TRAVERSING THE CHANGING LANDSCAPE IN THIRD PARTY CUSTODY AND VISITATION CASES

Oregon State Bar Family Law Section Annual Conference
October 2013

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OCTOBER 12TH, 2013

OREGON STATE BAR FAMILY LAW SECTION CLE

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ORS 109.119– Who Is Entitled to Relief?

Any person, including a related or nonrelated foster parent, stepparent, grandparent or relative by blood or marriage

Who has established emotional ties creating

A child-parent relationship

OR

An ongoing personal relationship

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ORS 109.119(10)(a) : Parent-Child Relationship Defined

Time

- a relationship that exists or did exist, in whole or in part, within the six months preceding the filing of an action
- which relationship continued on a day-to-day basis
- Entire six months? Or part of six months?

Place

- a person having physical custody of a child or residing in the same household as the child

Acts

- supplied, or otherwise made available to the child, food, clothing, shelter and incidental necessaries
- provided the child with necessary care, education and discipline
- through interaction, companionship, interplay and mutuality, that fulfilled the child's psychological needs for a parent as well as the child's physical needs

NOT

Unrelated foster parent for less than 12 months

Providing child care while parent works. *Jensen v. Bevard*, 215 Or App 215, 218, (2007)

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ORS 109.119(10)(e): Ongoing Personal Relationship Defined

Time

- a relationship with substantial continuity for at least one year,

Act

- through interaction, companionship, interplay and mutuality

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ORS 109.119(2) – The Hurdle

The Presumption: "[T]here is a presumption that the legal parent acts in the best interests of the child."

Findings of Fact Required: "[T]he court shall include findings of fact supporting the rebuttal of the presumption . . .."

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ORS 109.119(2) & -(3)
How to Obtain Visitation Rights

Child-Parent Relationship

- Rebut presumption by preponderance of the evidence ("greater weight of the evidence")
- Visitation in child's best interests

Ongoing personal relationship

- Rebut presumption by clear and convincing evidence (the facts are "highly probable")
- Visitation in child's best interests

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ORS 109.119: Comparison of Rebuttal Factors in Visitation and Custody Cases – Non Exclusive Factors/Totality of the Evidence

Factor	Visitation ORS 109.119(4)(a)	Custody ORS 109.119(4)(b)
The petitioner/intervenor is or recently has been the child's primary caretaker	X	X
The legal parent is unwilling or unable to care adequately for the child		X
Circumstances detrimental to the child exist if relief is denied (psychological, emotional or physical harm)	X	X
The legal parent has fostered, encouraged or consented to the relationship between the child and the petitioner/intervenor	X	X
Granting relief would not substantially interfere with the custodial relationship	X	
The legal parent has unreasonably denied or limited contact between the child and the petitioner /intervenor	X	X
The legal parent has fostered, encouraged or consented to the relationship between the child and the petitioner/intervenor	X	X

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ORS 109.119: Procedural Considerations

Existing Case

- Motion to Intervene
- ORCP 33 governs

No Existing Case

- Petition for visitation or custody

What about dormant cases?

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Troxel v. Granville, 530 US 57 (2000)

Dissents –
J. Scalia (substantive due process not triggered)
J. Kennedy (no harm to child required)

"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 persona when visitation may serve the best interests of the child whether or not there has been any change in circumstances. " RCW 26.10.160 (3) (1994).

"Special weight" given to parent's decision. J. O'Connor, Chief Justice Rehnquist, J. Ginsburg, J. Breyer

Washington statute unconstitutional on face because court supplants parent. J. Souter

Strict scrutiny applied to any infringement on parent's childrearing rights. J. Thomas

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Adoptive Couple v. Baby Girl, 133 S. Ct. 2552 (2013)

"This case is about a little girl (Baby Girl) who is classified as an Indian because she is 1.2% (3/256) Cherokee. Because Baby Girl is classified in this way, the South Carolina Supreme Court held that certain provisions of the federal Indian Child Welfare Act of 1978 required her to be taken, at the age of 27 months, from the only parents she had ever known and handed over to her biological father, who had attempted to relinquish his parental rights and who had no prior contact with the child." J. Alito, J. Roberts, J. Kennedy (concurrences by J. Thomas, J. Breyer)

J. Sotomayor dissents (joined by J. Ginsburg, J. Kagan and J. Scalia) – concludes decision violates parent's substantive due process rights

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Modification Proceedings: Epler & Epler & Graunitz

- Court of Appeals issued this *en banc* plurality decision on September 11, 2013
- HELD: ORS 109.119 only applies in an original action for third party custody. If a parent seeks custody of the child in a modification action, ORCP 71C provides the authority to modify, there is no presumption that a fit parent acts in the child's best interests, and the parent must show there has been a substantial and unanticipated change in circumstances related to the parties' capacity to care for the child.
- PRACTICE TIP: When crafting a judgment awarding custody to a third party on behalf of a parent, include provisions automatically triggering a change in custody. The provision should state that the triggering provision constitutes a substantial and unanticipated change in circumstances.

ORS 109.119:
Narrowing of Third Party Custody Rights

Peak of Third Party Rights: pre-

O'Donnell-Lamont

Downward Trending:
State v. Wooden (2002)
onward

(fit parent prevails)

Can deprive parent of custody on bases less egregious than parental termination case, but unclear what will satisfy standard.

See, e.g., Winczewski

ORS 109.119(4)(a)(A): Third Party Is Or Recently Has Been Primary Caretaker

- Factor "focuses on the interest in continuity of caregiving and relationship between parent and non-parent." *O'Donnell-Lamont*, 337 Or at 111.
- Important in: *GJL v. AKL*,

ORS 109.119(4)(b)(A): Parent is Unwilling or Unable to Care Adequately for Child

- "[C]onsideration of this factor does not allow the court to substitute its judgment for that of a parent in determining that the nonparent is *better* able to care for the child." *O'Donnell*, 337 Or at 110 (emphasis in original).
- Where father is a prior felon, has committed domestic violence, and used illegal drugs, he made "great effort to change his past behaviors," and therefore is able to care for child. *Dennis.*
- Third party must show that risky behavior is continuing. Drug use, exposure to domestic violence, emotional issues, exposure to gangs in past insufficient. *Nguyen.*
- Job as truck driver, residential instability, drug use, personal shortcomings as parent not factors. *Mulheim.*
- Mother's independence and recent history of caretaking weighs in her favor. *Sears.*
- Where there is no evidence parent engages in risky behavior in children's presence, this factor is non-persuasive. *Dennis; Strome.*
- Previous 10 months of father's commitment establishes present ability. *Strome.*
- Factor persuasive when parent unable to meet children's emotional needs, providing inappropriate information and failing to segregate parent's and children's needs. *Winczewski* (Deitz concurrence).

ORS 109.119(4)(a)(B) & -(4)(b)(C): Circumstances Detrimental to Child Exist if Relief is Denied

- To rebut presumption, "the nonparent must demonstrate that the circumstances of living with the legal parent pose a serious risk of psychological, emotional or physical harm to a child." *O'Donnell*, 337 Or. at 113.
- Need "serious present risk" and cannot speculate as to future harm. *Van Driesche*, *O'Donnell.*
- Likely requires expert testimony. *Van Driesche.*
- Past and generally isolated circumstances not persuasive. *Sears.*
- Temporary detriment not sufficient. *Wurtele*, *Wooden*.

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ORS 109.119(4)(a)(C) & -4(b)(D): Legal Parent Fostered, Encouraged or Consented to Relationship

- If so, legal parent "at least at one point, apparently believed that the relationship was beneficial, or at least not detrimental, to the child." *O'Donnell*, 337 Or. At 115.
- Is two of six months enough? Unclear. *Nguyen*.
- In third party custody case, must foster a parent-child relationship (e.g., placement). *Mulheim*.

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ORS 109.119(4)(a)(D):
Granting Relief Would Not Substantially Interfere with Custodial Relationship

- Court examines amount of time sought by non-parent.
- 49 days represents "considerable interference." *GJL v. AKL*.
- 2/3 of weekends and half of all holidays is substantial interference. *Van Driesche*.

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ORS 109.119(4)(a)(E) & -4(b)(E): Parent Has Unreasonably Denied or Limited Contact

- Focuses on potential harm to a child's interest if a parent terminates or limits a relationship with a non-parent. *O'Donnell*, 337 Or at 116.
- Threats to terminate relationship are relevant. *Nguyen*, *GJL v. AKL*,
- Not compelling if there is acrimony. *Van Driesche.*
- Practice tips: Parent should phase in new custody arrangement. *Dennis*, *Strome*, *Nguyen*, *Wurtele* (holding father's insistent on immediate change against him). Parent should live near third party. *Nguyen*. Parent should carefully consider offering reasonable visitation. *Winczewski.* Parent should not overstate case. *Mulheim* (father criticized for stating DHS placement was kidnapping/hiding).
- Parent is allowed to "reevaluate past choices." *Van Driesche.*

ORS 109.119: Hypothetical One

Biological mother, who periodically disappears due to illegal drug use, leaves five year old Corey with her retired parents, who have consistently cared for him on the several occasions when she has previously disappeared. Biological father, who exercised sporadic visitation at his parents' home and suffers from a recurring heroin addiction, resents maternal grandparents' dismissive attitude of him and their de facto custody of Corey. Paternal grandparents have been involved consistently even when father is uninvolved, and are now financially supporting his efforts to obtain custody. Biological mother vacillates between supporting her parents' desire to continue as custodial resources and father's similar desire. There is no existing custody judgment in the case, as the parties never married. What are the relative merits of the claims?

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ORS 109.119: Hypothetical Two

Three and five year old children were informally placed by biological mother with paternal grandparents two years ago. Mother suffers from bipolar disorder that responds well to medication when she takes it, which she has done for the last seven months. She has had sporadic contact with them for the past two years consisting of an occasional weekend and one week each summer. Biological father has had no contact since the children's birth, but, due to his parents' concerns, has recently expressed interest in seeing the children. The five year old was diagnosed with ADHD two years ago, and is receiving special services which mother does not support. Mother, who moved in with a recovering alcoholic, took the children from grandparents five months ago, and now announced she plans to move with the children to Medford. What are the relative merits of each claim?

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Thank You

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APPENDIX:
CHANGING LANDSCAPE IN THE LITIGATION
OF THIRD PARTY CUSTODY AND VISITATION CASES

GRANDPARENT AND PSYCHOLOGICAL PARENT RIGHTS IN OREGON AFTER *TROXEL*© - UPDATE (*Rev. August 2013*)

The Rise and Fall of the Best Interests Standard

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INTRODUCTION

Grandparents, foster parents, and other third-parties play an increasing role in the care of children, statewide and nationally. According to a Pew Research Center analysis of recent US Census Bureau data, almost 7 million U.S. children live in households with at least one grandparent. Of this total, 2.9 million (or 41%) were in households where a grandparent was the primary caregiver, an increase of 16% since 2000. According to the Census Bureau (19%) percent of these families (551,000 grandparents) fall below the poverty line. There are on average 8000 children in foster care on any given day in Oregon. The relationship between these third parties and natural or biological parents has resulted in a significant and evolving body of case law and statutory changes.

In the seminal case of *Troxel v. Granville,* 530 US 57, 120 S. Ct. 2054,147 L.Ed 2d 49 (2000), the United States Supreme Court held that awarding visitation to a non-parent, over the objections of a parent is subject to constitutional limitations. The court invalidated, as applied, a Washington statute authorizing "any person" to petition for visitation rights "at any time" and providing that the court may order such visitation if it serves the "best interest of the child," on the ground that the statute violates a natural parent's right to substantive due process. The court specifically recognized as a fundamental liberty interest, the "interest of parents in the care, custody and control of their children." The *Troxel* case has affected laws in virtually all of the states, and has significantly reduced previously recognized rights of grandparents, step-parents and psychological parents in favor of birth parents.

