

*Stuard v. Stuard*

The recent death of Justice Antonin Scalia has thrust Constitutional Law principles into the national consciousness. Many family law practitioners assume that lofty debate of Constitutional Law has little relevance to their day-to-day practice. That assumption is inaccurate, as exhibited by the *Stuard* opinion and its discussion of equal protection and due process contentions in a complex grandparent visitation case.

This is an interesting and important grandparent visitation case, with a rather unique attorney's fees aspect. Remember that Parts V - VII [attorney's fees, sanctions and anger management counseling] are not certified for publication.

We are becoming increasingly aware that constitutional equal protection and due process arguments are being injected into family law litigation. Here, the trial court awarded grandparent visitation under Family Code section 3104, based upon findings that there was a preexisting relationship between the minor child and her paternal grandparents, and that it was in the child's best interests to have continuing contact with her grandparents. This was the order, even though there was no allegation that the child's divorced parents were unfit. Father's appeal contended that section 3104 violated his equal protection guarantees because it discriminates between divorced parents as opposed to married parents who are cohabiting. Father also argued that his equal protection rights were violated because he would not be subject to a grandparent visitation order if he were still married; further, he contended that his substantive due process rights were violated by undermining his fundamental right to parent his child in the absence of any finding he or the child's mother were unfit parents. The Court of Appeal rejected his constitutional contentions, holding that he forfeited his equal protection challenge for failure to present argument on this point in the trial court and, with respect to his substantive due process argument, the court concluded that section 3104 permissively reflects a legitimate state interest preserving an already existing grandparent-grandchild relationship.

Although the attorney's fee section of the opinion was not certified for publication, it is instructive. The court determined that father was estopped from challenging the applicability of section 2030 to this case and from challenging the trial court award of fees to the grandparents on the grounds that he was judicially estopped from challenging the award because he asked for attorney's fees to be awarded to him under the same section. Having requested fees under section 2030 in the trial court, father was held judicially estopped from arguing for the first time on appeal that fees under section 2030 cannot be awarded to the grandparents.

The only section of the opinion causing the partial reversal was the order for anger management counseling; the trial court erred by imposing an unlimited anger management counseling order, violating the one-year limitation on such orders imposed by section 3190. The

trial court further erred in failing to make the statutory findings for counseling required by subdivision 3190(d)(2).

With respect to the frequently arising and emotionally sensitive issue of grandparent visitation, the Court of Appeal's discussion regarding the proper exercise of discretion under section 3104, its review of the rebuttable presumption that grandparent visitation is not in the child's best interest, and the discussion of best interests of the child standard in this context are important and worthy of careful study. The Court of Appeal observed that the extent to which parents encourage a grandparent-grandchild relationship is relevant to overcoming the rebuttable presumption against granting grandparent visitation.

Because court-ordered grandparent visitation with their grandchildren is a creature of statute [Fam. Code sections 3102, 3103 and 3104], the *Stuard* Court cites and reviews the threshold opinion of the California Supreme Court in *In re Marriage of Harris* (2004) 34 Cal.4th 210, which granted a petition by paternal grandparents for visitation with their grandchild. The California Supreme Court sustained the trial court's award of grandparent visitation, holding that section 3104 was constitutional both on its face and as applied. The Supreme Court's opinion in *Harris*, in turn, reviewed the seminal grandparent visitation case from the United States Supreme Court in *Troxel v. Granville* (2000) 530 U.S. 57.

The *Stuard* opinion from the Third Appellate District is worthy of review both for its background summary of grandparent visitation law, and for its current application of the statutory mandate and judicial interpretation of this emotionally charged aspect of the family law tapestry.

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