

DISSOLUTION ISSUES FOR GAY & LESBIAN COUPLES

Clackamas County Family Court Services
February 28, 2006

Mark Johnson
Johnson Renshaw & Lechman-Su PC
1200 Weatherly Building
516 SE Morison Street
Portland, Oregon 97214

503-224-1640
markj@jrl-s.com

www.jrl-s.com

Westlaw.

817 P.2d 764

108 Or.App. 707, 817 P.2d 764

(Cite as: 108 Or.App. 707, 817 P.2d 764)

▷

Court of Appeals of Oregon.
Christine N. SHURALEFF, Appellant-Cross-Respondent,
v.
Thomas J. DONNELLY, Respondent-Cross-Appellant.
16-89-00354; CA A64343.

Argued and Submitted June 7, 1991.

Decided Sept. 11, 1991.

Appeal and cross-appeal were taken from property division by the Circuit Court, Lane County, Jack L. Mattison, J., in action arising after breakdown of 14-year nonmarital domestic relationship. The Court of Appeals, Rossman, J., held that: (1) recognition in property division of parties' efforts over the years to build future together based on contributions of both could be accomplished only by including assets held in each parties' name alone; (2) trial court did not err in manner of its distribution of property and was not required to order sale of real property with net proceeds to be divided; and (3) trial court properly denied damages for reasonable rental value of property during time male cohabitant was in sole possession.

Affirmed.

West Headnotes

1 Implied and Constructive Contracts ↪47

205Hk47 Most Cited Cases

In proceeding in equity arising after breakdown of 14-year nonmarital domestic relationship, recognition in property division of parties' efforts over years of cohabitation to build future together based on contributions of both could be accomplished only by inclusion of assets held in each party's name alone.

2 Implied and Constructive Contracts ↪47

205Hk47 Most Cited Cases

Couples who choose to live together without marriage also choose not to avail themselves of the benefits society gives to married people and burdens it imposes on them, including statutory protection of presumption of equal contribution in acquisition of property.

3 Implied and Constructive Contracts ↪110

205Hk110 Most Cited Cases

In proceeding in equity arising after breakdown of 14-year nonmarital domestic relationship, trial court did not have to order sale of real property and division of net proceeds and did not have to award damages for reasonable rental value of property during time male cohabitant was in sole possession thereof; award to female cohabitant of liquid accounts and rental residence with total value of approximately \$190,000 and to male cohabitant of business he had started, residence, and two farm properties with total value of approximately \$114,000 disentangled parties' affairs, recognized individual skills of each, and provided female cohabitant a residence, and any rental value was offset by expenses, paid by male cohabitant, such as for finishing home and for back taxes.

**765 *708 Donald K. Armstrong, Eugene, argued the cause for appellant-cross-respondent. With him on the brief was Armstrong, McCullen & Philpott, P.C., Eugene.

Diane M. DePaolis, Eugene, argued the cause for respondent-cross-appellant. With her on the brief was DePaolis, Evans, Shepard & Vallerand, Eugene.

Before BUTTLER, P.J., and ROSSMAN and DE MUNIZ, JJ.

*709 ROSSMAN, Judge.

In this action arising after the breakdown of a 14-year nonmarital domestic relationship, both parties appeal the trial court's division of property. We affirm on the appeal and on the cross-appeal.

The parties met in June, 1973, when plaintiff rented a room in defendant's residence in Fall Creek. Within a short time they began an intimate relationship and lived together until January, 1989. At the time the relationship began, plaintiff had between ten and fifteen thousand dollars and defendant owned the Fall Creek property, which consisted of five acres and a log house. In 1975 the log house burned and defendant built a cabin, which the couple used as a residence.

In September, 1975, the parties decided to purchase a contiguous 10-acre parcel for \$15,000. Defendant gave the residence property to plaintiff to use as collateral to obtain a \$9,000 loan for the down payment. [FN1] After a flood destroyed a log bridge connecting the properties, defendant installed a permanent bridge, made of steel railroad cars. In about 1980, they began to develop the property as a holly farm. In 1984, they purchased 17 acres down the road from the residence. They developed it also as a holly farm and installed a mobile home for use as a rental. In 1978, they purchased a rental house in Eugene, which they still owned at the time the relationship ended.

[FN1. Plaintiff testified that a business relationship was formed at that time. She stated that she "took the gift as an act of love and used it as a basis of a business partnership."

The deed to the Eugene rental property, and to two other properties sold before the relationship ended, were in the names of the parties as "husband and wife." In 1987, the parties executed various deeds that put the residence property, the two holly farm properties and the Eugene rental house in both names with right of survivorship but without reference to the parties as husband and wife.

During the relationship, plaintiff worked as a teacher and consultant in the Eugene school system. She attended graduate school and earned one master's degree and **766 had over 90 hours towards a second. Defendant built modular *710 homes, did tree-thinning and, from 1977 to 1987, worked for Senco, a company that sold and serviced staple and nail guns. During that time, each earned approximately \$30,000 a year. In 1987, rather than transfer out of the area, defendant left his job and, for over a year, constructed a new home for the parties on the residence property, drawing unemployment benefits for part of the time. In the fall of 1988, he cashed in his IRA and withdrew savings that had been in his name alone and began a business similar to that of Senco which had a value of \$22,500. When the parties separated in January, 1989, plaintiff, in her name alone, had annuities, cash accounts, and a PERS account with a total value of \$180,865. [FN2]

[FN2. Two of plaintiff's accounts and her PERS account were legally required to be in her name alone. Defendant was beneficiary of her PERS account.

The leading case in Oregon on property division after the breakdown of a nonmarital domestic relationship is Beal v. Beal, 282 Or. 115, 577 P.2d 507 (1978), which held that

"courts, when dealing with the property disputes of a man and a woman who have been living together in a nonmarital domestic relationship, should distribute the property based upon the express or implied intent of those parties." 282 Or. at 123, 577 P.2d 507.

Plaintiff argues that this relationship was a "business" relationship and that, under Beal, the only property subject to distribution is the real property held in joint names. She argues that the evidence shows that the parties intended to share those properties, because both names are on the deeds and because they divided the expenses for the property. She contends that the evidence shows that they did not intend to share individually-held assets, because they divided the

monthly living expenses, did not file joint income tax returns and never had joint bank accounts or charge accounts.

Defendant argues that Oregon courts have not considered property division after a long-term nonmarital relationship, and that the evidence shows that the assets here were no longer individualized. He argues that it is no more appropriate to say that he owns the irrigation pipe because he bought and installed it than to say that plaintiff owns her tax sheltered annuity because the income was held out of her salary. He contends that to accept plaintiff's position would *711 result in her receiving \$231,030 and his receiving \$72,665 after 14 years of cohabitation and mutual contribution. He urges that that result would unjustly enrich her and would ignore the huge financial benefit she reaped from his initial contribution of property and his labor in developing the farm properties, building the bridge and residence and maintaining the rental properties.

The trial court issued a five-page letter opinion expressing its dissatisfaction with the "somewhat mechanical approach" of this court's cases which have cited *Beal*. It noted that neither *Beal* nor the later cases involved facts similar to this long-term domestic relationship and concluded that it would divide the property on the principle of what is "just and equitable after considering all relevant factors." It awarded plaintiff the liquid accounts and the rental residence with a total value of approximately \$190,000. It awarded defendant the business he had started, the residence and the two farm properties for a total value of approximately \$114,000.

The trial court noted that the principle of "just and equitable" distribution is incorporated into dissolutions of marriage by ORS 107.105 and stated that it was mindful of "converting Oregon to a common law marriage state by the back door." It specifically rejected any use of presumptions that flow from the concepts of short- and long-term marriages but was persuaded that an equitable division was required to recognize the change in social norms since the *Beal* decision. It was influenced by the rationale of Washington decisions:

" 'A court could ascertain whether there exists a long-term, stable, nonmarital family relationship. Such relevant factors include continuous cohabitation, **767 duration of the relationship, purpose of the relationship, and the pooling of resources and services for joint projects. If a relationship exists, it is reasonable to assume that each member in some way contributed to the acquisition of the property. A court could then examine the relationship and the property accumulations and make a just and equitable disposition of the property. * * * A joint and equitable disposition of property entails considering the 'respective merits of the parties, through whom the property was acquired, monetary and labor contributions, whether or not children were born of the relationship and who is to care for them, and the general *712 condition in which the termination of the relationship will leave each of the parties.' [*Latham v. Hennessey*, 87 Wash 2d 550, 554, 554 P.2d 1057.]" [1976] *Warden v. Warden*, 36 Wash.App. 693, 697, 676 P.2d 1037, 1039 (1984).

Although both *Beal* and this case deal with the general question of division of property in a nonmarital relationship, we agree with the trial court that this case can not be shoe-horned into the one-sentence holding from *Beal*. In his dissenting and concurring opinion, Judge Linde admonished that *Beal* should not be read for more than it decides on its facts and should not be held to involve "some special rule for property rights in 'nonmarital cohabitation' * * *." 282 Or. at 127, 577 P.2d 507. The *Beal* facts were a nonmarital domestic relationship of two years during which the parties cohabited in the residence the ownership of which was in dispute. The intent of the parties was clearly to acquire the home with the relative rights that apply to husband and wife. We do not believe that, under these dissimilar facts, the holding in *Beal* precludes a court of equity from resolving a nonmarital property division by considering the equitable principles underlying the *Beal* holding.

