

**COURT OF APPEALS  
THIRD APPELLATE DISTRICT  
HARDIN COUNTY**

**SHARON SPIVEY**

**CASE NUMBER 6-04-09**

**PLAINTIFF-APPELLEE**

**v.**

**OPINION**

**WILLIAM KELLER**

**DEFENDANT-APPELLANT**

**and**

**ATTORNEY GENERAL OF OHIO**

**INTERVENOR-APPELLEE**

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**CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas  
Court, Domestic Relations Division.**

**JUDGMENT: Judgment affirmed.**

**DATE OF JUDGMENT ENTRY: December 13, 2004.**

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**ATTORNEYS:**

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**Shaw, P.J.**

{¶1} Appellant, William Keller, appeals the decision of the Hardin County Court of Common Pleas granting visitation to his child's maternal grandmother, appellee, Sharon Spivey.

{¶2} Keller and his former wife, Diane, were married on April 29, 1995, and one child, Alec, was born as issue of the marriage on December 1, 1999. The marriage ended when Diane unexpectedly passed away in November 2001. Keller retained sole custody of Alec.

{¶3} Before Diane's passing, Spivey, Alec's grandmother (Diane's mother), was overtly involved in Alec's life. Since Diane's death, however, Keller has remarried, and the time Spivey spends with her grandson has diminished. Keller continuously suggested that Alec would be allowed to spend time with Spivey but requested that she not seek a court order requiring visitation rights. Nevertheless, Spivey initiated this action in order to obtain legally protected

visitation rights pursuant to R.C. 3109.11 and 3109.051. Keller defended his parental choice by arguing that the statute in question was unconstitutional. The Attorney General intervened as a nonparty pursuant to R.C. 2721.12 to defend the statute's constitutionality.

{¶4} In the hearing for visitation rights, Keller stated that he did not want visitation rights established because (1) he did not want a court order issued and (2) he felt the statute creating grandparent visitation rights was unconstitutional. The magistrate heard this testimony, as well as additional testimony from Keller, Spivey, and other relations and recommended Spivey be granted visitation rights. The magistrate's decision was adopted by the common pleas judge. Keller appeals from the court's decision and sets forth three assignments of error. For the sake of judicial economy, the first and third assignments will be consolidated into one argument; analysis of the second assignment will follow.

*First and Third Assignments of Error*

**A CUSTODIAL PARENT, WHETHER SINGLE OR MARRIED, HAS A FUNDAMENTAL RIGHT TO PRIVACY IN CHILD-REARING DECISIONS.**

**THE TRIAL COURT ERRED IN ORDERING ORC SECTION 3109.11 AS FACIALLY CONSTITUTIONAL AND CONSTITUTIONAL AS APPLIED.**

{¶5} At the outset, we note that the Ohio appellate courts seem to be divided over whether R.C. 3109.11 is constitutional. See *Oliver v. Feldner* (2002),

Case No. 6-04-09

149 Ohio App.3d 114 and *Frazier v. Frazier* (2003), 4th Dist. No. 02CA8, 2003-Ohio-1087 (holding R.C. 3109.11 unconstitutional); on the other hand, See *Baker v. Baker* (2003), 12th Dist. No. CA2002-04-008, 2003-Ohio-731 (holding that the factors announced in R.C. 3109.051 satisfy the requirements outlined in *Troxel v. Granville*); *In re Talkington* (2004), 5th Dist. No. 2003CA00226, 2004-Ohio-4215 and *Harrold v. Collier* (2004), 9th Dist. No. 03CA0064, 2004-Ohio-4331 (holding R.C. 3109.11 constitutional). The dispute, however, revolves around the interpretation of *Troxel v. Granville* (2000), 530 U.S. 57, 120 S.Ct. 2054 (plurality opinion), and its application to the statutes in question.

