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## GRANDPARENTS AND PSYCHOLOGICAL PARENTS RIGHTS AND REMEDIES© (Rev. January 2018)

### IMPORTANT LEGAL DEVELOPMENTS

| DATE          | LEGAL CHANGES AFFECTING GRANDPARENT AND THIRD PARTY VISITATION RIGHTS  |
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| June 2000     | The United States Supreme Court issues <i>Troxel v. Granville</i> .  |
| July 31, 2001 | Oregon Laws Regarding Grandparent and Psychological Parent Rights were fundamentally modified by the 2001 Legislature. This legislation, amending ORS 109.119, which became law on July 31, 2001, was intended to make Oregon's law consistent with the US Supreme Court's decision in 2000, <i>Troxel v. Granville</i> and applies to all cases, including those filed or decided before the effective date of the new law. |

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| June 10, 2004 | <p style="text-align: center;">TROXEL APPLIED IN OREGON – THE NEW STANDARD</p> <p>In <i>O'Donnell-Lamont and Lamont</i>, 337 Or 86 (2004), the Supreme Court reversed the Court of Appeals and restored custody of the children to grandparents. The Supreme Court's decision brings some much needed clarity to the application of <i>Troxel</i> as well as the post-<i>Troxel</i> version of ORS 109.119. Contrary to several prior Court of Appeals decisions, the Supreme Court held that it is not necessary that a third party overcome the <i>Troxel</i> birth parent presumption by demonstrating that the birth parent would harm the child or is unable to care for the child. Rather, the Supreme Court adhered to the legislative standard that "the presumption could be overcome by a showing, based on a preponderance of the evidence, that the parent does not act in the best interest of the child." <i>Id.</i> at 107. While a parent's unfitness or harm to a child can be strong evidence to overcome the <i>Troxel</i> (and ORS 109.119) birth parent presumption, that presumption may be rebutted by evidence of any of the enumerated factors as well as other evidence not specifically encompassed by one of the statutory factors. <b>"The statutory touchstone is whether the evidence at trial overcomes the presumption that a legal parent acts in the best interest of the child, not whether the evidence supports one, two, or all five of the nonexclusive factors identified in ORS 109.119 (4)(b)."</b> <i>Id.</i> at 108.</p> |
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**1. The Presumption that a Legal Parent Acts in the Best Interest of the Child/Rebutting the Presumption.**

Oregon law now establishes a presumption that a legal parent acts in the best interest of a child in cases where a third party seeks custody or visitation rights. The presumption may be rebutted by a number of factors, including:

- I. If the petitioning person is or recently has been the child's primary caretaker;
- ii. The legal parent is unwilling or unable to care adequately for the child;
- iii. If the child would be psychologically, emotionally or physically harmed if no custody or visitation relief was ordered;
- iv. The legal parent fostered, encouraged or consented to the relationship between the child and the third party;
- v. Granting the requested relief would not substantially interfere with the custodial relationship between the legal parent and the child; and
- vi. The legal parent unreasonably denied or limited contact between the child and the third party.

Upon the request of the legal parent or the third party, the court may order that a custody or visitation study be performed at the expense of either the legal parent, the third party or both. A attorney may be appointed for a children at the request of the child (mandatory appointment) or at the request of one of the parties (discretionary appointment).

**2. Psychological Parents' Rights--Visitation.**

- a. Authority. ORS 109.119.
- b. Eligibility.

Any person (not necessarily a blood relative) who has maintained "an ongoing personal relationship with substantial continuity for at least one year, through interaction, companionship, interplay and mutuality." The person must show a substantial degree of contact with the child for a period of at least a year. The person does not have to show that he or she had physical custody, only a relationship and substantial contact with the child. This statute applies to blood relatives and non-blood relatives, including grandparents, step-grandparents, stepparents and persons whose children have not established paternity. There is no longer a separate law that governs rights of grandparents. Grandparents must meet the same standards as other third parties. A petition may be filed in a new legal proceeding or through an existing guardianship or domestic relations proceeding. For interventions in juvenile court proceedings, see section 4B.

- c. Relief Available.

The petitioning party must rebut the presumption that the legal parent acts in the best interest of the child. If the court finds "from clear and convincing evidence" that the presumption has been rebutted, the court may order reasonable visitation or contact rights if it is in the best interest of the child. "Clear and convincing evidence" is a higher legal standard than is normally required. It means substantially more than a preponderance of the evidence (more than 51 percent), but not as high a standard as that used in a criminal case--"beyond a reasonable doubt." The presumption may be rebutted by a number of factors. Attorney fees are available to the prevailing party.

**3. Psychological Parents' Rights--Custody.**

- a. Authority. ORS 109.119.
- b. Eligibility.

A person petitioning for custody under this statute must show a "child-parent relationship." The statute defines "child-parent relationship" as follows:

"...a relationship that exists or did exist, in whole or in part, within the six months preceding the filing of an action under this section, and in which relationship a person having physical custody of a child or residing in the same household as the child supplied, or otherwise made available to the child, food, clothing, shelter and incidental necessities and provided the child with necessary care, education and discipline, and which relationship continued on a day-to-day basis, through interaction, companionship, interplay and mutuality, that fulfilled the child's psychological needs for a parent as well as the child's physical needs. However, a relationship between a child and a person who is the foster parent of the child is not a child-parent relationship under this section unless the relationship continued over a period exceeding 12 months."

In other words, a person requesting custody must show that they had exclusive or shared physical custody of the child within six months before the petition. It does not include foster parents unless the relationship extended for a period of 12 months or more. Shared custody may not be sufficient unless the third party has "fulfilled the child's psychological needs for a parent as well as the child's physical needs."

- c. Relief Available.

If the required relationship is shown, and if the presumption that a legal parent acts in the best interest of the child is rebutted (see Section 1 above) the court may award custody to the third party or appropriate visitation rights if it is in the best interests of the child. Upon filing the petition, the court may also award temporary custody, pending a final hearing.

**4. Intervention by Psychological Parents and Grandparents – ORS 109.119; ORS 419B.116; and ORS 419B.875.\***

Except for grandparents who have some limited rights based upon their status as grandparents (see section 6D below), unless a person is allowed to “intervene” or granted rights of “limited participation”, they are not parties, are not given formal notice of legal proceedings, and are not entitled to formally address the Court. Both grandparents, psychological parents and third parties may seek to intervene in family law proceedings affecting a child. Such persons may also seek to intervene in Juvenile Court proceedings.

a. Intervention in Circuit Court. ORS 109.119.

To intervene in circuit court, a person must allege that they have either a child-parent relationship or an ongoing personal relationship, as well as alleging facts that the intervention is in the best interest of the child. If allowed, Intervention will provide the intervener with formal notice of legal proceedings and the right to present evidence to the court. It does not, however, guarantee any substantive relief in the form of custody, visitation or contact rights. To obtain such rights, the party must overcome the presumption of a legal parent (see Sections 1-3 above).

b. Intervention in Juvenile Court Proceedings. ORS 419B.116.

In order to intervene in a juvenile court proceeding, a person must allege and prove that he/she has had a “care giver relationship”. The care giver relationship must have existed during the year preceding the initiation of the juvenile court proceeding, for at least 6 months during the juvenile court proceeding (one year for nonrelated foster parents), or for at least one-half of the child’s life if the child is less than 6 months of age. In order to demonstrate the care giver relationship, the person must also show physical custody or shared residence with the child, and that the person has provided the child on a daily basis with the love, nurturing and other necessities required to meet the child’s psychological and physical needs. An intervener in a juvenile court proceeding will be given notice of court proceedings, the opportunity to present evidence and the opportunity to be considered as a visitation or placement resource for the child.\*

c. Rights of Limited Participation In Juvenile Court. ORS 419B.875.

Persons who do not meet the care giver standards for full intervention may nevertheless qualify for rights of limited participation. The person must file a motion and affidavit with the juvenile court at least two weeks before a proceeding in the case in which participation is sought.\* If the petition is granted, the court will determine what rights are given to the person, but rights will generally include at least notice of hearings and the right to present evidence.

*\* Obtaining intervention or rights of limited participation is very challenging. Persons seeking intervention or rights of limited participation in juvenile court must also prove to the court that the other participants (e.g., parents, child's attorney, Department of Human Services) cannot adequately present the case.*

**5. Modification of Psychological Parents/Grandparent Visitation and Custody Orders.**

Modification of Orders under Amended ORS 109.119.

Once a visitation or custody order is issued under ORS 109.119, there is no need to re-litigate the issue of the presumption of the natural parent. In visitation cases, the modification standard is the "best interest of the child." In custody cases, before the best interest standard is reached, a moving party will have to show that there has been a substantial and unanticipated change of circumstances.