The Supreme Court arrived at its holding in *Beal* only after making the equitable determination that Oregon courts would not deny relief in nonmarital relationships despite the historical refusal of courts to do so. In so concluding, the court rejected legal theories that divide property mechanistically without recognition of the unique nature of a domestic relationship. 282 Or. at 122, 577 P.2d 507.

Despite plaintiff's attempt to characterize the relationship here as only a "business" one, it was a domestic one. The parties had an intimate relationship and lived together for 14 years. Although plaintiff claimed that she and defendant strictly accounted each month for individual expenses, the evidence shows that, over the years, accounts were often

muddled with both parties making trade-offs. [FN3] Furthermore, *713 in this so-called "business" relationship, neither party assigned a value to the other's labor. Plaintiff's strengths were primarily in investment and management. Defendant used his physical skills and knowledge of construction to construct the homes and the bridge and to improve the properties. Each party recognized the contributions of the other. [FN4]

FN3. Plaintiff testified:

"A. Well, as you heard us both testify, monthly we would sit down when it came time to do the bill paying and square our accounts at that time. We always felt it was fair and equitable.

"If he had more on the rentals that month and I had more on, you know, bought a riding lawn mower or something, and I bought like 15 shovels and hoes and everything around the house. It equaled up."

FN4. For example, plaintiff testified:

"Q. Did you have any kind of understanding in those early years, '74 and '75 as to how the actual expenditures would be split between you?

"A. At that point I didn't weigh and measure anything. When he did work around the house or when he fixed my bedroom, I felt my paying for his living expenses was for his labor so I always felt it was a fair exchange and I also knew that if he felt it wasn't a fair exchange, I would know that and so it was--we did not discuss it at that time, no."

" * * * * *

"A. Well, what I would try and do is have him make a contribution. It was never 50-50 but I always felt his labor was helping our joint properties so I would try and assist him for some living expenses on months when he didn't have the money to pay back. I would, I mean, we didn't always--we didn't always tally up every month."

****768** The relationship evolved, as domestic relationships do, with exchanges of ideas as to how the parties would spend the future. Plaintiff admitted to "dreams" of how they might spend retirement. They discussed options as to the best investments to realize their dreams. Together they rejected planting the farm properties in Christmas trees, because they wanted a crop that would provide a "yearly" income. The winter harvest of holly would leave summers free to travel. The holly business was a long-term investment; the first crop was still three or four years away at the time of trial. The future that they contemplated included continuing the domestic relationship. [FN5] Both were involved in planning the residence that defendant built to replace the cabin.

FN5. The trial court so found:

"From time to time over the years, the parties did have discussions regarding retirement together and retirement activities--travel, etc. While the evidence does not support a finding that they formulated a specific, detailed plan regarding how to finance this retirement, there were discussions regarding investments she began in the early 1980's and the potential proceeds from the holly farming operations, and he at least thought they were working together toward a common goal."

[1] ***714** We conclude, as did the trial court, that the division of property here should recognize the parties' efforts over 15 years of cohabitation to build a future together based on the contributions of both. That can be accomplished only by including assets held in each party's name alone. As the trial court succinctly stated:

"Economically, the parties' relationship has been symbiotic and I doubt very much that either, acting alone, would have accumulated what they will receive under this decision."

We do not agree with plaintiff that this conclusion requires overruling *Beal*, which we are not at liberty to do. [FN6] Our holding arises from the inference from the factual settings in which the parties lived. *Beal v. Beal, supra, 282 Or. at 122, 577 P.2d 507.* It incorporates the basic premise of *Beal* that one reason for providing relief in these disputes is to prevent the party with title, or in possession of property, from enjoying ownership without consideration of the contribution of the other party. Awarding property to the one with title had been the rule in cases where courts refused to act in nonmarital relationships. That rule often resulted in advantage to the party who was more cunning or shrewd. 282 Or. at 119, 577 P.2d 507. The same result would obtain here.

FN6. We also do not conclude that our determination overrules our earlier decisions, none of which involved a long-term relationship with plans for retirement. See, e.g., Rissberger v. Gorton, 41 Or.App. 65, 597 P.2d 366 (1979).

Defendant had virtually no skills in managing money and was unquestioning in plaintiff's management. Defendant testified that there were general discussions about savings and investments and the use of them for retirement. He knew that plaintiff was saving money and that the accounts were in her name but testified that he thought that all the property was "just one pot." FN7 Plaintiff gave him no details of her *715 accounts, keeping her papers in a locked file box in a cedar chest under clothes. Defendant was unaware of the box and did not open her mail. Plaintiff told the parties' accountant to keep her financial information confidential from defendant. On these facts, a mechanistic application of *Beal's* language regarding "intent" would reward plaintiff, despite her failure to make it clear to defendant, in the face of his belief in their common goal, that she was subtracting her investments from that endeavor. In effect, the result would be the same as if the court had refused to **769 act at all, the position rejected by the *Beal* court.

FN7. Defendant testified:

"A. Well, I did not mind paying a lot more money than Chris towards maintenance of rentals because she was saving money for us too. I mean, sort of taking money out of the left hand to the right hand. Just no purpose in it.

"I just did what needed to be done to make things work." Q. Was she aware that you were buying these materials and making these expenditures?

"A. Oh, yes, uh-huh.

"Q. Were you aware that she was saving money?

"A. Oh, yes. Of course."

[2] We do not hold that, after a long-term nonmarital relationship, property in one name only must always be divided. We are also cognizant that we must not convert Oregon "to a common law marriage state by the back door." Couples who choose to live together without marriage also choose not to avail themselves of the benefits society gives to, and burdens it imposes on, married people, one of which is the statutory protection of the presumption of equal contribution in the acquisition of property. Nonetheless, this is a proceeding in equity arising out of the breakdown of a domestic relationship. An equitable resolution cannot be reached without consideration of the "unique" and "symbiotic" nature of that relationship.

[3] We do not agree with plaintiff that the trial court erred in the manner of its distribution of property and that it should have ordered a sale of the real property with the net proceeds to be divided. The distribution disentangles the affairs of the parties, recognizes the individual skills of each, and provides plaintiff a residence. We also find no error in the denial of damages for the reasonable rental value of the property during the time defendant was in sole possession. We agree with the trial court's conclusion that any rental value is offset by expenses, paid by defendant, such as for finishing the home, and for back taxes.

On cross-appeal, defendant argues that the trial court should have awarded each party his or her initial contribution and then divided the remaining assets in half. The trial court's division of property not only recognizes the *716 abilities of each party, but also recognizes plaintiff's aggressive role in the acquisition of the additional farm properties. We decline to disturb the distribution.

Affirmed on appeal and on cross-appeal.

108 Or.App. 707, 817 P.2d 764

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971 P.2d 435

157 Or.App. 502, 971 P.2d 435, 132 Ed. Law Rep. 202

(Cite as: 157 Or.App. 502, 971 P.2d 435)

▷

Court of Appeals of Oregon.

Christine A. TANNER; Barbara J. Limandri; Regenia M. Phillips; Lisa J. Chickadonz; Terrie A. Lyons; and Kathleen A. Grogan, Respondents,

v.

OREGON HEALTH SCIENCES UNIVERSITY, a Division of the State of Oregon; State Board of Higher Education; a division of the State of Oregon; Executive Department of the State of Oregon; The State of Oregon, and Oregon Health Sciences University, a public corporation, Appellants,

and

Public Employees' Benefits Board, Appellant.

9201-00369; CA A94458.

Argued and Submitted March 3, 1998.

Decided Dec. 9, 1998.

Lesbian university employees appealed university's denial of insurance benefits to their domestic partners. The State Employees' Benefits Board (SEBB) upheld the denial, and the employees petitioned for judicial review. The Circuit Court, Multnomah County, Stephen L. Gallagher, Jr., J., entered order enjoining the state from denying group insurance benefits to unmarried domestic partners of its homosexual employees, and state defendants appealed. The Court of Appeals, Landau, P.J., addressing issues of first impression, held that: (1) action was not moot as to university; (2) university's denial of insurance benefits to employees' domestic partners did not amount to sex discrimination in violation of statute defining unlawful employment practices; but (3) denial of benefits violated privileges and immunities clause of Oregon Constitution.

Affirmed in part and reversed in part.

West Headnotes

[1] Action ↶613k6 Most Cited Cases

University's decision to grant domestic partner benefits to homosexual employees did not render moot action challenging its former policy denying benefits to such employees, where university continued to maintain that it was under no legal obligation to provide such benefits.

[2] Declaratory Judgment ↶65118Ak65 Most Cited Cases

Voluntary cessation of a practice that is challenged in an action for declaratory and injunctive relief does not, in itself, render an action moot.

[3] Action ↶613k6 Most Cited Cases

Statute transforming university from a state agency into a public corporation rendered moot action against state agency defendants challenging university's denial of domestic partner benefits to homosexual employees. Laws 1995, c. 162, §§ 2, 74.

