IN THE SUPREME COURT OF THE STATE OF NEVADA

TIMOTHY HOWARD ACKERS, SR.,
Appellant,
vs.
RAY EDWARD RUSSELL AND EDNA MARIE RUSSELL,
Respondents.

No. 37126

FILED

MAR 14 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. Richards
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order granting grandparent visitation against the custodial parent's objection. On appeal, appellant Timothy Ackers, Sr., argues that NRS 125C.050, Nevada's nonparent visitation statute, is unconstitutional because it infringes on parents' fundamental right to make decisions regarding the care, custody and control of their children. We disagree, and accordingly, we affirm the order granting grandparent visitation.

In June 2000, the United States Supreme Court considered the issue of grandparent visitation.[1] In Troxel, the Supreme Court declared a Washington third-party visitation statute unconstitutional as applied to a grandparent seeking visitation with her grandchild.[2] The Court found the Washington statute to be "breathtakingly broad" in that it allowed "any person" to petition the court "at any time."[3] In addition, it

[1]Troxel v. Granville, 530 U.S. 57 (2000).

[2]Id.

[3]Id. at 67.

authorized a court to grant visitation rights "whenever 'visitation may serve the best interest of the child.'"[4] The Court determined that the Washington statute did not give consideration or deference to the parents' determination of what was in their child's best interest.[5] Rather, the determination of the child's best interest was placed solely with the judge.[6]

In Troxel, the Court reiterated that, under the Fourteenth Amendment, substantive due process grants parents a "fundamental right" or "liberty interest" to make decisions concerning the care, custody and control of their children.[7] Moreover, a state statute that, as applied, allows trial courts to grant nonparent visitation rights over a parent's objections, whenever the court determines that such visitation may serve the child's best interest, unconstitutionally infringes on that right.[8] To be constitutional, as applied, a statute must give a presumption of validity or special weight to a parent's decision that visitation would not be in the child's best interest, absent a finding that the parent is unfit.[9] Therefore, noncustodial petitioners carry the burden of proof and must show "special

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[4]Id. at 67 (quoting Wash. Rev. Code § 26.10.160(3) (1994)).

[5]Id.

[6]Id.

[7]Id. at 65-66.

[8]Id. at 58.

[9]Id. at 68-70.

factors" that would warrant state interference with a fit parent's decision on the matter.[10]

Ackers contends that NRS 125C.050 is unconstitutional because it utilizes a "best interest test," thereby usurping parents' constitutionally protected fundamental liberty to make child rearing decisions for their children. Ackers also contends that the district court did not give deference to his decision. Additionally, Ackers contends that he has never been found to be an unfit parent and that, therefore, he is entitled to a presumption that he has acted in the best interests of his son.

NRS 125C.050 permits a district court to grant grandparent visitation if the court finds that the visits would be in the best interest of the child.[11] NRS 125C.050 lists several factors for the court to consider when granting visitation, including the emotional ties between the petitioner and the child, the petitioner's capacity to give love and guidance to the child, the prior relationship between the petitioner and the child, the mental and physical health of the petitioner, the willingness of the petitioner to foster a close relationship with the custodial parent, the

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[10]Id. at 68.

[11]NRS 125C.050 was amended during the 71st Legislature by Senate Bill 25. 2001 Nev. Stat., ch. 547, §1, at 2712. The amended version of the statute creates a rebuttable presumption that the granting of a right to visitation by a petitioner is not in the best interest of the child. To rebut this presumption, the petitioner must prove by clear and convincing evidence that visitation is in the best interest of the child. The legislature made this amendment in an attempt to conform with Troxel. The amendment became effective June 14, 2001, after the district court entered its order in November of 2000.

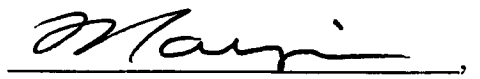
financial support given by the petitioner to the child and any other factor the court may deem relevant.

Initially, we note that NRS 125C.050 is more narrowly tailored than the Washington statute contemplated in Troxel, in that NRS 125C.050 applies only to grandparents and others having a meaningful relationship with a child. We further conclude that the district court applied the proper burden of proof and carefully weighed the parties' interests in finding that the petitioners met their burden.

First, the district court recognized "a strong presumption in favor of the parent's wishes." In doing so, the district court placed the burden of proof upon the noncustodial petitioners to show that state interference with Ackers' decision was warranted. Second, the district court implicitly applied the "special factors" that are necessary to rebut the presumption of validity given to Ackers' decision. The district court found that a "meaningful relationship" existed between the petitioners and their grandchild. The district court also found that the petitioners have a long history of providing financial and emotional support to their grandchild, evidenced by the fact that the petitioners provided a home for the child for eight years and that the child, now age thirteen, encouraged his grandparents to seek visitation. Finally, the district court noted that the child was removed, at least temporarily, from Ackers' home by the Division of Child and Family Services, due to allegations of inappropriate and excessive discipline.

We conclude that the district court gave an adequate presumption of validity to Ackers' decision that grandparent visitation would not be in his son's best interest when it applied NRS 125C.050.

Further, the district court implicitly weighed the "special factors" when determining whether the petitioners rebutted that presumption. Accordingly, we AFFIRM the district court's order granting grandparent visitation.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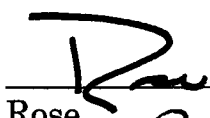
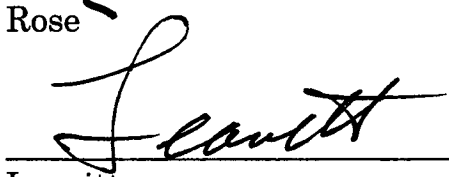
Maupin


, J.
Young


, J.
Shearing


, J.
Agosti


, J.
Rose


, J.
Leavitt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Becker

cc: Hon. J. Michael Memeo, District Judge
Brian D. Green
Marvel & Kump, Ltd.
Elko County Clerk