In 2001, Oregon's legislature responded to *Troxel* by radically restructuring Oregon's psychological parent law (ORS 109.119) and in so doing, eliminated ORS 109.121-123, which gave specific rights to grandparents.

Before discussing the implications of *Troxel* and amended ORS 109.119, it is important to understand Oregon's law before *Troxel*.

GRANDPARENT AND THIRD PARTY RIGHTS IN OREGON BEFORE *TROXEL*

Before *Troxel*, Oregon's jurisprudence evolved from a strict preference in favor of natural parents to a fairly straight-forward application of the best interests test. In *Hruby and Hruby*, 304 Or 500 (1987), the Oregon Supreme Court held that the best interest standard is not applicable in custody disputes between natural parents and other persons, and that in custody disputes, a natural parent would not be deprived of custody absent "some compelling threat to their present or future well-being." That standard remained in place until 1999 when in *Sleeper and Sleeper*, 328 Or 504 (1999), *Hruby* was effectively swept aside and the court ordered that the best interest standard be applied to psychological parent cases. In *Sleeper*, the stepfather, a primary caretaker, obtained custody over biological mother. (See also *Moore and Moore*, 328 Or 513 (1999)). Significantly, the court limited *Sleeper* holding, applying the best interests test under the statute, by making it limited by an undefined "supervening right" of a natural parent. Therefore, before *Troxel*, once a third party had met the test for being psychological parent (*de facto* custodian), the best interest standard was applied and the psychological parent competed on an equal footing with the natural parent, subject to the natural parent's "supervening right." This "supervening right" was defined and applied in the post *Troxel* cases.

TROXEL APPLIED – THE NEW STANDARD

In ***O'Donnell-Lamont and Lamont,*** 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 *Troxel* as well as the post-*Troxel* 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 *Troxel* 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." *Id.* at 107. While a parent's unfitness or harm to a child can be strong evidence to overcome the *Troxel* (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 non-exclusive factors identified in ORS 109.119 (4)(b)." *Id*. at 108.

Notwithstanding this broad and encompassing standard, the more-recent case law demonstrates that two factors, parental fitness and harm to the child, are by far the most significant. See also discussion below on "*Demonstrating Harm to the Child - What Is Enough*?"

DIGEST OF POST-*TROXEL* CASES IN OREGON

1. ***Harrington v. Daum***, 172 Or App 188 (2001), CA A108024. Visitation awarded to deceased mother's boyfriend over objection of birth father, reversed. After *Troxel* v. *Granville*, application of ORS 109.119 requires that "significant weight" be given to a fit custodial parent's decision. The parent's constitutional right is a supervening right that affects the determination of whether visitation is appropriate and prevents the application of solely the best interest of the child standard.

2. ***Ring v. Jensen***, 172 Or App 624 (2001), CA A105865. Award of grandparent visitation, reversed. Grandmother's difficulty in obtaining the amount of visitation desired does not demonstrate the pattern of denials of reasonable opportunity for contact with the child as required by ORS 109.121.

3. ***Newton v. Thomas***, 177 Or App 670 (2001), CA A109008. Interpreting a prior version of ORS 109.119, the court reversed an award of custody to the grandparents in favor of the mother. Under ORS 109.119, a court may not grant custody to a person instead of a biological parent based solely on the court's determination of what is in the child's best interest. The court must give significant weight to the supervening fundamental right of biological parents to the care, custody and control of their children. In a footnote, the court declined to consider the impact of the amendments to ORS 109.119 enacted by the 2001 Legislature.

4. ***Williamson v. Hunt***, 183 Or App 339 (2002), CA A112192. Award of grandparent visitation reversed. The retroactive provisions of amended ORS 109.119 apply only to cases filed under the 1999 version of that statute and former ORS 109.121. Parental decisions regarding grandparent visitation are entitled to "special weight." Without evidence to overcome the presumption that a parent's decision to limit or ban grandparent visitation is not in the best interest of the child, the trial court errs in ordering such visitation (but see *Lamont*, Case Note 6).

5. ***Wilson and Wilson***, 184 Or App 212 (2002), CA A113524. Custody of stepchild awarded to stepfather, along with parties' joint child, reversed. Under *Troxel*, custody of the mother's natural child must be awarded to fit birth mother and because of the sibling relationship, custody of the parties' joint child must also be awarded to mother. [See Case Note 20 discussion below for Court of Appeals decision on remand from Supreme Court.]

6. ***O'Donnell-Lamont and Lamont***, 184 Or App 249 (2002), CA A112960. Custody of 2 children to maternal grandparents, reversed in favor of birth father (mother deceased). To overcome the presumption in favor of a biological parent under ORS 109.119(2)(a) (1997), the court must find by a preponderance of the evidence either that the parent cannot or will not provide adequate love and care or that the children will face an undue risk of physical or psychological harm in the parent's custody. A Petition for Certification of Appeal has been filed by birth father with the US Supreme Court and is pending at this time. [See discussion at Case Note 12 for *en banc* decision and discussion above, and Case Note 16 below for Supreme Court decision.]

7. ***Moran v. Weldon***, 184 Or App 269 (2002), CA A116453. *Troxel* applied to an adoption case. Adoption reversed where father's consent was waived exclusively based upon the incarceration provisions of ORS 109.322. *Troxel* requires that birth father's consent may not be waived without "proof of some additional statutory ground for terminating parental rights***."

8. ***State v. Wooden***, 184 Or App 537, 552 (2002), CA A111860. Oregon Court of Appeals, October 30, 2002. Custody of child to maternal grandparents, reversed in favor of father (mother murdered). A legal parent cannot avail himself of the "supervening right to a privileged position" in the decision to grant custody to grandparents merely because he is the child's biological father. Father may be entitled to assert parental rights if he grasps the opportunity and accepts some measure of responsibility for the child's future. To overcome presumption in favor of father, caregiver grandparents must establish by a preponderance of the evidence that father cannot or will not provide adequate love and care for the child or that moving child to father's custody would cause undue physical or psychological harm. Rather than order an immediate transfer, the court ordered that birth father be entitled to custody following a 6-month transition period. [See also Case Note 20, *Dennis,* for an example of another transition period ordered.]

9. ***Strome and Strome***, 185 Or App 525 (2003), *rev. allowed*, 337 Or 555 (2004), CA A11369. Custody of 3 children to paternal grandmother reversed in favor of birth father. The Court of Appeals ruled that where the biological father had physical custody for 10 months before trial, and had not been shown to be unfit during that time, Grandmother failed to prove by a preponderance of the evidence that father cannot or will not provide adequate love and care for the children or that placement in his custody will cause an undue risk of physical or psychological harm, in spite of father's past unfitness. [See discussion below Case Note 22 for Court of Appeals decision on remand from Supreme Court.]

10. ***Austin and Austin***,185 Or App 720 (2003), CA A113121. In the first case applying revised ORS 109.119 and, in the first case since *Troxel*, the Court of Appeals awarded custody to a third party (step-parent) over the objection of a birth parent (mother). The constitutionality of the revised statute was not raised before the court. The court found specific evidence to show that mother was unable to adequately care for her son. The case is extremely fact specific. Father had been awarded custody of three children, two of whom were joint children. The third child at issue in the case, was mother's son from a previous relationship. Therefore, sibling attachment as well as birth parent fitness were crucial to the court's decision. Petition for Review was filed in the Supreme Court and review was denied [337 Or 327 (2004)].

11. ***Burk v. Hall***, 186 Or App 113 (2003), CA A112154. Revised ORS 109.119 and *Troxel* applied in the guardianship context. In reversing a guardianship order the court held that: "***guardianship actions involving a child who is not subject to court's juvenile dependency jurisdiction and whose legal parent objects to the appointment of guardian are – in addition to the requirements of ORS 125.305 – subject to the requirements of ORS 109.119." The constitutionality of amended ORS 109.119 was not challenged and therefore not addressed by this court.

12. ***O'Donnell-Lamont and Lamont***, 187 Or App 14 (2003) (*en banc*), CA A112960. The *en banc* court allowed reconsideration and held that the amended psychological parent law [ORS 109.119 (2001)] was retroactively applicable to all petitions filed before the effective date of the statute. The decision reversing the custody award to grandparent and awarding custody to father was affirmed. Although 6 members of the court appeared to agree that the litigants were denied the "***fair opportunity to develop the record because the governing legal standards have changed***," a remand to the trial court to apply the new standard was denied by a 5 to 5 tie vote. [See discussion at Case Note 6 and Case Note 16 for Supreme Court decision.]

13. ***Winczewski and Winczewski***, 188 Or App 667 (2003), *rev. den*. 337 Or 327 (2004), CA A112079. [Please note that the *Winczewski* case was issued before the Supreme Court's decision in *Lamont*.] The *en banc* Court of Appeals split 5 to 5 and in doing so, affirmed the trial court's decision, awarding custody of two children to paternal grandparents over the objection of birth mother, and where birth father was deceased. For the first time, ORS 109.119 (2001) was deemed constitutional as applied by a majority of the members of the court, albeit with different rationales. Birth mother's Petition for Review was denied by the Supreme Court.

14. ***Sears v. Sears & Boswell***, 190 Or App 483 (2003), *rev. granted* on remand, 337 Or 555 (2004), CA A117631. The court reversed the trial court's order of custody to paternal grandparents and ordered custody to mother where the grandparents failed to rebut the statutory presumption that mother acted in the best interests of a 4-year old child. Mother prevailed over grandparents, notwithstanding the fact that grandparents were the child's primary caretakers since the child was 8 months old, and that mother had fostered and encouraged that relationship. *Sears* makes it clear that the birth parent's past history and conduct are not controlling. Rather, it is birth parent's present ability to parent which is the pre-dominate issue. [See Case Note 19 for decision on remand.]

15. ***Wurtele v. Blevins***, 192 Or App 131 (2004), *rev. den*., 337 Or 555 (2004), CA A115793. Trial court's custody order to maternal grandparents over birth father's objections. A custody evaluation recommended maternal grandparents over birth father. The court found compelling circumstances in that if birth father was granted custody, he would deny contact between the child and grandparents, causing her psychological harm, including threatening to relocate with the child out-of-state.

16. ***O'Donnell-Lamont and Lamont*****,** 337 Or 86, 91 P3d 721 (2004), *cert. den*., 199 OR App 90 (2005), 125 S Ct 867 (2005), CA A112960. The Oregon Supreme Court reversed the Court of Appeals and restored custody of the children to grandparents. Contrary to several prior Court of Appeals decisions, the Supreme Court held that it is not necessary that a third party overcome the *Troxel* 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." *Id.* at 107. While a parent's unfitness or harm to a child can be strong evidence to overcome the *Troxel* (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 non-exclusive factors identified in ORS 109.119(4)(b)."

17. ***Meader v. Meader***, 194 Or App 31 (2004), CA A120628. Grandparents had previously been awarded visitation of two overnight visits per month with three grandchildren and the trial court's original decision appeared to be primarily based upon the best interests of the children and the original ruling was considered without application of the *Troxel* birth parent presumption. After the Judgment, birth parents relocated to Wyoming and grandparents sought to hold parents in contempt. Parents then moved to terminate grandparents' visitation. At the modification hearing, before a different trial court judge, parents modification motion was denied on the basis that birth parents had demonstrated no "substantial change of circumstances." *Id.* at 40.

The Court of Appeals reversed and terminated grandparents' visitation rights. The court specifically found that in a modification proceeding no substantial change of circumstances was required. *Id.* at 45. Rather, the same standard applied a parent versus parent case [see *Ortiz and Ortiz*, 310 Or 644 (1990)] was applicable, that is the best interest of the child. The evidence before the modification court included unrebutted expert testimony that the child's relationship with grandmother was "very toxic; that the child did not feel safe with grandmother; that the child's visitation with grandmother was a threat to her relationship with Mother and that such dynamic caused the child to develop PTSD." The court also found "persuasive evidence" that the three children were showing signs of distress related to the visitation.