[4] Appeal and Error ↪ **843(1)**

[30k843\(1\) Most Cited Cases](#)

Assuming that judgment for attorney fees requires examination of the merits of a case that otherwise has become moot since entry of the judgment, trial court's award of attorney fees against state agency defendants in action challenging university's denial of domestic partner benefits to homosexual employees did not require consideration of merits of claims against those defendants on appeal, where action had become moot with regard to those defendants at time judgment for attorney fees was entered.

[5] Civil Rights ↪ **1193**

[78k1193 Most Cited Cases](#)

(Formerly 78k164)

University's denial of insurance benefits to domestic partners of its homosexual employees did not amount to sex discrimination in violation of statute defining unlawful employment practices; although university's practice had a disparate impact on a protected class, there was no evidence that it engaged in a subterfuge to discriminate against that protected class. [ORS 659.028](#), [659.030\(1\)\(b\)](#).

[6] Civil Rights ↪ **1192**

[78k1192 Most Cited Cases](#)

(Formerly 78k164)

Statute prohibiting employment discrimination on the basis of the sex of any other person with whom an individual associates encompasses discrimination because of sexual orientation. [ORS 659.030\(1\)\(b\)](#).

[7] Civil Rights ↪ **1193**

[78k1193 Most Cited Cases](#)

(Formerly 78k164)

University's denial of insurance benefits to domestic partners of its homosexual employees amounted to discrimination "because of" their sexual orientation, within meaning of employment discrimination statute; although university's policy denied benefits to both unmarried heterosexual couples and unmarried homosexual couples, it effectively screened out all homosexual couples because state law prevented them from marrying. [ORS 659.030\(1\)\(b\)](#).

[8] Civil Rights ↪ **1140**

[78k1140 Most Cited Cases](#)

(Formerly 78k153)

To make out an employment discrimination claim based on disparate impact, a plaintiff must show: (1) membership in a class protected by the employment statutes, and (2) that the employer's facially neutral employment rule has the effect of screening out members of a protected class at a significantly higher rate than others.

[9] Civil Rights ↪ **1136**

[78k1136 Most Cited Cases](#)

(Formerly 78k152)

"Subterfuge," within meaning of statute permitting employer to observe terms of a bona fide employee benefit plan, which is not a subterfuge to evade employment discrimination statutes, refers to a deception by artifice or stratagem to conceal, escape, avoid or evade, and entails intentional conduct. [ORS 659.028](#).

[10] Statutes ↪ **188**

[361k188 Most Cited Cases](#)

In examining the text of a statute, Court of Appeals gives words of common usage their plain, natural and ordinary meaning unless there is textual or contextual evidence that the legislature intended some other meaning to apply.

[11] Appeal and Error ↪ **893(1)**

[30k893\(1\) Most Cited Cases](#)

Appellate review of evidence on issue of whether employer's observance of terms of employee benefit plan was

subterfuge to evade employment discrimination statutes is de novo. ORS 659.028.

[12] Colleges and Universities ↪8(3)

81k8(3) Most Cited Cases

[12] Constitutional Law ↪205(1)

92k205(1) Most Cited Cases

University's denial of insurance benefits to domestic partners of its homosexual employees violated privileges and immunities clause of Oregon Constitution. Const. Art. 1, § 20.

[13] Colleges and Universities ↪1

81k1 Most Cited Cases

[13] Constitutional Law ↪205(1)

92k205(1) Most Cited Cases

University that was transformed by statute into a nonstate agency public corporation remained a governmental entity subject to the prohibitions of privileges and immunities clause of Oregon Constitution. Const. Art. 1, § 20; Laws 1995, c. 162, §§ 2, 74.

[14] Constitutional Law ↪205(1)

92k205(1) Most Cited Cases

Only laws that disparately treat a "true class" may violate privileges and immunities clause of Oregon Constitution. Const. Art. 1, § 20.

[15] Constitutional Law ↪205(1)

92k205(1) Most Cited Cases

Class of unmarried homosexual couples was a "true class" for purposes of privileges and immunities clause of Oregon Constitution. Const. Art. 1, § 20.

[16] Constitutional Law ↪205(1)

92k205(1) Most Cited Cases

Class of unmarried homosexual couples was a suspect class for purposes of privileges and immunities clause of Oregon Constitution. Const. Art. 1, § 20.

****437*502** Robert B. Rocklin, Assistant Attorney General, argued the cause for appellants. With him on the briefs were Hardy Myers, Attorney General, and Michael D. Reynolds, Solicitor General.

Carl G. Kiss, argued the cause and filed the brief for respondents.

Lynn-Marie Crider filed a brief amicus curiae for Oregon Public Employees Union, SEIU Local 503, AFL-CIO, CLC.

Lynn R. Nakamoto and Jennifer C. Pizer filed a brief amicus curiae for American Civil Liberties Union Foundation of ***503** Oregon, Inc., and Lambda Legal Defense and Education Fund, Inc.

Before LANDAU, Presiding Judge, and DEITS, Chief Judge, and WOLLHEIM, Judge. [FN*]

[FN* Wollheim, J., *vice* Riggs, J., resigned.

***505** LANDAU, P.J.

At issue in this case is the lawfulness of Oregon Health Science University's (OHSU) denial of health and life insurance benefits to the unmarried domestic partners of its homosexual employees. Plaintiffs, who are three lesbian employees of

Mark Johnson

From: Jessica Dubois [Jessica@basicrights.org]
Sent: Monday, August 22, 2005 1:27 PM
To: Reeves, Edward; Jann Carson; markj@jrl-s.com; Tiffany Harris; donnaraemeyer@comcast.net; Bricker, Jennie; allenb@lanepowell.com; Roey Thorpe; Maura Roche
Subject: California parenting case - Hooray for Parents!

FOR IMMEDIATE RELEASE

August 22, 2005

**Contact:**

Courtney Joslin, Senior Staff Attorney 415.902.7981 joslin@nclrights.org

Kate Kendell, Executive Director 415.595.2233 kendell@nclrights.org

National Center For Lesbian Rights Applauds California Supreme Court Decisions In Groundbreaking Parenting Cases

"The California Supreme Court made legal history today by holding, in three separate decisions, that children born to same-sex couples must be treated equally to other children and thus have a legally protected relationship to both partners. These decisions are a tremendous victory for children, for parental responsibility, and for common sense."

(San Francisco, Monday August 22, 2005) This morning the California State Supreme Court issued groundbreaking opinions in three cases involving the legal status of children born to same-sex parents. The three cases are *Elisa B. v. Superior Court*, *K.M. v. E.G.*, and *Kristine H. v. Lisa R.* The National Center for Lesbian Rights (NCLR) was counsel for Emily B., a mother seeking child support from her former partner, in the *Elisa B.* case and filed amicus briefs in the *K.M.* and the *Kristine H.* cases.

In all three cases, the Court held that when a couple deliberately brings a child into the world through the use of assisted reproduction, both partners are legal parents, regardless of their gender or marital status. The California Supreme Court is the first state Supreme Court to reach this issue, and its holding in these three cases inevitably will influence courts in other states.

"The California Supreme Court made legal history today by holding, in three separate decisions, that children born to same-sex couples must be treated equally to other children and thus have a legally protected relationship to both partners," said Courtney Joslin, NCLR Senior Staff Attorney who argued one of the case before the California Supreme Court. "These decisions are a tremendous victory for children, for parental responsibility, and for common sense."

In the *Elisa B.* case a same-sex couple - Emily B. and Elisa B. - had children together using artificial insemination by an anonymous sperm donor. Emily gave birth to twins in 1998, one of which has Down Syndrome. After the twins' birth, the couple decided that Emily would stay home to care for the children and Elisa would be the family's breadwinner. When the couple split up 18 months later, Elisa eventually cut off all contact and support, prompting Emily to apply for assistance from the state, which brought a child support action against Elisa. In today's ruling, the California

Supreme Court strongly affirmed the trial court's ruling that Elisa is a legal parent who cannot simply walk away from her obligation to support the two children she agreed to bring into the world.

"I am elated beyond words that the Court recognized the reality that my children have two parents," said Emily B. "This is a tremendous victory not only for my family but for all children born to same-sex couples."

In its decision today, the Court held: "A person who actively participates in bringing children into the world, takes the children into her home and holds them out as her own, and receives and enjoys the benefits of parenthood, should be responsible for the support of those children - regardless of her gender or sexual orientation."

In the *K.M. v. E.G.* case, a fertilized egg from K.M. was implanted in her partner E.G., who gave birth to twins in 1996. When the couple broke up in 2002, E.G. denied K.M. any access to the children and took the position that she was the children's only parent. In its decision today, the Court held that both women are legal parents.

In the *Kristine H. v. Lisa R.* case, a same-sex couple had a child using assisted reproduction. Before the child was born, the couple sought and were granted a court judgment declaring that both women were the child's legal parents. After the couple ended their relationship 2½ years later, the birth mother filed an action seeking to vacate the judgment and have the court declare that she is the child's only parent. The Court held today that the birth mother was stopped from challenging the judgment and that both women are legal parents.