**6. Juvenile Court Proceedings.**

- a. Authority. ORS Chapter 419B (dependency); ORS Chapter 419C (delinquency, criminal--dispositional stage only).
- b. How the State Obtains Custody of A Child.

The State of Oregon may obtain legal custody of a child if the child commits an act which would be a crime if they were adult, or if the child is subject to abuse, neglect, or abandonment by the parent or custodian. The state may also obtain custody of run-aways. When the state obtains custody, it almost always places the child with State Office for Services to Children and Families, now known as Department of Human Services (DHS), although it does have authority to place the child with a grandparent, blood relative or other appropriate person. DHS, by statute, must now take reasonable efforts to give notice to relatives and to favor relative placements over stranger placements. However, in the past this preference has often been ignored. Sometimes no contact is made with the extended family. Other times, DHS has a built-in prejudice against extended family because they fear the extended family will take the side of the former custodial parent and interfere with their efforts.

c. Rights of Third Parties in Juvenile Court.

Juvenile Court proceedings are usually open to the public, particularly in non-criminal matters. See Section 4 above for rights of intervention and limited participation by third parties. Apart from those rights, the court is not required to hear from an extended family member unless he or she is called as a witness by the state (through DHS) or a party (mother, father or the child--through their attorneys). However, if a legal grandparent of a child requests in writing and provides contact information to DHS, the agency must give the legal grandparent notice of a hearing concerning the child and give the legal grandparent an opportunity to be heard. This does not make the legal grandparent a party to the proceeding. Persons interested in obtaining or maintaining their relationship with a child in the custody of the state should consider hiring an attorney and filing for intervention or rights of limited participation (see discussion above) and stay in close contact with the following individuals:

- i. DHS caseworker (consult phonebook for branch office nearest your home).
- ii. Juvenile Court counselor (Multnomah County: **503.988.3460**; Washington County: **503.846.8861**; Clackamas County: **503.655.8342**).
- iii. Court Appointed Special Advocate (CASA)--(In Multnomah County: **503.988.5115**; Washington County: **503.992.6728**; Clackamas County: **503.723.0521**) an advocate appointed by the court to look after the best interests of the child and report information to the court. Check with the Juvenile Court counselor for the name of the CASA, if one exists.
- iv. Child's attorney -- a court may, but is not required to appoint an attorney for the child. Again, check with the court, through the Juvenile Court counselor, for the name of the attorney.
- v. Attorneys for mother and father--again, check with the court to get in contact with mother or father's attorney.
- vi. Citizens Review Boards (CRBs) – CRBs are volunteer panels established under state law assigned to review DHS cases approximately every six months. CRBs are volunteer citizens. While they do not participate directly in Juvenile Court proceedings, they prepare reports and make recommendations regarding whether DHS is on track in its placement and whether the child needs or is receiving appropriate representation from the CASA or attorney. (For general information about CRBs in Multnomah, Washington, or Clackamas Counties contact the Portland Regional office at 503.731.3007. Otherwise contact Rebecca Regello, Regional Field Manager for Multnomah and Washington Counties at 503.731.3206 or Dave Smith, Regional Field Manager for Clackamas County at 503.731.4356)

d. Rights of Grandparents and Foster Parents in Juvenile Court Proceedings.

I. Notice and the Opportunity To Be Heard (ORS 419B.875(7))

DHS is required to make diligent efforts to identify and obtain contact information for the grandparents of a child or ward committed to the department's custody. When the department knows the identity of and has contact information for a grandparent, the department shall give the grandparent notice of a hearing concerning the child or ward. Therefore concerned grandparents should give written notice and their contact information to DHS so they will be notified of hearings. If a grandparent is present at a hearing concerning a child or ward, the court shall give the grandparent an opportunity to be heard. This does not make the legal grandparent a party to the proceeding.

Foster parents present at a dependency hearing also have a right to be heard.

ii. Court Ordered Visitation and Contact (ORS 419B.876)

At a hearing concerning a child in the legal custody of DHS, a court may order visitation and/or contact and communication rights to a grandparent of the child. A grandparent seeking such rights must notify DHS and the other parties to the case at least 30 days before the date of hearing. To qualify, such grandparent must show that there was a pre-existing ongoing relationship with the child prior to the establishment of the wardship and that court ordered visitation or contact will not negatively impact the court's permanent plan for the child.

e. Special Concerns.

I. If you do not believe the child's interests are being adequately represented, you may ask the court, through the Juvenile Court counselor, to appoint an attorney for the child.

ii. It is important in Juvenile Court that your primary goal be the best interests of the child. The court, and particularly DHS, are extremely wary where an extended family member strongly takes the position of the parent who has lost custody. In such a case, DHS may feel that the extended family member is interfering with their attempts to rehabilitate the parent, and DHS fears that the extended family member may not be able to protect the child. In some cases, it may be appropriate to strongly advocate the position of the parent who has lost custody. In other cases, it may be more appropriate to give emotional (and sometimes financial) support to the parent, without "taking their side."

- iii. The state provides a foster care subsidy to children placed with strangers, but in many cases denies that subsidy to children placed with extended family members. An extended family member who receives physical custody of the child should make every effort to seek any foster care subsidy which may be available (TANF, Title IV(E); Non-Needy Relative Grant and/or the Oregon Health Plan).

## **7. Adoption.**

- a. Authority. ORS 109.305-109.410.
- b. Eligibility.

Any person may seek to adopt a child. However, an adoption will not be granted unless the consent (or a waiver of the consent) is received from the child's birth parents. If the child's birth parents' rights have been terminated, then DHS must give its consent to the adoption. A birth parent's consent may be waived if paternity has never been established or if the birth parent willfully neglected or abandoned the child for at least one year prior to the adoption petition.

- c. Relief Available.

If the adoption is granted, the person becomes the legal parent of the child. The effect of the adoption is to terminate the birth parents' rights.

- d. Special Concern--Adoption and the Termination of Grandparents' Rights.

Since an adoption terminates the rights of the birth parents, it also has the effect of terminating the blood relationship of the grandparents. Therefore, it may be important to intervene in an adoption proceeding to protect your rights. Intervention has its own problems.

Notice to grandparents is required only in stepparent adoptions and then a motion for visitation rights must be filed within 30 days (see Section 6(e) below).

In non-stepparent adoptions, you may never find out about a pending adoption, because the law does not require notice to be given to extended family members--only to birth parents. Even if you do intervene, the court may permit the adoption to proceed and not award you any visitation with the child. Although it has not been conclusively determined, when a conflict exists between an extended family member and the new adoptive family, the court will give preference to the rights and concerns of the new adoptive family over the extended family member.

A grandparent or current caretaker who seeks but is denied a request to be the adoptive parent may seek a review by DHS of the denial and thereafter a limited right to appeal to the Circuit Court for a review of the agency (DHS) decision.

See also Section 6(d) above (notice to grandparents of DHS hearings) and Section 8 below regarding guardianship options as alternatives to adoption.

- e. Notice/Visitation Rights in Stepparent Adoptions. ORS 109.309; ORS 109.332.

In stepparent adoptions only, grandparents must be given notice of the proposed stepparent adoption by receiving a true copy of the adoption petition. Within 30 days of service of the petition, a grandparent may file a motion with the court seeking visitation rights after the adoption. Visitation rights will only be awarded if it can be established, by clear and convincing evidence, that visitation with the grandparent(s) is in the best interests of the child; that a substantial relationship existed prior to the adoption; and that establishing visitation rights will not interfere with the relationship between the child and the adoptive family. This law does not apply to independent or Department of Human Resources (DHS)-sponsored adoptions.

- f. Open Adoption Agreements. ORS 109.305.

In both stepparent adoptions and non-stepparent adoptions (including independent and DHS cases), birth parents and adoptive parents may sign an "open adoption" agreement, allowing visitation with grandparents. This agreement is enforceable by the courts but does not otherwise affect the adoption.

## 8. Guardianship.

- a. Authority. ORS 109.056, 125.055, ORS 419B.365, ORS 419B.366.

- b. Types of Guardianship.

- i. Juvenile Court Permanent Guardianship. The Juvenile Court may appoint a permanent guardian for a child *as an alternative to a formal termination of parental rights*. Although parental rights are not terminated, the parent could never have physical custody restored. The terms of contact between the child and the parent is determined by the Court and the guardian (ORS 419B.365).
- ii. Juvenile Court Non Permanent Guardianship. The Juvenile Court may now also terminate DHS involvement and, maintain wardship but award a more traditional guardianship to a foster parent, relative or third-party. Unlike a permanent guardianship, this guardianship option provides for modification and a potential future termination and restoration of a natural

parent's rights (ORS 419B.366).

