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GRANDPARENTS AND PSYCHOLOGICAL PARENTS RIGHTS AND REMEDIES© (Rev. January 2017)

IMPORTANT LEGAL DEVELOPMENTS

DATE	LEGAL CHANGES AFFECTING GRANDPARENT AND THIRD PARTY VISITATION RIGHTS
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.

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. "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)." <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.

a. 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.

b. Modification of Pre-*Troxel*/Pre-Amended ORS 109.119 Orders.

In custody and visitation cases decided before *Troxel* and before amended ORS 109.119, the modification standard is unclear. It may be necessary to litigate and demonstrate, in a modification proceeding, that the psychological parent or grandparent has overcome the constitutional presumption in favor of the natural parent.

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 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.

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.

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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