For twenty-eight years NCLR has been a national leader on LGBT family issues including adoption, child custody and visitation, alternative insemination, partnership protection, domestic partner benefits, and marriage rights.

The decisions in the three cases can be accessed at: <http://www.courtinfo.ca.gov/courts/supreme/>.

The briefs in the three cases can be accessed at:
http://www.nclrights.org/cases/lesbprntge_suprct.htm.

NCLR is a national legal resource center with a primary commitment to advancing the rights and safety of lesbian, gay, bisexual, and transgender people and their families through a program of litigation, public policy advocacy, and public education. We can be reached through our website at www.nclrights.org.

Jeana Frazzini
Legislative Campaign Coordinator
Basic Rights Oregon
503-222-6151

"Live fully in this blazing world"
~Toni Flores

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O.R.S. § 109.119

C

West's Oregon Revised Statutes Annotated Currentness

Title 11. Domestic Relations

⌚ Chapter 109. Parent and Child Rights and Relationships (Refs & Annos)

⌚ Parent and Child Relationship

→ 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 necessities 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.

Laws 1985, c. 516, § 2; Laws 1987, c. 810, § 1; Laws 1993, c. 372, § 1; Laws 1997, c. 92, § 1; Laws 1997, c. 479, § 1; Laws 1997, c. 873, § 20; Laws 1999, c. 569, § 6; Laws 2001, c. 873, §§ 1, 1a, 1e; Laws 2003, c. 143, §§ 1, 2; Laws 2003, c. 231, §§ 4, 5; Laws 2003, c. 576, §§ 138, 139.

HISTORICAL AND STATUTORY NOTES

2004 Electronic Pocket Part Update

2003 Legislation

Laws 2003, c. 143, § 1 and § 2, identically amended this section by redesignating former Subsec. (8) as Subsec. (9) and adding new Subsec. (8).

Laws 2003, c. 231, § 4 and § 5 identically amended Subsec. (6), which prior thereto read:

"(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)(A) A motion for intervention filed under ORS 419B.875 by a person other than a 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 interest of the child.

"(B) A motion for intervention filed under ORS 419B.875 by a grandparent may be granted upon a finding by clear and convincing evidence that the intervention is in the best interests of the child.

"(c) Costs for the representation of an intervenor under this section or ORS 419B.875 may not be charged against funds appropriated for indigent defense services.";

and by redesignating former Subsec. (9) as Subsec. (10) and adding new Subsec. (9).

Laws 2003, c. 576, § 138 and § 139, identically amended this section by substituting "post-judgment" for "post decree" and "judgment" for "decree", respectively, in Subsec. (5).

2003 Main Volume

Westlaw.

91 P.3d 721

337 Or. 86, 91 P.3d 721

(Cite as: 337 Or. 86, 91 P.3d 721)

▷

Supreme Court of Oregon.

In the Matter of the MARRIAGE OF Rayne Elizabeth O'DONNELL-LAMONT (deceased),

Petitioner,

and

Michael David Lamont, Jr., Respondent on Review,

and

Christine and Patrick O'Donnell, Petitioners on Review,

and

Darrell Miller, Intervenor-Respondent.

(C98 1284 DR; CA A112960; SC S50551).

Argued and Submitted Jan. 12, 2004.

Decided June 10, 2004.

Background: The Circuit Court of Washington County, Steven L. Price, J., awarded custody of two children to their maternal grandparents rather than to the father. Father appealed. The Court of Appeals, 184 Or.App. 249, 56 P.3d 929, 187 Or.App. 14, 67 P.3d 939, reversed.

Holdings: The Supreme Court, Balmer, J., held that:

(1) grandparents rebutted statutory presumption that father acted in best interests of children, and

(2) application of statutory presumption did not violate federal due process.

Affirmed judgment of trial court.

West Headnotes

[1] Appeal and Error ↪893(2)

30k893(2) Most Cited Cases

In reviewing a decision of the Court of Appeals that is an appeal from a suit in equity, Supreme Court may review de novo or may limit its review to questions of law. West's Or.Rev. Stat. Ann. § 19.415(4).

[2] Child Custody ↪919

76Dk919 Most Cited Cases

In Supreme Court's de novo review of the record in Court of Appeals in child custody case, it gives considerable weight to the findings of the trial judge who had the opportunity to observe the witnesses and their demeanor in evaluating the credibility of their testimony.

[3] Constitutional Law ↪274(5)

92k274(5) Most Cited Cases

In determining custody and visitation rights of persons who were not biological or adoptive parents, federal due process requires a court to accord some special weight to a parent's determination of what is in the child's best interest. U.S.C.A. Const.Amend. 5; ORS 109.119 (2001).

[4] Child Custody ↪465

76Dk465 Most Cited Cases

[4] Child Custody ↪509[76Dk509 Most Cited Cases](#)

The presumption that a parent acts in the best interests of the child may be overcome in custody dispute between parent and nonparents by a showing to the contrary based on the preponderance of the evidence, and courts as triers of fact may decide whether the nonparents have made that showing in any particular case. West's Or.Rev. Stat. Ann. § 109.119.

[5] Child Custody ↪468[76Dk468 Most Cited Cases](#)

The statutory touchstone in custody dispute between parent and nonparent 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 statutory factors. ORS 109.119(4)(b) (2001).

[6] Child Custody ↪42[76Dk42 Most Cited Cases](#)**[6] Child Custody ↪465**[76Dk465 Most Cited Cases](#)

In a child custody dispute between parent and nonparent, if a nonparent proves by a preponderance of the evidence that a parent is "unwilling" or "unable" to care for the child, the nonparent will have rebutted the presumption that the parent acts in the best interest of the child; however, consideration of this factor does not allow the court to substitute its judgment for that of a parent by determining that the nonparent is better able to care for the child. ORS 109.119(4)(b) (2001).

[7] Child Custody ↪276[76Dk276 Most Cited Cases](#)

In custody dispute between father and grandparents, evidence showed existence of factor that grandparents are or recently were the children's primary caretakers; grandparents had close and positive relationship with children for many years, mother and children lived with grandparents on occasion, and grandparents were children's primary caretakers for more than three months following mother's death. ORS 109.119(4)(b) (2001).

[8] Child Custody ↪460[76Dk460 Most Cited Cases](#)

In statute listing factors relevant to rebutting presumption that parent acts in the best interests of the child, factor relating to "circumstances detrimental to the child," refers to circumstances that pose a serious present, not future, risk of psychological, emotional, or physical harm to a child. ORS 109.119(4)(b) (2001).

[9] Child Custody ↪473[76Dk473 Most Cited Cases](#)

In child custody dispute between father and grandparents, preponderance of evidence showed that awarding custody to father would pose a serious present risk of psychological or emotional harm to the children, consisting of father's lack of understanding of the children's emotional and developmental needs, his difficulty in controlling his anger, together with girlfriend's deficiencies as a caregiver, and father's complete failure to acknowledge any of them. ORS 109.119(4)(b) (2001).

[10] Child Custody ↪460[76Dk460 Most Cited Cases](#)

The fact that a parent changes jobs or addresses frequently does not demonstrate "circumstances detrimental to the child" that are sufficient to rebut the presumption, in custody dispute with nonparent, that parent acts in best interests of child; although, other things being equal, frequent changes of school and residence are not ideal for children, such changes are a fact of life for many families. ORS 109.119(4)(b) (2001).

[11] Child Custody ↪42

76Dk42 Most Cited Cases

When a parent chooses to move often not because of employment or other external considerations but simply because of a desire to move, and the parent fails to consider the impact of the moves on the child, those moves can be relevant, in custody dispute with nonparent, to the determination whether the parent fails to act in the best interest of the child. ORS 109.119(4)(b) (2001).

[12] Child Custody ↪46076Dk460 Most Cited Cases

In child custody dispute between father and grandparents, factor to rebut presumption parent acts in best interest of child, that father consented to the development over many years of close relationship between grandparents and the children, should not be accorded any weight in rebutting the parental presumption; the fact that father consented to grandparents serving as primary caregivers and otherwise having a close relationship with the children did not indicate in any way that he did not act in the best interests of the children. ORS 109.119(4)(b) (2001).

[13] Child Custody ↪46076Dk460 Most Cited Cases

In child custody dispute between father and grandparents, factor to rebut presumption parent acts in best interest of child, that parent unreasonably denied or limited contact between the child and the nonparent, was shown by his moving the children with him and girlfriend to Montana, in violation of a court order, in breach of his promise to the trial judge, and without notice to grandparents or the court. ORS 109.119(4)(b) (2001).

[14] Child Custody ↪47376Dk473 Most Cited Cases

In child custody dispute between father and grandparents, grandparents rebutted presumption that parent acts in best interests of child, by evidence of grandparents' role as primary caretakers to the children after mother's death; father's denial of contact between the children and grandparents by moving the children to Montana; and the present risk to the children that granting custody to father would be detrimental to them. ORS 109.119(4)(b)(B. C. E) (2001).

[15] Child Custody ↪476Dk4 Most Cited Cases**[15] Constitutional Law ↪274(5)**92k274(5) Most Cited Cases

In child custody dispute between father and grandparents, governing statute did not violate federal due process by permitting the presumption that the legal parent acts in the best interest of the child to be rebutted by evidence that did not rise to the level of showing that the father was unable to care for the children or that granting custody to the father would cause harm to them.