- iii. Civil Court Guardianship. Any person may apply to the court to become a guardian of a minor under ORS 125.055. A person petitioning for a guardianship to the court must give appropriate notice to the child, the child's recent custodians, and the child's birth parents. In addition, the person must show a need for the guardianship, because the child's essential needs for physical health and safety are not being met. The court must find by clear and convincing evidence that the guardianship is necessary. The Court of Appeals has applied *Troxel v. Granville* to the guardianship context and therefore, to establish a guardianship, over the objection of a birth parent, it will be necessary to overcome the constitutional presumption in favor of the birth parent (see Section 1 above).
  - iv. Delegation of Parental Powers. Under another statute, ORS 109.056, a parent, through a "power of attorney," can delegate their parental powers to another for a period not exceeding six months. This does not need to be filed with a court, but the power of attorney should be properly drafted and signed before a notary.
  - v. Relative Caregiver Authority by Affidavit. ORS 109.575 authorizes a relative caregiver to consent to medical treatment and education for minors left in their care. The caregiver is required to complete a specific affidavit to utilize this authority and to attempt to give notice to the legal parent of his or her intent to exercise this authority.
- c. Relief Available.

A guardian has the powers and responsibilities of a parent, except that the guardian is not responsible to provide his or her personal funds to support the child. A guardian may petition for appropriate public assistance or child support from one or both of the child's parents.

## **9. Third Parties and Military Deployment of Parents**

Oregon law now allows a deployed parent to petition the court for visitation, during deployment, between the child of the deployed parent and a stepparent, grandparent, or other family member related to the child. The court must consider whether visitation will facilitate contact between the child and the deployed parent, the best interests of the child, and the third-party visitation factors in ORS 109.119.

CAUTION: This information is a general guide to your rights. Specific rights and remedies will vary with each case. This guide is not a substitute for legal advice. You should consult with an attorney in any matter concerning your rights or the rights of your children or grandchildren. You may contact the Oregon State Bar Lawyer Referral Service for the name and number of an attorney who may be able to assist you. **Telephone: 503.684.3763 or toll-free in Oregon 1.800.452.7636.**

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# GRANDPARENT AND PSYCHOLOGICAL PARENT RIGHTS IN OREGON AFTER *TROXEL*© - UPDATE (Rev. May, 2018)

## The Rise and Fall of the Best Interests Standard

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### INTRODUCTION

Grandparents, foster parents, and other third-parties play an increasing role in the care of children, statewide and nationally. According to a Pew Research Center analysis of recent US Census Bureau data, almost 7 million U.S. children live in households with at least one grandparent. Of this total, 2.9 million (or 41%) were in households where a grandparent was the primary caregiver, an increase of 16% since 2000. According to the Census Bureau (19%) percent of these families (551,000 grandparents) fall below the poverty line. There are on average 8000 children in foster care on any given day in Oregon. The relationship between these third parties and natural or biological parents has resulted in a significant and evolving body of case law and statutory changes.

In the seminal case of *Troxel v. Granville*, 530 US 57, 120 S. Ct. 2054, 147 L.Ed 2d 49 (2000), the United States Supreme Court held that awarding visitation to a non-parent, over the objections of a parent is subject to constitutional limitations. The court invalidated, as applied, a Washington statute authorizing “any person” to petition for visitation rights “at any time” and providing that the court may order such visitation if it serves the “best interest of the child,” on the ground that the statute violates a natural parent’s right to substantive due process. The court specifically recognized as a fundamental liberty interest, the “interest of parents in the care, custody and control of their children.” The *Troxel* case has affected laws in virtually all of the states, and has significantly reduced previously recognized rights of grandparents, step-parents and psychological parents in favor of birth parents.

In 2001, Oregon’s legislature responded to *Troxel* by radically restructuring Oregon’s psychological parent law (ORS 109.119) and in so doing, eliminated ORS 109.121-123, which gave specific rights to grandparents.

Before discussing the implications of *Troxel* and amended ORS 109.119, it is important to understand Oregon’s law before *Troxel*.

## **GRANDPARENT AND THIRD PARTY RIGHTS IN OREGON BEFORE *TROXEL***

Before *Troxel*, Oregon's jurisprudence evolved from a strict preference in favor of natural parents to a fairly straight-forward application of the best interests test. In *Hruby and Hruby*, 304 Or 500 (1987), the Oregon Supreme Court held that the best interest standard is not applicable in custody disputes between natural parents and other persons, and that in custody disputes, a natural parent would not be deprived of custody absent "some compelling threat to their present or future well-being." That standard remained in place until 1999 when in *Sleeper and Sleeper*, 328 Or 504 (1999), *Hruby* was effectively swept aside and the court ordered that the best interest standard be applied to psychological parent cases. In *Sleeper*, the stepfather, a primary caretaker, obtained custody over biological mother. (See also *Moore and Moore*, 328 Or 513 (1999)). Significantly, the court limited *Sleeper* holding, applying the best interests test under the statute, by making it limited by an undefined "supervening right" of a natural parent. Therefore, before *Troxel*, once a third party had met the test for being psychological parent (*de facto* custodian), the best interest standard was applied and the psychological parent competed on an equal footing with the natural parent, subject to the natural parent's "supervening right." This "supervening right" was defined and applied in the post *Troxel* cases.

### ***TROXEL* APPLIED – THE NEW STANDARD**

In *O'Donnell-Lamont and Lamont*, 337 Or 86 (2004), the Supreme Court reversed the Court of Appeals and restored custody of the children to grandparents. The Supreme Court's decision brings some much needed clarity to the application of *Troxel* as well as the post-*Troxel* version of ORS 109.119. Contrary to several prior Court of Appeals decisions, the Supreme Court held that it is not necessary that a third party overcome the *Troxel* birth parent presumption by demonstrating that the birth parent would harm the child or is unable to care for the child. Rather, the Supreme Court adhered to the legislative standard that "the presumption could be overcome by a showing, based on a preponderance of the evidence, that the parent does not act in the best interest of the child." *Id.* at 107. While a parent's unfitness or harm to a child can be strong evidence to overcome the *Troxel* (and ORS 109.119) birth parent presumption, that presumption may be rebutted by evidence of any of the enumerated factors as well as other evidence not specifically encompassed by one of the statutory factors. "The statutory touchstone is whether the evidence at trial overcomes the presumption that a legal parent acts in the best interest of the child, not whether the evidence supports one, two, or all five of the non-exclusive factors identified in ORS 109.119 (4)(b)." *Id.* at 108.

Notwithstanding this broad and encompassing standard, the more-recent case law demonstrates that two factors, parental fitness and harm to the child, are by far the most significant. See also discussion below on "*Demonstrating Harm to the Child - What Is Enough?*"

## DIGEST OF POST-TROXEL CASES IN OREGON

1. **Harrington v. Daum**, 172 Or App 188 (2001), CA A108024. Visitation awarded to deceased mother's boyfriend over objection of birth father, reversed. After *Troxel v. Granville*, application of ORS 109.119 requires that "significant weight" be given to a fit custodial parent's decision. The parent's constitutional right is a supervening right that affects the determination of whether visitation is appropriate and prevents the application of solely the best interest of the child standard.
2. **Ring v. Jensen**, 172 Or App 624 (2001), CA A105865. Award of grandparent visitation, reversed. Grandmother's difficulty in obtaining the amount of visitation desired does not demonstrate the pattern of denials of reasonable opportunity for contact with the child as required by ORS 109.121.
3. **Newton v. Thomas**, 177 Or App 670 (2001), CA A109008. Interpreting a prior version of ORS 109.119, the court reversed an award of custody to the grandparents in favor of the mother. Under ORS 109.119, a court may not grant custody to a person instead of a biological parent based solely on the court's determination of what is in the child's best interest. The court must give significant weight to the supervening fundamental right of biological parents to the care, custody and control of their children. In a footnote, the court declined to consider the impact of the amendments to ORS 109.119 enacted by the 2001 Legislature.
4. **Williamson v. Hunt**, 183 Or App 339 (2002), CA A112192. Award of grandparent visitation reversed. The retroactive provisions of amended ORS 109.119 apply only to cases filed under the 1999 version of that statute and former ORS 109.121. Parental decisions regarding grandparent visitation are entitled to "special weight." Without evidence to overcome the presumption that a parent's decision to limit or ban grandparent visitation is not in the best interest of the child, the trial court errs in ordering such visitation (but see *Lamont*, Case Note 6).
5. **Wilson and Wilson**, 184 Or App 212 (2002), CA A113524. Custody of stepchild awarded to stepfather, along with parties' joint child, reversed. Under *Troxel*, custody of the mother's natural child must be awarded to fit birth mother and because of the sibling relationship, custody of the parties' joint child must also be awarded to mother. [See Case Note 20 discussion below for Court of Appeals decision on remand from Supreme Court.]
6. **O'Donnell-Lamont and Lamont**, 184 Or App 249 (2002), CA A112960. Custody of 2 children to maternal grandparents, reversed in favor of birth father (mother deceased). To overcome the presumption in favor of a biological parent under ORS 109.119(2)(a) (1997), the court must find by a preponderance of the evidence either that the parent cannot or will not provide adequate love and care or that the children will face an undue risk of physical or psychological harm in the parent's custody. A Petition for Certification of Appeal has been filed by birth father with the US Supreme Court and is pending at this time. [See discussion at Case Note 12 for *en banc* decision and discussion above, and Case Note 16 below for Supreme Court decision.]