18. ***Van Driesche and Van Driesche,*** 194 Or App 475 (2004), CA A118214. The trial court had awarded substantial parenting time to step-father over birth mother's objections. The Court of Appeals reversed finding that the step-parent did not overcome the birth parent presumption. This was the first post - *Lamont* (Supreme Court) case. Although mother had encouraged the relationship with step-father while they were living together, and although such evidence constituted a rebuttal factor under ORS 109.119, this was not enough. The court found that such factor may be given "little weight" when the birth parent's facilitation of the third-party's contact was originally in the best interest of the child but was no longer in the best interest of the child after the parties' separation. Step-father contended that the denial of visitation would harm the children but presented no expert testimony.

19. ***Sears v. Sears & Boswell***, 198 Or App 377 (2005), CA A117631. The Court of Appeals, after remand by the Supreme Court to consider the case in light of *Lamont* [Case Note 16], adheres to its original decision reversing the trial court's order of custody to maternal grandparents and ordering custody to birth mother. Looking at each of the five rebuttal factors as well as under the "totality of the circumstances", birth mother prevailed again. Grandparents' strongest factor, that they had been the child's primary caretaker for almost two years before the custody hearing, was insufficient. Specifically, grandparents did not show birth mother to be unfit at the time of trial, or to pose a serious present risk of harm to the child.

20. ***Dennis and Dennis***, 199 Or App 90 (2005), CA A121938. The trial court had awarded custody of father's two children to maternal grandmother. Based upon ORS 109.119 (2001) and *Lamont*, the Court of Appeals reversed, finding that grandmother did not rebut the statutory presumption that birth father acts in the best interest of the children. The case was unusual in that there was apparently no evidentiary hearing. Rather, the parties stipulated that the court would consider only the custody evaluator's written report (in favor of grandmother) and birth father's trial memorandum, in making its ruling on custody. Birth father prevailed notwithstanding the fact that he was a felon, committed domestic violence toward birth mother, and used illegal drugs. However, birth father rehabilitated himself and re-established his relationship with his children. Although grandmother had established a psychological parent relationship and had been the long-term primary caretaker of the children, she was not able to demonstrate that birth father's parenting at the time of trial was deficient or inadequate; nor was grandmother able to demonstrate that a transfer of custody to birth father would pose a present serious risk of harm to the children as grandmother's concerns focused of birth father's past behaviors. The case continued the Court of Appeals trend in looking at the present circumstances of the birth parent rather than extenuating the past deficiencies. The case is also significant in that rather than immediately transferring custody of the children to birth father, and because birth father did not request an immediate transfer, the case was remanded to the trial court to develop a transition plan and to determine appropriate parenting time for grandmother. Birth father's request for a "go slow" approach apparently made a significant positive impression with the court. [See also Case Note 8, *State v. Wooden*, for an example of another transition plan.]

21. ***Wilson and Wilson*** [see Case Note 5 above]. Birth father's Petition for Review was granted [337 Or 327 (2004)] and remanded to the Court of Appeals for reconsideration in light of *Lamont*. On remand [199 Or App 242 (2005)], the court upheld its original decision, which found both parties to be fit. Birth father failed to overcome the presumption that birth mother does not act in the best interest of birth mother's natural child/father's stepchild; therefore, for the same reasons as the original opinion, custody of the party's joint child must also be awarded to birth mother.

22. ***Strome and Strome***, 201 Or App 625 (2005). On remand from Supreme Court to reconsider earlier decision in light of *Lamont*, the court affirms its prior decision (reversing the trial court) and awarding custody of the 3 children to birth father, who the trial court had awarded to paternal grandmother. Although birth father had demonstrated a prior interference with the grandparent-child relationship, the rebuttal factors favored birth father. The court particularly focused on the 10 months before trial where birth father's parenting was "exemplary." Because the children had remained in the physical custody of grandmother for the many years of litigation, the case was remanded to the trial court to devise a plan to transition custody to father and retain "ample contact" for grandmother. [See Case Note 9 above.]

23. ***Poet v. Thompson*****,** 208 Or App 442 (2006). Rulings made resulting from a pre-trial hearing to address issues of temporary visitation or custody under ORS 109.119, are not binding on the trial judge as the "law of the case." A party who does not establish an "ongoing personal relationship" or "psychological parent relationship" in such a hearing may attempt to establish such relationships at trial notwithstanding their failure to do so at the pre-trial hearing. Note the procedures and burdens to establish temporary visitation or custody or a temporary protective order or restraint are not established by statute or case law.

24. ***Jensen v. Bevard and Jones***, 215 Or App 215 (2007), CA A129611. The trial court granted grandmother custody of a minor child based upon a "child-parent relationship" in which grandmother cared for the child on many, but not all, weekends when mother was working. The Court of Appeals reversed, finding that grandmother's relationship did not amount to a "child-parent" relationship under ORS 109.119 and therefore, was not entitled to custody of the child. Mother and grandmother did not reside in the same home.

Practice Note: *It is unclear in this case whether grandmother also sought visitation based upon an "ongoing personal relationship." [ORS 109.119(10)(e)]. If she had, she may have been entitled to visitation but would have had to prove her case by a clear and convincing standard. Where a third-party's "child-parent" relationship is not absolutely clear, it is best to alternatively plead for relief under the "ongoing personal relationship," which is limited to visitation and contact only.*

25. ***Muhlheim v. Armstrong***, 217 Or App 275 (2007), CA A129926 and A129927. The Court of Appeals reversed the trial court's award of custody of a child to maternal grandparents. The child had been in an unstable relationship with mother and the child was placed with grandparents by the Department of Human Services (DHS). Although father had only a marginal relationship with the child, the court nevertheless ruled that he was entitled to custody, because the grandparents had not sufficiently rebutted the parental presumption factors set forth in ORS 119.119(4)(b). Grandparents had only been primary caretakers for 5 months proceeding the trial. Father had a criminal substance abuse history but "not so extensive or egregious to suggest that he is currently unable to be an adequate parent." While stability with grandparents was important and an expert had testified that removal of the child would "cause significant disruption to her development," those factors did not amount to "a serious present risk of psychological, emotional, or physical harm to the child." As in *Strome* (Case Note 22 above), the court directed the trial court to establish a transition plan to transfer custody to father and preserve ample contact between the child and her relatives.

Practice Note: *This case follows the general trend of preferring the birth parent over the third-party, and the downplaying of issues related to a birth parent's prior history, lack of contact, and disruption to the stability of the child. It may have been important in this case that grandparents hired a psychologist to evaluate their relationship, but the psychologist never met with father, nor was a parent-child observation performed.*

26. ***Middleton v. Department of Human Services***, 219 Or App 458 (2008), CA A135488. This case arose out of a dispute over the placement of a child between his long-term foster family and his great aunt from North Dakota, who sought to adopt him. DHS recommended that the child be adopted by his foster parents. The relatives challenged the decision administratively and then to the trial court under the Oregon Administrative Procedures Act (APA) (ORS 183.484). The trial court set aside the DHS decision, preferring adoption by the relatives. On appeal, the case was reversed and DHS's original decision in favor of the foster parent adoption was upheld. The court emphasized that its ruling was based upon the limited authority granted to it under the Oregon APA, and this was not a "best interest" determination. Rather, DHS had followed its rules, the rules were not unconstitutional, and substantial evidence in the record supported the agency decision. Since substantial evidence supported placement with either party, under the Oregon APA the court was not authorized to substitute its judgment and set aside the DHS determination.

27. ***Nguyen and Nguyen***, 226 Or App 183 (2009), CA A138531. Following the trend in recent cases, an award of custody to maternal grandparents was reversed and custody was awarded to birth mother. Mother had been the primary caretaker of the minor child (age 7 at the time of trial) but became involved in a cycle of domestic violence between herself, the child's father, and others; residential instability, and drug use. Mother also had some mental health issues in the past. At trial, the custody evaluator testified that mother was not fit to be awarded custody at the time of trial, but could be fit if she could make "necessary changes and provide stability and consistency ***." As to parental fitness, the most important issue according to the court, was that mother's history did not make her ***presently*** unable to care adequately for the child. As to the harm to the child element, the court repeated its past admonition that the evidence must show a "serious present risk" of harm. It is insufficient to show "***that living with a legal parent ***may*** cause such harm." As in *Strome* (Case Note 22), the court directed the trial court to establish an appropriate transition plan because of the child's long-term history with grandparents.

28. ***Hanson-Parmer, aka West and Parmer***, 233 Or App 187 (2010), CA A133335. The trial court determined that husband was the psychological parent of her younger son, and is therefore entitled to visitation with him pursuant to ORS 109.119(3)(a). Husband is not biological father. On appeal, the dispositive legal issue was whether husband had a "child-parent relationship." ORS 109.119(10)(a) is a necessary statutory prerequisite to husband's right to visitation in this case. Held: Husband's two days of "parenting time" each week is insufficient to establish that husband "resid[ed] in the same household" with child "on a day-to-day basis" pursuant to ORS 109.119(10)(a). Reversed and remanded with instructions to enter judgment including a finding that husband is not the psychological parent of child and is not entitled to parenting time or visitation with child; otherwise affirmed. See *Jensen v. Bevard* (Case No. 24).

29. ***DHS v. Three Affiliated Tribes of Port Berthold Reservation,*** 236 Or App 535 (2010), CA A143921. In a custody dispute under the Indian Child Welfare Act (ICWA) between long-term foster parents and a relative family favored by the tribe of two Indian children, the Court of Appeals found good cause to affirm the trial court's maintaining the children's placement with foster parents. Although this was not an ORS 109.119 psychological parent case, it contains interesting parallels. Under the ICWA, applicable to Indian children, the preference of the tribe for placements outside the biological parent's home, is to be honored absent good cause.

Although the ICWA does not define the term "good cause", the trial court concluded that it "properly and necessarily includes circumstances in which an Indian child will suffer serious and irreparable injury as a result of the change in placement." The Court of Appeals agreed with the trial court that good cause existed based upon persuasive expert testimony that "the harm to [the children] will be serious and lasting, if they are moved from [foster parents'] home." This analysis has its parallel in the ORS 109.119 rebuttal factor which provides for custody to a third-party if a child would be "psychologically, emotionally, or physically harmed" if relief was not ordered. It also parallels the Supreme Court's analysis of the ORS 109.119 harm standard, as requiring proof of circumstances that pose "a serious risk of psychological, emotional, or physical harm to the child." This case points to the necessity of expert testimony to support a third-party when they are seeking to obtain custody from a biological parent. See *Lamont* decision (Case Note 16).

30. ***Digby and Meshishnek***, 241 Or App 10 (2011), CA A139448. Former foster parent (FFP) sought third-party visitation from adoptive parents. FFP had last contact with children in July 2005 and filed an action under ORS 109.119 in June 2007, pleading only a "child-parent relationship" and not an "ongoing personal relationship." Trial court allowed FFP visitation rights. Court of Appeals reversed finding that FFP did not have a "child-parent relationship" within 6 months preceding the filing of the petition and because FFP did not plead or litigate an "ongoing personal relationship." *Lesson: Plead and prove the correct statutory relationship (or both if the facts demonstrate both).*

31. ***G.J.L. v. A.K.L.***, 244 Or App 523 (2011), CA A143417 (*Petition for Review Denied*). Grandparents were foster parents of grandson for most of his first 3 years of life. After DHS returned child to birth parents and wardship was terminated, parents cut off all contact with grandparents. Trial court found that grandparents had established a grandparent-child relationship and that continuing the relationship between them and child would be positive. Trial court denied Petition for Visitation because of the "*significant unhealthy relationship*" between grandparents and mother. No expert testimony was presented at trial. On appeal, the Court found that grandparents had prevailed on three statutory rebuttal factors (recent primary caretaker; prior encouragement by birth parents; and current denial of contact by parents). However, the Court of Appeals denied relief because grandparents failed to prove a "*serious present risk of harm*" to the child from losing his relationship with grandparents, and that grandparents' proposed visitation plan (49 days per year) "*would substantially interfere with the custodial relationship*." A Petition for Review was denied.