ORS 109.119(4)(b) (2001).

****723 *88** On review from the Court of Appeals. [FN*]

FN* Appeal from Washington County Circuit Court, Steven L. Price, Judge. 184 Or.App. 249, 56 P.3d 929 (2002), *modified and adhered to as modified by an equally divided court*, 187 Or.App. 14, 67 P.3d 939 (2003).

Eli D. Stutsman, Portland, argued the cause and filed the brief for petitioners on review. With him on the brief were David L. Heifetz, Jacqueline Koch, and Koch & Deering.

Philip F. Schuster II, of Dierking & Schuster, Portland, argued the cause and filed the brief for respondent on review.

F.G. (Jamie) Troy II, of Law Office of Ronnee S. Kliewer, Portland, filed the brief for amicus curiae Basic Rights Oregon, Inc. With him on the brief was Shaun Wardinsky, of Yates, Matthews & Marasch, P.C., Portland.

Darcia Krause, Portland, filed the brief for herself as amicus curiae.

After the dissolution, mother began a relationship with Darrell Miller. In March 1999, Miller, mother, and the children went to Disneyland. While they were there, mother **725 *91 died of her preexisting heart condition. Miller and the children returned to Oregon, where father and grandparents met them.

At the time of mother's death, father was working in Eugene and living in a trailer. Father acknowledged that his living situation was not appropriate for the children, and father and grandparents agreed that the children would stay with grandparents. Although father and grandparents at one point anticipated that the children might live with grandparents for as long as several years, during the summer of 1999 father reasserted his right to custody of the children, which grandparents disputed. The parties attempted unsuccessfully to mediate their dispute, and the children became the subject of a tug of war between father and grandparents. In July 1999, father refused to return children to grandparents after a visit, without telling grandparents in advance. Later that month, grandparents, while in possession of the children, sought and received a court order awarding them temporary custody. The court ordered the children returned to father, who by that time had acquired a house in Keizer. Father assured the court that he would keep the children in the Salem area. However, despite that promise, father moved to Montana with the children and his girlfriend, Laura Oliver, in September 1999, without notice to the court or grandparents. Father refused to disclose his address in Montana to grandparents and avoided grandparents' efforts to serve him with legal papers. The court found father in contempt and ordered him to return the children to Oregon, which he did. After living in Montana for about six weeks, father, Oliver, and the children moved to the Detroit Lake area, and father and Oliver later purchased a house in Lyons.

II. PROCEEDINGS BELOW

After a hearing on the merits, the trial court in July 2000 awarded permanent custody to grandparents, with substantial parenting time to father. The trial court issued a letter opinion making extensive findings of fact. The trial court relied on the testimony of the parties and numerous other witnesses, including Dr. Edward Vien, a clinical psychologist appointed by the court, who spent 27 hours interviewing family members and conducting psychological tests. The trial *92 court found that the children are bonded to father and to grandparents and that father loves the children, has attempted to provide for them, and has the potential to be a good custodial parent. However, the court also found that father had lied repeatedly during the hearing, had an unstable job and residence history, had used illegal substances during the marriage, had abused mother, and had difficulty controlling his anger. Although father claimed to have overcome those problems, the trial court found that he was "unconvincing." Based on his testimony in the trial court, the trial court found that father was "dishonest" and that he lacked credibility. For those and other reasons, the trial court determined that father had serious shortcomings and deficiencies as a parent.

In regard to grandparents, the trial court found that grandparents had provided the children with food, clothing, shelter, and other physical necessities, as well as care, education, and discipline. The court noted that grandparents had played a "closely supportive role" for many years in helping mother raise the children. The court also found that grandparents had a more constructive interest in, and attitude toward, the children than did father. However, the court also identified several negative factors regarding grandparents, including grandparents' tendency to dote on the children, their efforts to "control" father and the children, and their desire to prevent father from having the children.

The trial court began its legal analysis with ORS 109.119 (1999), which, at the time of the hearing, established the standards for the court to use in determining whether grandparents had shown "emotional ties creating a child-parent relationship" with the children. [FN2] Having found that **726 *93 grandparents had proved such a relationship, the court then considered father's argument that, as the biological parent, he had a "supervening right" to custody unless he was shown to be unfit. Father had argued that he was a fit legal parent and that, under Hruby and Hruby, 304 Or. 500, 748 P.2d 57 (1987), the court should award him custody in the absence of a "compelling threat" to the present or future well-being of the children. The trial court rejected that argument, stating that this court's decision in Sleeper and Sleeper, 328 Or. 504, 982 P.2d 1126 (1999), had concluded that the applicable version of ORS 109.119 did not incorporate Hruby's "compelling threat" standard.

FN2. ORS 109.119 (1999) provided, in part:

"(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.

"(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."

The 2001 Legislative Assembly amended ORS 109.119, and we discuss those amendments in detail below. 337 Or. at 102-09, 91 P.3d at 730-34; *see* Or. Laws 2001, ch. 873, §§ 1, 1a, 1e. The 2003 Legislative Assembly also amended the statute, but those amendments do not affect the decision in the case before us. *See* Or. Laws 2003, ch. 143, §§ 1-2; ch. 231, §§ 4-5; ch. 576, §§ 138-39. All subsequent references to ORS 109.119 are to the 2001 version, unless otherwise noted.

Although the trial court rejected the "compelling threat" standard as inconsistent with ORS 109.119 (1999), it nevertheless concluded that, to protect a legal parent's constitutional rights, *Hruby* required a "compelling reason" to grant custody to a psychological parent over a legal parent. The court further noted that a psychological parent could meet the "compelling reason" standard when the legal parent's custody would be "highly detrimental" to the child. Moreover, in applying that standard, the trial court ruled that detrimental *conduct* by the legal parent did not have to be shown; detrimental circumstances would suffice.

Reviewing the facts discussed above, the court found that "father [was] not so unfit as to justify termination of his parental rights" but that, given his shortcomings as a parent and the grandparents' status as psychological parents, it was appropriate for the court to determine custody based on the *94 best interests of the children. Applying the nonexclusive considerations respecting that standard that are listed in ORS 107.137, [FN3] the court determined that it was in the children's best interests for the court to award custody to grandparents, with substantial parenting time to father.

FN3. ORS 107.137 provides a nonexclusive set of factors for courts to consider in determining the "best interests and welfare" of a minor child when deciding to whom to award custody of the child in the context of a dissolution proceeding. Although ORS 107.137 is part of the marital dissolution statute, this court has approved the use of that standard in determining the "best interests of the child" under the third-party custody statute, ORS 109.119. *Sleeper and Sleeper*, 328 Or. at 511, 982 P.2d 1126.

The trial court also addressed the impact of the United States Supreme Court's decision in *Troxel*, which had been decided after the hearing, but before the trial court opinion. As discussed in greater detail below, in *Troxel*, a plurality of the Supreme Court held that the Due Process Clause "protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." 530 U.S. at 66. 120 S.Ct. 2054. The Court concluded that a Washington statute that authorized a court to award visitation rights to any nonparent if the "visitation may serve the best interest of the child" unconstitutionally infringed the parent's right to make decisions concerning the child. *Id.* at 75. 120 S.Ct. 2054. The Court failed to articulate the scope of the parent's right, holding only that, to meet due process requirements, "at least some special weight" must be given to a fit parent's determination of whether such visitation is in the **727 child's best interest. *Id.* at 70. 120 S.Ct. 2054.

The trial court determined that its decision to award custody to grandparents was consistent with *Troxel*. The trial court noted that the Court in *Troxel* had considered a "much broader" state law that would have allowed "any person" to pursue visitation rights and that the plurality opinion expressly had rejected a harm standard, *i.e.*, that the psychological parent must show that the child will be harmed if left with the legal parent for the psychological parent to prevail in a custody dispute. The trial court also pointed out that Oregon's presumption, developed in the custody case law, that a fit parent acts in the best interest of the child, was consistent with *Troxel's* requirement to "accord at least some *95 special

weight to the parent's own determination." 530 U.S. at 70, 120 S.Ct. 2054. In the trial court's view, because it had applied the presumption to which father was entitled and nevertheless had determined that it would be in the best interests of the children to award custody to grandparents, its decision complied with the Oregon law then in effect and met the due process requirements as stated in *Troxel*.

Father appealed and, as noted, the Court of Appeals reversed. In the initial panel decision, that court, like the trial court, applied ORS 109.119 (1999) in light of its understanding of *Troxel*. Unlike the trial court, however, the Court of Appeals viewed *Troxel* as raising the standard previously applied in Oregon for qualifying nonparents, like grandparents here, to meet if they are to prevail over fit parents in a custody dispute. 184 Or.App. at 254-55, 56 P.3d 929. Specifically, the Court of Appeals interpreted *Troxel* to require a showing by the nonparents that was more similar to the "compelling threat" standard articulated by this court in *Hruby* than to this court's later, but still pre-*Troxel*, decisions such as *Sleeper*. 184 Or.App. at 253-56, 56 P.3d 929. The Court of Appeals stated:

"[T]o overcome the presumption in favor of father under ORS 109.119(2)(a) (1997), grandparents must establish that the evidence as a whole preponderates in their favor, that is, that father *cannot or will not provide adequate love and care* for the children or that placement of the children in father's custody *will cause them undue physical or psychological harm*. * * * That means that 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."

