The summaries of the Colorado Court of Appeals published opinions constitute no part of the opinion of the division but have been prepared by the division for the convenience of the reader. The summaries may not be cited or relied upon as they are not the official language of the division. Any discrepancy between the language in the summary and in the opinion should be resolved in favor of the language in the opinion.

SUMMARY
April 20, 2023

2023COA35

No. 21CA1695, *Marriage of O'Connor* — Family Law — Grandparents or Great-Grandparents — Visitation Rights — *Troxel* Presumption

A division of the court of appeals considers what legal standard a district court must apply when one parent supports, but the other parent opposes, grandparents' request for court-ordered visitation with their grandchild under section 19-1-117, C.R.S. 2022. Guided by the test in *In re Adoption of C.A.*, 137 P.3d 318 (Colo. 2006), which articulated the standard for resolving disputes when both parents oppose a grandparent's request for visitation, and the holding in *Troxel v. Granville*, 530 U.S. 57 (2000), which requires courts to afford presumptive or special weight to a fit parent's decision regarding his or her child's visitation with third parties, the division holds that a district court may not disregard

the parents' fundamental right to make decisions regarding their children under the theory that the parents' presumptions cancel each other out. Because the opposing parent's decision concerning the best interests of his or her children is the only parental decision subject to judicial review under section 19-1-117, the presumption articulated in *Troxel* extends solely to the determination made by the opposing parent.

The division concludes that, because the district court afforded father his presumption and provided mother with the opportunity to present evidence and arguments, and because grandparents failed to meet their burden of proof to overcome father's presumption by clear and convincing evidence, the court did not err by denying grandparents' request for court-ordered visitation.

COLORADO COURT OF APPEALS **2023COA35**

Court of Appeals No. 21CA1695
City and County of Denver District Court No. 17DR30212
Honorable Christine C. Antoun, Judge

In re the Marriage of

Samuel Isaac O'Connor,

Appellee,

and

Aliza O'Connor,

Respondent,

and

William Greenbaum and Hadassa Gerber,

Intervenors-Appellants.

ORDER AFFIRMED

Division IV
Opinion by JUDGE LIPINSKY
Fox and Schock, JJ., concur

Announced April 20, 2023

GEM Family Law, LLC, Elizabeth Bonanno, Denver, Colorado, for Appellee

Woody Law Firm, LLC, Katie P. Ahles, Jennie A. Lepman, Colorado, for Intervenors-Appellants

¶ 1 We address a novel issue in Colorado: What legal standard must a district court apply where one fit parent supports, but the other fit parent opposes, grandparents' petition for court-ordered visitation with their grandchild under section 19-1-117, C.R.S. 2022?

¶ 2 Seventeen years ago, the Colorado Supreme Court articulated the standard for resolving disputes when *both parents* oppose grandparents' request for visitation. *See In re Adoption of C.A.*, 137 P.3d 318, 319, 322 (Colo. 2006). The court's analysis in *C.A.* accommodates the "best interests of the child" standard embodied in Colorado statutes, as well as the holding in *Troxel v. Granville*, 530 U.S. 57 (2000), the United States Supreme Court's landmark decision addressing grandparents' visitation rights. *See C.A.*, 137 P.3d at 322.

¶ 3 *C.A.* rests on two bedrock principles: (1) a parent has a "fundamental right to the care, custody, and control of his or her children," *id.* at 324; and (2) "a dispute between parents and grandparents regarding grandparent visitation is not a contest between equals," *id.* at 327. As we discuss in greater detail below, the procedure our supreme court adopted in *C.A.* requires "a

presumption in favor of the parental visitation determination." *Id.* at 319. The *C.A.* court held that, in grandparent versus parent visitation disputes, the district court must presume that "parental determinations about grandparent visitation are in the child's best interests," although grandparents can overcome that presumption by clear and convincing evidence presented at a hearing. *Id.* at 327.

