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## Blakely and Missouri's Grandparent Visitation Statute: An Abridgment of Parents' Constitutional Rights - Blakely v. Blakely

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## Notes

# ***Blakely* and Missouri's Grandparent Visitation Statute: An Abridgment of Parents' Constitutional Rights?**

*Blakely v. Blakely*<sup>1</sup>

### I. INTRODUCTION

Universally, states have enacted statutes granting nonparental parties, specifically grandparents, the right to petition courts for visitation of minor children.<sup>2</sup> However, the states differ significantly in the manner in which they grant these parties that right. A recent United States Supreme Court decision, *Troxel v. Granville*,<sup>3</sup> addressed the issue of the constitutionality of nonparental visitation statutes. Unfortunately, the Court failed to provide much clarity to the states in deciding constitutional challenges to these statutes.

In *Blakely v. Blakely*,<sup>4</sup> the Missouri Supreme Court addressed the issue and reached a result inconsistent with the *Troxel* decision. In so doing, the court applied an inappropriate standard of review for state statutes interfering with rights deemed fundamental—parental rights to the care, custody, and control of children. This Note explores the analysis employed by the court and argues that Missouri's grandparent visitation statute, as applied in *Blakely*, is unconstitutional.

### II. FACTS AND HOLDING

On April 24, 2000, Richard and Carol Blakely ("Grandparents") filed a petition against Dean and Shelly Blakely ("Parents") under Missouri's grandparent visitation statute, Missouri Revised Statutes Section 452.402,<sup>5</sup>

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1. *Blakely v. Blakely*, 83 S.W.3d 537 (Mo. 2002).

2. *See infra* note 26.

3. 530 U.S. 57 (2000).

4. *Blakely*, 83 S.W.3d at 538.

5. Missouri Revised Statutes Section 452.402 (2000) provides, in pertinent part:

1. The court may grant reasonable visitation rights to the grandparents of the child and issue any necessary orders to enforce the decree. The court may grant grandparents visitation when:

.....

(3) A grandparent is unreasonably denied visitation with the child for a period exceeding ninety days.

.....

seeking visitation with their four grandchildren.<sup>6</sup> The denial of access by Parents was based, in large part, on their belief that Grandparents were “improper moral teachers and poor examples,” specifically that Grandparents were “divisive, critical of [the children’s mother], bigoted, and liars.”<sup>7</sup> Parents were members of the River of Life Church, while Grandparents attended a church that was “basically Methodist in philosophy.”<sup>8</sup> Despite efforts to resolve the issue through counseling and mediation, Parents denied Grandparents visitation for a year prior to filing the suit.<sup>9</sup>

In their petition, Grandparents alleged that they were unreasonably denied visitation with their grandchildren and sought court-imposed visitation pursuant to Section 452.402.<sup>10</sup> In response, Parents argued that the statute was unconstitutional because it violated their Fourteenth Amendment due process right to raise their children free from unnecessary state interference.<sup>11</sup> The circuit court rejected Parents’ constitutional objections and found that Parents had denied visitation for more than ninety days, the denial was unreasonable, and that it was in the children’s best interests that Grandparents be awarded reasonable visitation.<sup>12</sup> Consequently, the court granted Grandparents two hours of visitation every ninety days.<sup>13</sup>

Parents appealed, arguing that *Troxel* required courts to find statutes granting grandparents visitation, in the absence of a finding that lack of visitation

2. The court shall determine if the visitation by the grandparent would be in the child’s best interest or if it would endanger the child’s physical health or impair his emotional development. Visitation may only be ordered when the court finds such visitation to be in the best interests of the child. The court may order reasonable conditions or restrictions on grandparent visitation.

After Grandparents filed for petition, Section 452.402 was amended. *See Blakely*, 83 S.W.3d at 540 n.1. While a court may still grant grandparent visitation if such visitation has been unreasonably denied for ninety days, the statute no longer permits grandparents to file for petition under Section 452.402.1 if the natural parents are legally married to each other and are living with the child. MO. REV. STAT. § 452.402.1(4) (Supp. 2002). Furthermore, Section 452.402.2 has been amended to include a rebuttable presumption in favor of the parents when they are legally married to each other and are living with the child. *Id.* § 452.402.2. These amendments, however, were not considered by the court in assessing Grandparents’ petition. *See Blakely*, 83 S.W.3d at 540 n.1. Though the amendments might alter a court’s evaluation of a grandparent’s right to visitation, the framework for analysis under the statute remains the same as prior to the amendments.

