IN THE
COURT OF APPEALS OF MARYLAND

September Term, 2003

No. 6

DEBORAH FRASE,

***Petitioner*.**

v.

CYNTHIA BARNHART, *et al.*,

Respondent.

On Appeal from the Circuit Court for Caroline County
(Jo Ann Asparagus, Master)

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONER DEBORAH FRASE

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STATEMENT OF THE CASE

The University of Baltimore Family Law Clinic and the Women's Law Center (*Amici*) filed a motion to participate in this case as A*mici Curiae* in support of the Petitioner, Deborah Frase, in the Court of Special Appeals. That court granted *Amici*'s motion on April 9, 2003. The Petitioner filed a Petition for a Writ of Certiorari to the Court of Appeals, which was also granted on April 9, 2003.

QUESTIONS PRESENTED

I. Whether any third party, regardless of her relationship with the child, has standing to seek court-ordered visitation over the objection of a fit parent.

II. Whether visitation can be awarded to a third party over the objection of a fit parent without first applying the presumption that a fit parent acts in the best interest of her child and then requiring a showing of harm or potential harm to the child if visitation is denied.

III. Whether limited existing *pro se* assistance available in Maryland to indigent litigants is an adequate substitute for legal representation in contested custody cases.

STATEMENT OF FACTS

Ms. Frase is the fit parent of a three-year old son, Brett Michael (E-257). In November, 2001, Ms. Frase placed Brett Michael in the temporary care and custody of family friends from her church when she was incarcerated for possession with intent to distribute three ounces of marijuana (E 50-51). A few weeks after Ms. Frase was incarcerated, Ms. Keys, her mother, placed Justin, her older son, and Brett Michael with the Barnharts, and placed Tara, her daughter, with another family, the Eskows (E-50).

The only relationship that the Barnharts had with the Frase family was that Mr. Barnhart was the leader of Justin's Boy Scout troop (E-160, 199-200, 204, 209, 216).

Ms. Frase pled guilty to the marijuana charge on January 15, 2002 (E-457). The Honorable William S. Horne sentenced her to eighteen months but suspended all but the eight weeks she had already served (E-51). Ms. Frase was released in January, 2002 and immediately attempted to retrieve Tara and Brett Michael. Ms. Frase did not know where the Barnharts lived, and Ms. Keys refused to take her to the Barnharts until Ms. Frase told her she would call the police for assistance (E-52). Ms. Frase was reunited with Brett Michael on January 19, 2002 (E-52). Three days later, the Barnharts filed a complaint for custody of Brett Michael (E 367-77). Ms. Frase filed a *pro se* answer and counterclaim for custody of Brett Michael (E 385-91).

Despite an exhaustive search for counsel, Ms. Frase could not find a lawyer to represent her (E 4, 163, 172). Although she was financially eligible for representation by the Legal Aid Bureau and other legal services programs, Ms. Frase was told they could not represent her because they were "understaffed and over worked" (E 4). The only help offered by the court in response to a request for appointed counsel was the suggestion from the master instructing Ms. Frase that "[i]f you need help with preparing your case come to the *Pro Se* Clinic because you should always find out what your witnesses are going to say before you call them to the stand" (E 9-10).

SUMMARY OF ARGUMENT

The University of Baltimore Family Law Clinic and The Women's Law Center of Maryland, organizations that have vast and varied experience and expertise in matters of

family law, are involved in this case because it raises several significant issues of first impression under Maryland law. The resolution of these issues will have far-ranging consequences for Maryland's families. The two issues this brief addresses are first, which third parties should have standing to seek visitation over the objection of fit parents and under what circumstances should such visitation be granted; and second, whether the available assistance for *pro se* litigants in Maryland is adequate to protect litigants' fundamental rights in contested custody cases.

The first issue involves a difficult and emotional area of family law---third party[1] visitation. Specifically, this case challenges this Court to reconsider and delineate the parameters of third party visitation in Maryland. This re-evaluation is necessitated by the decision of the Supreme Court in *Troxel v. Granville*, 530 U.S. 57 (2000).

The long-recognized fundamental right of parents in the care, custody, and control of their children, protected by the Due Process Clause of the Fourteenth Amendment, was reaffirmed in *Troxel* in the context of a visitation dispute between a fit mother and her children's paternal grandparents. *Troxel*, 530 U.S. at 66.[2] In *Troxel*, the grandparents, who were not happy with their limited visitation with their two granddaughters after the death of their son, sued the mother of the children under the visitation statute then in effect in Washington State. *Id.* at 61. That statute allowed "any person" to petition for visitation rights "at anytime," and authorized the court to grant visitation whenever it was in "the best interest of the child." WASH. REV. CODE § 26.10.160(3) (1994). The Court

[1] "Third party" as used here and throughout this brief means anyone who is not a parent or legal guardian of the child.
[2] For a discussion of the historical development of this fundamental right, see *Troxel*, 530 U.S. at 65-66.

held that this statute, as applied to a fit mother, unconstitutionally infringed on her fundamental right to make decisions concerning the care, custody, and control of her children. *Troxel*, 530 U.S. at 67.

The plurality opinion[3] focused on two flaws in the Washington statute, a statute that it found to be "breathtakingly broad." *Id*. The first flaw was that the statute effectively gave standing to seek court review of a parent's decision concerning visitation to any third party without limitation. *Id.* The second flaw was that the statute gave no deference to a fit parent's decision that visitation would not be in the child's best interest, thereby ignoring the presumption that fit parents act in the best interest of their children and instead leaving the determination of whether visitation is in a child's best interest to the courts. *Id*.