7. **Moran v. Weldon**, 184 Or App 269 (2002), CA A116453. *Troxel* applied to an adoption case. Adoption reversed where father's consent was waived exclusively based upon the incarceration provisions of ORS 109.322. *Troxel* requires that birth father's consent may not be waived without "proof of some additional statutory ground for terminating parental rights\*\*\*."

8. **State v. Wooden**, 184 Or App 537, 552 (2002), CA A111860. Oregon Court of Appeals, October 30, 2002. Custody of child to maternal grandparents, reversed in favor of father (mother murdered). A legal parent cannot avail himself of the "supervening right to a privileged position" in the decision to grant custody to grandparents merely because he is the child's biological father. Father may be entitled to assert parental rights if he grasps the opportunity and accepts some measure of responsibility for the child's future. To overcome presumption in favor of father, caregiver grandparents must establish by a preponderance of the evidence that father cannot or will not provide adequate love and care for the child or that moving child to father's custody would cause undue physical or psychological harm. Rather than order an immediate transfer, the court ordered that birth father be entitled to custody following a 6-month transition period. [See also Case Note 20, *Dennis*, for an example of another transition period ordered.]

9. **Strome and Strome**, 185 Or App 525 (2003), *rev. allowed*, 337 Or 555 (2004), CA A111369. Custody of 3 children to paternal grandmother reversed in favor of birth father. The Court of Appeals ruled that where the biological father had physical custody for 10 months before trial, and had not been shown to be unfit during that time, Grandmother failed to prove by a preponderance of the evidence that father cannot or will not provide adequate love and care for the children or that placement in his custody will cause an undue risk of physical or psychological harm, in spite of father's past unfitness. [See discussion below Case Note 22 for Court of Appeals decision on remand from Supreme Court.]

10. **Austin and Austin**, 185 Or App 720 (2003), CA A113121. In the first case applying revised ORS 109.119 and, in the first case since *Troxel*, the Court of Appeals awarded custody to a third party (step-parent) over the objection of a birth parent (mother). The constitutionality of the revised statute was not raised before the court. The court found specific evidence to show that mother was unable to adequately care for her son. The case is extremely fact specific. Father had been awarded custody of three children, two of whom were joint children. The third child at issue in the case, was mother's son from a previous relationship. Therefore, sibling attachment as well as birth parent fitness were crucial to the court's decision. Petition for Review was filed in the Supreme Court and review was denied [337 Or 327 (2004)].

11. **Burk v. Hall**, 186 Or App 113, 121 (2003), CA A112154. Revised ORS 109.119 and *Troxel* applied in the guardianship context. In reversing a guardianship order the court held that: "\*\*\*\*guardianship actions involving a child who is not subject to court's juvenile dependency jurisdiction and whose legal parent objects to the appointment of guardian are – in addition to the requirements of ORS 125.305 – subject to the requirements of ORS 109.119." The constitutionality of amended ORS 109.119 was not challenged and therefore not addressed by this court.

12. **O'Donnell-Lamont and Lamont**, 187 Or App 14 (2003) (*en banc*), CA A112960. The *en banc* court allowed reconsideration and held that the amended psychological parent law [ORS 109.119 (2001)] was retroactively applicable to all petitions filed before the effective date of the statute. The decision reversing the custody award to grandparent and awarding custody to father was affirmed. Although 6 members of the court appeared to agree that the litigants were denied the “\*\*\*fair opportunity to develop the record because the governing legal standards have changed\*\*\*,” a remand to the trial court to apply the new standard was denied by a 5 to 5 tie vote. [See discussion at Case Note 6 and Case Note 16 for Supreme Court decision.]

13. **Winczewski and Winczewski**, 188 Or App 667 (2003), *rev. den.* 337 Or 327 (2004), CA A112079. [Please note that the *Winczewski* case was issued before the Supreme Court's decision in *Lamont*.] The *en banc* Court of Appeals split 5 to 5 and in doing so, affirmed the trial court's decision, awarding custody of two children to paternal grandparents over the objection of birth mother, and where birth father was deceased. For the first time, ORS 109.119 (2001) was deemed constitutional as applied by a majority of the members of the court, albeit with different rationales. Birth mother's Petition for Review was denied by the Supreme Court.

14. **Sears v. Sears & Boswell**, 190 Or App 483 (2003), *rev. granted* on remand, 337 Or 555 (2004), CA A117631. The court reversed the trial court's order of custody to paternal grandparents and ordered custody to mother where the grandparents failed to rebut the statutory presumption that mother acted in the best interests of a 4-year old child. Mother prevailed over grandparents, notwithstanding the fact that grandparents were the child's primary caretakers since the child was 8 months old, and that mother had fostered and encouraged that relationship. *Sears* makes it clear that the birth parent's past history and conduct are not controlling. Rather, it is birth parent's present ability to parent which is the pre-dominate issue. [See Case Note 19 for decision on remand.]

15. **Wurtele v. Blevins**, 192 Or App 131 (2004), *rev. den.*, 337 Or 555 (2004), CA A115793. Trial court's custody order to maternal grandparents over birth father's objections. A custody evaluation recommended maternal grandparents over birth father. The court found compelling circumstances in that if birth father was granted custody, he would deny contact between the child and grandparents, causing her psychological harm, including threatening to relocate with the child out-of-state.

16. **O'Donnell-Lamont and Lamont**, 337 Or 86, 91 P3d 721 (2004), *cert. den.*, 199 OR App 90 (2005), 125 S Ct 867 (2005), CA A112960. The Oregon Supreme Court reversed the Court of Appeals and restored custody of the children to grandparents. Contrary to several prior Court of Appeals decisions, the Supreme Court held that it is not necessary that a third party overcome the *Troxel* birth parent presumption by demonstrating that the birth parent would harm the child or is unable to care for the child. Rather, the Supreme Court adhered to the legislative standard that “the presumption could be overcome by a showing, based on a preponderance of the evidence, that the parent does not act in the best interest of the child.” *Id.* at 107. While a parent's unfitness or harm to a child can be strong evidence to overcome the *Troxel* (and ORS 109.119) birth parent presumption, that presumption may be rebutted by evidence of any of the enumerated factors as well as other evidence not specifically encompassed by one of the

statutory factors. “The statutory touchstone is whether the evidence at trial overcomes the presumption that a legal parent acts in the best interest of the child, not whether the evidence supports one, two, or all five of the non-exclusive factors identified in ORS 109.119(4)(b).”

17. ***Meader v. Meader***, 194 Or App 31 (2004), CA A120628. Grandparents had previously been awarded visitation of two overnight visits per month with three grandchildren and the trial court’s original decision appeared to be primarily based upon the best interests of the children and the original ruling was considered without application of the *Troxel* birth parent presumption. After the Judgment, birth parents relocated to Wyoming and grandparents sought to hold parents in contempt. Parents then moved to terminate grandparents’ visitation. At the modification hearing, before a different trial court judge, parents’ modification motion was denied on the basis that birth parents had demonstrated no “substantial change of circumstances.” *Id.* at 40.

The Court of Appeals reversed and terminated grandparents’ visitation rights. The court specifically found that in a modification proceeding no substantial change of circumstances was required. *Id.* at 45. Rather, the same standard applied a parent versus parent case [see *Ortiz and Ortiz*, 310 Or 644 (1990)] was applicable, that is the best interest of the child. The evidence before the modification court included unrebutted expert testimony that the child’s relationship with grandmother was “very toxic; that the child did not feel safe with grandmother; that the child’s visitation with grandmother was a threat to her relationship with Mother and that such dynamic caused the child to develop PTSD.” The court also found “persuasive evidence” that the three children were showing signs of distress related to the visitation.