6. *Blakely*, 83 S.W.3d at 538.

7. *Id.* at 539.

8. *Id.*

9. *Id.*

10. *Id.* at 538.

11. *Id.* at 540.

12. *Id.*

13. *Id.*

will cause the child harm, per se unconstitutional.<sup>14</sup> In rejecting Parents' contention, the Missouri Supreme Court distinguished the instant case from *Troxel* and upheld the constitutionality of Section 452.402.<sup>15</sup> In so doing, the court affirmed the circuit court's judgment granting grandparents limited visitation, even when the parents are legally married to one another and are living with the child so long as such visitation is deemed reasonable.<sup>16</sup>

### III. LEGAL BACKGROUND

#### A. History of Nonparental Visitation Statutes

The development of nonparental visitation statutes is a relatively recent phenomenon.<sup>17</sup> The changing realities of American family life spurred state legislatures to enact statutes granting nonparental parties the right to petition the courts for visitation of minor children.<sup>18</sup>

Nonparental visitation rights are not firmly established in our judicial system.<sup>19</sup> The common law provided no protection, even to grandparents seeking relationships with grandchildren, if the parents of those children opposed such relationships.<sup>20</sup> Thus, prior to the statutory enactments, a parent was under no legal obligation to permit a child to visit grandparents and other third parties.<sup>21</sup>

As the demographics of family life have shifted over the last thirty years, however, grandparents and other nonparental figures have played an increasingly important role in children's lives. Rising rates of divorce, separation, and remarriage have contributed to a shift away from the traditional nuclear family, which is clearly no longer the norm.<sup>22</sup> The 2000 Census revealed that less than

14. *Id.* at 543.

15. *Id.* at 543-45.

16. *Id.* at 548.

17. The first statutes providing for nonparental visitation were promulgated in the mid-1960s. See Janet L. Dolgin, *The Constitution as Family Arbiter: A Moral in the Mess?*, 102 COLUM. L. REV. 337, 371 (2002). However, the concept of grandparent visitation has been around much longer. See *Succession of Reiss*, 15 So. 151 (La. 1894). *Reiss* is the earliest reported case addressing the issue of grandparent visitation. The court held that grandparent visitation was a moral, not legal, obligation. *Id.* at 152.

18. See Edward M. Burns, *Grandparent Visitation Rights: Is It Time for the Pendulum to Fall?*, 25 FAM. L.Q. 59, 59-60 (1991).

19. See 3 CHILD CUSTODY AND VISITATION LAW AND PRACTICE § 16.12, at 2 (2003).

20. See Dolgin, *supra* note 17, at 371.

21. See *Emanuel S. v. Joseph E.*, 577 N.E.2d 27, 28 (N.Y. 1991); *Leake v. Grissom*, 614 P.2d 1107, 1110 (Okla. 1980).

22. See M. Kristine Taylor Warren, GRANDPARENT VISITATION RIGHTS: A LEGAL

twenty-five percent of U.S. households are comprised of married couples and their children.<sup>23</sup> The result is a shift toward a “blended” family, where children may be raised by nonparental figures.<sup>24</sup>

In response to the changing demographics of American family life, state legislators began to promulgate nonparental visitation statutes.<sup>25</sup> Grandparental lobbying groups, such as the American Association of Retired Persons (AARP), played a significant role in convincing legislators to enact these statutes.<sup>26</sup> As a result, every state now has some form of nonparental visitation statute.<sup>27</sup>

### B. Substantive Due Process and Parental Rights

The Due Process Clause of the Fourteenth Amendment provides that no state shall “deprive any person of life, liberty, or property, without due process of law.”<sup>28</sup> In addition to the procedural guarantee of due process, the clause includes a substantive component that “provides heightened protection against government interference with certain fundamental rights and liberty interests.”<sup>29</sup> For a right to receive such heightened protection, it must be “deeply rooted in this Nation’s history and tradition” and “implicit in the concept of ordered liberty,” so that “neither liberty nor justice would exist if they were sacrificed.”<sup>30</sup>

The interest of parents in the care, custody, and control of their children is one of the oldest fundamental liberty interests recognized by the United States Supreme Court.<sup>31</sup> In *Meyer v. Nebraska*,<sup>32</sup> the Court stated that liberty, protected by the Due Process Clause, includes the right “to marry, establish a home and

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RESEARCH GUIDE, at xiii-xiv (2001).