The current approach of Maryland law to third party visitation is essentially the same as that of the Washington statute in *Troxel*. Under Maryland law any third party can seek visitation at anytime without limitation. *Evans v. Evans*, 302 Md. 334, 339-43, 488 A.2d 157, 159-62 (1985). In addition, under Maryland law, the determination of whether visitation is in a child's best interest is left to the courts without deference to a fit parent's decision about visitation. *Fairbanks v. McCarter*, 330 Md. 39, 49, 622 A.2d 121, 126 (1993). Although *Troxel* did leave the task of defining the standards for third party visitation to the states, *Troxel*, 530 U.S. at 73, no clear standards have emerged from post-*Troxel* case law in Maryland. See *In re Tamara R.*, 136 Md. App. 236, 764 A.2d

[3] In *Troxel* there were six separate opinions: the plurality opinion written by Justice O'Connor, two concurring opinions by Justice Souter and Justice Thomas, and three dissenting opinions by Justice Stevens, Justice Scalia, and Justice Kennedy.

844 (2000); *Brice v. Brice*, 133 Md. App. 302, 754 A.2d 1132 (2000); and *Gestl v. Frederick*, 133 Md. App. 216, 754 A.2d 1087 (2000) discussed below. Even though each of these cases acknowledges fit parents' fundamental rights to make decisions concerning the care, custody, and control of their children, none of the decisions develop a framework to adequately safeguard those fundamental rights in visitation disputes with third parties.

In light of *Troxel*, this Court should adopt a two-step test for use in visitation disputes between fit parents and third parties. Step one, in order to have standing to seek visitation, third parties must prove that they have a parent-like relationship with the child they wish to visit, and step two, in order to be granted visitation over the objection of a fit parent, a person who has standing must rebut the presumption that fit parents act in the best interest of their children by proving that a denial of visitation will cause harm or potential harm to the child. Each of these steps will be discussed in turn.

This brief also discusses the *pro se* assistance available to the fit parent in this case. This limited assistance was inadequate to protect her fundamental right to the care, custody, and control of her child without State interference.

ARGUMENT

I. THIRD PARTIES SHOULD NOT HAVE STANDING TO SEEK VISITATION OVER THE OBJECTIONS OF A FIT PARENT UNLESS THE THIRD PARTIES CAN PROVE THAT THEY HAVE A PARENT-LIKE RELATIONSHIP WITH THE CHILD.

A. The Adoption Of A Standing Requirement Will Protect The Constitutionally-Protected Fundamental Rights of Fit Parents By Limiting Unwarranted Intrusion Into Their Child-Rearing Decisions And Minimizing The Emotional and Financial Burdens Of Litigation.

As the Supreme Court recognized, one of the flaws in the Washington statute at issue in *Troxel* was that it placed no limits on who may petition for visitation. *Troxel*, 530 U.S. at 73. The same flaw exists in Maryland law. By adopting a standing requirement, this Court will cure that flaw.

At common law, only parents had standing to seek visitation with their children. *Succession of Reiss*, 15 So. 151 (La. 1894). *See also, Preston v. Mercieri*, 573 A.2d 128 (N.H. 1990). In the 1960's, states began enacting statutes that gave third parties, most often grandparents, standing to seek court–ordered visitation. By June of 2000, when *Troxel* was decided, all fifty states had enacted some type of third party visitation statute. *Troxel*, 530 U.S. at 74, n.1.

Currently in Maryland, anyone has standing to seek visitation with any child. Grandparents are given standing by statute to seek visitation with their grandchildren, MD. CODE ANN., FAM. LAW § 9-102 (2002),[4] and the Court of Appeals has held that the statute does not limit standing in visitation cases to grandparents. *Evans*, 302 Md. at 343-44, 488 A.2d. at 162. The court in *Evans*, which held that there are no statutory limitations on who can seek visitation in Maryland, granted standing to a stepmother to petition for visitation with her ex-husband's son, whom she did not adopt. Since the decision in *Troxel*, the Court of Special Appeals has held that a de facto parent, *Gestl*, 133 Md. App. 216, 754 A.2d 1087, and siblings, *In re Tamara R.*, 136 Md. App. 236, 764 A.2d 844, also have standing to seek visitation.

[4] This statute was found unconstitutional only as applied to the facts in *Brice*, 133 Md. App. at 309, 754 A.2d at 1136, where the court found the facts to be "strikingly similar" to those in *Troxel.*

The fundamental right of parents in the care, custody, and control of their children that must be protected in this case "is perhaps the oldest of the fundamental liberty interests" recognized by the Supreme Court. *Troxel*, 530 U.S. at 65. Beginning in 1923, the Court has held that the Due Process Clause protects the rights of parents to "establish a home and bring up children" and "to control the education of their own." *Meyer v. Nebraska*, 262 U.S. 390, 399, 401 (1923). As noted by the Court in *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972), the "primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." *Troxel* reiterated the importance of these fundamental parental rights in the context of a fit parent's decisions about visitation.

In *Troxel*, both Justice O'Connor writing for the plurality and Justice Kennedy in his dissent, recognized that giving any third party standing to seek visitation can unconstitutionally infringe on the fundamental rights of fit parents. "[T]he burden of litigating a domestic relations proceeding can itself be 'so disruptive of the parent-child relationship that the constitutional right of a custodial parent to make certain basic determinations for the child's welfare becomes implicated.'" *Troxel*, 530 U.S. at 75 (*quoting* Kennedy, J., dissenting, 530 U.S. at 98). In fact, the plurality refused to remand the case for further proceedings, emphasizing its concern about the already substantial cost of litigation for the mother and the further burden of additional litigation on her fundamental parental rights. *Id.* at 75.

Other courts have echoed these concerns. When fundamental rights are involved,

a standing requirement insures that an individual's "personal affairs are not needlessly intruded upon and interrupted by the trauma of litigation." *Roth v. Weston*, 789 A.2d 431, 442 (Conn. 2002). In *Roth*, which involved a visitation dispute between the father of the children, and the maternal grandmother and maternal aunt, the court concluded that a standing requirement was the "jurisdictional safeguard necessary to prevent families from having to defend against unjustified petitions for visitation." *Roth*, 789 A.2d at 443.