¶ 4 But application of the presumption favoring a parental determination required under *Troxel* (the *Troxel* presumption) becomes difficult when parents take conflicting positions on grandparents' request for court-ordered visitation under section 19-1-117. We hold that, under the facts of this case, only the opposing parent's *Troxel* presumption is implicated. Thus, the grandparents must overcome the *Troxel* presumption of the opposing parent. They did not do so here; therefore, we affirm the district court's order denying grandparents' petition.

I. Background

¶ 5 Samuel Isaac O'Connor (father) and Aliza O'Connor (mother) are the parents of two children. As of the filing date of the parents' dissolution of marriage case, the parents and the children resided in Colorado. (Father later relocated to Maryland with the children.)

Mother's parents, William Greenbaum and Hadassa Gerber (grandparents), live in New York.

¶ 6 The parents' marriage ended in 2017. At that time, mother had been exhibiting symptoms of mental illness. The parents' dissolution decree incorporated a stipulated parenting plan for the children. The plan provides that father is the children's sole residential parent and decision-maker, and it limits mother's parenting time to four one-hour supervised visits each week.

¶ 7 As mother's mental illness became more severe, Greenbaum petitioned for appointment as her conservator. The court granted the petition and also appointed a guardian ad litem and an attorney to represent mother's interests. She had limited contact with the children while receiving treatment for her mental illness. No court ever held that mother was not a fit parent, however.

¶ 8 Following the dissolution of the parents' marriage, father and grandparents were unable to agree among themselves on the terms and conditions of grandparents' visitation with the children. In 2019, grandparents filed a petition in the dissolution of marriage case for visitation rights with the children pursuant to section 19-1-117.

¶ 9 In their petition, grandparents contended that they had enjoyed regular and positive contact with the children before the dissolution of the parents' marriage, but that father was now thwarting their efforts to see the children. Grandparents asked the court to enter an order allowing them to visit the children no more than once every month and to have reasonable and regular telephone contact with them.

¶ 10 Father did not dispute that the children should maintain contact with grandparents. But in his response to grandparents' petition, father alleged that the children were at a critical point in their development and that grandparents' court-ordered involvement in their lives would pose a risk to their well-being. He also expressed concern that, if the court granted grandparents visitation rights, mother would "insert herself into the visits and either create confusion for the children or abduct them."

¶ 11 The district court conducted a hearing on grandparents' petition, at which grandparents, father, and mother appeared through separate counsel. Grandparents' and father's attorneys presented evidence and made arguments. Mother's attorney did

not. As relevant here, the court made the following findings after the hearing:

- The parties stipulated that mother believed that the proposed court-ordered visitation with grandparents was in the children's best interests.
- Father argued that any grandparent visitation should be on his terms and that a court order compelling it was not in the children's best interests.
- Father is a fit parent who consistently puts the children's best interests first.
- Father "has done a commendable job of attempting to nurture and promote a relationship" between the children and grandparents.
- Grandparents care deeply for the children and would not use their visitation time inappropriately.
- Father "cultivated and encouraged" the children to have regular calls with grandparents.

Because grandparents do not challenge the court's findings, we accept them as true. *See Pickell v. Ariz. Components Co.*, 931 P.2d 1184, 1186 (Colo. 1997).

¶ 12 After making these findings, the district court applied the procedure outlined in *C.A.*, which we discuss further in Part III.C below. Specifically, the court (1) accorded a presumption in favor of mother's position that court-ordered grandparent visitation was in the children's best interests; (2) also accorded a presumption in favor of father's position that court-ordered grandparent visitation was not in the children's best interests; (3) concluded that grandparents had failed to meet their burden of rebutting, by clear and convincing evidence, the presumption accorded to father; and (4) determined that father's decision to allow grandparents visitation at his discretion was in the children's best interests. The court denied grandparents' petition but encouraged father to continue involving grandparents in the children's lives.

