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UPDATED REPORT: CASELAW ON GRANDPARENTS' VISITATION RIGHTS IN CONNECTICUT

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You asked us to summarize four Connecticut Supreme Court cases and one U.S. Supreme Court case involving child visitation and custody disputes between fit parents and third parties, including grandparents (*Castagno v. Wholean*, *Troxel v. Granville*, *Roth v. Weston*, *Fish v. Fish*, and *DiGiavanni v. St. George*).

CASTAGNO V. WHOLEAN

Castagno v. Wholean involved grandparents who had applied for an order permitting them to visit their grandchildren (239 Conn. 336 (1996)). Connecticut's third-party visitation statute allows the Superior Court to grant child visitation rights to third parties based on the best interest of the child (CGS § 46b-59). The parents moved to dismiss the case, arguing that the trial court lacked jurisdiction because no case or controversy was before it concerning either the parent's custody or child visitation. The trial court granted the parents' motion and the grandparents appealed.

The Connecticut Supreme Court ruled that "the established rules of statutory construction, the context of the third-party visitation statute and its legislative history support the incorporation of a requirement that the plaintiffs must demonstrate disruption of the family unit sufficient to justify state intervention" (*Wholean* at 338). This case involved a traditional intact nuclear family of mother, father, and children. The Court noted that under judge-made (common) law, grandparents had no

right of visitation, and that the common law reflected a general belief that “the family unit should be respected, and its autonomy and privacy invaded through court action only in the most pressing circumstances” (*Wholean* at 341).

In a concurring opinion, Justice McDonald affirmed the trial court’s petition dismissal, but on the grounds that the statute was facially unconstitutional because it was overly broad.

TROXEL V. GRANVILLE

On June 5, 2000, a plurality of the U.S. Supreme Court affirmed a Washington Supreme Court ruling that the state’s third-party visitation statute violated the Due Process Clause of the 14th Amendment to the U.S. Constitution. The case arose when a widowed mother denied the request of the paternal grandparents to visit their grandchildren. The Washington statute (Wash. Rev. Code § 26.10.160(3)) allowed anyone to petition for visitation at any time and allowed a judge to grant the petition based on his or her judgment of what was in the child’s best interest, in effect overriding the parent’s decision (*Troxel v. Granville*, 530 U.S. 57 (2000), *affirming In re: Troxel*, 137 Wash. 2nd 1 (1998)). The U.S. Supreme Court agreed with the state Supreme Court’s finding that the Washington third-party visitation statute unconstitutionally infringed on the fundamental right of parents to rear their children.

The state Supreme Court had invalidated the statute because it (1) was overly broad in that it allowed anyone to petition for visitation and (2) allowed visitation without a finding that the child would be harmed if visitation were withheld. It concluded that the statute was unconstitutional on its face, meaning that there was no set of circumstances under which it could be constitutionally applied.

U.S. Supreme Court Justice O’Connor, in a plurality opinion, declined to find the statute facially unconstitutional. Instead, she found it overbroad and, as applied to the mother, that it unconstitutionally deprived her of the fundamental right to make decisions concerning the care, custody, and control of her children. She cited three factors to support her conclusion: (1) the grandparents did not allege, and no court had found, that their daughter-in-law was an unfit parent; (2) the trial court should have given special weight to the mother’s determination of what was in her children’s best interest; and (3) there was no allegation that the mother ever sought to cut off visitation with the grandparents entirely. The Court did not decide (1) if all third party visitation statutes were unconstitutional or (2) whether, if not, all petitioners had to prove that a denial visitation would harm the child.

In addition to the plurality opinion, there were two concurring and three dissenting opinions.

In his concurrence, Justice Souter agreed with the plurality's conclusion that the statute was overbroad. In his view, further analysis was not needed.

Justice Thomas agreed that the Court's recognition of a parent's fundamental right to direct his or her child's upbringing resolved the case, but added that in these cases strict scrutiny was the appropriate standard of court review. This test requires the state to prove, by clear and convincing evidence, that (1) it has a compelling interest that justifies its intrusion on a fundamental constitutional right (in this case, parenting) and (2) its action is narrowly tailored to protect its interest.

In his dissent, Justice Stevens argued that the Court should not have decided the case because Washington's Supreme Court had already invalidated the statute. He pointed out that Washington's legislature could cure the constitutional infirmity by drafting a better statute. He added that since the Court decided to address the merits, it should balance the child's interest in maintaining contact with a particular individual against a parent's right to determine who associates with his or her child.

Dissenting Justice Scalia opined that parents have unalienable rights to direct the upbringing of their children but the state legislatures and not judges should decide what those rights are. He noted that legislators have the great advantage of doing harm in a more circumscribed area. They are also able to correct their mistakes in a flash and can be voted out of office if their constituents are dissatisfied with their performance.