Similarly, in *Lulay v. Lulay*, 739 N.E.2d 521 (Ill. 2000) the court found the burden on parents of litigating a contested visitation case to be a "significant interference with their fundamental rights," specifically noting that the necessity to hire counsel, present evidence, and defend their parenting decisions in court diminishes the parents' authority over their children. *Id*. at 531. Likewise, the court in *Rideout v. Riendeau*, 761 A.2d 291 (Me. 2000), characterized a standing requirement as a safeguard against unwarranted intrusions into the lives of families and noted that requiring proof of standing before litigation can proceed helps protect against the "expense, stress, and pain" of litigation for parents. *Id*. at 303.

It is the obligation of this Court to recognize and protect the fundamental rights of parents in Maryland by imposing a standing requirement on third parties who seek visitation with other people's children. Any and all third parties should not be allowed to subject parents' decisions about visitation to court scrutiny and inflict the emotional and financial burdens of litigation on families.

B. In Order To Grant Standing To A Third Party Over The Objection Of A Fit Parent, The Trial Court Must Find That The Third Party Has A Parent-Like Relationship With The Child.

Although the Court in *Troxel* urged states to limit the circumstances in which third-party visitation can be ordered over the objection of fit parents, *Troxel*, 530 U.S. at 73, the Court's decision did not dictate a particular approach to limiting which third parties may seek visitation. States have taken various approaches when drawing this line. All fifty states have third-party visitation statutes, and there are as many variations in the statutes as there are statutes themselves, making them hard to categorize. However, there are several basic approaches to standing that are used in different combinations in various statutes.

One approach is to grant standing according to status – grandparents are always included, sometimes other relatives[5] are as well. Another approach is to give standing only in situations where there has been some type of disruption in the child's family, such as divorce or death of one of the child's parents.[6] A third approach, the one advanced by *Amici,* is a functional approach that is based upon the relationship between the person seeking visitation and the child.[7]

The problem with standing only for specified relatives is twofold. First, which relatives should be included? Do you stop at grandparents, or do you include great grandparents, siblings, aunts, uncles, cousins, and so forth? Second, if standing is given only to relatives, regardless of who they are, what happens to other third parties who

[5] *See, e.g.,* IDAHO CODE § 32-719 (Michie 2000) (grandparents and great-grandparents); KY. REV. STAT. ANN. § 405.021 (Michie 2002)(paternal or maternal grandparents); R.I. GEN. LAWS § 15-5-24.3 (2002) (grandparents and siblings).
[6] NEV. REV. STAT. § 125C.050 (2003) (death, divorce, or separation); ME. REV. STAT. ANN. tit. 19, § 1803 (West 2003)(death of a parent or legal guardian).
[7] *See infra* notes 8-13.

might be worthier of visitation based upon their relationship with the child than those enumerated relatives? In rejecting an approach that confers standing based upon a third party's status as a relative, *Amici* are not assuming that grandparents and other members of a child's extended family "are unimportant to a child's welfare but, rather, that the interests of children are best served when access by adults who are not the child's parents is controlled by those who are." PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS & RECOMMENDATIONS § 2.03 (American Law Inst. 2000).

As to statutes that premise standing on some type of disruption in the child's family, at one time Maryland had such a statue. Prior to October 1, 1993, Maryland's statute gave grandparents standing to petition for visitation only in cases where their child's marriage had been terminated by divorce, annulment, or death. However, that limitation was eliminated by the General Assembly, and the statute currently in effect does not require disruption in the family in order for a grandparent to have standing to seek visitation.

The third option, a functional approach based upon the relationship the third party has with the child, is the best determinant of who should have standing to seek visitation. State legislatures have expressed the relationship between the third party and the child in different ways: "emotional ties creating a parent-child relationship,"[8] "a meaningful relationship with a person with whom the child has resided,"[9] "a relationship similar to a

[8] OR. REV. STAT. § 109.119 (2001); MINN. STAT. § 257C.08 (2002).
[9] NEV. REV. STAT. 125C.050 (2003).

parent-child relationship,"[10] "on going personal contact with the child,"[11] "a significant relationship,"[12] and a "significant beneficial relationship."[13]

The descriptions of the required relationships under state statutes vary from the most significant, that of a parent-like relationship, to the most casual, which only requires "on going personal contact." While children usually have important relationships with many different individuals, relatives as well as non-relatives, all of those individuals cannot be allowed to seek court-ordered visitation with that child. Furthermore, from a child's point of view, not all relationships with third parties are equally important. *See* Sally F. Goldfarb, *Visitation for Nonparents After Troxel v. Granville: Where Should States Draw the Line?* 32 RUTGERS L.J. 783, 793 (2001). The most important relationship that a child can develop with a third party is a parent-like relationship. *See, e.g., Roth, supra* 789 A.2d at 443, (holding that any third party, including grandparents, must allege and prove that they have a parent-like relationship with the child in order to have standing to seek visitation with that child.)

Requiring proof of a parent-like relationship before a third party has standing to seek visitation insures that the third party has a colorable claim to visitation before subjecting the visitation decisions of fit parents to court scrutiny. What constitutes a colorable claim will vary from case to case based on the particular facts and circumstances. Two factors converge in determining whether a parent-like relationship exists. One is the role the third party has played in the child's life. The other is the

[10] WIS. STAT. § 767.245 (2002).
[11] ALASKA STAT. § 25.20.065 (Michie 2000).
[12] WASH. REV. CODE § 26.09.240 (2003). This statute replaces the statute held unconstitutional as applied in *Troxel.*
[13] NEB. REV. STAT. § 43-1802 (2002).

length of time that relationship has existed. Although some states have specified a minimum amount of time, a more flexible approach is desirable. While the few short weeks that Ms. Frase's child stayed with the Barnharts is clearly inadequate to create a parent-like relationship, the period of time required to satisfy this factor should not be fixed. Other factors for the court to consider include whether the child regards the adult as a parent figure, and the extent to which the third party has assumed the duties and responsibilities of parenthood. Goldfarb, 32 RUTGERS L.J. at 793.