32. ***In the Matter of M.D., a Child, Dept. Of Human Services v. J.N.***, (A150405) 253 Or App 494 (2012). (Juvenile Court) The court did not err in denying father's motion to dismiss jurisdiction given that the combination of child's particular needs created a likelihood of harm to child's welfare. However, the court erred by changing the permanency plan to guardianship because there was no evidence in the record to support the basis of that decision- that the child could not be reunified with father within a reasonable time because reunification would cause "severe mental and emotional harm" to child. The "severe mental and emotional harm" standard parallels to the Oregon Supreme Court's analysis of the ORS 109.119 harm standard, as requiring proof of circumstances that pose a "serious risk of psychological, emotional, or physical harm to the child." See *Lamont* decision [Case No. 16].

33. ***In the Matter of R.J.T., a Minor Child, Garner v. Taylor*****,** (A144896) 254 Or App 635 (2013). Non bio parent obtained an ORS 109.119 judgment by default against child's mother for visitation rights with child. Later mother sought to set aside the default which was denied. Non bio parent later filed an enforcement action and also sought to modify the judgment seeking custody. The trial court set aside the original judgment, finding that non bio parent did not originally have a "child-parent" or "ongoing personal" relationship to sustain the original judgment; if she did have such a relationship, she could not rebut the birth parent presumption; and finally, that even if the birth parent presumption was rebutted, that visitation between non bio parent and the child was not in the child's best interest. On appeal, the Court of Appeals reversed the trial court for setting aside the original judgment *sua sponte*, finding no extraordinary circumstances pursuant to ORCP 71C. The Court of Appeals bypassed the issue as to whether there was originally an ongoing personal relationship with the child and originally whether the birth parent presumption had been rebutted. Instead, it simply upheld the trial court, finding that visitation should be denied because it was not in the child's best interests. Since this was not a *de novo* review, the court did not explain why visitation was not in the best interests of the child, but it would appear that the continuing contentious relationship between the parties was a significant factor.

34. ***Underwood et al and Mallory, nka Scott*** **(**A144622) 255 Or App 183 (2013). Grandparents obtained custody of child by default. Although certain ORS 109.119 rebuttal factors were alleged, the judgment granting custody to Grandparents was pursuant to ORS 109.103. Mother later filed a motion to modify the original judgment citing ORS 107.135 and ORS 109.103, but not ORS 109.119. In response, Grandparents contended that Mother did not satisfy the "substantial change of circumstances" test, governing ORS 107.135 modifications. The trial court and the Court of Appeals agreed. The Court of Appeals also noted with approval the trial court's finding that a change of custody would not be in the child's best interest, noting in particular that Grandparents had been the primary caretaker of the child for the past 10 years and facilitated (until recently) ongoing relationships between the child, his siblings, and mother. Because the case had originally been filed (apparently erroneously) under ORS 109.103, the Court of Appeals avoided "*the complex and difficult question *** as to whether the provision of ORS 109.119(2)(c) that removes the presumption from modification proceedings would be constitutional as applied to a circumstance where no determination as to parental unfitness was made at the time the court granted custody to grandparents*." Accordingly, where a custody or visitation judgment is obtained originally by default without a specific finding that the birth parent presumption had been overcome, it is unclear as to whether such presumption, under the United States Constitution, needs to be rebutted in modification or other subsequent proceedings.

35. ***Dept. of Human Services v. S.M.***, (A151376) 256 Or App 15 (2013). This is a juvenile court case holding a trial court's order allowing children, as wards of the court, to be immunized pursuant to legal advice but over mother and father's religious objections. There is an insightful discussion of *Troxel v. Granville* at pp 25-31. The court found that the immunization order did not violate *Troxel* or the constitutional right of parents to "direct the upbringing of their children," but noted the possibility that certain state decisions might run afoul of constitutional rights. This case strongly suggests that legal parents may be fit in certain spheres of parenting, but unfit as to others.

36. ***Dept. Of Human Services v. L. F.***, (A152179) 256 Or App 114 (2013). This is a fairly standard juvenile court case where the Court of Appeals upheld the trial court's finding of jurisdiction as to mother. As applied to ORS 109.119 litigation, the court's holding as follows may be relevant to the rebuttal factor relating to parental fitness and harm to the child. Noting that child, L.F., had "*** *severe impairments of expressive and receptive language*," the Court of Appeals agreed with the trial court that "*** *mother's inability or unwillingness to meet [child's] medical and developmental needs of [child] to a threat of harm or neglect. *** [Child's] development and welfare would be injured if mother were responsible for his care because she does not understand how to meet his special needs. Without the ability to understand and meet [child's] developmental and medical needs, it is reasonably likely that mother's care would hinder [child's] development and fall short of satisfying his medical needs*." *Id.* at 121-122.

DEMONSTRATING HARM TO THE CHILD - WHAT IS ENOUGH?

Query: Is the court expecting empirical or objective evidence that a transfer to a birth parent's full custody from a psychological parent would cause psychological harm to a child? How does one establish such evidence? Perhaps, some children may have to actually suffer psychological harm to form an empirical base. If a child is psychologically harmed as a result of the transition, does this constitute grounds for a modification? How long does one have to wait to assess whether psychological harm is being done - 6 months? One year? Some guidance is offered from the following cases.

Although Amended ORS 109.119 provides that the natural parent presumption may be rebutted if "circumstances detrimental to the child exists if relief is denied," summary evidence that a child would be harmed through a transition to the custodial parent will not be adequate. In *State v. Wooden* [Case Note 8], the testimony of noted child psychologist Tom Moran, that moving the child now "would be devastating and traumatic" was not sufficient. The court was critical as to the narrow scope of Dr. Moran's analysis - he did not perform a traditional custody evaluation "instead, he offered an opinion - - based solely on his limited contact with the child - - on the narrow issue of the probable effect of awarding custody 'right now'." Moran was also rebutted by Dr. Jean Furchner, who recommended that custody be awarded to father after a transition period of between 6 to 12 months.

In the *Strome* case [Case Note 9], the court majority discounted the testimony of Dr. Bolstad (who, in contrast to Dr. Moran in *Wooden*, did a comprehensive evaluation including mental health testing) that found the children to be "significantly at risk." The majority preferred the testimony of evaluator Mazza who evaluated Father and the children only, albeit in a more intensive fashion. *Strome* reversed the trial court and awarded custody to father drawing a dissent of 4 members of the court.

Five members of the *Winczewski* court [Case Note 13], agreed that the facts demonstrated that birth mother was unable to care adequately for the children and that the children would be

harmed if grandparent's were denied custody. That decision relied in part on the opinion of custody evaluator Dr. Charlene Sabin, whose report contained extensive references to mother's inability to understand the needs of the children; her unwillingness to accept responsibility for the children's difficulties and her very limited ability to distinguish between helpful and harmful conduct for the children. Viewing the same evidence through a different prism, Judge Edmonds and 4 members of the court determined that such evidence was inadequate to meet the constitutional standard. Judge Schuman and Judge Armstrong would have required evidence "far, far more serious" than presented to deny mother custody.

In the Supreme Court's *Lamont* decision [Case Note 16], the court specifically interpreted the "harm to child" rebuttal factor, ORS 109.119(4)(b)(C). Although the statutory language appeared to include a "may cause harm" standard, the Supreme Court adopted a limiting construction finding that "circumstances detrimental to the child" (ORS 109.119(4)(b)(c) "***refers to circumstances that pose a **serious present risk** of psychological, emotional, or physical harm to the child." The use of the reference to "serious present risk" is significant. The court specifically rejected an interpretation that the birth parent presumption could be overcome merely by showing that custody to the legal parent "may" cause harm*. Id.* at 112-113. While helpful, this does not end the analysis. Although the harm may occur in the future, arguably an expert can testify that a transfer of custody to a birth parent presents a serious present risk of harm even though the actual harm may occur in the future. Regardless of how one articulates the standard, it is clear from *Lamont* and *Van Driesche* [Case Note 18] that expert testimony will be required to demonstrate harm to the child and likely be necessary in order to demonstrate deficits or incapacity of a parent.

The trend in recent cases is to focus on the current, not past, parenting strengths and weaknesses of the birth parent, particularly where the birth parent has made a substantial effort at rehabilitation or recovery. Recent cases also suggest that the importance of preserving the stability achieved with a third-party and avoiding the trauma due to a change of custody may not be sufficient to meet the "serious present risk of harm" standard. This is particularly so where the third-party and birth parent are cooperating [*Dennis,* Case Note 20] and a reasonable transition plan can be developed.

DO CHILDREN HAVE CONSTITUTIONAL RIGHTS?

In the ongoing battles between birth parents and third parties, it seems that the rights of children have been largely ignored, except to the extent that the best interests standard is still considered on a secondary level. In *Troxel*, Justice Stevens in dissent found that children may have a constitutional liberty interest in preserving family or family-like bonds. In a challenge that does not appear to have been taken root in post-*Troxel* jurisprudence, Justice Stevens warned:

> "It seems clear to me that the due process clause of the 14th Amendment leaves room for states to consider the impact on a child of possibly arbitrary parental decisions that neither serve nor are motivated by the best interests of the child." 120 S. Ct. at 2074.

Contrast Justice Stevens' opinion with the recent case of *Herbst v. Swan* (Case No. B152450, October 3, 2002, Court of Appeals for the State of California, Second Appellate District), applying *Troxel* and reversing a decision awarding visitation to an adult sister with her half-brother (after their common father died). The statute was determined to be an unconstitutional infringement upon the mother's right to determine with whom the child could associate.

In *Winczewski* [Case Note 13], Judge Brewer, citing a number of cases from other states and literature from journals, noted: "In the wake of *Troxel*, courts are beginning to recognize that 'a child has an independent, constitutional guaranteed right to maintain contact with whom the child has developed a parent-like relationship.'" 188 Or App at 754. Judge Brewer recognized that "***it is now firmly established that children are persons within the meaning of the constitution and accordingly possess constitutional rights." 188 Or App at 752. But such rights are not absolute: "When the compelling rights of child and parent are pitted against each other, a balancing of interest is appropriate." 188 Or App at 750. In the final analysis, however, Judge Brewer did not articulate the parameters of a child's constitutional right and how that is to be applied, concluding only that a child's constitutional right "to the preservation and enjoyment of child-parent relationship with a non-biological parent is both evolving and complex." 188 Or App at 756. It would appear that Judge Brewer would be content to consider a child's constitutional right as part of the best interest analysis, but only if the *Troxel* presumption has been rebutted. 188 Or App at 756. Commenting upon Judge Brewer's analysis, Judge Schuman and Judge Armstrong were sympathetic to "a more sensitive evaluation of the child's interest than *Troxel* appears to acknowledge," but refused to accord to a child a free-standing fundamental substantive due process right. Rather, Judge Schuman and Judge Armstrong would accord a child "an interest protected by the state as *parens patriae*" rather than as a right. 188 Or App at 761.

In the 2003 and 2005 legislative sessions, this author proposed legislation (SB 804 [2003], SB 966 [2005]) which would mandate the appointment of counsel for children in contested custody third party v. parent proceedings, unless good cause was shown. Counsel would be appointed at the expense of the litigants, but each court would be required to develop a panel list of attorneys willing to represent children at either modest means rates or pro bono. The legislation stalled in committee in 2003 and 2005 with opponents citing cost considerations to litigants and that the court's discretionary power was adequate.

For further information about the implications of *Troxel* on children and families, see: Barbara Bennett Woodhouse, *Talking about Children's Rights in Judicial Custody and Visitation Decision-Making*, 33 Fam. L.Q. 105 (Spring 2002); *Family Court Review*, An Interdisciplinary Journal, Volume 41, Number 1, January 2003, Special Issue: *Troxel v. Granville and Its Implications for Families and Practice: A Multidisciplinary Symposium*; Victor, Daniel R. and Middleditch, Keri L., *Grandparent Visitation: A Survey of History, Jurisprudence, and Legislative Trends Across the United States in the Past Decade*, 22 J. Am. Acad. Matrimonial Lawyers 22, 391 (Dec. 2009); and Atkinson, Jeff, *Shifts in the Law Regarding the Rights of Third Parties to Seek Visitation and Custody of Children*, 47 F.L.Q. 1, 34 (Spring 2013).