23. See *Whatever Happened to the Nuclear Family?: 2000 Census Report on Families*, 16 FOOD PROCESSING 10 (Aug. 1, 2001), available at LEXIS, News Library, All News Group File.

24. See Steven H. Hobbs, *We Are Family: Changing Times, Changing Ideologies and Changing Laws*, 14 CAP. U. L. REV. 511, 512 (1985).

25. See *Troxel v. Granville*, 530 U.S. 57, 64-65 (2000).

26. See Catherine Bostock, *Does the Expansion of Grandparent Visitation Rights Promote the Best Interests of the Child?: A Survey of Grandparent Visitation Laws in the Fifty States*, 27 COLUM. J.L. & SOC. PROBS. 319, 325 (1994); Burns, *supra* note 18, at 59-60.

27. See David L. Walther, *Survey of Grandparents’ Visitation Rights*, 11 AM. J. FAM. 95, 104 (1997).

28. U.S. CONST. amend. XIV, § 1.

29. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997); see also *Reno v. Flores*, 507 U.S. 292, 301-02 (1993).

30. *Glucksberg*, 521 U.S. at 721 (citing *Palko v. Connecticut*, 302 U.S. 319, 326 (1993)).

31. See *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

32. 262 U.S. 390 (1923).

bring up children . . . and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."<sup>33</sup> In *Meyer*, a Nebraska school teacher was convicted of violating a state statute that prohibited the teaching of foreign languages to students who had not yet completed the eighth grade.<sup>34</sup> The Supreme Court held the statute unconstitutional as a violation of due process and preserved the right of parents to instruct their children in a foreign language.<sup>35</sup>

A short time after *Meyer*, the Supreme Court reaffirmed the right of parents to control their children's education. In *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*,<sup>36</sup> an organization running Catholic schools challenged the constitutionality of an Oregon statute requiring every child between the ages of eight and sixteen to attend a public school.<sup>37</sup> The Court found that the statute "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control."<sup>38</sup> Consequently, the Court held that the statute violated the parents' constitutional right to choose where their children would be educated.<sup>39</sup>

Almost twenty years later, in *Prince v. Massachusetts*,<sup>40</sup> the Court returned to the subject of parental rights in directing the upbringing of children.<sup>41</sup> The Court stated: "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."<sup>42</sup>

These principles were reaffirmed thirty years later in *Wisconsin v. Yoder*.<sup>43</sup> In *Yoder*, Amish parents were charged with violating Wisconsin's compulsory school attendance law, requiring children to attend school until the age of sixteen.<sup>44</sup> In finding for the parents, the Court stated that the "history and culture

33. *Id.* at 399.

34. *Id.* at 396-97.

35. *Id.* at 403.

36. 268 U.S. 510 (1925).

37. *Id.* at 530.

38. *Id.* at 534-35.

39. *Id.* at 535.

40. 321 U.S. 158 (1944).

41. In *Prince*, the United States Supreme Court upheld a Massachusetts labor law statute. *Id.* at 170. Sarah Prince, a Jehovah's Witness, was the legal custodian of Betty Simmons, her niece. *Id.* at 159. Both distributed pamphlets on public streets. *Id.* at 161-62. Sarah was accused of using Betty for child labor. *Id.* at 159. While noting the constitutionally protected province of parents in nurturing and caring for their children, the court held that the distribution of pamphlets did not fall within the scope of private parental rights. *Id.* at 168.

42. *Id.* at 166.

43. 406 U.S. 205 (1972).

44. *Id.* at 207-09.

of Western civilization reflects a strong tradition of parental concern for the nurture and upbringing of their children.<sup>45</sup> The Court concluded, “This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.”<sup>46</sup>

Subsequent Supreme Court cases continue to recognize the fundamental nature of a parent’s right to make decisions regarding the care, custody, and control of his or her children.<sup>47</sup> Most recently, and most applicable to this Note, is the Court’s decision in *Troxel v. Granville*.<sup>48</sup> *Troxel*, like *Blakely*, is a case where a parent’s right to determine who may visit her children was infringed upon by the application of a state statute permitting third parties to apply for visitation of minor children.<sup>49</sup> In *Troxel*, the grandparents sought visitation with their two granddaughters, born to their son out of wedlock.<sup>50</sup> The Washington Supreme Court held the statute unconstitutional and denied the grandparents visitation of their grandchildren.<sup>51</sup> The grandparents appealed to the United States Supreme Court, which granted certiorari.<sup>52</sup> The Supreme Court held that the Washington statute, as applied, violated the Fourteenth Amendment’s Due Process Clause.<sup>53</sup> In so holding, the Court recognized a parent’s fundamental

45. *Id.* at 232.