Giving standing to a third party who has a parent-like relationship with a child recognizes the child's potential need to continue that most important relationship, and allows the third party to prove that that relationship should be maintained. On the other hand, giving standing to a third party whose relationship with a child falls short of a parent-like relationship would open the gate to neighbors, distant relatives, and virtual strangers as in the case at issue here. These individuals should not be allowed to intrude on the fundamental right of fit parents to decide with whom their children should visit or inflict the emotional and financial burdens of litigation on fit parents.

II. IN A VISITATION DISPUTE BETWEEN A FIT PARENT AND A THIRD PARTY WHO HAS STANDING, THE TRIAL COURT MUST APPLY THE PRESUMPTION THAT A FIT PARENT ACTS IN THE BEST INTEREST OF HER CHILD, AND THIS PRESUMPTION CAN BE REBUTTED ONLY BY EVIDENCE OF HARM TO THE CHILD IF VISITATION IS DENIED.

A. *Troxel* Mandates The Application Of A Rebuttable Presumption That A Fit Parent Acts In The Best Interest Of Her Child To Protect The Parent's Fundamental Rights.

In *Troxel*, a majority of the Supreme Court held that decisions made by fit parents regarding third party visitation are presumed to be in their child's best interest. Speaking for the plurality, Justice O'Connor stated, "there is a presumption that fit parents act in the best interests of their children," *Troxel*, 530 U.S. at 68 (*quoting, Parham v. J.R.*, 442 U.S. 584, 602 (1979), and in separate opinions Justices Souter,[14] Stevens,[15] and Kennedy[16] recognized the validity of the presumption as well. Citing *Reno v. Flores*, 507 U.S. 292, 304 (1993), Justice O'Connor wrote:

> [S]o long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.

Troxel, 530 U.S. at 68-69.

In keeping with this presumption, *Troxel* found fault with the Washington statute governing third-party visitation because "a parent's decision that visitation would not be in the child's best interest [was] accorded no deference." *Id.* at 67.[17] The *Troxel* plurality concluded that in applying the statute, the trial court "failed to provide any protection for Granville's fundamental right to make decisions regarding the rearing of her own daughters." *Id*. at 70. The Court found that the Washington court's failure to accord the parents' decision any presumptive validity was unconstitutional. *Id*. at 72. As Justice O'Connor stated, "the Due Process Clause does not permit a state to infringe on the

[14] *Troxel*, 530 U.S. at 78, n.2 (Souter, J. concurring in judgment).
[15] *Id*. at 87 (Stevens, J. dissenting).
[16] *Id.* at 98 (Kennedy, J. dissenting).
[17] The plurality criticized the framework of the Washington trial court's decision, noting that the court reversed the presumption, placing the burden on the fit custodial parent to *disprove* that visitation would be in the best interest of her daughters. *Id.* at 69.

fundamental right of parents to make childrearing decisions simply because a trial judge believes a 'better' decision could be made." *Troxel*, 530 U.S. at 72-73.

It is clear after *Troxel* that state courts can not base decisions in third-party visitation cases solely on what the judge determines is in the best interest of the child. In order to adequately protect the Due Process rights of parents, state courts must first apply the rebuttable presumption that fit parents act in the best interests of their children. *Id*. Neither Maryland case law governing third-party visitation nor the Maryland grandparent visitation statute[18] expressly mandates application of that presumption. *Wolinski v. Browneller*, 115 Md. App. 285, 312, 693 A.2d 30, 37 (1997). [19] Instead, construing the Maryland grandparent visitation statute, this Court in *Fairbanks* stated, "the outcome of the grandparents' petition lies within the sound discretion of the trial court, guided solely by the best interest of the grandchild." *Fairbanks*, 330 Md. at 49, 622 A.2d at 126.[20] Unfortunately, the *Fairbanks* analysis is susceptible to the same criticism leveled against the Washington State statute in *Troxel*, because it "… places the best-interest determination solely in the hands of the judge." *Troxel*, 530 U.S. at 67.

In *Roth v. Weston, supra*, the Connecticut Supreme Court recognized the need post-*Troxel* to apply this presumption, notwithstanding its statute that relied solely on

[18] MD. CODE ANN., FAM. LAW § 9-102.

[19] In *Wolinski*, 115 Md.App. at 315, 693 A.2d at 42, the Court of Special Appeals held in a dispute over the amount of visitation appropriate under the grandparent statute that there is a presumption that a parent's proposed schedule for visitation was in the child's best interest.

[20] This Court has applied a presumption similar to that discussed in *Troxel* in third party custody cases, holding in *Ross v. Hoffman*, 280 Md. 172, 178-179, 372 A. 2d 582, 587 (1977), that there is a presumption that the child's best interest is served by custody in the parent. The presumption is overcome and custody will be denied if (a)the parent is unfit to have custody, or (b) if there are such exceptional circumstances as make such custody detrimental to the best interest of the child. *Shurupoff v. Vockroth*, 372 Md. 639, 814 A.2d 543 (2003), *citing Ross*, 280 Md. at 178-79, 372 A.2d at 587.

best interest. Finding that "on its face, the statute ignores the presumption that parents act in the best interest of their children," the court went on to state, "[f]urthermore, it allows parental rights to be invaded by judges based solely upon the judge's determination that the child's best interests would be better served if the parent exercised his parental authority differently." *Roth*, 789 A.2d at 443.

Numerous commentators have noted that the best interest of the child standard is "notoriously vague and indeterminate and permits judges to apply inconsistent and subjective criteria." Goldfarb, *supra*, 32 RUTGERS. L. J. at 790. *See also*, David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 480-85 (1984); Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminancy*, 39 LAW & CONTEMP. PROBS. 226 (1975). Likewise, state courts have entered the fray. As the Supreme Judicial Court of Maine stated, "[t]he best interest of the child standard has at times been criticized as indeterminate, leading to unpredictable results. . . .What is best for children depends upon values and norms upon which reasonable people differ." *Rideout*, 761 A.2d 296, n.5. *See also*, *In re Herbst*, 917 P.2d 395, 399 (Okla.1998).