Id. at 256, 56 P.3d 929 (emphasis added). Applying that standard, the Court of Appeals concluded that grandparents' evidence did not rise to the level necessary to overcome the presumption that father would act in the best interests of the children and was entitled to custody. Accordingly, that court reversed the judgment of the trial court and remanded with instructions to award custody to father. Id. at 259, 56 P.3d 929.

Grandparents petitioned for reconsideration, arguing that the Court of Appeals should have applied the 2001 *96 amendments to ORS 109.119 in its *de novo* review of the trial court decision. As noted, the legislature adopted those amendments after *Troxel*. The amendments replaced the existing statute, which allowed a court to award custody to a nonparent who met certain criteria, if the court determined that custody was "appropriate in the case" and was "in the best interest of the child." ORS 109.119(3)(a) (1999). As discussed in detail below, the 2001 amendments established a statutory presumption that a legal parent acts in the best interest of the child and identified the kinds of factors a court may consider in determining whether a nonparent seeking custody of a child has rebutted that presumption. The 2001 amendments had been adopted after the trial court's decision, but before the argument in the Court of Appeals.

The Court of Appeals, en banc, agreed with grandparents and modified the panel opinion to state that the 2001 amendments "are fully retroactive." 187 Or.App. at 17, 67 P.3d 939. The court was divided, however, regarding the effect of the 2001 amendments on its decision and on the appropriate disposition of the case. Judge Edmonds, the author of the panel decision, joined by three other members of the court, concluded that **728 the result under the 2001 amendments would be the same as the panel's decision, declined to remand for further trial court proceedings under the 2001 amendments, and adhered to the panel opinion as modified. Three additional opinions were filed. In all, five members of the court adhered to the panel decision, as modified, and five members dissented in part, arguing that the case should be remanded for further development of the record. Because the court was evenly divided, the court adhered to the panel decision as modified.

III. THE 2001 AMENDMENTS TO ORS 109.119

A. Background

This court has not been required, prior to this case, to address *Troxel* or the changes to ORS 109.119 that the legislature adopted after *Troxel*. For that reason, it will be helpful to review the nature of the dispute before this court and to examine the Supreme Court's decision in *Troxel*, before turning to our statutory analysis.

*97 This case involves a third-party custody dispute between grandparents and father. In contrast to a proceeding to terminate parental rights under ORS 419B.498 to 419B.530, the state is not a party to this case, no one claims that father is "unfit" to be a parent, and father's status as a legal parent is not at issue. The only issue here is custody. Although any

decision awarding custody to a third party is a serious intrusion on a parent's right to care for and make decisions for a child, it is less drastic than the termination of the parent-child relationship and, as we discuss below, the statutory standard also is less demanding. See *Stillman*, 333 Or. at 149-50, 36 P.3d 490 (parental rights may be terminated only if parent is "unfit" and that conduct or condition is "seriously detrimental" to children).

A custody dispute also involves a less significant interference with parental rights than does a juvenile dependency proceeding in which the court determines that a child is within the jurisdiction of the court based on a finding that a parent has, among other things, abandoned the child or failed to provide "care, guidance and protection necessary for the physical, mental or emotional well-being" of the child, ORS 419B.100(A), (D). In those circumstances, as in a termination proceeding, the state intervenes to relieve a parent of ordinary parental responsibilities and to assume control over decisions about such matters as shelter and health care.

On the other hand, a custody decision involves a greater potential intrusion on parental interests than a decision regarding visitation. Father here has more at stake than whether the children are to spend every other weekend with grandparents. The decision as to who will have primary custody of the children will alter in fundamental, unknowable ways the lives of the children, father, and grandparents. Courts make these difficult decisions fully aware of their potential consequences for all the individuals involved.

Another critical aspect of the background of the 2001 amendments to the third-party custody statute, and therefore of our decision in this case, is the Supreme Court's decision in *Troxel*, to which we now turn. As noted, the parties agree that the 2001 amendments to ORS 109.119 were adopted in response to *Troxel*. We begin with a review of *98 what the Court decided--and what it did not decide--in *Troxel*, because that discussion provides important context for construing the amended statute.

In *Troxel*, the Court reviewed a decision of the Washington Supreme Court that had considered three consolidated challenges to a state statute that permitted nonparents to obtain visitation rights if a court determined that visitation was in the best interest of the child. The Washington court had held that the statute unconstitutionally interfered with the rights of parents to rear their children. That court found the statute to be constitutionally deficient because it permitted the state to interfere with the rights of parents to rear their children without any threshold showing of harm to the children and also because it allowed "any person" to petition for court-ordered visitation of a child at "any time," contrary to a parent's wishes, subject only to a best-interests-of-the-child standard. **729 *In re Smith*, 137 Wash.2d 1, 15-20, 969 P.2d 21, 28-31 (1998). The United States Supreme Court affirmed, although it did not adopt the analysis of the Washington Court.

The Court held that the statute, as applied to the facts there, violated the legal parent's fundamental right, protected by the Due Process Clause, to make decisions concerning the child. The Court failed to produce a majority opinion. Justice O'Connor wrote the plurality opinion, in which the Chief Justice and Justices Breyer and Ginsburg joined. The plurality held that the Due Process Clause "protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Troxel*, 530 U.S. at 66, 120 S.Ct. 2054. The plurality emphasized, however, that a parent's right to make decisions related to a child is not absolute, but rather provides the basis for a "presumption that fit parents act in the best interests of their children." *Id.* at 68, 120 S.Ct. 2054. The problem in *Troxel*, according to the plurality, was "not that the Washington Superior Court intervened, but that when it did so, it gave no special weight at all to [mother's] determination of her daughters' best interests." *Id.* at 69, 120 S.Ct. 2054. The plurality stated that, when a decision made by a fit parent is subject to judicial review, due process requires that *99 the court "accord at least some special weight to the parent's own determination." *Id.* at 70, 120 S.Ct. 2054.

The plurality, however, provided no specificity as to the extent of the parents' right or the evidence required to overcome the parental presumption. Indeed, the plurality expressly declined to "define * * * the precise scope of the parental due process right in the visitation context." *Id.* at 73, 120 S.Ct. 2054. Instead, the plurality stressed the nuanced, case-specific nature of the inquiry. It agreed with Justice Kennedy's dissenting opinion that the constitutionality of any standard in this area "turns on the specific manner in which that standard is applied and that the constitutional protections in this area are best 'elaborated with care.'" *Id.*, quoting 530 U.S. at 101, 120 S.Ct. 2054 (Kennedy, J.,

dissenting).

Three other members of the Court, although not joining in the plurality opinion, agreed that the Due Process Clause protects parental interests in decisions regarding children, but that the parental interest is qualified. Justice Souter wrote a separate opinion concurring in the judgment. He pointed out that the Washington statute authorized "any person" at "any time" to seek visitation rights "subject only to a free-ranging best-interests-of-the-child standard." *Id.* at 76. 120 S.Ct. 2054. Because that statute failed to give any recognition to the due process rights of parents to make decisions regarding their children, Justice Souter stated that the statute was unconstitutional on its face. *Id.* at 76-77. 120 S.Ct. 2054. Justice Stevens wrote a separate opinion in which he agreed that parents have a "fundamental liberty interest in caring for and guiding their children," that that interest is not absolute, and that the presumption that parents will act in the best interests of their children is a rebuttable one. *Id.* at 86-87. 120 S.Ct. 2054 (Stevens, J., dissenting). Justice Stevens dissented, however, because the plurality did not address what he viewed as the Washington Supreme Court's erroneous holding that the federal constitution "requires a showing of actual or potential 'harm' to the child" to overcome the presumption that a fit parent acts in the best interest of a child. *Id.* at 86. 120 S.Ct. 2054. Justice Kennedy dissented for the same reason, stating that the Washington court erred in applying a "harm" standard to overcome the *100 parents' right to make decisions for their children. *Id.* at 94. 101-02. 120 S.Ct. 2054.

Justice Thomas concurred in the judgment. He stated that, because the Due Process Clause protects a "fundamental right of parents to direct the upbringing of their children," any infringement of that right is subject to "strict scrutiny." *Id.* at 80. 120 S.Ct. 2054 (Thomas, J., concurring). In his view, the State of Washington lacked "even a legitimate governmental interest--to say nothing of a compelling one--in second-guessing a fit parent's decision regarding visitation with third parties." *Id.*

Finally, Justice Scalia dissented on the ground that the Due Process Clause provides no protection for "parental rights," and the Washington legislature therefore was free to **730 adopt the "best interest" test that was challenged in *Troxel*. 530 U.S. at 91-92. 120 S.Ct. 2054 (Scalia, J., dissenting).