46. *Id.*

47. *See, e.g.*, *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (discussing the “long line of cases” that recognize the constitutionally protected right of parents to “direct the education and upbringing of one’s children”); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (discussing “[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child”); *Parham v. J.R.*, 442 U.S. 584, 602 (1979) (noting that “[o]ur jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children”); *Quilloin v. Wolcott*, 434 U.S. 246, 255 (1978) (reaffirming the constitutionally protected relationship between parents and their children); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (stating that “the interest of a parent in the companionship, care, custody, and management of his or her children ‘come(s) to this Court with a momentum of respect’”) (quoting *Kovacs v. Cooper*, 336 U.S. 77, 95 (1949)).

48. 530 U.S. 57 (2000).

49. *Id.* at 67. Washington Revised Code Annotated Section 26.10.160(3) (West 1997), the pertinent statute, read as follows: “Any person may petition the court for visitation rights at any time including, but not limited to, custody proceedings. The court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances.” The Washington statute now states that the United State Supreme Court found Section 26.10.160(3) unconstitutional in the *Troxel* case. WASH. REV. CODE ANN. § 26.10.160 (West Supp. 2003).

50. *Troxel*, 530 U.S. at 60.

51. *Id.* at 63.

52. *Id.*

53. *Id.*

right to make decisions concerning the care, custody, and control of his or her children.<sup>54</sup> The Court, however, was cautious not to hold specific nonparental visitation statutes *per se* unconstitutional.<sup>55</sup> The Court reasoned that Washington's statute was "breathhtakingly broad" and failed to accord "special weight" to the decisions of parents.<sup>56</sup> The Supreme Court's decision in *Troxel* resulted in a reexamination by many state courts of the constitutionality of nonparental visitation statutes, including the Missouri Supreme Court in *Blakely*.

### C. Missouri's Grandparent Visitation Statute

Early common law recognized no legal right of grandparents or other third parties to visitation with minor children.<sup>57</sup> Courts and legislatures adopted laws consistent with protecting the autonomy of parents in decisions regarding the care, custody, and upbringing of their children.<sup>58</sup> Missouri case law supporting the common law approach is found as early as 1930,<sup>59</sup> and was further solidified in the 1953 case *Wilson v. Wilson*,<sup>60</sup> where the Eastern District of the Missouri Court of Appeals stated that "[a] parent's claim to custody, absent unfitness, must prevail over the claims of grandparents."<sup>61</sup>

In 1977, the Missouri legislature supplanted the common law approach of parental autonomy with the enactment of Section 452.402, which provided grandparents a claim to visitation of their grandchildren.<sup>62</sup> The legislature intended to provide an "expeditious procedure for grandparents to petition the court to determine reasonable visitation rights."<sup>63</sup> The original version of Missouri's grandparent visitation statute allowed visitation only upon the death of the grandparent's child.<sup>64</sup> In 1988, the legislature amended the statute, adding Subsection 1(4), to include claims to visitation in circumstances where an intact family unit denied such visitation to grandparents.<sup>65</sup>

54. *Id.* at 66.

55. *Id.* at 73-74.

56. *Id.* at 67, 69.

57. *See Dolgin, supra* note 17, at 371.

58. *See Robert C. Paden, Jr., Child Custody and Visitation Rights: Parents v. Guardians*, 52 J. MO. B. 156, 156 (1996).

59. *See Abel v. Ingram*, 24 S.W.2d 1048, 1050 (Mo. Ct. App. 1930).

60. 260 S.W.2d 770 (Mo. Ct. App. 1953).

61. *Id.* at 776.

62. *See* MO. REV. STAT. § 452.402 (1978) (superceded).

63. *In re A.F. v. B.F.O.*, 760 S.W.2d 916, 917 (Mo. Ct. App. 1988).

64. *See* MO. REV. STAT. § 452.402 (1978) (superceded).

65. MO. REV. STAT. § 452.402.1(4) (2000). Subsection 1(4) provides that a court may grant grandparent visitation when: "[a] grandparent is unreasonably denied visitation with the child for a period exceeding ninety days." MO. REV. STAT. § 452.402.1(4) (2000).