Relying on the best interest standard alone provides insufficient protections for a parent's constitutionally protected autonomy in third party visitation cases. Using the best interest standard, trial judges, with little personal knowledge of the parties, the circumstances, or the possible ramifications of their decision on the family, may impose their own judgment upon a fit custodial parent and impermissibly interfere with the parent's decision-making authority. By adopting a standard that applies a rebuttable

presumption that the parent's decision is in the child's best interest, this Court will avoid such intrusion into family autonomy and satisfy the constitutional mandates of *Troxel*.

In its decision in *Fairbanks*, this Court enumerated a list of factors for trial courts to consider when determining the best interest of the child under the Maryland grandparent visitation statute.[21] The plurality in *Troxel* cited *Fairbanks* as an example of "state court adjudication on a case by case basis" that might pass constitutional muster. Nevertheless, as the Court of Special Appeals noted in *In re Tamara R:*

> *Troxel* require[s] . . . that we superimpose upon these factors some deference to the parent's determination of what is in the child's best interest. The best way to do this . . . is to apply a presumption that the parent's decision to decline visitation is in the best interest of the child, and to place the burden on the non-parent seeking visitation to rebut that presumption.

136 Md. App. 252, 764 A.2d at 852-53. Articulating similar concerns, the *Tamara R* court emphasized that, "Simply to ignore a parent's wishes regarding the time his or her child should spend outside the family home, and outside of his or her immediate care and custody, is to trample improperly on the parent's liberty interest in directing the upbringing of his or her child." *Id*. at 253.

Adopting Judge Adkins' analysis in *Tamara R*, this Court should hold that in third-party visitation cases in Maryland, there is a presumption that fit parents act in the best interest of their children. Failure to adopt this presumption would contravene the

[21] The factors included, but were not limited to: the nature and stability of the child's relationships with its parents; the nature and substantiality of the relationship between the child and the grandparent, taking into account frequency of contact, regularity of contact, and the amount of time spent together; the potential benefits and detriments to the child in granting the visitation order; the effect, if any, grandparental visitation would have on the child's attachment to the nuclear family; the physical and emotional health of the adults involved; and the stability of the child's living and schooling arrangement. *Fairbanks*, 330 Md. at 49-50, 622 A.2d at 126.

Supreme Court's holding in *Troxel*, and would leave open the door for an unconstitutional infringement upon parental authority in the litigation of third-party visitation cases in Maryland.

B. In Order To Award Visitation To A Third Party Over The Objection Of A Fit Parent, A Trial Court Must Find That The Presumption Has Been Rebutted By Proof Of Harm Or Potential Harm To The Child If Visitation Is Denied.

The plurality in *Troxel* declined to address the "primary constitutional question passed on by the Washington Supreme Court – whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation." *Troxel*, 530 U.S. at 73. Thus, states are left largely to their own devices to determine what third parties must show to rebut the presumption that the parents' decision regarding visitation is in the child's best interest. *See*, Goldfarb, *supra*, 32 RUTGERS L.J. at 786**.**

This Court should adopt a standard that requires third parties to prove harm or potential harm to the child in order to rebut the presumption. While this Court recently stated in *Shurupoff*, 372 Md. at 662, 814 A.2d at 557, that in custody and visitation cases "[t]he court must always, necessarily, inquire into what is in the child's best interest, for that is the ultimate, determinative factor," the question in light of *Troxel* is <u>when</u> the best interest analysis should take place. Clearly, post-*Troxel* courts must apply a stricter standard than the best interest of the child to rebut the presumption. To do otherwise would render the presumption meaningless by allowing a trial court to impose its own

views of what is "better" for the child of perfectly fit parents, exactly what *Troxel* sought to avoid. *Troxel*, 530 U.S. at 72-73.[22]

A number of state courts have held that a third party must first make a showing of harm or potential harm.[23] For example, in *In re Herbst*, 917 P.2d 395 (Okla.1998), the Oklahoma Supreme Court held that a third party must first prove actual or threatened harm before the court reaches the best interest analysis. "Absent a showing of harm, (or threat thereof) it is not for the state to choose which associations a family must maintain and which the family is permitted to abandon." *Id.* at 399. Likewise, the Court of Appeals of Virginia in *Williams v. Williams*, 485 S.E.2d 651, 654 (Va. App. 1997) stated, "the best interest standard is considered in determining visitation only after a finding of harm if visitation is not ordered." As early as 1993, the Tennessee Supreme Court stated:

> The requirement of harm standard is the sole protection the parents have against pervasive state interference in the parenting process. For the state to delegate to the parents the authority to raise the child as the parents see fit, except when the state thinks another choice would be better, is to give the parents no authority at all.

Hawk v. Hawk, 855 S.W.2d 573, 580 (Tenn. 1993)(quoted in *Smith v. Stillwell*, 969 P.2d 21, 29-30 (Wash. 1998), *cert granted sub. nom. Troxel v. Granville*, 527 U.S. 1069 (1999)). [24]

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[22] *See also, Rideout*, 761 A.2d at 301 (best interest allows judges to apply personal and essentially unreviewable life style preferences on parents).

[23] *See, e.g. Roth*, 789 A.2d at 443-44; *Beagle v. Beagle*, 678 So.2d 1271, 1275-77 (Fla. 1996) (state can satisfy compelling interest required under state constitution when acting to prevent harm); *Brooks v. Parkerson*, 454 S.E.2d 769, 773 (Ga. 1995) (holding that "state interference with parental rights to custody and control of children is permissible only where the health or welfare of a child is threatened" under both state and federal constitutions).