18. ***Van Driesche and Van Driesche***, 194 Or App 475 (2004), CA A118214. The trial court had awarded substantial parenting time to step-father over birth mother’s objections. The Court of Appeals reversed finding that the step-parent did not overcome the birth parent presumption. This was the first post - *Lamont* (Supreme Court) case. Although mother had encouraged the relationship with step-father while they were living together, and although such evidence constituted a rebuttal factor under ORS 109.119, this was not enough. The court found that such factor may be given “little weight” when the birth parent’s facilitation of the third-party’s contact was originally in the best interest of the child but was no longer in the best interest of the child after the parties’ separation. Step-father contended that the denial of visitation would harm the children but presented no expert testimony.

19. ***Sears v. Sears & Boswell***, 198 Or App 377 (2005), CA A117631. The Court of Appeals, after remand by the Supreme Court to consider the case in light of *Lamont* [Case Note 16], adheres to its original decision reversing the trial court’s order of custody to maternal grandparents and ordering custody to birth mother. Looking at each of the five rebuttal factors as well as under the “totality of the circumstances”, birth mother prevailed again. Grandparents’ strongest factor, that they had been the child’s primary caretaker for almost two years before the custody hearing, was insufficient. Specifically, grandparents did not show birth mother to be unfit at the time of trial, or to pose a serious present risk of harm to the child.

20. ***Dennis and Dennis***, 199 Or App 90 (2005), CA A121938. The trial court had awarded custody of father's two children to maternal grandmother. Based upon ORS 109.119 (2001) and *Lamont*, the Court of Appeals reversed, finding that grandmother did not rebut the statutory presumption that birth father acts in the best interest of the children. The case was unusual in that there was apparently no evidentiary hearing. Rather, the parties stipulated that the court would consider only the custody evaluator's written report (in favor of grandmother) and birth father's trial memorandum, in making its ruling on custody. Birth father prevailed notwithstanding the fact that he was a felon, committed domestic violence toward birth mother, and used illegal drugs. However, birth father rehabilitated himself and re-established his relationship with his children. Although grandmother had established a psychological parent relationship and had been the long-term primary caretaker of the children, she was not able to demonstrate that birth father's parenting at the time of trial was deficient or inadequate; nor was grandmother able to demonstrate that a transfer of custody to birth father would pose a present serious risk of harm to the children as grandmother's concerns focused on birth father's past behaviors. The case continued the Court of Appeals trend in looking at the present circumstances of the birth parent rather than extenuating the past deficiencies. The case is also significant in that rather than immediately transferring custody of the children to birth father, and because birth father did not request an immediate transfer, the case was remanded to the trial court to develop a transition plan and to determine appropriate parenting time for grandmother. Birth father's request for a "go slow" approach apparently made a significant positive impression with the court. [See also Case Note 8, *State v. Wooden*, for an example of another transition plan.]

21. ***Wilson and Wilson*** [see Case Note 5 above]. Birth father's Petition for Review was granted [337 Or 327 (2004)] and remanded to the Court of Appeals for reconsideration in light of *Lamont*. On remand [199 Or App 242 (2005)], the court upheld its original decision, which found both parties to be fit. Birth father failed to overcome the presumption that birth mother does not act in the best interest of birth mother's natural child/father's stepchild; therefore, for the same reasons as the original opinion, custody of the party's joint child must also be awarded to birth mother.

22. ***Strome and Strome***, 201 Or App 625 (2005). On remand from Supreme Court to reconsider earlier decision in light of *Lamont*, the court affirms its prior decision (reversing the trial court) and awarding custody of the 3 children to birth father, who the trial court had awarded to paternal grandmother. Although birth father had demonstrated a prior interference with the grandparent-child relationship, the rebuttal factors favored birth father. The court particularly focused on the 10 months before trial where birth father's parenting was "exemplary." Because the children had remained in the physical custody of grandmother for the many years of litigation, the case was remanded to the trial court to devise a plan to transition custody to father and retain "ample contact" for grandmother. [See Case Note 9 above.]

23. **Poet v. Thompson**, 208 Or App 442 (2006), CA A129220. Rulings made resulting from a pre-trial hearing to address issues of temporary visitation or custody under ORS 109.119, are not binding on the trial judge as the “law of the case.” A party who does not establish an “ongoing personal relationship” or “psychological parent relationship” in such a hearing may attempt to establish such relationships at trial notwithstanding their failure to do so at the pre-trial hearing. Note the procedures and burdens to establish temporary visitation or custody or a temporary protective order or restraint are not established by statute or case law.

24. **Jensen v. Bevard and Jones**, 215 Or App 215 (2007), CA A129611. The trial court granted grandmother custody of a minor child based upon a “child-parent relationship” in which grandmother cared for the child on many, but not all, weekends when mother was working. The Court of Appeals reversed, finding that grandmother’s relationship did not amount to a “child-parent” relationship under ORS 109.119 and therefore, was not entitled to custody of the child. Mother and grandmother did not reside in the same home.

*Practice Note: It is unclear in this case whether grandmother also sought visitation based upon an “ongoing personal relationship.” [ORS 109.119(10)(e)]. If she had, she may have been entitled to visitation but would have had to prove her case by a clear and convincing standard. Where a third-party’s “child-parent” relationship is not absolutely clear, it is best to alternatively plead for relief under the “ongoing personal relationship,” which is limited to visitation and contact only.*

25. **Muhlheim v. Armstrong**, 217 Or App 275 (2007), CA A129926 and A129927. The Court of Appeals reversed the trial court’s award of custody of a child to maternal grandparents. The child had been in an unstable relationship with mother and the child was placed with grandparents by the Department of Human Services (DHS). Although father had only a marginal relationship with the child, the court nevertheless ruled that he was entitled to custody, because the grandparents had not sufficiently rebutted the parental presumption factors set forth in ORS 119.119(4)(b). Grandparents had only been primary caretakers for 5 months preceding the trial. Father had a criminal substance abuse history but “not so extensive or egregious to suggest that he is currently unable to be an adequate parent.” While stability with grandparents was important and an expert had testified that removal of the child would “cause significant disruption to her development,” those factors did not amount to “a serious present risk of psychological, emotional, or physical harm to the child.” As in *Strome* (Case Note 22 above), the court directed the trial court to establish a transition plan to transfer custody to father and preserve ample contact between the child and her relatives.

*Practice Note: This case follows the general trend of preferring the birth parent over the third-party, and the downplaying of issues related to a birth parent’s prior history, lack of contact, and disruption to the stability of the child. It may have been important in this case that grandparents hired a psychologist to evaluate their relationship, but the psychologist never met with father, nor was a parent-child observation performed.*

26. ***Middleton v. Department of Human Services***, 219 Or App 458 (2008), CA A135488. This case arose out of a dispute over the placement of a child between his long-term foster family and his great aunt from North Dakota, who sought to adopt him. DHS recommended that the child be adopted by his foster parents. The relatives challenged the decision administratively and then to the trial court under the Oregon Administrative Procedures Act (APA) (ORS 183.484). The trial court set aside the DHS decision, preferring adoption by the relatives. On appeal, the case was reversed and DHS's original decision in favor of the foster parent adoption was upheld. The court emphasized that its ruling was based upon the limited authority granted to it under the Oregon APA, and this was not a "best interest" determination. Rather, DHS had followed its rules, the rules were not unconstitutional, and substantial evidence in the record supported the agency decision. Since substantial evidence supported placement with either party, under the Oregon APA the court was not authorized to substitute its judgment and set aside the DHS determination.

27. ***Nguyen and Nguyen***, 226 Or App 183 (2009), CA A138531. Following the trend in recent cases, an award of custody to maternal grandparents was reversed and custody was awarded to birth mother. Mother had been the primary caretaker of the minor child (age 7 at the time of trial) but became involved in a cycle of domestic violence between herself, the child's father, and others; residential instability, and drug use. Mother also had some mental health issues in the past. At trial, the custody evaluator testified that mother was not fit to be awarded custody at the time of trial, but could be fit if she could make "necessary changes and provide stability and consistency \*\*\*." As to parental fitness, the most important issue according to the court, was that mother's history did not make her **presently** unable to care adequately for the child. As to the harm to the child element, the court repeated its past admonition that the evidence must show a "serious present risk" of harm. It is insufficient to show "\*\*\*\*that living with a legal parent **may** cause such harm." As in *Strome* (Case Note 22), the court directed the trial court to establish an appropriate transition plan because of the child's long-term history with grandparents.

28. ***Hanson-Parmer, aka West and Parmer***, 233 Or App 187 (2010), CA A133335. The trial court determined that husband was the psychological parent of her younger son, and is therefore entitled to visitation with him pursuant to ORS 109.119(3)(a). Husband is not biological father. On appeal, the dispositive legal issue was whether husband had a "child-parent relationship." ORS 109.119(10)(a) is a necessary statutory prerequisite to husband's right to visitation in this case. Held: Husband's two days of "parenting time" each week is insufficient to establish that husband "resid[ed] in the same household" with child "on a day-to-day basis" pursuant to ORS 109.119(10)(a). Reversed and remanded with instructions to enter judgment including a finding that husband is not the psychological parent of child and is not entitled to parenting time or visitation with child; otherwise affirmed. See *Jensen v. Bevard* (Case No. 24).