¶ 13 Grandparents present a single issue on appeal: Whether *C.A.*, in which both parents opposed the paternal grandparents' visitation request, applies where, as here, the parents take conflicting positions on grandparents' request for visitation. They urge us to adopt instead the rationale of *In re Marriage of Friedman*, 418 P.3d 884, 892 (Ariz. 2018). In that case, the Arizona Supreme Court held that, when two fit parents disagree on grandparent visitation,

their constitutional presumptions cancel each other out and the best interests of the child standard controls the analysis. *Id.*

¶ 14 We disagree with *Friedman* and affirm the district court's order denying grandparents' petition for court-ordered visitation.

II. Standard of Review

¶ 15 We review de novo whether a district court applied the correct legal standard in resolving a dispute regarding visitation rights. *See In re Parental Responsibilities of A.M.*, 251 P.3d 1119, 1121 (Colo. App. 2010); *see also Vanderborgh v. Krauth*, 2016 COA 27, ¶ 19, 370 P.3d 661, 665 (reviewing de novo issues involving a parent's fundamental constitutional rights).

III. Legal Framework

A. Section 19-1-117

¶ 16 A grandparent has a statutory right to seek a court order granting reasonable visitation when "there is or has been a child custody case or a case concerning the allocation of parental responsibilities relating to that child." § 19-1-117(1). Section 19-1-117(1) prescribes the procedure a grandparent must follow to obtain a visitation order.

¶ 17 A grandparent seeking visitation rights under the statute must file a motion and a supporting affidavit and provide notice to "the party who has legal custody of the child or to the party with parental responsibilities as determined by a court." § 19-1-117(2). "The party with legal custody or parental responsibilities as determined by a court . . . may file opposing affidavits." *Id.*

¶ 18 "If neither party requests a hearing, the court shall enter an order granting grandchild . . . visitation rights to the petitioning grandparent . . . only upon a finding that the visitation is in the best interests of the child." *Id.* The court must conduct a hearing, however, if "either party so requests or if it appears to the court that it is in the best interests of the child that a hearing be held." *Id.*

¶ 19 "At the hearing, parties submitting affidavits shall be allowed an opportunity to be heard." *Id.* If, at the conclusion of the hearing, the court finds that the grandparent's requested visitation "is in the best interests of the child," the court must "enter an order granting such rights." *Id.*

B. *Troxel v. Granville*

¶ 20 *Troxel* established a fit parent's minimum protection against state intrusion in his or her parenting decisions. 530 U.S. at 69-70.

In *Troxel*, a widowed mother challenged an order granting visitation rights to the child's paternal grandparents over her objections. *Id.* at 60-61. A plurality of the Supreme Court reiterated the well-settled conclusion that fit parents have a fundamental right to make decisions concerning the care, custody, and control of their children. *Id.* at 65 (noting that this liberty interest "is perhaps the oldest of the fundamental liberty interests" the Supreme Court has recognized); *accord In re Parental Responsibilities Concerning B.J.*, 242 P.3d 1128, 1133-35 (Colo. 2010).

¶ 21 *Troxel* identifies two requirements to protect a fit parent's fundamental rights. First, because a fit parent is presumed to act in his or her child's best interests, courts must give presumptive or "special" weight to a fit parent's decision regarding his or her child's visitation with third parties, including grandparents. *Troxel*, 530 U.S. at 68-69. Second, the plurality in *Troxel* explained that a court cannot interfere with a parent's fundamental right absent "special factors" justifying the interference. *Id.* at 68.

C. *In re Adoption of C.A.*

¶ 22 In *C.A.*, our supreme court applied *Troxel* to a situation in which a child's biological paternal grandparents sought court-

ordered visitation under section 19-1-117 against the wishes of the child's adoptive parents. 137 P.3d at 324. The supreme court held that, when considering a request for grandparent visitation over the parents' objection, a district court must take the following steps to protect the parents' rights guaranteed in *Troxel*:

1. The court must accord a presumption in favor of the parental visitation determination.
2. The court must provide the grandparents an opportunity to rebut that presumption by showing through clear and convincing evidence at a hearing that the parent is unfit to make the grandparent visitation decision or that the parental visitation determination is not in the child's best interests. If the grandparents meet that burden, the burden shifts to the parents to "adduce evidence" in support of their decision on the grandparents' visitation request.
3. Grandparents bear the ultimate burden of proving by clear and convincing evidence that the parental determination is not in the child's best interests and that

> the visitation schedule the grandparents seek is in the child's best interests.