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TIPS AND WARNINGS

- ORS 109.121-123 (former grandparent visitation statutes) was abolished. Now, grandparents are treated as any other third parties seeking visitation or custody. Therefore grandparent-child relationship which has languished for more than a year may result in the loss of any right to make a claim.

- Although Amended ORS 109.119 does not require the specific pleading of facts to support the rebuttal of the parental parent presumption, come trial courts have required this and have dismissed petitions without such allegations.

- Amended ORS 109.119 requires findings of fact supporting the rebuttal of the parental parent presumption. Be prepared to offer written fact findings to the court.

- It may be appropriate to seek appointment of counsel for the children involved. ORS 107.425 applies to psychological parent cases. It mandates the appointment of counsel if requested by the child and permits the appointment of counsel at the request of one of the parties. Expense for the appointment is charged to the parties.

- Custody and visitation evaluations are provided for at the parties' expense. This evidence is critical to the issue of the presumption as well as best interests of the child. An evaluator should be prepared to speak to issues of attachment (both to the birth parent and the third party); potential short and long term emotional harm if the child is placed with the birth parent or third party.

- The application of third party rights in the juvenile court has been substantially restructured. See ORS 419B.116; 419B.192; 419B.875. In 2003, the legislature created a new form of guardianship that would permit third parties to have custody of children under a court's wardship, but without the involvement of the Department of Human Services (DHS). (ORS 419B.366).

- Request findings of fact pursuant to ORCP 62 at the outset of your case and be prepared to draft the findings for the court. This will reduce the likelihood of remand if an appeal is successful.

- Whether representing a birth parent or a third-party, counsel should consider and present to the court a detailed transition plan to guide the court's decision in the event that a change of custody is ordered.

FAMILY LAW NEWSLETTER

Published by the Family Law Section of the Oregon State Bar

Oregon State Bar

Vol. 31, No. 3 June 2012

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What About the Children? - The Rise and Fall of the Best Interests Standard in Third Party Custody and Visitation Cases

Mark Kramer, Kramer and Associates

Introduction

Generations ago, families were typically multi-generational. Children, parents and grandparents lived in the same household and parenting was commonly shared. After World War II, the parent/grandparent generations increasingly became physically separated. Then, a variety of factors (including drugs, alcohol and dire economic conditions to name a few) conspired to make the older generation a significant partner once again in parenting children. Read the rest...

Pension Division – Three Easy Steps to Avoiding Costly Errors

By: David W. Gault

Executive Summary

To get pension division right in divorce proceedings (meaning truly equitable), family law attorneys and members of the bench do not need to be technical experts. All they really need is an elementary and easily gained understanding of some basic concepts presented here. The following discussion focuses on division of retirement plans prior to retirement, but the same principles apply to pensions in payout status. A recent Court of Appeals opinion, ***Rushby and Rushby***, 247 Or App 528, 270 P3d 327 (2011), held that a pension in payout status must be treated as property and therefore subject to potential division, and is not to be regarded as merely an income stream. Read the rest...

Marriage Equality Background and the Oregon Family Fairness Act

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I. Introduction

Perhaps no social issue has impassioned more sustained debate among Americans in the last decade than the question of marriage rights for same-sex couples. Gay couples sought such protections for their relationships as early as 1971, ***Baker v. Nelson***, 191 NW2d 185 (Minn. 1971), appeal dismissed, 409 US 810 (1972), but the issue did not really impinge on the public consciousness until some 20 years later. Read the rest...

Editor's Note

It is exciting to bring you this month's issue of the newsletter with five outstanding articles, an announcement and a correction from one of last year's articles. It is difficult to determine how to lead off the newsletter this month so we are listing three articles as leads on the front page with hyperlinks to the full article inside.

We have been bringing you regular articles on military family law subjects now for some time and as these articles are becoming regular features we have named a section for them called The Military Family Law Feature. As long as those articles keep coming look for that feature section each issue.

I want to again thank these authors for submitting such great materials. I hope you have a chance to read each and every article and by all means save them for future reference.

Daniel R. Murphy
Editor

What About the Children? – The Rise and Fall of the Best Interests Standard in Third Party Custody and Visitation Cases (Continued from Page 1)

Today, grandparents, foster parents, and other third-parties play an increasing role in the care of children, statewide and nationally. "One child in 10 in the United States lives with a grandparent, a share that increased slowly and steadily over the past decade before rising sharply from 2007 to 2008, the first year of the Great Recession."[1] About four-in-ten (41%) of those children who live with a grandparent (or grandparents) are also being raised primarily by that grandparent. In 2009, 7.8 million children lived with at least one grandparent. 2.9 million (or 41%) were in households where a grandparent was the primary caregiver.[2] There are more than 8000 children in foster care on any given day in Oregon.33 Approximately 22,000 children are raised by relative caregivers instead of parents, the equivalent of 3% of all children in Oregon. Of that number about 10% are in foster care.[4]

The relationship between these third parties and natural or biological parents has resulted in a significant and evolving body of case law and statutory changes. In this author's view, the evolution of recent law has run counter to the best interests of children.

1 September 2010, Pew Research Center, Pew Social and Demographic Trends, analysis of recent US Census Bureau data.

2 *Id.*

3 2011 Children's Defense Fund Report (http://www.childrensdefense.org/child-research-data-publications/data/state-data-repository/cits/2011/children-in-the-states-2011-oregon.pdf.)

4 "Stepping Up for Kids" - Report, Anne E. Casey Foundation, May, 2012 – http://www.aecf.org/KnowledgeCenter/Publications.aspx?pubguid={642BF3F2-9A85-4C6B-83C8-A30F5D928E4D}

The World Before and After *Troxel v. Granville*

Before *Troxel v. Granville,* 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed 49 (2000), Oregon's jurisprudence involving disputes between third parties and legal parents, evolved from a strict preference in favor of legal parents to a fairly straight-forward application of the best interests test. In *Hruby and Hruby*, 304 Or 500 (1987), the Oregon Supreme Court held that the best interest standard is not applicable in custody disputes between natural parents and other persons, and that in custody disputes, a natural parent would not be deprived of custody absent "some compelling threat to their present or future well-being." That standard remained in place until 1999 when in *Sleeper and Sleeper*, 328 Or 504 (1999), *Hruby* was effectively swept aside and the Court ordered that the best interest standard be applied to psychological parent cases. In *Sleeper*, the stepfather, a primary caretaker, obtained custody over biological mother. (See also *Moore and Moore*, 328 Or 513 (1999)). Significantly, the court limited *Sleeper* holding, applying the best interests test under the statute, by making it limited by an undefined "supervening right" of a natural parent.

Therefore, before *Troxel*, once a third party had met the test for being psychological parent (*de facto* custodian), the best interest standard was applied and the psychological parent competed on an equal footing with the natural parent, subject to the natural parent's "supervening right." This "supervening right" was defined and applied in the post *Troxel* cases.

Then came *Troxel,* where United States Supreme Court, in a plurality opinion, held that awarding visitation to a non-parent, over the objections of a parent is subject to constitutional limitations. The court invalidated, as applied, a Washington statute authorizing "any person" to petition for visitation rights "at any time" and providing that the court may order such visitation if it serves the "best interest of the child," on the ground that the statute violates a legal parent's right to substantive due process. The court specifically recognized as a fundamental liberty interest, the "interest of parents in the care, custody and control of their children." *Troxel, supra* 530 US at 66. This is referenced below as the "*Troxel presumption.*"

In 2001, Oregon's legislature responded to *Troxel* by radically restructuring Oregon's psychological parent law (ORS 109.119) and in so doing, eliminated ORS 109.121-123, which gave specific rights to grandparents. That statute creates two classes of third parties - "psychological parents" and those with "an ongoing personal relationship." Psychological parents can seek custody or visitation; those with an ongoing personal relationship can seek only visitation. To obtain relief, both classes need to overcome the *Troxel* presumption by proving one or more rebuttal factors - psychological parents by a preponderance of the evidence and the others by a clear and convincing standards. Assuming the rebuttal is proven, then relief may be ordered if it is in the best interests of the children.

The Fallout - Oregon's Application of *Troxel*

Since 2001 there have been more than 30 cases directly or indirectly addressing grandparent and psychological parent issues arising under the 2001 statute. The vast majority of cases have applied *Troxel* and ORS 109.119 in custody contests. The Oregon Supreme Court has spoken only once - *O'Donnell-Lamont and Lamont,* 337 Or 86 (2004). There, the Court reversed the Court of Appeals and restored custody of the children to grandparents. Contrary to several prior Court of Appeals decisions, the Supreme Court held there that it is not necessary that a third party overcome the *Troxel* presumption by demonstrating that the birth parent would harm the child or is unable to care for the child. Rather, the 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." *Id.* at 107. While a parent's unfitness or harm to a child can be strong evidence to overcome the *Troxel* (and ORS 109.119) 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)."* Id. at 108.

Although *O'Donnell-Lamont* was clear that the *Troxel* presumption legal parent presumption could be overcome by one, two or any number of the rebuttal factors, considered in isolation or in their totality, that holding has been distorted in a serious of later decisions by the Court of Appeals. In such cases, the Oregon Court of Appeals has focused almost entirely on two factors, parental fitness and harm to the child.

In *State v. Wooden*, 184 Or App 537 (2002), a custody order in favor of maternal grandparents was reversed in favor of father where grandparents failed to prove father was unfit. In *Strome and Strome*, 185 Or App 525 at 201 Or App 625 (2005), the Court of Appeals affirmed its prior (pre-*O'Donnell-Lamont*) decision awarding custody three children to birth father where father was deemed fit at least for the ten months prior to trial. In *Mulheim v. Armstrong*, 217 Or App 275 (2007), the Court of Appeals reversed the trial court's award of custody of a child to maternal grandparents finding that even with expert testimony supporting grandparents, that there was insufficient evidence to demonstrate "a serious present risk of psychological, emotional or physical harm to the child." *Id.* At 287, quoting *Strome and Strome,* 201 Or App 625, 634-35 (2005). In *Nguyen and Nguyen*, 226 Or App 183 (2009) an award of custody to maternal grandparents was reversed and custody was awarded to birth mother where the court found that mother's history did not make her ***presently*** unable to care adequately for the children and that as in prior cases, there is insufficient evidence of "serious present risk" of harm. See also *Sears v. Sears & Boswell*, 198 Or App 377 (2005)("Grandparents did not show birth mother to be unfit at the time of trial or pose a serious risk of harm to the child."); *Dennis and Dennis*, 199 Or App 90 (2005) (an award of custody to maternal grandmother reversed where father was not shown to be presently unfit at the time of trial or that a transfer of custody to birth father would pose a present serious risk of harm).

In one of the few post *O'Donnell-Lamont* cases going the other way, in *Wurtele v. Blevins*, 192 Or App 131 (2004), *rev. den.,* 337 Or 555 (2004), the Court affirmed a custody judgment in favor of maternal grandparent over legal father's objections. The court found compelling circumstances in that if legal father was granted custody, he would deny contact between the child and grandparents causing her psychological harm, including threatening to relocate with the child out of state.