{¶6} In *Troxel*, the United States Supreme Court held that a Washington law that permitted “any person” at “any time” to petition a court for visitation rights was unconstitutional as applied to the particular facts of the case. *Id.* at 73. In writing for the plurality, Justice O’ Connor determined that the law was unconstitutional as applied because of its “sweeping breadth.” *Id.* In making its determination, the Court recognized that parents have a “fundamental right...to make decisions concerning the care, custody, and control of their children.” *Id.* at 65-66 (citing *Meyer v. Nebraska* (1923), 262 U.S. 390, 399, 43 S.Ct. 625; *Prince v. Massachusetts* (1944), 321 U.S. 158, 166, 64 S.Ct. 438; *Stanley v. Illinois* (1972), 405 U.S. 645, 651, 92 S.Ct. 1208; *Washington v. Glucksberg* (1997), 521 U.S. 702, 720, 117 S.Ct. 2258).

{¶7} However, after concluding that parental rights for visitation falls within the protection of substantive due process, the Court limited its ruling by stating that, as applied, the lower Washington courts did not take into account, or give special weight to, a fit parent’s decision to allow others visitation time with their children, which is a Due Process requirement. *Id.* at 69-70. The Court, in summation, explicitly announced that the *Troxel* ruling does not “define...the precise scope of the parental due process right in the visitation context.” *Id.* at 73.

{¶8} Although the *Troxel* Court did not expressly analyze the constitutionality of the Washington law under a “strict scrutiny” analysis, *Id.* at 81 (J. Thomas, concurring), the general rule is that when challenged legislation impinges on a fundamental constitutional right, courts must examine the statute under strict scrutiny analysis, i.e. the statute that challenges the fundamental right is unconstitutional unless it is necessary to promote a compelling governmental interest and is narrowly tailored to achieve that result. See *Perry Edn. Assn. v. Perry Local Educators’ Assn.* (1983), 460 U.S. 37, 45, 103 S.Ct. 948; *Sorrell v. Thevenir* (1994), 69 Ohio St.3d 415, 423, 633 N.E.2d 504. Moreover, Ohio courts have decided the issue based on whether the Ohio law is more narrowly tailored than the law in Washington, see *Oliver, supra; Frazier, supra; Baker, supra; In re Talkington, supra; Harrold, supra*, and whether a trial court provides “special weight” to parental decisions. *Id.*

{¶9} In two cases which find the grandparent visitation law unconstitutional, i.e. *Oliver*, supra and *Frazier*, supra, the Seventh and Fourth Districts concluded that the trial courts in those cases did not afford the parent’s decision to withhold visitation rights the “special weight” necessary to fulfill the *Troxel* requirements. *Oliver*, supra, at 126 (“It is clear from *Troxel* that the ‘special weight’ that must be given to a parent’s childrearing decisions has constitutional implications, and to overcome that ‘special weight,’ there must be some showing of compelling reasons and circumstances to disregard that parent’s wishes.”); *Frazier*, supra, at ¶27 (“Furthermore, although the language of the statute does not elevate any one of the factors above the others, *Troxel* makes it clear that...the wishes and concerns of the parent, are to be accorded special weight.” (internal citations and quotations omitted)). Moreover, both courts’ opinions rely heavily on the fact that the trial courts below did not give *any* weight to the parents’ wishes. *Oliver*, supra, at 127 (“[I]t appears as though the trial court substituted its own judgment as to [the grandchild’s] best interests and gave no weight at all to [the parent’s] expressed wishes”); *Frazier*, supra, at ¶27 (“In its judgment entry, the trial court clearly stated that it was not ‘elevating’ appellant’s wishes above any of the other factors for consideration.”).

{¶10} On the other hand, two cases from the Fifth and Ninth Districts conclude that the sixteen factor inquiry outlined in R.C. 3109.051 is narrowly

tailored to allow a trial court to fulfill the “special weight” requirement in *Troxel*, as well as, balance the best interest of the child. *In re Talkington*, supra; *Harrold*, supra (“Upon review, we conclude R.C. 3109.11 does not violate the dicta of *Troxel* because the statute provides for the wishes of the parents to be considered as well as the best interests of the child.”). For example, both courts note that R.C. 3109.51(D) specifically requires a court to give the requisite weight to a parent’s choice to refrain from visitation. *Harrold*, supra, at ¶17; *In re Talkington*, supra, at ¶31.