C.A., 137 P.3d at 322, 327-28 (citing *Troxel*, 530 U.S. at 65, 67-68); *see also B.J.*, 242 P.3d at 1134.

¶ 23 In addition, to satisfy the second *Troxel* requirement, before granting a grandparent's request for visitation over a parent's objection, a district court must make factual findings and conclusions of law identifying the "special factors" supporting the request. *See C.A.*, 137 P.3d at 322, 328; *see also Troxel*, 530 U.S. at 68; *B.J.*, 242 P.3d at 1133-35 (applying *Troxel* and *C.A.* where the district court had ordered that the children could visit their former foster parents against the wishes of the child's father). The supreme court explained that the *C.A.* standard accommodates "the General Assembly's best interests of the child intent consistent with *Troxel*." *C.A.*, 137 P.3d at 327; *see also People in Interest of J.G.*, 2016 CO 39, ¶ 22, 370 P.3d 1151, 1158-59 (analyzing *Troxel*); § 14-10-124, C.R.S. 2022 (stating that the best interests of the child standard applies to decisions regarding parenting time and allocation of decision-making responsibility).

IV. Analysis

A. *C.A.* and the Applicability of the *Troxel* Presumption

¶ 24 We first consider father's argument that we should not address the merits of grandparents' contention because they invited any error in the district court by agreeing that the *C.A.* framework applies. The doctrine of invited error precludes a party from appealing an error that the party invited or injected into the case. *Bernache v. Brown*, 2020 COA 106, ¶ 11, 471 P.3d 1234, 1238.

¶ 25 While grandparents agreed that the district court should follow the "rationale" of *C.A.*, they interpreted *C.A.* to mean that "special weight must be afforded to [m]other's position that grandparent visitation is in the children's best interest, as well as special weight to [f]ather's position that grandparent visitation is not in the children's best interest." Grandparents argued that the court should nonetheless adopt mother's position "because [f]ather is placing his own desire to assert control over [g]randparents and [m]other over the needs of the children."

¶ 26 Because grandparents' reading of *C.A.* in the district court is consistent with the position they advance on appeal, as described below, we conclude that grandparents did not invite any error by

citing to *C.A.* *See Bernache*, ¶ 11, 471 P.3d at 1238. We now turn to the merits of their contention.

¶ 27 Grandparents maintain that the district court misapplied *C.A.* because mother supports their visitation request and father opposes it. Grandparents argue that, in situations such as this, the court should apply the *Friedman* analysis: After determining that the parents' *Troxel* presumptions cancel each other out, the court should decide whether grandparents established by a preponderance of the evidence that their requested visitation is in the children's best interests.

¶ 28 In *Friedman*, the mother was the sole custodian and legal decision-maker for the children, while the father had weekly supervised parenting time. 418 P.3d at 886. The paternal grandparents sought court-ordered visitation with the children. *Id.* The father agreed with the grandparents' request, while the mother opposed it. *Id.* at 887. The family court determined it was in the children's best interests to grant the grandparents' request for video calls with the children every two weeks and visitation during portions of the father's supervised parenting time. *Id.*

¶ 29 The Arizona Supreme Court affirmed, concluding that the *Troxel* analysis is limited to situations where "a lone parent's visitation opinion [is] pitted against a court's contrary order based on the court's determination of the children's best interests." *Id.* at 890. The court held that, when "two legal parents' visitation opinions conflict, neither parent is entitled to a [*Troxel*] presumption in his or her favor and, although both parents' visitation opinions are entitled to special weight, the family court's factually supported determination of whether visitation is in the child's best interests controls." *Id.* at 892. In other words, because the parents' *Troxel* presumptions cancel each other out, *id.*, their "conflicting opinions must give way to the court's finding on whether [grandparent] visitation is in the child's best interests." *Id.* at 886.