In contrast, there have been no Supreme Court cases and few Court of Appeals cases addressing ORS 109.119 in the context of third party visitation, rather than custody. In *Harrington v. Daum*, 172 Or App 188 (2001), the Court of Appeals reversed a trial court's decision awarding visitation to deceased mother's boyfriend over the objection of legal father. In *Harrington*, father had offered continuing contact to boyfriend, but boyfriend wanted more. In *Williamson v. Hunt*, 183 Or App 339 (2002), (decided under pre-ORS 109.119 (2001) standards), a order for grandparent visitation was reversed where there was no evidence to overcome the birth parent presumption. In *Meader v. Meader*, 194 Or App 131 (2004), the matter was birth parents' motion to terminate grandparents' visitation previously ordered in light of birth parents' relocation to Wyoming. Finding "persuasive evidence" that the children at issue were showing signs of distress related to the visitation, the court terminated grandparents' visitation rights. In *Van Driesche and Van Driesche*, 194 Or App 475 (2004), the Court of Appeals reversed the trial court's award of parenting time to stepfather over birth mother's objections, finding that the parties' co-habitation and mother's prior encouragement of the stepparent relationship was insufficient to overcome the legal parent presumption. Stepfather had contended that denial of visitation would harm.

In the recent case of *G.J.L. v. A.K.L.*, 244 Or App 523 (2011), CA A143417 (Petition for Review Denied), grandparents were foster parents of grandson for most of his first 3 years of life. After DHS returned child to birth parents and wardship was terminated, parents cut off all contact with grandparents. The trial court found that grandparents had established a grandparent-child relationship and that continuing the relationship between them and child would be positive. The trial court denied their petition for visitation because of the "significant unhealthy relationship" between grandparents and

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FAMILY LAW NEWSLETTER

Published Six Times a Year by the Family Law Section of the Oregon State Bar.

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Publication Deadlines

The following deadlines apply if a member wants an announcement or letter included in the newsletter.

Deadline	Issue
August	07.15.12
October	09.15.12
December	11.15.12

mother.[5] No expert testimony was presented at trial. On appeal, the Court of Appeals found that grandparents had prevailed on three statutory rebuttal factors (recent primary caretaker; prior encouragement by birth parents; and current denial of contact by parents). However, the Court of Appeals denied relief because grandparents failed to prove a "serious present risk of harm" to the child from losing his relationship with grandparents, and that grandparents' proposed visitation plan (49 days per year) "would substantially interfere with the custodial relationship." A Petition for Review was denied.

Whither The Best Interests Standard?

ORS 109.119 was formulated in response to *Troxel* but nothing in *Troxel* dictates the narrow focus on the parental fitness and serious present risk of harm that has so preoccupied the Court of Appeals. *Troxel* specifically gave wide latitude to the states to determine how the legal parent presumption was to be applied:

> Because we rest our decision on the sweeping breadth of § 26.10.160(3) and the application of that broad, unlimited power in this case, we do not consider 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. We do not, and need not, define today the precise scope of the parental due process right in the visitation context. In this respect, we agree with JUSTICE KENNEDY that the constitutionality of any standard for awarding visitation turns on the specific manner in which that standard is applied and that the constitutional protections in this area are best "elaborated with care." Post, at 9 (dissenting opinion). Because much state-court adjudication in this context occurs on a case-by-case basis, we would be hesitant to hold that specific nonparental visitation statutes violate the Due Process Clause as a per se matter. 530 U.S. at 73.

Reasonable minds can differ about the Court of Appeals' constricted focus (serious present risk of harm to the child and present parental unfitness) in custody cases. Assuming such a focus is consistent with *O'Donnell-Lamont and Lamont* and appropriate in a custody case, should the same hold true when only visitation is at issue? If so, should there be a lesser threshold of evidence that is necessary to show serious present risk of harm to a child? Can ***serious present risk of harm*** be demonstrated, where the third party has been totally cut off from contact? If so, what

5 Strained relations, if not outright antipathy, between biological parents and thirds parties is a prevalent issue in these cases. The effect of this on continuing the third party-child relationship is beyond the scope of this article. Suffice it to say, if strained relations between parents was enough to limit parenting time, there would be far less parenting time for noncustodial parents. In parent v. parent cases, the court has ample tools to limit the fallout on children. The court can use those same tools in third party cases.

threshold of evidence is required? Are professional forensic witnesses required or can other professional or lay witnesses suffice? If the Court is essentially demanding expert testimony to meet the serious present risk of harm standard, is it even possible for an expert to competently arrive at such a finding within the current limitations of social science?

In none of the reported third party custody cases did the Supreme Court or Court of Appeals sanction a scheme that would allow a total termination of the third-party or grandparent relationship. In fact, in *Wurtele v. Blevins*, custody was awarded to maternal grandparents in large part because the court found that if birth father was granted custody he would deny contact between the child and grandparents including threatening to relocate out of state. Even in cases in which a custody award in favor of grandparents was reversed, the Court of Appeals has taken special note to direct a planful transition of the children to ensure that continuing contact with the grandparents occurred. See *State v. Wooden, Dennis and Dennis, and Strome and Strome*. But the absolute termination of a third party relationship, even one found to be in the best interests of a child, has been the result of constricted focus of the Court of Appeals.

All of us should be concerned about the impact of termination of a bonded third-party relationship to the children involved. Under our current focus, the best interest of the child is sometimes not even reached and if reached, the discussion is invariably secondary to the arguments about the *Troxel* presumption. The *Troxel* presumption is a matter of federal constitutional mandate, but the application and interpretation of that mandate should be revisited. The rights of children and in particular the *best interests* standard have been unfairly and inappropriately neglected in the Court of Appeals' construction of ORS 109.119. In *Troxel,* Justice Stevens noted in his forceful dissent:

> While this Court has not yet had occasion to elucidate the nature of a child's liberty interests in preserving established familial or family-like bonds, 491 U.S. at 130 (reserving the question), it seems to me extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests, and so, too, must their interests be balanced in the equation. 530 US at 88

He continued:

> It seems clear to me that the Due Process Clause of the Fourteenth Amendment leaves room for States to consider the impact on a child of possibly arbitrary parental decisions that neither serve nor are motivated by the best interests of the child. 530 US at 91.

Now that we have had more than a decade of experience after *Troxel* and the restructured ORS 109.119, it is high time to reflect on the impact of that experience on children and the risk it poses to third party relationships with children. The discussion and application of the best interests of children standard can and should be elevated in our cases. Such a much needed refocusing can be done without violating the commands of *Troxel* and ORS 109.119.

Pension Division – Three Easy Steps to Avoiding Costly Errors (Continued from page 1)

The three steps (summarized here and more fully explained below) essentially are:

> **Step One:** Correctly distinguish between a Defined Contribution Plan (a DC plan) and a Defined Benefit Pension Plan (a DB plan). General Judgment language that fails to distinguish the difference can compromise your intended result.
>
> **Step Two:** If the plan is a DB plan, consider carefully which "accrued benefit" it is that you are apportioning: the one accrued as of the date of divorce or the one that will exist fully-matured at the date of the employee's retirement.
>
> While dividing the accrued benefit at date of divorce may sound intuitively fair and correct, it appears to be presently contrary to Oregon law, and for good reason as explained later in this article.
>
> **Step Three:** Craft your General Judgment language to properly reflect your intent with the matters discussed in Steps One and Two. If the plan is a DC plan, award a dollar sum or a percent of the account balance as of a specified effective date, and address those issues of plan loans and investment earnings and losses between award date and distribution date. If the plan is a DB plan, refer to division of an accrued benefit rather than an account balance, while clearly identifying the benefit being apportioned and providing the marital fraction that derives the "marital portion".

Step One – Distinguish Between DC and DB

Many of you are well acquainted with the difference between a DC plan and a DB plan. That said, I continue to see general judgment language that attempts to treat a DC plan such as a 401(k) as if it were a pension plan by trying to assign a share of an annuity at retirement that does not exist, or more commonly, tries to assign an account balance in a pension plan that contains no account balance.

In general terms, DC plans are those carrying an account balance and the most prolific example is the 401(k) plan. Contributions into the employee plan account come from the employer or from elective deferrals of employee wages, or a combination of both. Investment results then hopefully grow the balance in the account, and the account balance at retirement constitutes the benefit.

Often the balance is rolled over to an IRA at retirement. Yes, there are a limited number of DB plans that carry an account balance, but those are more often treated as if they were DC plans when it comes to dividing them. **For DC plans, your general judgment language should award**

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	A	B	C	D
1	**Decision**	**Date**	**Third Party**	**Third Party Request**
2	*Troxel v. Granville, 530 US 57 (2000)*	Jun-00		
3	*Harrington v. Daum, 172 Or App 188 (2001)*	Jan-01	grandfather	visitation
4	*Ring v. Jensen, 172 Or App 624 (2001)*	Feb-01	maternal grandmother	custody & visitation
5	*Troxel fix amendments take effect*	May-01		
6	*Newton v. Thomas, 177 Or App 624 (2001)*	Oct-01	paternal grandparents	custody
7	*Marriage of Wilson, 184 Or App 212 (2002)*	Oct-02	stepfather	custody
8	*Williamson v. Hunt, 183 Or App 339 (2002)*	Aug-02	maternal grandmother	visitation
9	*Marriage of O'Donnell-Lamont I, 184 Or App 249 (2002), modified and adhered to, 187 Or App 14 (2003)*	Oct-02	maternal grandparents	custody
10	*Moran v. Weldon, 184 Or App 269 (2002)*	Oct-02	maternal uncle & his wife	adoption
11	*State v. Wooden, 184 Or App 537 (2002)*	Oct-02	maternal grandparents	custody
12	*Strome & Strome, 201 Or App 625 (2005)*	Jan-13	stepfather	custody
13	*Marriage of Austin, 185 Or App 720 (2003)*	Jan-03	stepfather	custody
14	*Burk v. Hall (In Re Goodwin) 186 Or App 113 (2003)*	Jan-03	child's 1/2 sister & husband	Permanent Co-Guardianship
15	*Marriage of Winczewski, 188 Or App 667 (2003), rev. den., 337 Or 327 (2004)*	Jul-03	paternal grandparents	custody
16	*Sears v. Sears & Boswell, 190 Or App 483, rev. granted on remand, 337 Or 555 (2004)*	Nov-03	paternal grandparents	custody
17	*Wurtele v. Blevins, 192 Or App 131 (2004), rev. den., 337 Or 555 (2004)*	Feb-04	maternal grandparents	custody
18	*Marriage of O'Donnell-Lamont, 337 Or 86 (2004)*	Jun-04	maternal grandparents	custody
19	*Meader & Meader, 194 Or App 331 (2004)*	Jun-04	paternal grandmother & stepgrandfather	visitation
20	*Marriage of Van Driesche, 194 Or App 475*	Aug-04	stepfather	visitation
21	*Sears v. Sears & Boswell, 198 Or App 337 (2005)*	Mar-05	paternal grandparents	custody
22	*Marriage of Dennis, 199 Or App 90 (2005)*	Apr-05	maternal grandmother	custody
23	*Strome & Strome, 201 Or App 625 (2005)*	Sep-05	paternal grandmother	custody
24	*Poet v. Thompson, 208 Or App 442 (2006)*	Oct-06	companion of maternal grandmother	visitation
25	*Jensen v. Bevard, 215 Or App 215 (2007)*	Sep-07	maternal grandmother	custody
26	*Muhlheim v. Armstrong, 217 Or App 275 (2007)*	Dec-07	maternal aunt and uncle	custody
27	*Middleton v. DHS, 219 Or App 458 (2008)*	Apr-08	maternal great aunt and husband	adoption
28	*Marriage of Nguyen, 226 Or App 183 (2009)*	Feb-09	maternal grandparents	custody
29	*Marriage of Hanson-Parmer, 233 Or App 187 (2010)*	Jan-10	stepfather	visitation
30	*In the Matter of KRC & IAC; DHS v. Three Affliliated Tribes of Berthold Reservation, 236 Or App 535 (2010)*	Aug-10	foster parents	custody
31	*In the Matter of CB, Digby v. Meshishnek, 241 Or App 10 (2011)*	Feb-11	former foster parents	visitation
32	*GJL v. AKL, 244 Or App 523 (2011)*	Jul-11	paternal grandparents	visitation
33	*In the Matter of MD; DHS v. JN, 253 Or App 494 (2012)*	Nov-12	maternal grandparents	adoption
34	*Garner v. Taylor, 254 Or App 635 (2013)*	Jan-13	lesbian partner	visitation
35	*Epler & Epler & Graunitz*, ___ Or App ___ (Sept. 11, 2013)	13-Sep	paternal grandmother	custody