{¶11} Whereas the Washington statute gave nearly unlimited discretion to a trial court to award visitation rights “to anyone” at “any time,” the Ohio statute specifically requires a trial judge to review several factors that support the *Troxel* ruling. The Ohio statute states in relevant part:

**In determining whether to grant parenting time to a parent pursuant to...section 3109.11...the court shall consider all of the following factors:**

**(1) The prior interaction and interrelationships of the child with the child's parents, siblings, and other persons related by consanguinity or affinity, and with the person who requested companionship or visitation if that person is not a parent, sibling, or relative of the child;**

**(2) The geographical location of the residence of each parent and the distance between those residences, and if the person is not a parent, the geographical location of that person's residence and the distance between that person's residence and the child's residence;**

**(3) The child's and parents' available time, including, but not limited to, each parent's employment schedule, the child's school schedule, and the child's and the parents' holiday and vacation schedule;**

**(4) The age of the child;**

**(5) The child's adjustment to home, school, and community;**

**(6) If the court has interviewed the child in chambers, pursuant to division (C) of this section, regarding the wishes and concerns of the child as to parenting time by the parent who is not the residential parent or companionship or visitation by the grandparent, relative, or other person who requested companionship or visitation, as to a specific parenting time or visitation schedule, or as to other parenting time or visitation matters, the wishes and concerns of the child, as expressed to the court;**

**(7) The health and safety of the child;**

**(8) The amount of time that will be available for the child to spend with siblings;**

**(9) The mental and physical health of all parties;**

**(10) Each parent's willingness to reschedule missed parenting time and to facilitate the other parent's parenting time rights, and with respect to a person who requested companionship or visitation, the willingness of that person to reschedule missed visitation;**

**(11) In relation to parenting time, whether either parent previously has been convicted of or pleaded guilty to any criminal offense involving any act that resulted in a child being an abused child or a neglected child; whether either parent, in a case in which a child has been adjudicated an abused child or a neglected child, previously has been determined to be the perpetrator of the abusive or neglectful act that is the basis of the adjudication; and whether there is reason to believe that**

**either parent has acted in a manner resulting in a child being an abused child or a neglected child;**

**(12) In relation to requested companionship or visitation by a person other than a parent, whether the person previously has been convicted of or pleaded guilty to any criminal offense involving any act that resulted in a child being an abused child or a neglected child; whether the person, in a case in which a child has been adjudicated an abused child or a neglected child, previously has been determined to be the perpetrator of the abusive or neglectful act that is the basis of the adjudication; whether either parent previously has been convicted of or pleaded guilty to a violation of section 2919.25 of the Revised Code involving a victim who at the time of the commission of the offense was a member of the family or household that is the subject of the current proceeding; whether either parent previously has been convicted of an offense involving a victim who at the time of the commission of the offense was a member of the family or household that is the subject of the current proceeding and caused physical harm to the victim in the commission of the offense; and whether there is reason to believe that the person has acted in a manner resulting in a child being an abused child or a neglected child;**

**(13) Whether the residential parent or one of the parents subject to a shared parenting decree has continuously and willfully denied the other parent's right to parenting time in accordance with an order of the court;**

**(14) Whether either parent has established a residence or is planning to establish a residence outside this state;**

**(15) In relation to requested companionship or visitation by a person other than a parent, the wishes and concerns of the child's parents, as expressed by them to the court;**

**(16) Any other factor in the best interest of the child.**

{¶12} In our view, the sixteen factor analysis set forth in R.C. 3109.051(D) clearly permits a trial judge to satisfy the *Troxel* dicta and afford “special weight” to a parent’s decision to decline grandparent visitation rights. Moreover, given the range and specificity of these factors, the trial court can not only afford parental decisions the requisite “special weight,” it can also take into consideration the best interest of the child in question *and* balance that interest against the parent’s choice. Thus, we concur with the Fifth and Ninth Districts that R.C. 3109.051 and 3109.11 are constitutional within the parameters of the *Troxel* decision.