¶ 30 The Arizona court continued, "Because the decision to award visitation rests within the family court's discretion upon finding that visitation is in the child's best interests, [it would] not disturb the court's decision absent an abuse of discretion in making the best-interests finding." *Id.* at 893. The court then determined that the family court had not abused its discretion by granting the

grandparents' visitation request against the mother's wishes. *Id.* at 893-94.

¶ 31 We reject the *Friedman* approach because we disagree with its reasoning. Were we to allow the supporting parent's decision to cancel out the opposing parent's *Troxel* presumption and merely apply the best interests of the child standard, grandparents' argument in favor of visitation would be accorded the same weight as the opposing parent's argument against visitation, thereby depriving that parent of a fundamental right. That approach cannot be reconciled with *Troxel*, which demands robust deference to a fit parent's determination regarding the child's best interests. *See Troxel*, 530 U.S. at 66; *see also C.A.*, 137 P.3d at 327 (explaining that a parental responsibilities dispute between a parent and a nonparent is not a contest between equals). Thus, mother's disagreement with father regarding grandparents' request for visitation cannot act to deprive father of his *Troxel* presumption.

¶ 32 We further disagree with grandparents that the preponderance of the evidence standard of proof, rather than the clear and convincing evidence standard, is appropriate in determining the children's best interests when parents disagree on grandparents'

request for visitation. Lowering the burden of proof would violate *Troxel*. When a fundamental right is at stake, a significant quantum of proof is necessary to safeguard that right. Otherwise, there is a risk that a court would impermissibly substitute its personal views for those of a fit parent. *See C.A.*, 137 P.3d at 327; *see also Troxel*, 530 U.S. at 69-70. Applying the more demanding clear and convincing standard of proof ensures that the court accords adequate deference to a fit parent's fundamental right to make decisions about raising his or her child. *See B.J.*, 242 P.3d at 1135.

¶ 33 We now turn to the application of the *Troxel* presumption when fit parents disagree on grandparents' request for visitation under section 19-1-117.

¶ 34 The principles discussed above inform our analysis, even though the Colorado appellate courts have not previously applied them to a situation where, as here, the parents disagree on grandparents' request for visitation.

¶ 35 Our approach recognizes that this case is essentially a dispute between grandparents and father, to whom the court in the dissolution of marriage case granted nearly all parental

responsibilities. Mother did not testify at the hearing and is not a party to this appeal. While mother has a *Troxel* presumption as a fit parent, that presumption does not apply to the dispute between grandparents and father.

¶ 36 Grandparents did not need to rebut mother's *Troxel* presumption because she agreed with grandparents' request for visitation. *See C.A.*, 137 P.3d at 322. Section 19-1-117 does not permit grandparents to assert mother's *Troxel* presumption to circumvent their heavy burden under *C.A.* to overcome father's opposition to their visitation request. Grandparents cannot transform this case into "a contest between equals" by pointing to mother's support for their petition. *See C.A.*, 137 P.3d at 327.

¶ 37 We acknowledge that, in certain situations, Colorado courts resolving disputes regarding care for children need not consider the parents' *Troxel* presumptions. But those cases involve disputes between the parents — not disputes between a parent and a third party. The presumption only applies to disputes between a parent and a nonparent. *See In re Marriage of DePalma*, 176 P.3d 829, 832 (Colo. App. 2007) (explaining that whether the father's wife (stepmother) could care for the children during his usual parenting

time while he was deployed overseas was a dispute between the parents and not between the mother and the stepmother; father did not request that the court grant parental rights to stepmother).