Justice Kennedy disagreed with the Washington Court's conclusion that required a finding of harm to be alleged and proved in all cases. He stated that if harm were required in every instance, a question that the plurality left open, it would essentially mean the best interest of the child standard would never be appropriate in third-party visitation cases.

The *Troxel* holding applies to every state's third-party visitation statute.

ROTH V. WESTON

In *Roth v. Weston*, a widowed father denied the maternal grandmother and aunt's request for visitation. The relatives challenged this decision, claiming that visitation was in the children's best interest; they did not contend that the father was an unfit parent. The father argued that visitation was not in his children's best interest and provided the trial court with evidence to support his position. The trial court ruled in the relatives' favor.

The Connecticut Supreme Court reversed (*Roth v. Weston*, 259 Conn. 202 (2002)). It ruled that CGS § 46b-59, the state's third-party visitation statute, would be unconstitutional unless it required parties, including grandparents and other relatives, to make specific and good faith allegations to show that (1) they had a parent-like relationship with the child and (2) denying visitation would cause the child real and significant harm. The degree of harm had to be more than a determination that visitation would be in the child's best interest. It must be analogous to a claim that the child is neglected, uncared-for, or dependent within the meaning of Connecticut's child abuse statutes. Without this showing, courts lacked jurisdiction to resolve the dispute.

Once these high jurisdictional hurdles were overcome, the Supreme Court held that the petitioner had to prove his or her claims by clear and convincing evidence, a particularly stringent burden of proof. The Court indicated that these requirements affix a judicial gloss to the statute and serve as safeguards against unwarranted intrusions into a parent's authority (*Roth v. Weston* at 234-235).

The *Roth* standard is applicable to all third-party visitation cases brought in Connecticut.

FISH V. FISH

In *Fish v. Fish*, the Connecticut Supreme Court differentiated between third-party child visitation and custody cases (285 Conn. 24 (2008)). The issue before the Court was whether a third party had to satisfy the *Roth* jurisdictional pleading requirements when seeking custody of, rather than visitation with, a child over a fit parent's objection. The Court held that (1) the *Roth* requirements do not apply to disputed child custody cases involving a fit parent and (2) custody decisions require a less exacting evidentiary standard than was applicable to visitation determinations.

The Court's rationale for a different standard was that third-party visitation and custody cases are inherently different because they challenge different things. In visitation cases, they challenge the decision of a fit parent to deny or limit third-party visitors, but in custody cases they challenge the parent-child relationship itself.

The Court decided in *Fish* that a third party seeking custody must prove by a fair preponderance of the evidence (rejecting the clear and convincing evidentiary requirement that *Roth* required courts to apply to third-party visitation cases), that he or she had a relationship with the child akin to that of a parent and that it would be clearly damaging, injurious, or harmful for the child to remain in the parent's custody. Parental rights were further protected because third parties could not initiate custody proceedings, which they can do in visitation cases.

In her concurrence, Justice Katz agreed with the majority's judgment to reverse the Appellate Court ruling and return the case to the trial court for further proceedings. But she contended that child custody cases should have to satisfy the *Roth* requirements, including the higher clear and convincing evidentiary threshold because child custody cases caused a greater infringement on family autonomy than visitation cases and should not have lesser constitutional protections.

Fish's evidentiary standard applies to all third-party custody disputes brought in Connecticut.

DIGIAVANNI V. ST. GEORGE

In *DiGiavanni v. St. George*, the mother's former boyfriend applied for but was denied a visitation order (300 Conn. 59 (2011)). The trial court had ruled that, despite the boyfriend's having met the *Roth* standard, granting visitation was not in the child's best interest because the mother would inflict greater harm on the child if visitation were granted than she would if visitation were denied.

The Connecticut Supreme Court reversed the lower court's ruling. It based its reversal on three factors.

1. By finding that the former boyfriend had satisfied *Roth* (i.e., had proved by clear and convincing evidence that he had (a) a parent-like relationship with the child and (b) shown that denying visitation would cause the child harm akin to abuse or neglect), the trial court had necessarily found that visitation was in the child's best interest.

2. Public policy argued against denying the boyfriend visitation because doing so effectively allowed the losing party (the child's mother) to deny visitation in spite of having lost the case on the merits.
3. The trial court erred in not considering its inherent authority to place conditions and limitations on visitation orders and punish violators by holding them in contempt of court.

In his dissent, Justice Palmer wrote that the *Roth* requirements cannot be viewed in a vacuum, but needed to be read together with the child's best interest standard. He argued that if the Court read the *Roth* requirements in conjunction with the best interest of the child standard, it would conclude that the *Roth* standard had not been met in this case.

Justice Eveleigh disagreed with the majority's conclusion that once the *Roth* requirements were satisfied, visitation must be granted. He wrote that the *Roth* requirements were merely a jurisdictional test and not a substantive one. Therefore, once the party seeking visitation meets *Roth*'s jurisdictional burden of proof, he or she must still prove by a fair preponderance of the evidence that visitation is in the child's best interest.

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