{¶13} In the case sub judice, the trial court, after weighing and hearing all the testimony, evaluated each factor outlined in R.C. 3109.051(D) and its impact on Keller, Spivey, and Alec in order to determine whether to grant Spivey visitation time with Alec. In its Findings and Opinions, the trial court concluded

**[Keller’s] answers demonstrate that he is agreeable to contact between [Spivey] and Alec. The terms, however, appear to pose difficulties. It is apparent 1) that relations are strained; 2) that [Keller] resents Court interference with his parental rights; 3) that visitation between [Spivey] and Alec will be at risk without an order.... The Court is reluctant to interfere with parental decisions and is of the opinion that such interference ought not to be done without substantial justification. However, after considering all of the factors mandated by [R.C. 3109.051(D)]...and after giving special weight to the wishes and concerns of Alec’s parents, which go to the nature, quality, and duration of the visitation rather than to its prohibition, the Court finds that it is in the best interest of the child [to allow] visitation....**

The trial court, therefore, did afford Keller's decision to limit court ordered visitation the "special weight" required by *Troxel* but ultimately decided that despite the "special weight," Spivey should be granted some visitation rights because it was in Alec's best interest. Additionally, the trial court's sixteen factor analysis in this case, which does appropriately weigh the parental interest, even seems to align with *Oliver* and *Frazier* since the trial courts in those cases did not appear to take into account the parent's wishes at all.

{¶14} In sum, we conclude that even though a parent's childrearing decision has been recognized as a fundamental right, R.C. 3109.11 and 3109.051 are sufficiently and narrowly tailored to take into account the "special weight" necessary to satisfy *Troxel's* substantive due process requirements. Furthermore, as applied in this case, the trial court did afford Keller's interest the "special weight" required by *Troxel*, but decided that interest was outweighed by Alec's interest to spend some time with his maternal grandmother. We, therefore, join the Fifth and Ninth Districts in concluding that R.C. 3109.11 and R.C. 3109.051 are constitutional and further find that those statutes were properly applied in this case. Keller's first and third assignments of error are overruled.

*Second Assignment of Error*

**THE TRIAL COURT'S DECISION TO GRANT APPELLEE VISITATION UNDER ORC SECTION 3109.11 WITH THE APPELLANT'S MINOR CHILD CONSTITUTED AN ABUSE OF DISCRETION BY THE TRIAL COURT.**

{¶15} In general, an appellate court will not disturb a trial court’s decision regarding visitation rights absent an abuse of discretion. *Booth v. Booth* (1989), 44 Ohio St.3d 142, 144, 541 N.E.2d 1028. “Abuse of discretion” is more than an error of judgment or law; it implies the court’s attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶16} In the instant case, we conclude that the trial court did not abuse its discretion when assigning visitation rights to Spivey. The trial court, in its Findings and Opinions, carefully reviewed and applied each of the sixteen factors stated in R.C. 3109.051(D), as well as interpreted that statute in light of *Troxel*. In particular, we note the trial court’s finding that the parental concerns went to the “nature, quality, and duration of the [grandparent’s] visitation rather than to its prohibition.” Thus, the trial court’s analysis after hearing and weighing the evidence submitted cannot be deemed unreasonable, arbitrary, or unconscionable. Keller’s second assignment of error is overruled.

*Judgment Affirmed.*

**CUPP, J., concurs.**

**ROGERS, J., dissenting in part and concurring in part.**

{¶17} **Rogers, J. Dissenting in part and concurring in part.** After reviewing the record and the applicable law, I must respectfully dissent in part

from the analysis and disposition of this case by the majority. Specifically, I would find that R.C. 3109.11, as applied in this case, is unconstitutional.