[24] In contrast, some jurisdictions do not consider a showing of harm to be constitutionally required before a third party will be afforded visitation over a parent's objections. *See e.g., Kansas Dept. of Social & Rehab. Svcs. v. Paillet*, 16 P.3d 962 (2001)(holding that due process requirements met under statute that requires presumption that fit parents acts in best interest of child and places burden to show otherwise on petitioner); *Zeman v. Stanford*, 789

What constitutes harm will, of course, vary in each case depending upon the nature of the third party's relationship with the child. In some cases where the "parent-like" relationship involves extended, day-to-day care by someone who has assumed the role of parent with the consent of the legal parent, the harm from depriving the child of contact with that "parent by estoppel" or "de facto parent" will be self-evident.[25]

The Connecticut Supreme Court recognized this in *Roth v. Weston* when addressing the type of harm a child might suffer from ceasing to maintain a relationship with a third party. The court stated, "when a person has acted in a parental-type capacity for an extended period of time, becoming an integral part of the child's regular routine, that child could suffer serious harm should contact with that person be denied or so limited as to seriously disrupt that relationship." *Roth*, 789 A.2d at 445. *See also, Williams v. Williams*, 501 S.E.2d 417, 418 (Va. 1998) (requiring the trial court to find "actual harm to the child's health or welfare without such [third party] visitation"); Oklahoma Proposed Statute H.R. 1321, 49th Leg., 1st Sess. (Ok. 2003) ("harm or potential harm means a showing that without court-ordered visitation by the [third party], the child's "emotional or physical well-being would be jeopardized.") On the other hand, where the "parent-like" relationship has occurred for a less extended period and has

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So.2d 798, 804 (Miss. 2001)(noting that "best interest of the child" is paramount consideration); *West Virginia ex rel. Brandon L. v. Moats*, 551 S.E.2d 674 (W.Va. 2001) (concluding that two-prong standard of best interest of child and lack of substantial interference with parents' rights meets *Troxel* requirements).

[25] "Parent by estoppel" and "defacto parent" are defined in the American Law Inst., *supra* § 2.03 at 110. Although Maryland has not codified these categories of "parents," the courts have recognized the right of such a "parent" to seek visitation. *See e.g., S.F. v. M.D.*, 132 Md. App. 99, 751 A.2d 9 (2000). The standard we propose should not disturb the court's holding in that case. *See also,* Nancy Polikoff, *The Impact of Troxel v. Granville on Lesbian and Gay Partners*, 32 RUTGERS L.J. 825 (2001).

involved less substantial involvement in the child's day to day care, harm will not be self-evident.

Once the presumption has been rebutted by a showing of harm, a trial court must apply the best interest of the child standard to determine the appropriate schedule of visitation for the child with the third party. It is at this point in the analysis that the trial judge would consider factors similar to those enumerated by this Court in *Fairbanks*, such as the physical and emotion health of the adults involved and the effect visitation would have on the child's attachment to the nuclear family,[26] to determine a visitation schedule that would best serve the child's interests.

Finally, the question remains what standard of proof should be required to rebut the presumption by a finding of harm. Although several state courts have held that harm must be established by clear and convincing evidence,[27] we are cognizant of this Court's recent analysis in *Shurupoff*, holding in a case involving third-party custody that the clear and convincing evidence standard "was neither constitutionally required nor appropriate." *Shurupoff*, 372 Md. at 660, 814 A.2d at 556. In light of *Shurupoff*, it appears the preponderance of the evidence standard of proof is applicable in third party visitation cases as well.

In sum, in order to protect the fundamental rights of fit parents, this Court should adopt a two-step test in third-party visitation cases that require third parties to: 1) establish standing by proving that they have a parent-like relationship with the child, and

[26] *See supra*, footnote 21.
[27] *See, e.g., Roth, supra*, 789 A.2d at 448; *In re Marriage of Harris*, 112 Ca. Rptr.2d 127, 130 (Cal. 2001); *Hunter v. Carter*, 485 S.E.2d 827, 829-30 (Ga. 1997).

2) prove harm or potential harm to the child to overcome the presumption that a fit parent acts in the child's best interest, before a trial court can override the parent's decision to deny visitation.

III. THE LIMITED ASSISTANCE AVAILABLE TO *PRO SE* LITIGANTS IN MARYLAND IS NOT ADEQUATE TO PROTECT PARENTS' FUNDAMENTAL RIGHTS IN CONTESTED CUSTODY CASES[28]

Lack of access to the courts to resolve domestic disputes is a longstanding problem in Maryland and throughout this country. *See e.g.*, Jane Murphy, *Access to Legal Remedies: The Crisis in Family Law*, 8 B.Y.U. J. PUB. L. 123, 123-127 (1993). Over the last fifteen years, however, the bench and bar in Maryland have made substantial efforts to address this problem. As a result, there has been a growth in the numbers and types of services available to *pro se* litigants in Maryland. However, these services are limited in scope and availability and were never intended to substitute for counsel in contested custody cases.

In 1988, the Maryland Legal Services Corporation (MLSC) completed its "Action Plan for Legal Services to Maryland's Poor." MARYLAND LEGAL SERVICES CORPORATION, ACTION PLAN FOR LEGAL SERVICES TO MARYLAND'S POOR: A REPORT OF THE ADVISORY COUNCIL OF THE MARYLAND LEGAL SERVICES CORPORATION (June, 1988). The study found that fewer than twenty percent of Maryland's low-income population was served by existing legal aid or voluntary private attorney efforts for

[28] "Child custody" in this context means both custody and visitation. These issues are often linked in family law cases. Many cases, like the case at issue here, start as complaints for custody and result in visitation orders. What is important in evaluating whether a right to counsel exists is whether parents' rights to continued access to their children are at issue in the proceeding.
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critical legal problems. Domestic legal problems were cited as one of the most underserved areas. *Id.* at 21. As a result of this critical finding, MLSC funded a second study examining access to family law remedies for low-income citizens. An Advisory Council, chaired by Attorney General J. Joseph Curran, Jr., consisted of forty-one members representing the judiciary, General Assembly, bar, social services agencies, and legal services providers and client representatives from all regions in Maryland. The central goals of the study, directed by the University of Baltimore Family Law Clinic, were to make recommendations to, among other things, increase the availability of legal services to resolve domestic disputes for low-income persons.