	A	E	F	G
1	**Decision**	**Opposing Party**	**Trial Court**	**Appeal**
2	*Troxel v. Granville, 530 US 57 (2000)*			
3	*Harrington v. Daum, 172 Or App 188 (2001)*	father	granted visitation	reversed
4	*Ring v. Jensen, 172 Or App 624 (2001)*	father & adoptive stepmother	granted visitation	reversed
5	*Troxel fix amendments take effect*			
6	*Newton v. Thomas, 177 Or App 624 (2001)*	mother	granted custody	reversed
7	*Marriage of Wilson, 184 Or App 212 (2002)*	mother	granted custody	reversed
8	*Williamson v. Hunt, 183 Or App 339 (2002)*	mother and stepfather	granted custody	reversed
9	*Marriage of O'Donnell-Lamont I, 184 Or App 249 (2002), modified and adhered to, 187 Or App 14 (2003)*	father	granted visitation	reversed
10	*Moran v. Weldon, 184 Or App 269 (2002)*	father	granted visitation	reversed
11	*State v. Wooden, 184 Or App 537 (2002)*	father	allowed adoption	reversed
12	*Strome & Strome, 201 Or App 625 (2005)*	father	allowed custody	reversed
13	*Marriage of Austin, 185 Or App 720 (2003)*	mother	granted custody	affirmed
14	*Burk v. Hall (In Re Goodwin) 186 Or App 113 (2003)*	mother	granted guardianship	reversed
15	*Marriage of Winczewski, 188 Or App 667 (2003), rev. den., 337 Or 327 (2004)*	mother	granted custody	affirmed
16	*Sears v. Sears & Boswell, 190 Or App 483, rev. granted on remand, 337 Or 555 (2004)*	mother	granted custody	reversed
17	*Wurtele v. Blevins, 192 Or App 131 (2004), rev. den., 337 Or 555 (2004)*	father	granted custody	affirmed
18	*Marriage of O'Donnell-Lamont, 337 Or 86 (2004)*	father	granted custody	affirmed
19	*Meader & Meader, 194 Or App 331 (2004)*	parents	denied parents' mod	affirmed
20	*Marriage of Van Driesche, 194 Or App 475*	mother	granted vistiation	reversed
21	*Sears v. Sears & Boswell, 198 Or App 337 (2005)*	mother	granted custody	reversed
22	*Marriage of Dennis, 199 Or App 90 (2005)*	father	granted custody	reversed
23	*Strome & Strome, 201 Or App 625 (2005)*	father	granted custody	reversed
24	*Poet v. Thompson, 208 Or App 442 (2006)*	father	allowed custody	reversed
25	*Jensen v. Bevard, 215 Or App 215 (2007)*	mother	granted custody	reversed
26	*Muhlheim v. Armstrong, 217 Or App 275 (2007)*	father	granted custody	reversed
27	*Middleton v. DHS, 219 Or App 458 (2008)*	foster parents	DHS Order set aside	reversed
28	*Marriage of Nguyen, 226 Or App 183 (2009)*	mother	granted custody	reversed
29	*Marriage of Hanson-Parmer, 233 Or App 187 (2010)*	mother	granted visitation	reversed
30	*In the Matter of KRC & IAC; DHS v. Three Affliliated Tribes of Berthold Reservation, 236 Or App 535 (2010)*	tribe/maternal grandparents	granted visitation	affirmed
31	*In the Matter of CB, Digby v. Meshishnek, 241 Or App 10 (2011)*	adoptive parents	granted visitation	reversed
32	*GJL v. AKL, 244 Or App 523 (2011)*	mother	denied	affired
33	*In the Matter of MD; DHS v. JN, 253 Or App 494 (2012)*	father	granted guardianship	affirmed
34	*Garner v. Taylor, 254 Or App 635 (2013)*	mother	denied visitation	affirmed
35	*Epler & Epler & Graunitz* , ___ Or App ___ (Sept. 11, 2013)	mother	denied mother's mod	affirmed

	APP-24 A	H	I	J
1	**Decision**	**Child-Parent Relationship?**	**Ongoing Personal Relationship?**	**Rebut Presumption?**
2	*Troxel v. Granville, 530 US 57 (2000)*			
3	*Harrington v. Daum, 172 Or App 188 (2001)*		Yes	No
4	*Ring v. Jensen, 172 Or App 624 (2001)*		Yes	No
5	*Troxel fix amendments take effect*			
6	*Newton v. Thomas, 177 Or App 624 (2001)*	Yes		No
7	*Marriage of Wilson, 184 Or App 212 (2002)*		Yes	No
8	*Williamson v. Hunt, 183 Or App 339 (2002)*		Yes	No
9	*Marriage of O'Donnell-Lamont I, 184 Or App 249 (2002), modified and adhered to, 187 Or App 14 (2003)*	Yes		No
10	*Moran v. Weldon, 184 Or App 269 (2002)*			
11	*State v. Wooden, 184 Or App 537 (2002)*	Yes		No
12	*Strome & Strome, 201 Or App 625 (2005)*	Yes		No
13	*Marriage of Austin, 185 Or App 720 (2003)*	Yes		Yes
14	*Burk v. Hall (In Re Goodwin) 186 Or App 113 (2003)*	No		Not addressed
15	*Marriage of Winczewski, 188 Or App 667 (2003), rev. den., 337 Or 327 (2004)*	Yes		Yes
16	*Sears v. Sears & Boswell, 190 Or App 483, rev. granted on remand, 337 Or 555 (2004)*	Yes		No
17	*Wurtele v. Blevins, 192 Or App 131 (2004), rev. den., 337 Or 555 (2004)*	Yes		Yes
18	*Marriage of O'Donnell-Lamont, 337 Or 86 (2004)*	Yes		Yes
19	*Meader & Meader, 194 Or App 331 (2004)*			
20	*Marriage of Van Driesche, 194 Or App 475*	Did not decide	Did not decide	No
21	*Sears v. Sears & Boswell, 198 Or App 337 (2005)*	Yes		No
22	*Marriage of Dennis, 199 Or App 90 (2005)*	Yes		No
23	*Strome & Strome, 201 Or App 625 (2005)*	Yes		No
24	*Poet v. Thompson, 208 Or App 442 (2006)*			
25	*Jensen v. Bevard, 215 Or App 215 (2007)*	No		Not addressed
26	*Muhlheim v. Armstrong, 217 Or App 275 (2007)*	Yes		No
27	*Middleton v. DHS, 219 Or App 458 (2008)*			
28	*Marriage of Nguyen, 226 Or App 183 (2009)*	Yes		No
29	*Marriage of Hanson-Parmer, 233 Or App 187 (2010)*	No	No	
30	*In the Matter of KRC & IAC; DHS v. Three Affliliated Tribes of Berthold Reservation, 236 Or App 535 (2010)*			
31	*In the Matter of CB, Digby v. Meshishnek, 241 Or App 10 (2011)*	No	Not plead	
32	*GJL v. AKL, 244 Or App 523 (2011)*	Plead	Not plead	No
33	*In the Matter of MD; DHS v. JN, 253 Or App 494 (2012)*			
34	*Garner v. Taylor, 254 Or App 635 (2013)*		Yes	Not addressed
35	*Epler & Epler & Graunitz* , ___ Or App ___ (Sept. 11, 2013)	asserted		inapplicable

	A	K	L
1	**Decision**	**Panel**	**Note**
2	*Troxel v. Granville, 530 US 57 (2000)*		
3	*Harrington v. Daum, 172 Or App 188 (2001)*	Kistler, Armstrong	Pre Troxel fix
4	*Ring v. Jensen, 172 Or App 624 (2001)*	Armstrong, Kistler	Decided under former ORS 109.121
5	*Troxel fix amendments take effect*		
6	*Newton v. Thomas, 177 Or App 624 (2001)*	Landau, Brewer	
7	*Marriage of Wilson, 184 Or App 212 (2002)*	Landau, Brewer	
8	*Williamson v. Hunt, 183 Or App 339 (2002)*	Landau, Brewer	
9	*Marriage of O'Donnell-Lamont I, 184 Or App 249 (2002), modified and adhered to, 187 Or App 14 (2003)*	Kistler, Schuman	
10	*Moran v. Weldon, 184 Or App 269 (2002)*	Armstrong, Kistler	
11	*State v. Wooden, 184 Or App 537 (2002)*	En Banc	Shuman, Deitz, Brewer dissent
12	*Strome & Strome, 201 Or App 625 (2005)*	Wolheim, Schuman	On remand in light of O'Donnell
13	*Marriage of Austin, 185 Or App 720 (2003)*	Landau, Armstrong	
14	*Burk v. Hall (In Re Goodwin) 186 Or App 113 (2003)*	Landau, Armstrong	Chapter 125
15	*Marriage of Winczewski, 188 Or App 667 (2003), rev. den., 337 Or 327 (2004)*	En Banc	Affirmed by an equally divided court.
16	*Sears v. Sears & Boswell, 190 Or App 483, rev. granted on remand, 337 Or 555 (2004)*	Haselton, Wollheim	
17	*Wurtele v. Blevins, 192 Or App 131 (2004), rev. den., 337 Or 555 (2004)*	Linder, Ortega	
18	*Marriage of O'Donnell-Lamont, 337 Or 86 (2004)*		
19	*Meader & Meader, 194 Or App 331 (2004)*	Haselton, Linder	visits with third party not in children's best interests
20	*Marriage of Van Driesche, 194 Or App 475*	Haselton, Linder	
21	*Sears v. Sears & Boswell, 198 Or App 337 (2005)*	Haselton, Wollheim	On remand in light of *O'Donnell*
22	*Marriage of Dennis, 199 Or App 90 (2005)*	Edmonds, Schuman	
23	*Strome & Strome, 201 Or App 625 (2005)*	Wollheim, Schuman	On remand in light of *O'Donnell*
24	*Poet v. Thompson, 208 Or App 442 (2006)*	Brewer, Leonard	remanded
25	*Jensen v. Bevard, 215 Or App 215 (2007)*	Landau, Ortega	
26	*Muhlheim v. Armstrong, 217 Or App 275 (2007)*	Armstrong, Rosenblum	
27	*Middleton v. DHS, 219 Or App 458 (2008)*	Armstrong, Rosenblum	DHS administrative order
28	*Marriage of Nguyen, 226 Or App 183 (2009)*	Landau, Dietz	
29	*Marriage of Hanson-Parmer, 233 Or App 187 (2010)*	Armstrong, Rosenblum	
30	*In the Matter of KRC & IAC; DHS v. Three Affliliated Tribes of Berthold Reservation, 236 Or App 535 (2010)*	Armstrong, Duncan	ICWA decision
31	*In the Matter of CB, Digby v. Meshishnek, 241 Or App 10 (2011)*	Sercombe, Oretega	Failure to Plead
32	*GJL v. AKL, 244 Or App 523 (2011)*	Sercombe, Landau	
33	*In the Matter of MD; DHS v. JN, 253 Or App 494 (2012)*	Sercombe,Hadlock	Juvenile proceeding
34	*Garner v. Taylor, 254 Or App 635 (2013)*	Sercombe, Hadlock	
35	*Epler & Epler & Graunitz* , ___ Or App ___ (Sept. 11, 2013)	plurality en banc	

THIS FORM PRESUPPOSES TWO GRANDPARENTS AS PETITIONERS AND TWO PARENTS AS RESPONDENTS.

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF KEYBOARD()

Department of Family Law

KEYBOARD(), Petitioners, and KEYBOARD(), Respondents.	No. KEYBOARD() PETITION FOR CUSTODY (ORS 109.119)

1.

Petitioners KEYBOARD() and KEYBOARD() are the KEYBOARD(maternal OR paternal) grandparents of the minor childKEYBOARD(ren), KEYBOARD(), born KEYBOARD().

