of father’s commitment establishes present ability. *Strome*.
- Factor persuasive when parent unable to meet children’s emotional needs, providing inappropriate information and failing to segregate parent’s and children’s needs. *Winczewski* (Deitz concurrence).



ORS 109.119(4)(a)(B) & -(4)(b)(C): Circumstances Detrimental to Child Exist if Relief is Denied



- To rebut presumption, “the nonparent must demonstrate that the circumstances of living with the legal parent pose a serious risk of psychological, emotional or physical harm to a child.” *O’Donnell*, 337 Or. at 113.
- Need “serious present risk” and cannot speculate as to future harm. *Van Driesche*, *O’Donnell*.
- Likely requires expert testimony. *Van Driesche*.
- Past and generally isolated circumstances not persuasive. *Sears*.
- Temporary detriment not sufficient. *Wurtele*, *Wooden*.



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ORS 109.119(4)(a)(C) & -4(b)(D):
Legal Parent Fostered, Encouraged or Consented to Relationship



- If so, legal parent “at least at one point, apparently believed that the relationship was beneficial, or at least not detrimental, to the child.” *O’Donnell*, 337 Or. At 115.
- Is two of six months enough? Unclear. *Nguyen*.
- In third party custody case, must foster a parent-child relationship (e.g., placement). *Mulheim*.



ORS 109.119(4)(a)(D):
Granting Relief Would Not Substantially Interfere with Custodial Relationship



- Court examines amount of time sought by non-parent.
- 49 days represents “considerable interference.” *GJL v. AKL*.
- 2/3 of weekends and half of all holidays is substantial interference. *Van Driesche*.



ORS 109.119(4)(a)(E) & -4(b)(E): Parent Has Unreasonably Denied or Limited Contact



- Focuses on potential harm to a child's interest if a parent terminates or limits a relationship with a non-parent. *O'Donnell*, 337 Or at 116.
- Threats to terminate relationship are relevant. *Nguyen, GJL v. AKL*,
- Not compelling if there is acrimony. *Van Driesche*.
- Practice tips: Parent should phase in new custody arrangement. *Dennis, Strome, Nguyen, Wurtele* (holding father's insistent on immediate change against him). Parent should live near third party. *Nguyen*. Parent should carefully consider offering reasonable visitation. *Winczewski*. Parent should not overstate case. *Mulheim* (father criticized for stating DHS placement was kidnapping/hiding).
- Parent is allowed to "reevaluate past choices." *Van Driesche*.



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ORS 125.200 vs. 109.119: Guardianship or Psych Parent?



ISSUE	GUARDIANSHIP	PSYCHOLOGICAL PARENT	NOTES
Can you seek Custody?	Yes ORS 125.315	Yes ORS 109.119(3)(a)	
Relatives Preferred?	Yes ORS 125.200	No (Except in Juvenile Court)	
Can you seek Visitation/Contact?	Maybe ORS 125.315	Yes ORS 109.119(3)(b)	Court has authority as an incident of guardianship
Prior Custody or Relationship Status Required?	No	Yes ORS 109.119(1)	Troxel presumption and ORS 109.119 rebuttal factors apply if a legal parent object to a guardianship - See Burk v. Hall, 35 Or App 113 (2003)
Ex Parte Status Quo Order Possible?	No (But see temporary custody below)	Maybe ORS 109.119(3)(a), ORS 109.119(3)(b), ORS 107.097	
Temporary Custody Possible?	Yes ORS 125.600	Yes ORS 109.119(3)(a)	Guardianship temporary fiduciary requires proof that is an immediate and serious danger to the life or health of the child.



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ORS 125.200 vs. 109.119: Guardianship or Psych Parent?



Can Custody Evaluation Be Ordered?	Maybe*	Yes ORS 109.119(7)(a)	Guardianship Court can order a visitor, but it is not clear that the court's authority extends to ordering a custody evaluation.
Can Child Support Be Ordered?	Yes ORS 125.025(3)(k)	No statutory authorization, but see ORS 109.010	Custodian/Guardian Can Seek to be Representative Payee of Social Security Benefits For Child
Can Attorney Fees Be Awarded?	No	Yes ORS 109.119(7)(b)	
Standard of Proof Required	Clear and Convincing ORS 125.305	Preponderance ORS 109.119(3)(a)	
Can Order Be Modified/Terminated?	Yes ORS 125.225	Yes ORS 107.135(a) Also see ORS 109.119(2)(c)	Change of Circ, likely required for modifications of ORS 109.119 Custody Judgments; Only Best Interests required for termination of Guardianship
Post Judgment Obligations	Annual Report Required ORS 125.325	None	



Thank You



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