One of the Advisory Council's committees focused on court access and developing support for *pro se* litigants. *See* ADVISORY COUNCIL ON FAMILY LEGAL NEEDS OF LOW INCOME PERSONS, INCREASING ACCESS TO JUSTICE FOR MARYLAND'S FAMILIES 49-64 (1992) (Advisory Council Study). The study included recommendations that were the impetus for a number of reforms to assist *pro se* litigants that were implemented during the last decade. These recommendations included the development of "informational materials and judicially-approved standard pleadings . . . available at the court clerk's office."[29] *Id.* at 55. In addition, the Advisory Council recommended that family law trained court personnel to assist *pro se* litigants be available throughout the state. *Id.* While *pro se* projects for family law litigants were initially available only in the

[29] The development of form pleadings are now updated and distributed by the Administrative Office of the Courts, Family Division and Family Services Program [hereinafter AOC]. *See* http://www.courts.state.md.us/family/forms/domrel.html (Last visited May 15, 2003). These forms are part of a multifaceted approach taken by the AOC to assist self-represented litigants that also includes improvements in case management, promotion of alternative dispute resolution and limited funding for full legal representation in selected categories of cases, including contested custody.

state's five largest jurisdictions,[30] there is now some level of court-sponsored assistance for *pro se* litigants in all but one jurisdiction in Maryland.[31] This assistance, provided by lawyers, paralegals, or social workers is usually limited to a brief consultation to fill out forms or provide information. While programs function five days a week in the largest jurisdictions, smaller jurisdictions have offices open as little as a few hours a month.

Although there are a variety of other educational programs for *pro se* litigants scattered throughout the state, the only other statewide assistance for *pro se* litigants in family cases are two telephone hotlines administered by the Women's Law Center of Maryland and an online law library. The first telephone service, the Legal Forms Helpline, only provides procedural advice regarding notification procedures, responding to court papers, and filing court documents with the Clerk's office at any circuit court.[32] The second telephone service, the Family Law Hotline, provides free legal information to residents in Maryland who meet the income eligibility guidelines.[33] Most recently, the online People's Law Library of Maryland,[34] was created and maintained by the Maryland Legal Assistance Network in collaboration with legal services providers. It provides information on a variety of legal topics, including family law issues. Like the other

[30] Michael Millemann, *et al., Rethinking the Full-Service Legal Representational Model: A Maryland Experiment*, CLEARINGHOUSE REV., Mar.-Apr. 1997, at 1181, note 10. (describing the joint efforts of the University of Baltimore Family Law Clinic and the University of Maryland in establishing the first court-based *Pro Se* Projects in Baltimore City, Baltimore, Anne Arundel, and Montgomery counties.)
[31] For a description of the *Pro Se* Assistance Projects in each of the circuits in Maryland, see *http://www.courts.state.md.us/family/forms/proseprojects.html* (Last visited May 15, 2003).
[32] *See* The Women's Law Ctr. of Md., Inc., see *http://www.wlcmd.org/projects.html*. (Legal Forms Helpline information)(Last visited May 15, 2003).
[33] *See* The Women's Law Ctr. of Md., Inc., see *http://www.wlcmd.org/projects.html* (Family Law Hotline information) (Last visited May 15, 2003).
[34] Source: People's Law Library of Maryland: *www.peoples-law.org* (Last visited May 15, 2003).

services, the website cautions that it is intended to provide "legal information, not legal advice."

For the last few decades, then, Maryland has joined other states in developing support for *pro se* family litigants. Throughout these efforts, however, scholars and advocates have recognized the limitations of such support and its inadequacy in certain categories of cases. Legal ethics scholar Russell Engler has surveyed the literature on appropriate court response to unrepresented litigants and identified a number of factors, which, if present in a case, require the court system to provide increased assistance. Russell Engler, *And Justice For All – Including The Unrepresented Poor: Revisiting The Roles Of The Judges, Mediators, And Clerks*, 67 FORDHAM L. REV. 1987 (1999). These include: 1) the complexity of the proceeding, 2) the adversarial or contested nature of the proceeding, 3) the presence of counsel on one side of the case against an unrepresented party, and 4) the extent to which a power imbalance exists between the parties. *Id.* at 2045-46. The presence of one or more of these factors requires greater assistance for the *pro se* litigant. The presence of all of these factors would suggest assistance "at the far edge of the spectrum…the appointment of counsel to represent the litigant." *Id.* at 2046. *See also*, Paul R. Tremblay, *Acting "A Very Moral Type of God": Triage Among Poor Clients*, 67 FORDHAM L. REV. 2475, 2520 (1999).

The principle that, even in times of scarce resources, full legal representation should be preserved for those in contested custody cases has long been recognized by legal service providers. Jona Goldshmidt, a national authority on meeting the needs of unrepresented litigants, notes in a recent article that due to the funding cuts, legal services

offices must often limit full representation to "cases involving contested child custody." Jona Goldschmidt, *The Pro Se Litigant's Struggle for Access to Justice: Meeting the Challenge of Bench and Bar Resistance*, 40 FAM. CT. REV. 36 (2002). Indeed, MLSC has determined from its relationships with staff and pro bono legal services programs, courts, bars, and others that child custody cases are the most critically underserved category of cases in Maryland and that such cases cannot be handled in any substantial volume through *pro bono* services, and that *pro se* assistance services are inadequate to meet the need. MODEL CHILD CUSTODY REPRESENTATION PROJECT – EVALUATION REPORT (March 25, 2003). MLSC further found that, while expanded mediation services helped to resolve some child custody disputes, many custody cases could only be resolved through litigation.