In 1993, the constitutionality of Section 452.402 was challenged in *Herndon v. Tuhey*.<sup>66</sup> In *Herndon*, the grandparents brought an action, under Section 452.402, against the parents seeking visitation rights with the children.<sup>67</sup> The Missouri Supreme Court recognized the fundamental right of parents to raise their children as they see fit, but noted that the magnitude of the infringement by a state is a significant consideration in determining whether a statute unconstitutionally interferes with that right.<sup>68</sup> The court found that Section 452.402 contemplated only “occasional, temporary visitation, which may only be allowed if a trial court finds visitation to be in the best interest of the child and does not endanger the child’s physical or emotional development.”<sup>69</sup> Moreover, the court noted that grandparents are members of the extended family and, as such, play an important role in the raising of the children.<sup>70</sup> The court, therefore, upheld Section 452.402.<sup>71</sup> *Blakely* acted to confirm the *Herndon* holding in light of the United States Supreme Court’s subsequent *Troxel* decision.

#### IV. THE INSTANT DECISION

In *Blakely*, the Missouri Supreme Court held that Section 452.402 was constitutional and, as applied, did not unnecessarily interfere with parental rights.<sup>72</sup> The court began by acknowledging that its earlier opinion in *Herndon v. Tuhey*<sup>73</sup> upheld Section 452.402 and approved an order similar to that issued in the instant case.<sup>74</sup> Borrowing from *Herndon*’s analysis, the court stated that Section 452.402 contemplates “occasional, temporary visitation, which may only be allowed if a trial court finds visitation to be in the best interest of the child and does not endanger the child’s physical or emotional development.”<sup>75</sup> The court then distinguished such minimal intrusion from those infringements that have been held to be substantial and thus unconstitutional.<sup>76</sup>

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66. 857 S.W.2d 203 (Mo. 1993).

67. *Id.* at 204.

68. *Id.* at 208.

69. *Id.* at 209.

70. *Id.*

71. *Id.* at 208.

72. *Blakely v. Blakely*, 83 S.W.3d 537, 538 (Mo. 2002).

73. *Herndon*, 857 S.W.2d 203.

74. *Blakely*, 83 S.W.3d at 541.

75. *Id.* at 543-44 (quoting *Herndon*, 875 S.W.2d at 209).

76. *Id.* at 541. Parents relied on a number of cases where state interference with parental rights was held unconstitutional, including *Santosky v. Kramer*, 455 U.S. 745 (1982), *Prince v. Society of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925), and *Meyer v. Nebraska*, 262 U.S. 390 (1923). *Blakely*, 83 S.W.3d at 541. The court distinguished each of those cases as constituting substantial infringements on parental rights. *Id.*

Next, the court discussed the effect of the United States Supreme Court's holding in *Troxel* on the reasoning of *Herndon* and subsequent Missouri decisions.<sup>77</sup> The court first noted that the *Troxel* decision did not act to invalidate all grandparent visitation statutes; rather, it simply held the Washington statute unconstitutional as applied.<sup>78</sup> Then, the court distinguished Section 452.402 from the invalidated statute in *Troxel* on a number of grounds.<sup>79</sup> Because the Missouri statute permits only *grandparents* to petition for forced visitation, while the Washington statute allowed *any* person to petition for visitation, the court stated that Section 452.402 "avoids the sweeping breadth" of the statute criticized by the *Troxel* Court.<sup>80</sup> The court made a further distinction between the statutes. To have standing under Section 452.402, a grandparent must have been denied full visitation for a period of ninety days prior to filing for petition.<sup>81</sup> In contrast, the Washington statute gave automatic standing—that is, no minimal period for denial of visitation—to parties seeking visitation.<sup>82</sup> The court noted the importance of this distinction in limiting the breadth of the visitation statute and alleviating the *Troxel* Court's concerns.<sup>83</sup>

Additionally, the court found that Section 452.402, unlike the Washington statute, required the denial of visitation to be "unreasonable."<sup>84</sup> This was a key distinction in the mind of the court, because the requirement of "unreasonableness" placed the burden of proof on the grandparents.<sup>85</sup> Thus, the court found that the Missouri statute afforded the decision of the parents a "rebuttable presumption of validity."<sup>86</sup> Consequently, the court felt that the statute recognized a parent's fundamental right to make decisions relating to the care and custody of a child.<sup>87</sup>

Finally, the court made the distinction that the Missouri statute provided procedural safeguards that assist the court in determining whether a parent's decision as to visitation is unreasonable.<sup>88</sup> These safeguards include home study, consultation with the child, and appointment of a guardian ad litem if

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77. *Id.* at 542.