The absence of a majority opinion in *Troxel* and the array of viewpoints expressed in the six different opinions make it difficult to identify the scope of the parental rights protected by the Due Process Clause or the showing that the state or a nonparent must make before a court may interfere with a parent's custody or control of a child. [FN4] However, two conclusions safely can be drawn from *Troxel*. First, with the exception of Justice Scalia, all the members of the Court agreed that the Due Process Clause protects, to some degree, a fit parent's right to make decisions for a child. Second, of the eight justices who recognized a constitutional protection for parental rights, only Justice Thomas concluded that the constitution requires strict scrutiny of state actions that intrude upon those rights. [FN5] The other opinions articulated an undefined but less exacting standard. As noted, the plurality *101 held that "some special weight" must be given to a parent's determination of what is in the child's best interest, but did not elaborate on the nature or extent of that "weight." Nevertheless, a majority of the Court strongly indicated that the presumption in favor of a parent's decisions was not so strong that it could be overcome only by a showing that the parent poses a risk of harm to the child. As previously discussed, Justices Stevens and Kennedy each expressly rejected the Washington Supreme Court's conclusion that a finding of harm to the child is required to overcome the parental presumption. 530 U.S. at 85-86. 89-90. 120 S.Ct. 2054 (Stevens, J., dissenting); *id.* at 94-96. 120 S.Ct. 2054 (Kennedy, J., dissenting). Moreover, the plurality declined to consider the lower court's reliance on the "harm" standard, *id.* at 73. 120 S.Ct. 2054, but cited with approval various statutes that would be inconsistent with such a standard, *id.* at 70-71. 120 S.Ct. 2054. [FN6]

FN4. See Emily Buss, *Adrift in the Middle: Parental Rights After Troxel v. Granville*, 2000 Sup. Ct. Rev. 279, 312 (2001) ("A detailed search [of *Troxel*] for some concrete criteria produces a handful of near contentless assertions about what the constitutional protection allows and requires."); *The Supreme Court. 1999 Term--Leading Cases*, 114 Harv. L. Rev. 229, 229 (2000) ("[T]he plurality's failure to elaborate on the mechanics of the constitutional standard will leave judges, legislators, and individual litigants without adequate guidance.").

FN5. See Buss, 2000 Sup. Ct. Rev. at 283 (Except for the separate opinions of Justices Scalia and Thomas, "all four [opinions] recognized some constitutional protection for parental rights, but none suggested that the right

is particularly strong.").

FN6. For a discussion of the consideration of the "harm" standard in the various *Troxel* opinions, see Buss, 2000 Sup. Ct. Rev. at 283, 303-05.

The Supreme Court's decision in *Troxel* led directly to the 2001 amendments to Oregon's statute regulating third-party custody and visitation claims. As previously discussed, ORS 109.119(3)(a) (1999) allowed a court to award custody to a psychological parent if the court determined that custody "was appropriate in the case" and was "in the best interest of the child." That statute was less "open-ended" than the Washington statute at issue in *Troxel*, because it limited the class of third parties who could seek custody or visitation and also because of cases interpreting the statute to impose a presumption in favor of the legal parent. The statute nevertheless appeared likely to draw a constitutional challenge under *Troxel* because it failed to assign any special weight or deference to the legal parent's interest in the custody and control of a child. For that reason, the legislature undertook to amend the statute.

B. Retroactivity of the 2001 Amendments

Before we consider the legislature's 2001 amendments to ORS 109.119, we must decide the threshold issue whether those amendments are retroactive and therefore *102 applicable to this case. Grandparents filed the custody petition in 1999, and the trial occurred in 2000. Father argues that the 2001 amendments apply only to custody proceedings in which the petition seeking custody was filed after July 31, 2001, the effective date of the 2001 amendments. As noted, all members of the Court of Appeals rejected that argument, agreeing that the **731 legislature made the 2001 amendments applicable to all custody proceedings filed "before, on or after" July 31, 2001. 187 Or.App. at 17-18, 67 P.3d 939. We agree with the Court of Appeals' determination of that issue and do not address it further.

C. The Text and Structure of ORS 109.119

We now turn to ORS 109.119, which establishes the law that we must apply in determining custody as between a legal parent, such as father, and other persons who have established a child-parent relationship with a child, such as grandparents here. [FN7] That statute provides, in part:

FN7. Former ORS 109.119(8)(a) (2001), *renumbered as* ORS 109.119(10)(a) (2003), defines the term "child-parent relationship." Here, the trial court found, and father does not dispute, that grandparents established a "child-parent relationship" within the meaning of the statute. Accordingly, we do not discuss further that aspect of ORS 109.119.

"(1) [A]ny 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 * * * with a child may petition or file a motion for intervention with the court having jurisdiction over the custody * * * of that child, or if no such proceedings are pending, may petition the court * * * 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.

** * * *

"(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 *103 shall grant custody * * * to the person having the child-parent relationship, if to do so is in the best interest of the child. * * *

** * * *

"(4)(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."

" * * * * *

"(8) As used in this section:

" * * * * *

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

Although, as this case demonstrates, application of ORS 109.119 to specific circumstances may involve difficult and close determinations and the exercise of Solomonian judgment by the finder of fact, the statute establishes a clear roadmap for that decision-making process. As noted, only persons who have demonstrated a child-parent relationship with the child have the right to seek custody under ORS 109.119, ORS 109.119(1). In such a custody proceeding, the legal parent is presumed to act in the best interest of the child. ORS 109.119(2)(a). That presumption can be rebutted, *104 however, by a preponderance of the evidence, and the statute identifies five nonexclusive factors that the court may consider in determining whether the presumption has been rebutted (rebuttal factors). ORS 109.119(3), (4)(b). Finally, the statute provides that, if the evidence rebuts the presumption in favor of the legal parent, the court shall award custody to the person having the child-parent relationship with the **732 child, but only if to do so is in the best interests of the child. ORS 109.119(3)(a).

D. *The Parties' Contentions Regarding ORS 109.119*

The parties agree that ORS 109.119 (2001) is facially constitutional. [FNS] They disagree, however, over the interpretation of the statute and its application to this case. Grandparents contend that the evidence at trial supported each of the five nonexclusive factors of ORS 109.119(4)(b) that the court may consider in determining whether the evidence has rebutted the presumption. Grandparents argue first that undisputed evidence supports the factors set out in ORS 109.119(4)(b)(B) and (D) because grandparents had been the children's "primary caregivers" in the months after mother's death, and father had "fostered, encouraged or consented to" the relationship between grandparents and the children. Second, grandparents assert that the evidence supported a finding under ORS 109.119(4)(b)(E) that father had "unreasonably denied or limited contact" between the children and grandparents by moving the children to Montana without notice to grandparents and in violation of a court order. Finally, grandparents argue that father is "unwilling or unable to care adequately" for the children and that "circumstances detrimental to the child [ren] [would] exist" if the court awarded custody to father, ORS 109.119(4)(b)(A) and (C), based on findings by the trial court as to, among other things, father's job and home instability, past substance abuse, difficulty in controlling his anger, and dishonesty.

FNS. It follows that there is no issue before us respecting the constitutionality of ORS 109.119 (2001), and we express no opinion concerning that issue.

Father responds that the evidence at trial was not sufficient to rebut the presumption that he acts in the best interest of the children. Father then makes a multifaceted *105 legal argument, the primary thrust of which is that the court should interpret ORS 109.119 to permit rebuttal of the parental presumption only by a showing that "the parent is *unable* to adequately care for the child or that custodial placement with the parent *will harm* the child." (Emphasis added.) If that interpretation is not required by the words and legislative history of ORS 109.119, father concludes, *Troxel* nevertheless compels such a reading for the statute to be consistent with the Due Process Clause. Put another way, father argues that if ORS 109.119, as applied to the facts here, results in the award of custody to grandparents, then that award would infringe his rights under the Due Process Clause because grandparents have not shown that father is unable or unwilling to care for the children or that awarding custody to father will harm the children.

E. *Construction of ORS 109.119*

Before we can evaluate the parties' competing positions, we first must construe ORS 109.119. We then can consider the

facts in this proceeding in light of that construction.

[3] The 2001 amendments to ORS 109.119 were intended to make that statute consistent with the due process requirements articulated in *Troxel*, but not to make broader changes in custody law. [FN9] Nothing in the text of the 2001 amendments or in the legislative history indicates that the legislature intended to make any change to the custody **733 *106 standard other than the protection of the parental right recognized in *Troxel*. Thus, as we examine ORS 109.119, we do so in view of the legislature's intent to meet the constitutional mandate of *Troxel*, which, as we discussed above, requires a court, in making custody or visitation decisions, to accord some special weight to a parent's determination of what is in the child's best interest. ORS 109.119(2)(a) purports to implement that mandate by establishing "a presumption that the legal parent acts in the best interest of the child." However, as discussed above and as permitted by *Troxel*, that presumption can be rebutted. ORS 109.119(3)(a) provides that, "if the court determines that the presumption * * * has been rebutted by a preponderance of the evidence, the court shall grant custody * * * to the person having the child-parent relationship, if to do so is in the best interest of the child."

