

THE STATE OF NEW HAMPSHIRE

STRAFFORD COUNTY

SUPERIOR COURT

Della J. Rollins

v.

Sarah Scegell and Forrest Rollins

Docket No.: 03-M-985

ORDER ON RESPONDENT'S MOTION TO DISMISS

The petitioner, Della J. Rollins, petitions the court for visitation with her granddaughter, Lauren Sceggell. Respondent Sarah Sceggell, mother of Lauren, moves to dismiss the petition under Troxel v. Granville, 530 U.S. 57 (2000), and the petitioner objects. Upon review of the parties' arguments and the relevant law, the court finds and rules as follows.

In considering a motion to dismiss, the court determines "whether the allegations [in the plaintiff's pleadings] are reasonably susceptible of a construction that would permit recovery." Putnam v. University of New Hampshire, 138 N.H. 238, 239 (1994) (quoting Collectramatic, Inc. v. Kentucky Fried Chicken Corp., 127 N.H. 318, 320 (1985)). The court will "assume the truth of the plaintiff's pleadings and construe all reasonable inferences therefrom in a light most favorable to the plaintiff." Id.

The petitioner maintains she has enjoyed a loving relationship with her granddaughter, consisting of almost daily contact, frequent overnight visits and transporting her granddaughter home from school. The respondent disagrees with the

petitioner's description of her relationship with the child, and further asserts that she has denied the petitioner visitation with the child because: 1) the petitioner has attempted to influence the child's recollection of events surrounding an alleged assault on the child by the child's father, respondent Forrest Rollins; 2) the petitioner may attempt to tamper with the child's testimony concerning the alleged assault; 3) the petitioner has, in the past, left the child unsupervised with Forrest Rollins in violation of the terms of her visitation privileges; 4) the petitioner has acted inappropriately relative to her contact with the child, specifically, by calling the respondent a "sick bitch" when the respondent informed the petitioner that the child did not want to speak to the petitioner on the telephone; 5) the child does not wish to have visitation with the petitioner; and 6) visitation with the petitioner would not be in the child's best interests.

The respondent seeks dismissal of the petitioner's petition for visitation on two grounds. First, she contends that because the petitioner's access to the child was restricted contemporaneously with the termination of Forrest Rollins' contact with the child due to the alleged assault, the petitioner has no standing to pursue grandparents' rights under RSA 458:17-d, I. Second, she maintains that although Troxel did not strike down grandparents' rights of access to minor children, it strongly reaffirmed parents' rights to make decisions relative to the custody, care and control of their children. The respondent asserts that under Troxel, courts may only award visitation over a parent's objection where the parent has unreasonably denied visitation to a concerned third party. According to the respondent, the facts of this case establish that she had ample reason to deny the petitioner's requests to visit with the child.

The petitioner argues that Troxel is inapplicable because its holding was specifically limited to the facts of the case and Washington's visitation statute. The petitioner further

contends that RSA 458:17-d, under which she claims to have the right to visit with the child, complies with all of the concerns expressed by the Court in Troxel.

RSA 458:17-d, I provides as follows:

Grandparents, whether adoptive or natural, may petition the court for reasonable rights of visitation with the minor child as provided in paragraph III. The provisions of this section shall not apply in cases where access by the grandparent or grandparents to the minor child has been restricted for any reason prior to or contemporaneous with the divorce, death, relinquishment or termination of parental rights, or other cause of the absence of a nuclear family.

(Supp. 2003). The New Hampshire Supreme Court has construed this provision as triggering grandparents' rights to petition for visitation with a minor child "only when one of the conditions listed at the end of the second sentence has come to pass." O'Brien v. O'Brien, 141 N.H. 435, 437 (1996) (citation omitted). Thus, "standing to seek visitation is conferred upon grandparents, whether natural or adoptive, whenever a grandchild's nuclear family is the subject of 'divorce, death, relinquishment or termination of parental rights' unless the grandparent's access to the child has been earlier, or contemporaneously, restricted." Id. (citation omitted).

Here, by final decree dated February 23, 2004, the respondent was awarded "sole legal and physical custody of the minor child, Lauren Elizabeth Sceggell[.]" (Docket no. 98-M-128, doc. no. 75, ¶2.) The foregoing order was entered

in consideration of the fact that there is presently a no contact order against Mr. Rollins as a consequence of the criminal charges pending against him for alleged abuse of the child and in light of the fact that he is going to be incarcerated on other unrelated offenses for a period of approximately 14 months (at a minimum) and will not be able to exercise joint legal custody.

...

Upon [Mr. Rollins'] release from incarceration, he may petition this court for resumption of his custodial rights and he may also petition the court for reinstatement of joint legal custody at that time.

(Id. at ¶¶2 & 3.)