{¶18} Initially, I must acknowledge that I agree with the majority's conclusion that R.C. 3109.11 is significantly different from the Washington statute reviewed by the Supreme Court in *Troxel*. I also agree that the above statute, when read in conjunction with R.C. 3109.051(D), is not as sweepingly overbroad as the Washington statute. Additionally, while I would generally agree with the majority's finding that the factors set forth in R.C. 3109.051(D) do permit a trial court to satisfy the requirement's of *Troxel*, I would note that not all sixteen factors set forth in R.C. 3109.051(D) apply to non-parental visitation rights. However, because R.C. 3109.051(D)(15), which states, "In relation to requested companionship or visitation by a person other than a parent, the wishes and concerns of the child's parents, as expressed by them to the court," specifically requires the trial court to give heed to a parent's wishes and concerns, I concur with the majority's general determination that R.C. 3109.11 is, on its face, constitutional.

{¶19} However, while I would find R.C. 3109.11 constitutional on its face, I disagree with the majorities finding that the trial court herein afforded Appellant the extreme deference required under *Troxel*.

{¶20} In *Oliver v. Feldner*, which the majority references above, the Seventh District Court of Appeals thoroughly discussed *Troxel*, as well as the history of cases leading up to the Supreme Court's decision in that case. In *Oliver*, the Seventh District Court of Appeals noted that while the Supreme Court agreed with the Washington Supreme Court that the Washington statute was unconstitutional, the Supreme Court found the statute to be unconstitutional for different reasons. *Oliver*, 149 Ohio App.3d at ¶52. Specifically, the *Oliver* Court noted that the *Troxel* Court found that the Washington statute was unconstitutional as applied to the facts in that case. *Id.*

{¶21} The Seventh District went on to breakdown the analysis of the Supreme Court in *Troxel*. Accordingly, the Seventh District stated:

**In light of extensive Supreme Court precedent *Troxel* concluded that 'it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.'**

***Troxel* also held that, 'if a fit parent's decision of the kind at issue here becomes subject to judicial review, the court must accord at least some special weight to the parent's own determination.'** This holding recognizes that there are at least two hurdles of constitutional analysis which must be overcome for a nonparental visitation order to be valid. The first hurdle, and that which takes up the major part of the *Troxel* decision, addresses whether there are compelling and narrowly tailored reasons for a court to be hearing the visitation case at all. The second hurdle addresses whether there are compelling and narrowly tailored reasons for the court to impose a specific visitation order on the parents. Assuming that the statute has overcome the first hurdle (i.e., there is a constitutionally valid

reason for haling the parents into court), the *Troxel* court articulated the "special weight" rule to ensure that any resulting visitation order would also be narrowly tailored to serve a compelling governmental interest.

Id. at ¶ 55-56 (citations omitted.)

{¶22} The Seventh District Court of Appeals noted that the Supreme Court neither defined nor provided much guidance on how to apply its "special weight" rule; however, it went on to look at other Supreme Court decisions that dealt with a "special weight" requirement. Id. at ¶ 59. Specifically, the Seventh District stated:

**Even though the *Troxel* court did not define 'special weight,' previous Supreme Court decisions make it clear that "special weight" is a very strong term signifying extreme deference. See, e.g., *Rodrigues v. Hawaii* (1984), 469 U.S. 1078, 1080, 105 S.Ct. 580, 83 L.Ed.2d 691 (special weight is given to a verdict of acquittal, signifying a conclusive presumption that a second trial would be unfair); *Guardians Assn. v. Civ. Serv. Comm.* (1983), 463 U.S. 582, 621, 103 S.Ct. 3221, 77 L.Ed.2d 866 (special weight given to longstanding and consistent administrative interpretations of a statute; court must defer to the interpretation even if the court would interpret the statute differently); *Comstock v. Group of Institutional Investors* (1948), 335 U.S. 211, 230, 68 S.Ct. 1454, 92 L.Ed. 1911 (findings of bankruptcy judge are given special weight; reviewing courts should defer to those findings). The "special weight" requirement, as illuminated by these prior Supreme Court cases, means that the deference provided to the parent's wishes will be overcome only by some compelling governmental interest and overwhelmingly clear circumstances supporting that governmental interest.**

Id.