2.

Respondent KEYBOARD() is the father of the minor childKEYBOARD(ren). Respondent KEYBOARD() is the mother of the minor childKEYBOARD(ren).

3.

The minor childKEYBOARD(ren) KEYBOARD(is OR are) residentKEYBOARD(s (plural)) of the State of Oregon and KEYBOARD(is OR are) in the legal custody, care and control of KEYBOARD().

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TELEPHONE (503) 243-2733

UCCJEA INFORMATION

Child(ren) Address	DOB	Date	State	Placement Name/Address
KEYBOARD()	KEYBOARD()	KEYBOARD()	KEYBOARD()	KEYBOARD()

Petitioners have not participated, as parties, witnesses, or in any other capacity, in any other litigation concerning the custody of the minor childKEYBOARD(ren) in this or any other state; Petitioners have no information of any custody proceeding concerning the minor child KEYBOARD(ren) pending in a court of this or any other state; Petitioners know of no person not a party to these proceedings who has physical custody of the minor child KEYBOARD(ren)or claims to have custody or visitation rights with respect to the minor childKEYBOARD(ren).

4.

The presumption of a natural parent under ORS 109.119(2) should be rebutted based upon the following:

A. _____ The petitioner or intervenor is or recently has been the child's primary caretaker;

B. _____ Circumstances detrimental to the child exist if relief is denied;

C. _____ The legal parent has fostered, encouraged or consented to the relationship between the child and the petitioner or intervenor;

D. _____ Granting relief would not substantially interfere with the custodial relationship; or

E. _____ The legal parent has unreasonably denied or limited contact between the child and the petitioner or intervenor.

F. _____ The legal (surviving) parent is unwilling or unable to care adequately for the minor child

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5.

Petitioners have established a child-parent relationship with the minor childKEYBOARD(ren), which has existed within the six months preceding the filing of this action, in which the childKEYBOARD(ren) resided with Petitioners and Petitioners supplied the childKEYBOARD(ren) with food, clothing, shelter, and necessaries, and provided the childKEYBOARD(ren) with the necessary care, education, and discipline. Such a relationship has continued on a day-to-day basis through interaction, companionship, interplay, and mutuality, which has fulfilled the chil dKEYBOARD()'s psychological needs for a parent, as well as the childKEYBOARD(ren)'s physical needs.

6.

Grandparents have established an ongoing personal relationship with the minor child for at least one year through interaction, companionship, interplay and mutuality.

7.

Petitioners are fit and proper persons to be awarded custody of the minor child KEYBOARD(), and it is in the best interests of the childKEYBOARD() that custody be granted to Petitioners.

8.

If Petitioners are granted custody, Respondent KEYBOARD() should be granted reasonable parenting time with the minor childKEYBOARD(). **[add appropriate specifics]**

9.

If Petitioners are not granted custody, Petitioners should be awarded reasonable visitation and contact rights with the minor children, including one weekend per month, after school day visitation each week and the ability to volunteer in the children's classrooms and attend the social, recreational and academic activities of the children.

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10.

Petitioners should be awarded reasonable attorney fees and costs, pursuant to ORS 109.119(7).

WHEREFORE, Petitioners pray for an Order:

(a) Awarding Petitioners custody, care, and control of the minor child; alternatively reasonable visitation and contact rights.

(b) Awarding KEYBOARD( ) reasonable parenting time as described above;

(c) Awarding Petitioners reasonable attorney fees and costs;

(d) Awarding such other relief as the Court may deem equitable and just.

DATED this _____ day of KEYBOARD(), KEYBOARD().

KRAMER & ASSOCIATES

_____
KEYBOARD(), OSB No. KEYBOARD()
Of Attorneys for Petitioners
Trial Attorney
Email

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VERIFICATION

STATE OF OREGON)
) ss.
County of Multnomah)

We, KEYBOARD(), having been first duly sworn, do hereby state:

We are the Petitioners herein. The information contained in this Petition is true and accurate to the best of our knowledge and belief.

_____
KEYBOARD(), Petitioner

SUBSCRIBED and SWORN TO before me this _____ day of KEYBOARD(), KEYBOARD().

_____
Notary Public for Oregon
My Commission Expires:_____

_____
KEYBOARD(), Petitioner

SUBSCRIBED and SWORN TO before me this _____ day of KEYBOARD(), KEYBOARD().

_____
Notary Public for Oregon
My Commission Expires:_____

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O.R.S. § 109.119

109.119. Rights of person who establishes emotional ties creating child-parent relationship or ongoing personal relationship; presumption regarding legal parent; motion for intervention

(1) Except as otherwise provided in subsection (9) of this section, any person, including but not limited to a related or nonrelated foster parent, stepparent, grandparent or relative by blood or marriage, who has established emotional ties creating a child-parent relationship or an ongoing personal relationship with a child may petition or file a motion for intervention with the court having jurisdiction over the custody, placement or guardianship of that child, or if no such proceedings are pending, may petition the court for the county in which the child resides, for an order providing for relief under subsection (3) of this section.

(2)(a) In any proceeding under this section, there is a presumption that the legal parent acts in the best interest of the child.

(b) In an order granting relief under this section, the court shall include findings of fact supporting the rebuttal of the presumption described in paragraph (a) of this subsection.

(c) The presumption described in paragraph (a) of this subsection does not apply in a proceeding to modify an order granting relief under this section.

(3)(a) If the court determines that a child-parent relationship exists and if the court determines that the presumption described in subsection (2)(a) of this section has been rebutted by a preponderance of the evidence, the court shall grant custody, guardianship, right of visitation or other right to the person having the child-parent relationship, if to do so is in the best interest of the child. The court may determine temporary custody of the child or temporary visitation rights under this paragraph pending a final order.

(b) If the court determines that an ongoing personal relationship exists and if the court determines that the presumption described in subsection (2)(a) of this section has been rebutted by clear and convincing evidence, the court shall grant visitation or contact rights to the person having the ongoing personal relationship, if to do so is in the best interest of the child. The court may order temporary visitation or contact rights under this paragraph pending a final order.

(4)(a) In deciding whether the presumption described in subsection (2)(a) of this section has been rebutted and whether to award visitation or contact rights over the objection of the legal parent, the court may consider factors including, but not limited to, the following, which may be shown by the evidence:

(A) The petitioner or intervenor is or recently has been the child's primary caretaker;

(B) Circumstances detrimental to the child exist if relief is denied;

(C) The legal parent has fostered, encouraged or consented to the relationship between the child and the petitioner or intervenor;

(D) Granting relief would not substantially interfere with the custodial relationship; or

(E) The legal parent has unreasonably denied or limited contact between the child and the petitioner or intervenor.

(b) In deciding whether the presumption described in subsection (2)(a) of this section has been rebutted and whether to award custody, guardianship or other rights over the objection of the legal parent, the court may consider factors including, but not limited to, the following, which may be shown by the evidence:

(A) The legal parent is unwilling or unable to care adequately for the child;

(B) The petitioner or intervenor is or recently has been the child's primary caretaker;

(C) Circumstances detrimental to the child exist if relief is denied;

(D) The legal parent has fostered, encouraged or consented to the relationship between the child and the petitioner or intervenor; or

(E) The legal parent has unreasonably denied or limited contact between the child and the petitioner or intervenor.

(5) In addition to the other rights granted under this section, a stepparent with a child-parent relationship who is a party in a dissolution proceeding may petition the court having jurisdiction for custody or visitation under this section or may petition the court for the county in which the child resides for adoption of the child. The stepparent may also file for post-judgment modification of a judgment relating to child custody.

(6)(a) A motion for intervention filed under this section shall comply with ORCP 33 and state the grounds for relief under this section.

(b) Costs for the representation of an intervenor under this section may not be

charged against funds appropriated for public defense services.

(7) In a proceeding under this section, the court may:

(a) Cause an investigation, examination or evaluation to be made under ORS 107.425 or may appoint an individual or a panel or may designate a program to assist the court in creating parenting plans or resolving disputes regarding parenting time and to assist the parties in creating and implementing parenting plans under ORS 107.425 (3).

(b) Assess against a party reasonable attorney fees and costs for the benefit of another party.

(8) When a petition or motion to intervene is filed under this section seeking guardianship or custody of a child who is a foreign national, the petitioner or intervenor shall serve a copy of the petition or motion on the consulate for the child's country.

(9) This section does not apply to proceedings under ORS chapter 419B.

(10) As used in this section:

(a) “Child-parent relationship” means 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 necessaries 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 nonrelated foster parent of the child is not a child-parent relationship under this section unless the relationship continued over a period exceeding 12 months.

(b) “Circumstances detrimental to the child” includes but is not limited to circumstances that may cause psychological, emotional or physical harm to a child.

(c) “Grandparent” means the legal parent of the child's legal parent.

(d) “Legal parent” means a parent as defined in ORS 419A.004 whose rights have not been terminated under ORS 419B.500 to 419B.524.

(e) “Ongoing personal relationship” means a relationship with substantial continuity for at least one year, through interaction, companionship, interplay and mutuality.

Or. Rev. Stat. Ann. § 109.119 (West)

ORS 109.119 (PRE-*TROXEL* FIX)

109.119 Rights of grandparent, person who establishes emotional ties creating child-parent relationship or person who has ongoing personal relationship; costs for intervenor representation.

(1) Any person, including but not limited to a related or nonrelated foster parent, stepparent or relative by blood or marriage who has established emotional ties creating a child-parent relationship or an ongoing personal relationship with a child, or any legal grandparent may petition or file a motion for intervention with the court having jurisdiction over the custody, placement, guardianship or wardship of that child, or if no such proceedings are pending, may petition the court for the county in which the minor child resides for an order providing for relief under subsection (3) of this section.

(2) In any proceeding under this section, the court may cause an investigation to be made under ORS 107.425.

(3)(a) If the court determines that a child-parent relationship exists and if the court determines by a preponderance of the evidence that custody, guardianship, right of visitation, or other generally recognized right of a parent or person in loco parentis, is appropriate in the case, the court shall grant such custody, guardianship, right of visitation or other right to the person, if to do so is in the best interest of the child. The court may determine temporary custody of the child or temporary visitation rights under this paragraph pending a final order.

(b) If the court determines that an ongoing personal relationship exists and if the court determines by clear and convincing evidence that visitation or contact rights are appropriate in the case, the court shall grant visitation or contact rights to the person having the ongoing personal relationship if to do so is in the best interest of the child. The court may order temporary visitation rights under this paragraph pending a final order.

(4) In addition to the rights granted under subsection (1) or (3) of this section, a stepparent with a child-parent relationship who is a party in a dissolution proceeding may petition the court having jurisdiction for custody or visitation or may petition the court for the county in which the minor child resides for adoption of the child. The stepparent may also file for post decree modification of a decree relating to child custody.

(5)(a) A motion for intervention filed by a person other than a legal grandparent may be denied or a petition may be dismissed on the motion of any party or on the court's own motion if the petition does not state a prima facie case of emotional ties creating a child-parent relationship or ongoing

personal relationship or does not allege facts that the intervention is in the best interests of the child.

(b) A motion for intervention filed by a legal grandparent may be granted upon a finding by clear and convincing evidence that the intervention is in the best interests of the child.

(6) As used in this section:

(a) "Child-parent relationship" means 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 necessaries 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 nonrelated foster parent of the child is not a child-parent relationship under this section unless the relationship continued over a period exceeding 18 months.

(b) "Legal grandparent" means the legal parent of the child's legal parent.

(c) "Legal parent" means a parent as defined in ORS 419A.004 whose rights have not been terminated under ORS 419B.500 to 419B.524.

(d) "Ongoing personal relationship" means a relationship with substantial continuity for at least one year, through interaction, companionship, interplay and mutuality.

(7) In no event shall costs for the representation of an intervenor under this section be charged against funds appropriated for indigent defense services.

(8) In a proceeding under this section, the court may assess against any party a reasonable attorney fee and costs for the benefit of any other party.

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