29. ***DHS v. Three Affiliated Tribes of Port Berthold Reservation***, 236 Or App 535 (2010), CA A143921. In a custody dispute under the Indian Child Welfare Act (ICWA) between long-term foster parents and a relative family favored by the tribe of two Indian children, the Court of Appeals found good cause to affirm the trial court's maintaining the children's placement with foster parents. Although this was not an ORS 109.119 psychological parent case, it contains interesting parallels. Under the ICWA, applicable to Indian children, the preference of the tribe for placements outside the biological parent's home, is to be honored absent good cause.

Although the ICWA does not define the term “good cause”, the trial court concluded that it “properly and necessarily includes circumstances in which an Indian child will suffer serious and irreparable injury as a result of the change in placement.” The Court of Appeals agreed with the trial court that good cause existed based upon persuasive expert testimony that “the harm to [the children] will be serious and lasting, if they are moved from [foster parents’] home.” This analysis has its parallel in the ORS 109.119 rebuttal factor which provides for custody to a third-party if a child would be “psychologically, emotionally, or physically harmed” if relief was not ordered. It also parallels the Supreme Court’s analysis of the ORS 109.119 harm standard, as requiring proof of circumstances that pose “a serious risk of psychological, emotional, or physical harm to the child.” This case points to the necessity of expert testimony to support a third-party when they are seeking to obtain custody from a biological parent. See *Lamont* decision (Case Note 16).

30. ***Digby and Meshishnek***, 241 Or App 10 (2011), CA A139448. Former foster parent (FFP) sought third-party visitation from adoptive parents. FFP had last contact with children in July 2005 and filed an action under ORS 109.119 in June 2007, pleading only a “child-parent relationship” and not an “ongoing personal relationship.” Trial court allowed FFP visitation rights. Court of Appeals reversed finding that FFP did not have a “child-parent relationship” within 6 months preceding the filing of the petition and because FFP did not plead or litigate an “ongoing personal relationship.” *Lesson: Plead and prove the correct statutory relationship (or both if the facts demonstrate both).*

31. ***G.J.L. v. A.K.L.***, 244 Or App 523 (2011), CA A143417 (*Petition for Review Denied*). Grandparents were foster parents of grandson for most of his first 3 years of life. After DHS returned child to birth parents and wardship was terminated, parents cut off all contact with grandparents. Trial court found that grandparents had established a grandparent-child relationship and that continuing the relationship between them and child would be positive. Trial court denied Petition for Visitation because of the “*significant unhealthy relationship*” between grandparents and mother. No expert testimony was presented at trial. On appeal, the Court found that grandparents had prevailed on three statutory rebuttal factors (recent primary caretaker; prior encouragement by birth parents; and current denial of contact by parents). However, the Court of Appeals denied relief because grandparents failed to prove a “*serious present risk of harm*” to the child from losing his relationship with grandparents, and that grandparents’ proposed visitation plan (49 days per year) “*would substantially interfere with the custodial relationship.*” A Petition for Review was denied.

32. ***In the Matter of M.D., a Child, Dept. Of Human Services v. J.N.***, 253 Or App 494 (2012), CA A150405. (Juvenile Court) The court did not err in denying father’s motion to dismiss jurisdiction given that the combination of child’s particular needs created a likelihood of harm to child’s welfare. However, the court erred by changing the permanency plan to guardianship because there was no evidence in the record to support the basis of that decision- that the child could not be reunified with father within a reasonable time because reunification would cause “severe mental and emotional harm” to child. The “severe mental and emotional harm” standard parallels to the Oregon Supreme Court’s analysis of the ORS 109.119 harm standard, as requiring proof of circumstances that pose a “serious risk of psychological, emotional, or physical harm to the child.” See *Lamont* decision [Case No. 16].

33. ***In the Matter of R.J.T., a Minor Child, Garner v. Taylor***, 254 Or App 635 (2013), CA A144896). Non-bio parent obtained an ORS 109.119 judgment by default against child's mother for visitation rights with child. Later mother sought to set aside the default which was denied. Non bio parent later filed an enforcement action and also sought to modify the judgment seeking custody. The trial court set aside the original judgment, finding that non bio parent did not originally have a "child-parent" or "ongoing personal" relationship to sustain the original judgment; if she did have such a relationship, she could not rebut the birth parent presumption; and finally, that even if the birth parent presumption was rebutted, that visitation between non bio parent and the child was not in the child's best interest. On appeal, the Court of Appeals reversed the trial court for setting aside the original judgment *sua sponte*, finding no extraordinary circumstances pursuant to ORCP 71C. The Court of Appeals bypassed the issue as to whether there was originally an ongoing personal relationship with the child and originally whether the birth parent presumption had been rebutted. Instead, it simply upheld the trial court, finding that visitation should be denied because it was not in the child's best interests. Since this was not a *de novo* review, the court did not explain why visitation was not in the best interests of the child, but it would appear that the continuing contentious relationship between the parties was a significant factor.

34. ***Underwood et al and Mallory, nka Scott***, 255 Or App 183 (2013), CA A144622. Grandparents obtained custody of child by default. Although certain ORS 109.119 rebuttal factors were alleged, the judgment granting custody to Grandparents was pursuant to ORS 109.103. Mother later filed a motion to modify the original judgment citing ORS 107.135 and ORS 109.103, but not ORS 109.119. In response, Grandparents contended that Mother did not satisfy the "substantial change of circumstances" test, governing ORS 107.135 modifications. The trial court and the Court of Appeals agreed. The Court of Appeals also noted with approval the trial court's finding that a change of custody would not be in the child's best interest, noting in particular that Grandparents had been the primary caretaker of the child for the past 10 years and facilitated (until recently) ongoing relationships between the child, his siblings, and mother. Because the case had originally been filed (apparently erroneously) under ORS 109.103, the Court of Appeals avoided "*the complex and difficult question \*\*\* as to whether the provision of ORS 109.119(2)(c) that removes the presumption from modification proceedings would be constitutional as applied to a circumstance where no determination as to parental unfitness was made at the time the court granted custody to grandparents.*" Accordingly, where a custody or visitation judgment is obtained originally by default without a specific finding that the birth parent presumption had been overcome, it is unclear as to whether such presumption, under the United States Constitution, needs to be rebutted in modification or other subsequent proceedings.

35. ***Dept. of Human Services v. S.M.***, 256 Or App 15 (2013), CA A151376. This is a juvenile court case holding a trial court's order allowing children, as wards of the court, to be immunized pursuant to legal advice but over mother and father's religious objections. There is an insightful discussion of *Troxel v. Granville* at pp 25-31. The court found that the immunization order did not violate *Troxel* or the constitutional right of parents to "direct the upbringing of their children," but noted the possibility that certain state decisions might run afoul of constitutional rights. This case strongly suggests that legal parents may be fit in certain spheres of parenting, but unfit as to others. (Oregon Supreme Court review pending.)

36. **Dept. Of Human Services v. L. F.**, 256 Or App 114 (2013), CA A152179. This is a fairly standard juvenile court case where the Court of Appeals upheld the trial court's finding of jurisdiction as to mother. As applied to ORS 109.119 litigation, the court's holding as follows may be relevant to the rebuttal factor relating to parental fitness and harm to the child. Noting that child, L.F., had *\*\*\* severe impairments of expressive and receptive language,* the Court of Appeals agreed with the trial court that *\*\*\* mother's inability or unwillingness to meet [child's] medical and developmental needs of [child] to a threat of harm or neglect. \*\*\* [Child's] development and welfare would be injured if mother were responsible for his care because she does not understand how to meet his special needs. Without the ability to understand and meet [child's] developmental and medical needs, it is reasonably likely that mother's care would hinder [child's] development and fall short of satisfying his medical needs.* *Id.* at 121-122.

37. **Kleinsasser v. Lopes**, 265 Or App 195, 333 P3d 1239 (2014). In a marked departure from recent trends, the Court of Appeals upheld the trial court's judgment awarding custody of a child to Stepmother over the objections of biological Mother, where Father had died. Child had resided with Father and Stepmother for the prior four years. Mother had been in and out of Oregon and had not been active in the child's life until after Father's death. In contrast to a more rigid focus on the "parental fitness" and "harm to child" factors in prior cases, and although this was not a de novo review case, the Court of Appeals assessed all of the ORS 109.119 rebuttal factors and agreed with the trial court's findings that Stepmother satisfied the rebuttal factors except one. As to the parental fitness factor, the Court of Appeals disagreed with the trial court finding as to mother's past absenteeism as it related to her parental fitness. Consistent with prior rulings, it is the birth parent's present state of fitness, as of the date of the trial, that is most important. The trial court noted Mother's attitudes and conduct toward the child-Stepmother relationship which reflected poorly on her understanding of the child's best interests.