{¶23} The Seventh District then stated that the traditional areas where the State has had a compelling government interest, necessitating interference with a parent's right to care and custody of their child, include protection of the children from harm and the State's interest in preserving the welfare of its children, which involve situations of delinquency, neglect and abuse." Id. at ¶ 60- 61.

{¶24} Finally, the Seventh District held that:

**Appellees present no compelling governmental interest for interfering with appellant's fundamental right to raise her daughter as she sees fit. There is nothing in the case at bar indicating that appellees' petition for visitation arose to prevent actual or potential harm to Laken. It is undisputed that appellant is a fit parent, so there was no reason for the court to intervene as *parens parentiae*. Furthermore, appellees did not seek visitation on the basis that they had functioned as *de facto* parents to Laken, which may at times serve as a compelling governmental interest in nonparental-visitation cases. See, e.g., *Rideout v. Riendeau* (Me.2000), 761 A.2d 291, 301.**

\* \* \*

**It is clear from *Troxel* that the "special weight" that must be given to a parent's childrearing decisions has constitutional implications, and to overcome that "special weight," there must be some showing of compelling reasons and circumstances to disregard the parent's wishes. We find no such compelling reasons either in the nonparental-visitation statute or the evidence presented in this case. Because we find no compelling interest at stake, it is also apparent that we cannot find that the resulting visitation order was narrowly tailored to achieve a compelling interest. Therefore, *as applied to the facts of this case*, the trial court's decision must be overturned.**

Id. at ¶ 62, 66.

{¶25} The majority relies upon the fact that the *Oliver* Court gave no consideration to the parent's wishes in that case, finding that court's decision distinguishable with the case sub judice. I, on the other hand, find the facts of this case to be similar to *Oliver*. In *Oliver*, "[t]he trial court concluded that the only significant explanation for the appellant's refusal to allow visitation was that appellant's mother was against such visitation." *Id.* at ¶ 68. In the case sub judice, Appellant was not against visitation per se, but rather Appellant was against the court being involved in that visitation. While the trial court's judgment entry does note that it gave "special weight to the wishes and concerns of [Appellant]," I cannot say that such a statement alone is enough to satisfy the requirements of *Troxel*.

{¶26} Based upon the above discussion, Appellant is presumed to be a fit parent. Upon review of the record, there is no evidence to contrary. Furthermore, it is presumed that a fit parent will act in their child's best interest. Again, upon review of the record, I find no evidence that Appellant is not acting in accordance with the child's best interests. Finally, I find that Appellee failed to present any evidence to overcome these strong presumptions. Appellee has failed to present any evidence as to why seeking visitation is in the child's best interest, where a fit parent is against such visitation. I do not believe it is enough for a grandparent to merely want visitation. Rather, the petitioning party carries the burden of showing

why visitation is in the child's best interest. Furthermore, the petitioner cannot rely solely on the general principle that a child will benefit from a relationship with a biological relative.

{¶27} The trial court in this case did consider the relevant factors under R.C. 3109.051(D); however, I cannot say that the trial court's findings under those factors rose to a level to disregard Appellant's wishes in the case. While Appellant's wish to not have the court involved may seem minimal, it is still the wish of a fit parent who is presumed to act in his child's best interests. Additionally, the trial court in this case seemed to gloss over Appellant's wish in light of Appellee's desire to be involved in the child's life. I cannot say this is enough to satisfy the *Troxel* requirement.

{¶28} In conclusion, because I cannot find that the trial court had a compelling reason or circumstance to disregard Appellant's wishes in this case, I would find that R.C. 3109.11, as it was applied in this case, is unconstitutional. Accordingly, I respectfully dissent from the majority, and I would reverse the decision of the trial court.

**r**