78. *Id.* at 543.

79. *Id.* at 544.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 545.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

necessary.<sup>89</sup> The court believed that these safeguards avoid a decision based solely on the discretion of the trial judge in lieu of parental decisions.<sup>90</sup>

Next, the court determined the appropriate standard of review to apply to visitation statutes. The court noted that the plurality in *Troxel* did not articulate the specific standard to apply to such statutes; rather, the *Troxel* Court left that determination to a case-by-case analysis.<sup>91</sup> Given this opportunity, the Missouri Supreme Court specifically rejected the application of strict scrutiny in reviewing the validity of visitation statutes.<sup>92</sup> However, the court failed to clearly articulate the standard of review it applied in determining the constitutionality of Section 452.402. Although the court recognized that parental rights are “of prime importance,” it balanced those rights against the best interests of the child and the state’s interests in maintaining contact between grandparents and grandchildren and in encouraging families to resolve disputes without a great amount of governmental interference.<sup>93</sup> In so doing, the court held that the state’s interest in preserving the grandparent-grandchild relationship outweighed the parents’ right to make decisions regarding visitation.<sup>94</sup> Therefore, the court held Section 452.402 constitutional.<sup>95</sup>

#### V. COMMENT

In *Blakely*, the Missouri Supreme Court extended the holding of its earlier decision in *Herndon* into the post-*Troxel* era. In so doing, the court upheld the constitutionality of Section 452.402 and affirmed the grandparent visitation order imposed by the trial court.<sup>96</sup> Although the court made it apparent that strict scrutiny was not the appropriate standard of review to apply to the facts before it,<sup>97</sup> the court failed to clearly articulate the standard it utilized in determining the constitutionality of Missouri’s grandparent visitation statute. Rather, the court favored a case-by-case approach that could potentially yield inconsistent applications of the Fourteenth Amendment’s Due Process Clause among individuals challenging the constitutionality of Section 452.402.<sup>98</sup>

Despite recognizing the fundamental right of parents to make decisions regarding the care, custody, and upbringing of their children, the court failed to

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89. *Id.*

90. *Id.*

91. *Id.* at 546.

92. *Id.* at 547.

93. *Id.* at 546.

94. *Id.*

95. *Id.* at 538.

96. *Id.*

97. *Id.* at 547.

98. *Id.* at 546.

apply the standard of review appropriate for such fundamental rights (i.e., strict scrutiny).<sup>99</sup> The court avoided application of the strict scrutiny standard, relying heavily on *Herndon*, by finding that the state's intrusion into the fundamental liberty did not "infringe substantially" or "heavily burden" family autonomy.<sup>100</sup> The magnitude of the infringement has been recognized as a consideration in fundamental rights jurisprudence.<sup>101</sup> However, allowing the government to force third party visitation upon an unwilling family, even when that third party is a grandparent, constitutes a significant intrusion into the integral family unit sufficient to warrant strict scrutiny analysis.<sup>102</sup> In fact, most courts have applied strict scrutiny analysis in determining the constitutionality of nonparental visitation statutes.<sup>103</sup> The application of strict scrutiny would afford the right of parents to make decisions regarding the care of their children the fundamental

99. *See id.* at 547; *see also* *Troxel v. Granville*, 530 U.S. 57, 80 (2000) (Thomas, J., concurring) (noting that the plurality failed to articulate the appropriate standard of review but stating that he would apply strict scrutiny analysis); *Herndon v. Tuhey*, 857 S.W.2d 203, 211 (Mo. 1993) (Covington, J., dissenting) ("Traditionally, governmental intrusions on a fundamental liberty interest have been reviewed with strict scrutiny to determine whether the governmental intrusion is constitutional.") (citing *Moore v. City of East Cleveland*, 431 U.S. 494, 499-502 (1977); *Roe v. Wade*, 410 U.S. 113, 155 (1973); *Aptheker v. Secretary of State*, 378 U.S. 500, 508-09 (1964)).

100. *Blakely*, 83 S.W.3d at 542 (quoting *Herndon*, 857 S.W.2d at 208-09).

101. *See Zablocki v. Redhail*, 434 U.S. 374, 386 (1978); *Herndon*, 857 S.W.2d at 208.