As a result, MLSC entered into a partnership with the Administrative Office of the Courts to provide funding to develop and operate a model project offering legal counsel in certain "high need" child custody cases in the three jurisdictions. The criteria to define "high need" includes whether the other side is represented by counsel.[35]

The assumption that *pro se* assistance is not sufficient to protect rights in contested cases, particularly those involving custody and visitation issues where the other side is represented, has been recognized from the beginning by those seeking to expand assistance to *pro se* litigants in Maryland. Recognizing the tension between "ensur[ing] the right balance between increasing court access through *pro se* programs and protecting

[35]At the request of MLSC and the Administrative Office of the Courts, the University of Baltimore School of Law has recently completed an evaluation on this project. The report indicates high satisfaction with the project by participating staff and private attorneys, judges, clients, and other involved parties. MODEL CHILD CUSTODY REPRESENTATION PROJECT EVALUATION REPORT, *supra.*

low-income persons' rights," the Advisory Council report addressed the issue of the areas appropriate for *pro se* representation. The study surveyed *pro se* programs around the country and noted wide consensus on two issues 1) that *pro se* programs function well for uncontested divorces and 2) that *pro se* programs "should not include contested custody cases." Advisory Council Report at 54. Those providing "legal information" in court-based *pro se* assistance offices routinely advise litigants to get attorneys in contested custody cases. *See, e.g*. Nathalie Gilfrich, *et al*., *Law Students Assist Pro Se Litigants in Maryland,* 81 JUDICATURE 82 (1997) (describing the "most important advice" given by law students staffing *pro se* offices in Maryland was to "retain counsel" in cases involving child custody but noting the lack of free representation).

The strong warning that "going *pro se*" is not advisable in contested custody cases is also emphasized in all the materials offered *pro se* litigants in Maryland. *See e.g.*, General Instructions for Dom Rel Forms (DRO-1-Revised 2/01) (promulgated by the Administrative Office of the Courts and instructing potential *pro se* litigants that they need a lawyer "if the case is contested and the other side has a lawyer" or "you and your spouse do not agree who should have custody of the children"); Instructions for Completing Dom Rel Complaint for Custody ("[Y]ou are urged to consider carefully the importance of getting an attorney to help you. Custody, if contested, is one of the most difficult types of cases and you should consider seriously using an attorney.") Finally, the People's Law Library family law link cautions: "In the event that you have a highly volatile, hostile or contested custody issue you should seek out a lawyer to represent you.

Additionally, if the other parent is using the services of an attorney, it is advisable that you also have an attorney."[36]

The inadequacy of the minimal *pro se* assistance offered litigants in contested custody and visitation cases in Maryland is demonstrated by the facts of this case. Ms. Frase sought legal representation from a variety of sources in her community including the Legal Aid Bureau, the Office of Public Defender and potential *pro bono* attorneys (E 163; 171-72). The only assistance offered by the court was the suggestion to go to the Caroline County *Pro Se* Office (E 10-11). Like most other *pro se* projects, the services offered in the Caroline County *Pro Se* Project are limited to providing assistance in filling in the standardized domestic pleadings available to *pro se* litigants.[37]

The services are further limited in Caroline County in that the office is only open on Mondays from 9:00 a.m. – 12:00 p.m. and requires *pro se* litigants to come to the courthouse for assistance. The same limitations exist in neighboring Talbot County. Further, the Caroline County *pro se* office is staffed primarily by local volunteer attorneys, creating a high potential for conflicts of interest in this relatively small community when *pro se* litigants are involved in cases where the other side is represented. Indeed, on one of the occasions Ms. Frase sought the assistance of the *Pro Se* Clinic for a related case involving visitation with her son Justin, she was assisted by an attorney from the law office of the Barnharts' attorney (E 291). When she discovered the conflict, the attorney appropriately refused further assistance.

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[36] *See* http://www.peoples-law.com/family/divorce/Custody/custody.html (Last visited May 15, 2003).

[37] (Telephone interview with John Camardella, Caroline County Family Support Services Coordinator 410-479-4162). The *Pro Se* Project in the neighboring Circuit Court for Talbot County is similarly limited. It is open from 9:00 a.m. – 12:00 p.m. on Mondays only and is staffed by volunteer attorneys who give limited assistance.

The case at bar presents a clear example of the inadequacy of *pro se* assistance to protect the rights of litigants in cases where fundamental rights are at issue. As noted, the case raised issues about Ms. Frase's fundamental right as a fit parent to raise her child without state interference. In addition, the fact that the opposing parties were represented, and, as more fully set out in Appellant's brief, that the litigation was highly adversarial, made the need for counsel even more critical. Legal scholars, advocates and proponents of "unbundled legal services" and *pro se* representation would all agree that under these circumstances Ms. Frase should have been afforded full legal representation to protect her fundamental rights.

In sum, Maryland has made substantial efforts to improve services for *pro se* litigants in family law cases. However, these services were never intended to substitute for counsel in contested custody cases. Moreover, such services are inadequate to protect the rights of parents in such cases.

CONCLUSION

Amici urge this Court to adopt a two-step test in disputes between fit parents and third parties seeking visitation in order to protect the fundamental right of parents to make decisions regarding the care, custody and control of their children. First, a third party should be required to establish standing by proving a parent-like relationship with the child in order to seek a court order for visitation. Second, the third party must prove harm or potential harm to the child to overcome the presumption that a fit parent's decision denying visitation is in the child's best interest. Only then may a trial court override the parent's decision and order visitation which the court determines to be in the

best interest of the child. By adopting this two-step standard, this Court will provide protection from State interference into the private realm of the family required by the Supreme Court's decision in *Troxel*.

In addition, this Court should consider the inadequacy of services in Maryland for *pro se* litigants in family law disputes, particularly contested custody and visitation cases where the party's fundamental rights as a parent are at issue. *Amici* urge the Court to require the State to afford *pro se* litigants like Ms. Frase full legal representation in order to protect the fundamental rights at issue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this **28th** day of **May, 2003,** a copy of the foregoing Brief of Amici Curiae in Support of Petitioner Deborah Frase was mailed first class, postage prepaid to:

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