38. **Epler and Epler and Graunitz**, 258 Or App 464 (2013), (Court of Appeals); 356 Or 634 (2014) (Supreme Court). 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 a ORS Chapter 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.
- ORS 107.135 does not expressly apply to modification proceedings in ORS 109.119 actions; rather ORCP 71C 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 Chapter 419B juvenile court termination cases (and presumably broader than such fitness standard in ORS Chapter 419B juvenile court dependency cases).

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

- Because the custody to Grandmother was pursuant to a Chapter 107 dissolution proceeding that this case is not governed by the psychological 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) and
- Mother was not prejudiced when she was held to the substantial change-in-circumstances rule."
- Because the trial court found properly that it was not in the child's best interests that custody be changed, the Supreme Court did not address Mother's argument that the application of the change of circumstances rule unduly burdened her due process rights under *Troxel*.

39. **Department of Human Services v. A.L.**, 268 Or App 391, 400 (2015). Parents successfully challenged the juvenile court's jurisdiction where, among other things, they had placed their children with paternal grandparents. "Because parents have entrusted their children to paternal grandparents who pose no a current threat of harm, the court did not have a basis for asserting jurisdiction over the children." A parent's inability to parent independently does not amount to a condition "seriously detrimental to the child," when such child is placed in a safe alternative placement. See also, **Matter of NB**, 271 Or App 354 (2015) - another juvenile court case in which juvenile court jurisdiction of a child was based in part by the parents' delegation/transfer of care to third parties (grandparents). Construing ORS 419B.100(2), the Court held that the fact of the delegation could indeed be a factor in determining whether juvenile court jurisdiction was appropriate, but the delegation *per se* was not sufficient. Rather the inquiry would have to be case specific and address particular facts, for example whether the child was exposed to risks of the parent(s) while in the third party's care. In the **NB** case, DHS didn't meet the burden to demonstrate such risks.

40. **Kennison v. Dyke**, 280 Or App 121 (2016). CA157378. ORS 109.119 judgement awarding grandmother visitation, reversed and remanded because trial court failed to make the required findings that grandmother rebutted, by clear and convincing evidence, the birth parent presumption prescribed by ORS 109.119. The Court of Appeals made it clear that "an order granting visitation rights must include 'findings of fact supporting the rebuttal of the presumption.' ORS 109.119(2)(b)" The trial court had made ten detailed findings including a finding that "it would be unreasonable for [grandmother] to have no visitation" but the Court of Appeals agreed with mother that the trial court must specifically find that a third party (here grandmother) rebutted the statutory presumption that mother acted in the best interest of the child, "*before determining whether visitation would be in the best interest of the child.*"

Although the trial court made specific findings it did not make a specific reference to the statutory presumption and specifically that grandmother had overcome the presumption by clear and convincing evidence [PRACTICE TIP: be prepared to provide the court with proposed findings of fact and conclusions of law at the conclusion of your case or attach the same to your trial memorandum].

41. **Husk v. Adelman**, 281 Or App 378 (2016). CA158504. Mother's former partner was awarded third party visitation under ORS 109.119. The trial court was (mostly) upheld by the Court of Appeals, on a clear and convincing standard. Mother and her former partner were originally going to adopt a child together but later mother changed her position and adopted the child as her own. Several experts testified regarding the child's needs and whether mother's limitations on her partner's visitation schedule was appropriate and in the best interests of the child or self-serving and retaliatory. *De novo* review was requested but not adopted by the Court. Apart from the interesting fact pattern and the battle of the experts, this case is interesting in other respects. As to the "clear and convincing" standard required in ORS 109.119, when an "ongoing personal relationship" is present, the Court of Appeals made it clear that "... the clear and convincing standard of proof applies only to the courts' ultimate determination. The courts' subsidiary factual findings including [any of the statutory rebuttal factors] need only be found by a preponderance of the evidence ..." Mother did prevail in one aspect. The Court of Appeals reversed the trial court's order that partner receive access to child's medical and educational records, finding that such an order was beyond the authority granted to the court under ORS 109.119(3)(b) which provides only "visitation or contact rights." Finally, in a footnote, the court reiterated prior holdings that the constitutional requirements set forth in *Troxel v. Granville* 530 US 57 (2000) are satisfied once ORS 109.119 is applied properly.

42. **Holt and Atterbury**, 291 Or. Ap. 813 (2018). The Court upheld an award of custody of child to grandparents. In doing so it validated the construct that the Court is to use when determining if the birth parent presumption has been rebutted:

*"Further, when determining whether the presumption the legal parent acts in the best interest the child has been rebutted, "the court's focus is not in whether one or more of the statutory factors are present, but on whether the evidence as a whole is sufficient to overcome the presumption that the parent acts in the best interest of the child. \* \* \* Put another way, "[i]n specific cases, the weight to be given to each of the five statutory factors, to the evidence supporting those factors, and to other relevant evidence, will vary." Id. at 823-824 (internal citations omitted)*

In contrast to **Jensen** (see case note 24), here the Court found that the child's residence with grandparents 5-6 days a week met the "day to day" basis requirement to establish a child-parent relationship under ORS 109.119(10)(a).

## DEMONSTRATING HARM TO THE CHILD - WHAT IS ENOUGH?

**Query:** Is the court expecting empirical or objective evidence that a transfer to a birth parent's full custody from a psychological parent would cause psychological harm to a child? How does one establish such evidence? Perhaps, some children may have to actually suffer psychological harm to form an empirical base. If a child is psychologically harmed as a result of the transition, does this constitute grounds for a modification? How long does one have to wait to assess whether psychological harm is being done - 6 months? One year? Some guidance is offered from the following cases.

Although Amended ORS 109.119 provides that the natural parent presumption may be rebutted if "circumstances detrimental to the child exists if relief is denied," summary evidence that a child would be harmed through a transition to the custodial parent will not be adequate. In *State v. Wooden* [Case Note 8], the testimony of noted child psychologist Tom Moran, that moving the child now "would be devastating and traumatic" was not sufficient. The court was critical as to the narrow scope of Dr. Moran's analysis - he did not perform a traditional custody evaluation "instead, he offered an opinion - - based solely on his limited contact with the child - - on the narrow issue of the probable effect of awarding custody 'right now'." Moran was also rebutted by Dr. Jean Furchner, who recommended that custody be awarded to father after a transition period of between 6 to 12 months.

In the *Strome* case [Case Note 9], the court majority discounted the testimony of Dr. Bolstad (who, in contrast to Dr. Moran in *Wooden*, did a comprehensive evaluation including mental health testing) that found the children to be "significantly at risk." The majority preferred the testimony of evaluator Mazza who evaluated Father and the children only, albeit in a more intensive fashion. *Strome* reversed the trial court and awarded custody to father drawing a dissent of 4 members of the court.

Five members of the *Winczewski* court [Case Note 13], agreed that the facts demonstrated that birth mother was unable to care adequately for the children and that the children would be harmed if grandparent's were denied custody. That decision relied in part on the opinion of custody evaluator Dr. Charlene Sabin, whose report contained extensive references to mother's inability to understand the needs of the children; her unwillingness to accept responsibility for the children's difficulties and her very limited ability to distinguish between helpful and harmful conduct for the children. Viewing the same evidence through a different prism, Judge Edmonds and 4 members of the court determined that such evidence was inadequate to meet the constitutional standard. Judge Schuman and Judge Armstrong would have required evidence "far, far more serious" than presented to deny mother custody.

In the Supreme Court's *Lamont* decision [Case Note 16], the court specifically interpreted the "harm to child" rebuttal factor, ORS 109.119(4)(a)(B). Although the statutory language appeared to include a "may cause harm" standard, the Supreme Court adopted a limiting construction finding that "circumstances detrimental to the child" (ORS 109.119(4)(a)(B) "\*\*\*\*refers to circumstances that pose a **serious present risk** of psychological, emotional, or physical harm to the child." The use of the reference to "serious

present risk” is significant. The court specifically rejected an interpretation that the birth parent presumption could be overcome merely by showing that custody to the legal parent “may” cause harm. *Id.* at 112-113. While helpful, this does not end the analysis. Although the harm may occur in the future, arguably an expert can testify that a transfer of custody to a birth parent presents a serious present risk of harm even though the actual harm may occur in the future. Regardless of how one articulates the standard, it is clear from *Lamont* and *Van Driesche* [Case Note 18] that expert testimony will be required to demonstrate harm to the child and likely be necessary in order to demonstrate deficits or incapacity of a parent.