102. *See Herndon*, 857 S.W.2d at 212 (Covington, J., dissenting). If the impact of the state regulation does not rise to the level of substantial infringement, the applicable level of scrutiny is rational basis. *See City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 462 (1983) (O'Connor, J., dissenting), *overruled by Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

103. *See, e.g., L.B.S. v. L.M.S.*, 826 So. 2d 178, 184 (Ala. Civ. App. 2002) (stating that "[b]ecause the determination of child-visitation rights directly interferes with the parents' fundamental right to rear their children, a strict-scrutiny analysis must be applied"); *Linder v. Linder*, 72 S.W.3d 841, 855 (Ark. 2002) (applying strict scrutiny to grandparent visitation statute, in accordance with most courts addressing the issue); *In re Custody of C.M.*, No. 00CA2313, 2002 WL 31116773, at \*2 (Colo. Ct. App. Sept. 12, 2002) (concluding that strict scrutiny is the proper standard of review for grandparent visitation statute); *Roth v. Weston*, 789 A.2d 431, 441 (Conn. 2002) (stating that any infringement on a parent's interest in the care, custody, and control over his or her child requires application of the strict scrutiny test); *Santi v. Santi*, 633 N.W.2d 312, 317 (Iowa 2001) (applying strict scrutiny test to visitation statute); *Blixt v. Blixt*, 774 N.E.2d 1052, 1062 (Mass. 2002) (stating that the grandparent visitation statute requires strict scrutiny analysis because it implicates fundamental parental rights); *Stacy v. Ross*, 798 So. 2d 1275, 1280 (Miss. 2001) (stating that "[i]nterference with [the right of a parent to determine visitation] based upon anything less than compelling circumstances is not the intent of the visitation statute").

protection it deserves.<sup>104</sup> Under strict scrutiny review, Section 452.402 is highly suspect because where *fit* parents assert their fundamental right to the care and upbringing of their children, the state's interest is "de minimis."<sup>105</sup>

In lieu of the strict scrutiny test, the court in *Blakely* balanced the parental rights against the best interest of the child and the state's interest in maintaining contact between grandparents and grandchildren and found the scales to tip in favor of the state.<sup>106</sup> Exactly where this test falls along the spectrum of statutory judicial review is somewhat unclear. It appears that the court employed a rational basis test in determining the constitutionality of Section 452.402, asserting that the statute sought to "ensure the welfare of children therein by protecting the relationships those children form with such third parties' and provide children with the 'opportunity to benefit from relationships with statutorily specified persons—for example, their grandparents.'"<sup>107</sup> Although the United States Supreme Court, in *Troxel*, did not clearly articulate the standard of review to apply in determining the constitutionality of nonparental visitation statutes, it is relatively clear that the Court used something more rigorous than the rational basis test.<sup>108</sup> Applying, at the very least, a heightened standard of review as suggested in *Troxel* would require more than a rational relationship between the state statute and the objective of that statute. Rather, Section 452.402 intrudes upon the parents' fundamental liberty interest in family autonomy and does so in a broad fashion, providing only a "best interest of the child" test.<sup>109</sup> Consequently, the means are not narrowly drawn to the statute's ends.<sup>110</sup>

Furthermore, as a practical matter, the balancing test employed by the *Blakely* court encourages inconsistent and unpredictable applications of the Fourteenth Amendment's Due Process Clause among individuals challenging the

104. See *Herndon*, 857 S.W.2d at 212 (Covington, J., dissenting).

105. See *Stanley v. Illinois*, 405 U.S. 645, 657-58 (1972); *Herndon*, 857 S.W.2d at 211 (Covington, J., dissenting); Bryan Thomas White, Note, *Muddling Through the Murky Waters of Troxel: Will Grandparent Visitation Statutes Sink or Swim?*, 39 FAM. & CONCILIATION CTS. REV. 104, 108 (2001) (stating that "grandparent/third-party visitation statutes would be rendered unconstitutional because it is highly unlikely that these statutes serve a compelling state interest").

106. *Blakely v. Blakely*, 83 S.W.3d 537, 545 (Mo. 2002).

107. *Id.* at 546 (quoting *Troxel v. Granville*, 530 U.S. 57, 64 (2000)).