The petitioner does not dispute that once the court awarded sole legal and physical custody of the child to the respondent, the respondent restricted her access to the child. Thus, even if the court's award of sole legal and physical custody of the child to the respondent is not a "termination" of Forrest Rollins' parental rights for purposes of RSA 458:17-d, I, see RSA 170-C et seq., there is no dispute that the petitioner's access to the child has been restricted. Therefore, the petitioner has standing to pursue visitation under RSA 458:17-d, I. See O'Brien, 141 N.H. at 437.

Furthermore, the court finds Troxel does not compel dismissal of the petitioner's request for visitation with the child. In Troxel, the United States Supreme Court considered whether the application of Washington's visitation statute, §26.10.160(3), to Tommie Granville and her family violated Granville's due process right to make decisions concerning the custody, care and control of her two daughters. Washington's visitation statute provided, in relevant part, that "[a]ny person may petition the court for visitation rights at any time including, but not limited to, custody proceedings. The court may order visitation rights for any person when visitation may serve the best interests of the child whether or not there has been any change of circumstances." 530 U.S. at 61.

The Court held that the statute did violate Granville's due process rights relative to her children. Id. at 75. Specifically, the Court noted that, as applied to Granville and her family, Washington's visitation statute unconstitutionally infringed on the fundamental right of a parent to make decisions as to the custody, care and control of her children because the statute "is breathtakingly broad[.]" as it "effectively permits any third party seeking visitation to subject any decision by a parent concerning visitation of the parent's children to state-court review." Id. at 67. Further, the Court stated that it did not take issue with state-court intervention in third party visitation matters altogether, but reasoned that the

“problem here is that . . . when [the state court did intervene], it gave no special weight at all to Granville’s determination of her daughters’ best interests.” Id. at 69. Indeed, the Court observed that, “[m]ore importantly, it appears that the Superior Court applied exactly the opposite presumption.” Id. Finally, the Court noted that Granville never sought to entirely foreclose grandparent visitation, but wanted simply to restrict their visitation with her daughters to “one short visit per month and special holidays.” Id. at 71 (citation omitted). The Court concluded that the Superior Court had improperly substituted its judgment for that of Granville in rejecting her proposal and ordering more frequent visitation, and further observed that “[s]ignificantly, many other States expressly provide by statute that courts may not award visitation unless a parent has denied (or unreasonably denied) visitation to the concerned third party.” Id. (citations omitted).

Thus, in holding the application of Washington’s visitation statute to Granville and her family violated Granville’s due process rights relative to the custody, care and control of her daughters, the Court stated as follows:

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 today, define the precise scope of the parental due process rights 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.” 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.

Id. at 73 – 74 (emphasis in original) (citations omitted). Thus, Troxel was expressly limited to the applicability of Washington’s visitation statute to the Granville family, and was narrowly drafted so as to invalidate only Washington’s visitation statute. See id. at 74-75.

Therefore, although the respondent is correct in asserting that Troxel strongly reaffirmed parents' rights to make decisions relative to the custody, care and control of their children,¹ she is incorrect in claiming that under Troxel, courts may only award visitation over a parent's objection where the parent has unreasonably denied visitation to a concerned third party. To the contrary, Troxel stands for the limited proposition that where a parent does not deny or unreasonably deny all visitation to a third party, where there is no finding that the parent denying visitation is an unfit parent and where a court fails to afford special weight to that parent's determination of his or her child's best interests, the court may not, consistent with federal constitutional due process, substitute its judgment for that of the parent relative to third party visitation. Moreover, Troxel does not require that a parent unreasonably restrict grandparents' access to a child before a court may entertain a grandparent's petition for visitation. The Court in Troxel simply noted that unlike Washington's visitation statute, most other state visitation statutes require either the denial, or the unreasonable denial, of visitation to trigger judicial review of a parent's decision relative to third parties such as grandparents. Id. at 71. Therefore, where, as here, the respondent has admittedly denied the petitioner access to the minor child, the court may entertain the petitioner's petition consistent with Troxel.

Finally, the court notes that RSA 458:17-d, II (Supp. 2003), the provision setting forth the criteria a court must consider in ruling on a grandparent's petition for visitation, does not violate Troxel. Under that provision, a court must consider seven enumerated factors, including the best interests of the child, as well as "[a]ny such other factors as the court may find appropriate or relevant to the petition for visitation." RSA 458:17-d, II (h).

¹ "The liberty interest at issue in this case – the interest of parents in the care, custody and control of their children – is perhaps the oldest of the fundamental liberty interests recognized by this Court." Id. at 65.

Thus, the court, under section (h), may incorporate into the enumerated factors it must consider, any other factors stemming from Troxel.

Accordingly, having found that the petitioner may pursue her petition, the respondent's request for dismissal is **DENIED**. Consistent with this court's order of January 28, 2004, the Clerk shall schedule a one-half day evidentiary merits hearing after April 1, 2004, at which time the court will hear evidence pertinent to the factors it must consider under RSA 458:17-d, II.

So Ordered.

Date: March 15, 2004

Bruce E. Mohl
Presiding Justice