The trend in recent cases is to focus on the current, not past, parenting strengths and weaknesses of the birth parent, particularly where the birth parent has made a substantial effort at rehabilitation or recovery. Recent cases also suggest that the importance of preserving the stability achieved with a third-party and avoiding the trauma due to a change of custody may not be sufficient to meet the “serious present risk of harm” standard. This is particularly so where the third-party and birth parent are cooperating [*Dennis*, Case Note 20] and a reasonable transition plan can be developed. On the other hand, a third party may be given favorable consideration when he or she has acted as the primary caretaker for a substantial period of the child’s life. [*Kleinsasser*, Case Note 37; *Eppler*, Case note 38].

## DO CHILDREN HAVE CONSTITUTIONAL RIGHTS?

In the ongoing battles between birth parents and third parties, it seems that the rights of children have been largely ignored, except to the extent that the best interests standard is still considered on a secondary level. In *Troxel*, Justice Stevens in dissent found that children may have a constitutional liberty interest in preserving family or family-like bonds. In a challenge that does not appear to have been taken root in post-*Troxel* jurisprudence, Justice Stevens warned:

“It seems clear to me that the due process clause of the 14<sup>th</sup> Amendment leaves room for states to consider the impact on a child of possibly arbitrary parental decisions that neither serve nor are motivated by the best interests of the child.” 120 S. Ct. at 2074.

Contrast Justice Stevens’ opinion with the recent case of *Herbst v. Swan* (Case No. B152450, October 3, 2002, Court of Appeals for the State of California, Second Appellate District), applying *Troxel* and reversing a decision awarding visitation to an adult sister with her half-brother (after their common father died). The statute was determined to be an unconstitutional infringement upon the mother’s right to determine with whom the child could associate.

In *Winczewski* [Case Note 13], Judge Brewer, citing a number of cases from other states and literature from journals, noted: “In the wake of *Troxel*, courts are beginning to recognize that ‘a child has an independent, constitutional guaranteed right to maintain contact with whom the child has developed a parent-like relationship.’” 188 Or App at 754. Judge Brewer recognized that “\*\*\*it is now firmly established that children are persons within the meaning of the constitution and accordingly possess constitutional rights.” 188 Or App at 752. But such rights are not absolute: “When the compelling rights of child and parent are pitted against each other, a balancing of interest is appropriate.” 188 Or App at 750. In the final analysis, however, Judge Brewer did not articulate the parameters of a child’s constitutional right and how that is to be applied, concluding only that a child’s constitutional right “to the preservation and enjoyment of child-parent relationship with a non-biological parent is both evolving and complex.” 188 Or App at 756. It would appear that Judge Brewer would be content to consider a child’s constitutional right as part of the best interest analysis, but only if the *Troxel* presumption has been rebutted. 188 Or App at 756. Commenting upon Judge Brewer’s analysis, Judge Schuman and Judge Armstrong were sympathetic to “a more sensitive evaluation of the child’s interest than *Troxel* appears to acknowledge,” but refused to accord to a child a free-standing fundamental substantive due process right. Rather, Judge Schuman and Judge Armstrong would accord a child “an interest protected by the state as *parens patriae*” rather than as a right. 188 Or App at 761.

In the 2003 and 2005 legislative sessions, this author proposed legislation (SB 804 [2003], SB 966 [2005]) which would mandate the appointment of counsel for children in contested custody third party v. parent proceedings, unless good cause was shown. Counsel would be appointed at the expense of the litigants, but each court would be required to develop a panel list of attorneys willing to represent children at either modest means rates or pro bono. The legislation stalled in committee in 2003 and 2005 with opponents citing cost considerations to litigants and that the court’s discretionary power was adequate.

For further information about the implications of *Troxel* on children and families, see: Barbara Bennett Woodhouse, *Talking about Children’s Rights in Judicial Custody and Visitation Decision-Making*, 33 Fam. L.Q. 105 (Spring 2002); *Family Court Review*, An Interdisciplinary Journal, Volume 41, Number 1, January 2003, Special Issue: *Troxel v. Granville and Its Implications for Families and Practice: A Multidisciplinary Symposium*; Victor, Daniel R. and Middleditch, Keri L., *Grandparent Visitation: A Survey of History, Jurisprudence, and Legislative Trends Across the United States in the Past Decade*, 22 J. Am. Acad. Matrimonial Lawyers 22, 391 (Dec. 2009); and Atkinson, Jeff, *Shifts in the Law Regarding the Rights of Third Parties to Seek Visitation and Custody of Children*, 47 F.L.Q. 1, 34 (Spring 2013).

### **TIPS AND WARNINGS**

- ORS 109.121-123 (former grandparent visitation statutes) were abolished. Now, grandparents are treated as any other third parties seeking visitation or custody. Therefore a grandparent-child relationship which has languished for more than a year

may result in the loss of any right to make a claim. (However Grandparents are given some special consideration in juvenile court proceedings. ORS 419B.876)

- Although ORS 109.119 does not require the specific pleading of facts to support the rebuttal of the parental parent presumption, some trial courts have required this and have dismissed petitions without such allegations.
  - ORS 109.119 requires findings of fact supporting the rebuttal of the parental parent presumption. Be prepared to offer written fact findings to the court.
  - It may be appropriate to seek appointment of counsel for the children involved. ORS 107.425 applies to psychological parent cases. It mandates the appointment of counsel if requested by the child and permits the appointment of counsel at the request of one of the parties. Expense for the appointment is charged to the parties.
  - Custody and visitation evaluations are authorized upon motion at the parties' expense. This evidence is critical to the issue of the presumption as well as best interests of the child. An evaluator should be prepared to speak to issues of attachment (both to the birth parent and the third party); potential short and long term emotional harm if the child is placed with the birth parent or third party.
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- The application of third party rights in the juvenile court has been substantially restructured. See ORS 419B.116; 419B.192; 419B.875; 419B.876 In 2003, the legislature created a new form of guardianship that would permit third parties to have custody of children under a court's wardship, but without the involvement of the Department of Human Services (DHS). (ORS 419B.366).
  - Request findings of fact pursuant to ORCP 62 at the outset of your case and be prepared to draft the findings for the court. This will reduce the likelihood of remand if an appeal is successful.
  - Whether representing a birth parent or a third-party, counsel should consider and present to the court a detailed transition plan to guide the court's decision in the event that a change of custody is ordered.

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**COMPARISON - GUARDIANSHIP VS. PSYCHOLOGICAL PARENT STATUTES**

| <b>ISSUE</b>  | <b>GUARDIANSHIP</b>                  | <b>PSYCHOLOGICAL PARENT</b>                            | <b>NOTES</b>   |
|---|--------------------------------------|--|--|
| <b>Can you seek Custody?</b>                          | Yes ORS 125.315                      | Yes ORS 109.119(3)(a)                                  |  |
| <b>Relatives Preferred?</b>                           | Yes ORS 125.200                      | No (Except in Juvenile Court)                          |  |
| <b>Can you seek Visitation/Contact?</b>               | Maybe ORS 125.315                    | Yes ORS 109.119(3)(b)                                  | Court has authority as an incident of guardianship   |
| <b>Prior Custody or Relationship Status Required?</b> | No                                   | Yes ORS 109.119(1)                                     | <i>Troxel</i> presumption and ORS 109.119 rebuttal factors apply if a legal parent object to a guardianship - See <i>Burk v. Hall</i> , 35 Or App 113 (2003) |
| <b>Ex Parte Status Quo Order Possible?</b>            | No (But see temporary custody below) | Maybe ORS109.119(3)(a), ORS 109.119(3)(b), ORS 107.097 |  |
| <b>Temporary Custody Possible?</b>                    | 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.                                  |
| <b>Can Custody Evaluation Be Ordered?</b>             | 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.                             |

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|--|--|--|--|
| <b>Can Child Support Be Ordered?</b>     | 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   |
| <b>Can Attorney Fees Be Awarded?</b>     | No   | Yes ORS 109.119(7)(b)                            |  |
| <b>Standard of Proof Required</b>        | Clear and Convincing ORS 125.305                           | Preponderance ORS 109.119(3)(a)                  |  |
| <b>Can Order Be Modified/Terminated?</b> | Yes ORS 125.225  | Yes ORS 107.135(a)<br>Also see ORS 109.119(2)(c) | Change of Circumstances likely required for modifications of ORS 109.119 Custody Judgments; Only Best Interests required for termination of Guardianship |
| <b>Post Judgment Obligations</b>         | Annual Report Required ORS 125.325; Mult. Co. SLR 9.075(4) | None   |  |