108. See *Troxel*, 530 U.S. at 65; Holly M. Davis, Note, *Non-Parent Visitation Statutes: Was Troxel v. Granville Their Death-Knell?*, 23 WHITTIER L. REV. 721, 753 (2002) (suggesting that using the rational basis test might contradict the plurality opinion in *Troxel*); White, *supra* note 105, at 108 (stating that the *Troxel* plurality employed a heightened protection standard of review to parental decisions opposing grandparent visitation petitions).

109. See *Herndon*, 857 S.W.2d at 212 (Covington, J., dissenting).

110. *Id.*

constitutionality of Section 452.402.<sup>111</sup> Rather than adopting a standard of review consistent with the fundamental right asserted, the court adopted a case-by-case approach for determining the propriety of Missouri's grandparent visitation statute—that is, each court must balance the applicable interests to determine if the court-ordered visitation amounts to a substantial interference of a parent's right to care, custody, and control of his or her children.<sup>112</sup> This standard, in essence, allows an individual trial judge's discretion to determine the amount of infringement permissible under the Constitution.<sup>113</sup> Furthermore, it encourages an arbitrary application of the law and permits a scenario where various courts reach differing opinions as to the constitutionality of similar visitation orders.<sup>114</sup> The court's standard directly contradicts the long-standing principle that the Constitution must be applied as uniformly as possible without resulting in a vast number of differing constitutional interpretations among jurisdictions.<sup>115</sup>

Additionally, the *Blakely* court's holding failed to acknowledge that Section 452.402 does not afford "special weight" to a fit parent's decision regarding the care, custody, and control of his or her child—a primary concern of the Supreme Court in *Troxel*. Instead, the court suggests that the "unreasonably denied" language in the statute employs such a presumption.<sup>116</sup> However, the legislative history of Section 452.402 suggests that the "unreasonably denied" Subsection was added to broaden the scope of the statute to include visitation between an intact family and estranged grandparents.<sup>117</sup> Contrary to the court's assertion, the statute, on its face, does not require a court to lend special weight to the parent's determination.<sup>118</sup> Absent a finding of unfitness, such a presumption in favor of the parents must be employed.<sup>119</sup> Interestingly, the court made no such assertion, much less a finding, that the parents were not fit to raise their children.

111. *Id.*; see also Natania M. Soto, Note, *Family Law: Whose Kids Are They, Anyway?: Analyzing Troxel v. Granville and the Current State of Oklahoma's Grandparent Visitation Statute*, 54 OKLA. L. REV. 413, 427 (2001).

112. See *Blakely*, 83 S.W.3d at 546; see also *Herndon*, 857 S.W.2d at 210-11 (stating that "[o]ur interpretation is based in part on the fact that if the statute allowed a great amount of visitation we would be more likely to find an undue burden on the family and hold that [Section 452.402 is] unconstitutional").

113. *Herndon*, 857 S.W.2d at 211.

114. *Id.*; see also Mark Moody, Note, *Constitutional Questions Regarding Grandparent Visitation and Due Process Standards*, 60 MO. L. REV. 195, 215 (1995).

115. See *Martin v. Hunter's Lessee*, 14 U.S. 304, 347-48 (1 Wheat. 1816).

116. See *Blakely*, 83 S.W.3d at 545.

117. See Brief for Respondent at 26, *Herndon v. Tuhey*, 857 S.W.2d 203 (Mo. 1993) (No. 17897-2) (citing Missouri House of Representative Interim Committee on Children, Youth, and Families, Report to the Speaker on Child Custody, Visitation, Child Support Enforcement and Divorce Mediation 22 (1987)).

118. Perhaps this explains the Missouri legislature's recent amendment to Section 452.402 to include such a presumption. See *supra* note 5.

119. See *Troxel v. Granville*, 530 U.S. 57, 70 (2000).

The court found significant the fact that the statute includes procedural safeguards, such as providing a home study, consulting with the child, and appointment of a guardian ad litem.<sup>120</sup> Though these safeguards may assist the judge in determining visitation rights, they are a far cry from ensuring that special weight is given to parental decisions. Consequently, Section 452.402 does not clearly afford a presumption in favor of fit parents regarding nonparental visitation and, as a result, is unconstitutional.

## VI. CONCLUSION

In *Blakely v. Blakely*, the Missouri Supreme Court held Missouri's grandparent visitation statute constitutional. While properly acknowledging the fundamental right of parents to make decisions concerning the care, custody, and upbringing of their children, the court applied an inappropriate standard of review and, consequently, reached a result that encourages inconsistent and unpredictable application of the law.

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120. *Blakely*, 83 S.W.3d at 545.