¶ 38 *Troxel* lends support to our analysis. In that case, the plurality stated that, if a fit parent's decisions concerning the care, custody, and control of the child become subject to judicial review, the court must bestow "special weight" on those decisions. *Troxel*, 530 U.S. at 70. Here, father, as the parent opposing the visitation request, is the only parent whose best interests decision is subject to judicial review. *See* § 19-1-117(2) (stating that the party with parental responsibilities may file affidavits opposing grandparent visitation and be allowed an opportunity to be heard at a hearing). As we explain above, the court is not weighing mother's decision regarding the children's best interests against grandparents' request for court-ordered visitation because grandparents' and mother's positions are aligned.

¶ 39 Our conclusion does not mean that a parent similarly situated to mother has no right to participate in a section 19-1-117 proceeding. Even though the supporting parent's *Troxel* presumption is not implicated in a visitation dispute between the

opposing parent and grandparents, the supporting parent may nonetheless present evidence at the section 19-1-117 hearing, and the district court may consider that evidence when determining whether grandparents have met their burden of proof. *See C.A.*, 137 P.3d at 322. Moreover, the denial of the visitation request does not prevent mother from allowing grandparents to spend time with the children during mother's limited, supervised parenting time or from requesting an increase in her parenting time — and if granted, allowing the children to spend time with grandparents during her additional allotted time.

¶ 40 (Because mother is not a party to this appeal, we decline to address grandparents' argument that the district court's application of *C.A.* deprived her of the constitutional rights described in *Troxel*. Grandparents lack standing to make this argument. *See C.W.B. v. A.S.*, 2018 CO 8, ¶ 18, 410 P.3d 438, 443 (holding that, to have standing, litigants must assert their own legal rights and interests and not those of others).)

B. Applying the *C.A.* Procedure to This Case

¶ 41 In light of our holding that grandparents' visitation request implicated only father's *Troxel* presumption, the three-part

procedure in *C.A.* governs. *See C.A.*, 137 P.3d at 322. Under that case, grandparents' request for visitation fails unless they overcome, by clear and convincing evidence, father's presumption that his determination against visitation is in the children's best interests. *See id.* Thus, the district court correctly accorded father a *Troxel* presumption in considering his opposition to grandparents' visitation request. *See C.A.*, 137 P.3d at 327.

¶ 42 After hearing grandparents' and father's evidence, the court determined that grandparents had failed to overcome father's *Troxel* presumption by clear and convincing evidence. It further found that father's evidence supported his decision that court-ordered visitation was not in the children's best interests. The record supports the court's findings, which, as we note above, grandparents do not challenge.

¶ 43 Out of an abundance of caution, the court also found that father's parental determination was in the children's best interests. *See C.A.*, 137 P.3d at 328. The court was not required to make this determination because it had already found that grandparents had failed to meet their burden of proving by clear and convincing

evidence that father's opposition to their requested visitation was not in the children's best interests.

¶ 44 In sum, the court did not err by concluding that grandparents failed to rebut father's *Troxel* presumption and thus denying grandparents' request for court-ordered visitation.

V. Appellate Attorney Fees

¶ 45 Father requests his appellate attorney fees on the grounds that grandparents' arguments on appeal lack substantial justification. Although grandparents have not prevailed, we do not consider their contentions to be so lacking in merit that they are substantially frivolous, groundless, or vexatious. *See* § 13-17-102(4), C.R.S. 2022. We therefore deny father's request. *See Mission Denver Co. v. Pierson*, 674 P.2d 363, 365 (Colo. 1984) ("Standards for determining whether an appeal is frivolous should be directed toward penalizing egregious conduct without deterring a lawyer from vigorously asserting his client's rights."); *see also In re Marriage of Boettcher*, 2018 COA 34, ¶ 38, 454 P.3d 321, 327 ("Fees should be awarded only in clear and unequivocal cases . . . ."), *aff'd*, 2019 CO 81, 449 P.3d 382.

VI. Disposition

¶ 46 The order is affirmed.

JUDGE FOX and JUDGE SCHOCK concur.