FN9. Representative Lane Shetterly, who sponsored the legislation, stated the drafters' intentions before the House Judiciary Committee:

"What I would emphasize to the committee is that my charge to the work group, which I think they maintained very well, was that *our focus would be limited to addressing those issues raised by the Troxel case*. That is, we already had third-party visitation and custody in the Oregon statutes, uh, the *Troxel* case raised issues as to constitutionality under its analysis of the Washington statute. And so the charge to the work group which I think they held to very well, and so did the subcommittee, was that we would only deal with those issues raised by the *Troxel* case, and try not to get into re-debating the fundamental issues of third-party visitation, or trying to make changes in those statutes that went beyond the * * * issues raised by the *Troxel* case. *I would invite anyone to bring another bill to raise those broader issues, but this is one of these things we need to do, and so to get it done, we kept a very narrow focus.*"

Tape Recording, House Committee on Judiciary Work Session, Mar. 30, 2001, Tape 30, Side A (emphasis added).

The difficult issue in construing this statute is to determine how demanding the burden is on the nonparent to rebut the parental presumption. As noted, father's argument suggests that the nonparent's burden is a "heavy" one that can be met only by showing that a parent is unable to care for the child or will harm the child. Grandparents do not articulate any specific standard, other than to repeat the words of the statute, but suggest that the parental presumption "easily" can be rebutted by evidence of any one of the five nonexclusive factors listed in ORS 109.119(4)(b).

Such characterizations of the evidence to rebut the parental presumption are of limited utility. Rather than place any further adjectival gloss on the burden that an otherwise qualified nonparent must meet, we offer the following observations respecting the operation of the statute, in the hope that they will assist courts in applying the statute in future cases. First, the legislature used the basic "preponderance of the evidence" standard for cases such as this, involving a custody petition by a nonparent who has a parent-child relationship with the child, while imposing the more demanding "clear and convincing evidence" standard when a person with an "ongoing personal relationship" seeks to overcome the parental presumption and obtain visitation or other rights regarding a child. ORS 109.119(3)(b).

*107 Second, as previously discussed, the legislature specifically identified five factors that may be considered in determining whether the presumption has been rebutted. ORS 109.119(4)(b). By stating that those factors are nonexclusive and by including, as relevant factors, whether the nonparent recently has been the child's primary caretaker and whether the legal parent has consented to the relationship between the child and the nonparent, the legislature demonstrated that the parental presumption can be rebutted *without* a showing that the parent will harm the child or is unable to care for the child.

Third, the legislature could have imposed a more rigorous standard than the standard that we have read *Troxel* to require. However, as discussed above, the legislature declined to do so. That fact further supports the conclusion that the presumption can be overcome without showing that a parent is unable to care for the child or will harm the child. *Troxel*

holds only that the Due Process Clause requires that "some special weight" be given to the interest of the legal parent, and nothing in the amendments to ORS 109.119 suggests that the legislature intended its use of the rebuttable parental presumption to impose a higher standard.

Finally, as previously discussed, we note that the consequences of a custody decision are less drastic, and the statutory requirements for such a decision correspondingly less exacting, than when the state petitions to terminate a parent's rights because the parent is "unfit" or to have a child determined to be within the jurisdiction of the juvenile court because the parent has failed to provide necessary care.

[4] Accordingly, although we recognize the significance of the parental interest protected by the presumption embodied in ORS 109.119(2)(a), we nevertheless take the legislature at its word (as we must) when it determined that the presumption could be overcome by a showing, based on the preponderance of the evidence, that a parent does not act in the best interest of the child, and left to the courts as triers of fact the task of ****734** deciding whether the nonparents had made that showing in any particular case.

We therefore turn to the other critical issue of statutory construction in this case, namely, what evidence must ***108** a nonparent seeking custody present to show that the legal parent does not act in the best interest of the child. We will discuss each of the five rebuttal factors listed in the statute when we review the evidence in this case. But we first must resolve the issue of whether evidence that supports less than all those factors--or other evidence not encompassed within the enumerated factors--is sufficient to rebut the statutory presumption.

[5] Grandparents point out that the statute phrases the five rebuttal factors in the disjunctive, rather than the conjunctive. That phrasing suggests that, in an appropriate case, a court could conclude that the presumption was rebutted based on evidence of the existence of only one factor, provided that the court found, by a preponderance of the evidence, that the nonparent had overcome the presumption that the legal parent acts in the best interest of the child. There may be cases in which the parent is so obviously unwilling or unable to care adequately for the child that a court could conclude that the parental presumption was rebutted, despite the absence of evidence of any of the other four factors. Conversely, a nonparent may be able to present some evidence of each of the five enumerated factors and yet be unable to prove, by a preponderance of the evidence, that the legal parent fails to act in the best interest of the child. In specific cases, the weight to be given to each of the five statutory factors, to the evidence supporting those factors, and to other relevant evidence, will vary. 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).

This court has taken the approach set out above in construing other statutes in which the legislature has provided a nonexclusive list of factors for a court to consider in making a determination under the statute. In *Stillman*, for example, this court interpreted and applied ORS 419B.504, which describes the standard for determining when parental rights may be terminated because of parental unfitness. The statutory standard was whether the parent was "unfit by reason of conduct or condition seriously detrimental to the ***109** child," and the statute provided that, in making that determination, the court was to consider six nonexclusive factors, including the parent's "emotional illness," "physical neglect of the child," and "criminal conduct that impairs the parent's ability to provide adequate care of the child." 333 Or. at 144-45, 36 P.3d 490 (quoting ORS 419B.504). In construing that statute, this court stated:

"[T]he legislature has provided a nonexclusive list of six examples of conduct and conditions that courts must consider, both in determining whether a parent is unfit and in determining whether the parent's disqualifying circumstances are not likely to change. But those statutory examples are just that--examples. The focus of that part of the statute is on the parent's conduct or condition."

333 Or. at 146, 36 P.3d 490. Similarly, the focus of the statute here is not on whether one or more of the statutory factors are present, but on whether the evidence as a whole is sufficient to overcome the presumption that the parent acts in the best interest of the child. [FN10]

FN10. See also *State ex rel. Juv. Dept. v. Smith*, 316 Or. 646, 652-53, 853 P.2d 282 (1993) ("We therefore reject the proposition that any specific condition or circumstance *per se* does, or does not, establish the juvenile

court's jurisdiction. We read ORS 419.476(1)(c) to require the juvenile court to consider the *totality of the circumstances* presented in the case before it. If, *after considering all the facts*, the juvenile court finds that there is a reasonable likelihood of harm to the welfare of the child, the court may take jurisdiction.") (emphasis added).

Father is probably correct that, ordinarily, a nonparent seeking to overcome the parental presumption will do so by proving that the parent is unable or unwilling to provide adequate care or that the parent is likely to cause harm to the child. However, nothing in the text of ORS 109.119 or in *Troxel* suggests that such proof is required for the **735 nonparent to rebut the presumption that the parent acts in the best interest of the child.

IV. APPLICATION OF ORS 109.119

We now consider the evidence in this case in light of our construction of the controlling statute. As noted, no party has argued to this court that grandparents have not established a "child-parent relationship," as defined in ORS 109.119(8)(a) (2001), with each child. The trial court found *110 that they had established such relationships, and the Court of Appeals did not disagree. Accordingly, grandparents may seek custody of the children under ORS 109.119. Neither does any party argue that father is not a "legal parent" entitled to the presumption set out in ORS 109.119(2)(a) that he acts in the best interests of the children. [FN11] The parties disagree, however, as to whether the evidence at trial was sufficient to rebut that statutory presumption.

[FN11. We use the term "legal parent" because that is the term used in ORS 109.119(2)(a). That term includes, generally, biological and adoptive parents. See ORS 109.119(8)(e) (2001) ("legal parent" means parent as defined in ORS 419A.004 whose parental rights have not been terminated); ORS 419A.004(16) (defining "parent" as biological or adoptive mother of child and adoptive or "legal" father of child, and identifying circumstances in which biological father is "legal" father).

A. Findings as to the Rebuttal Factors

[6] The first rebuttal factor is whether the "legal parent is unwilling or unable to care adequately for the child." ORS 109.119(4)(b)(A). It should be obvious that, if a nonparent proves by a preponderance of the evidence that a parent is "unwilling" or "unable" to care for the child, the nonparent will have rebutted the presumption that the parent acts in the best interest of the child. However, consideration of this factor does not allow the court to substitute its judgment for that of a parent by determining that the nonparent is *better* able to care for the child. The legislature's use of the word "adequate" suggests that the parent must have the willingness and ability to provide something more than a bare subsistence level of care for the child, but that it would be inappropriate to compare a parent's "adequate" care with a nonparent's "more than adequate" care in considering this factor.

Here, grandparents assert that the evidence described above demonstrates that father is "unwilling or unable to care adequately" for the children. ORS 109.119(4)(b)(A). We disagree. Although grandparents claim that father's job and residential instability and other personal issues show father's shortcomings as a parent, those facts do not demonstrate that father is "unwilling" or "unable" to care adequately for the children as those terms are used in the statute. On the contrary, father plainly is willing *111 to care for the children, and the evidence at trial, including the report and testimony of the court-appointed psychologist, Vien, does not support grandparents' assertion that father is "unable" to provide "adequate" care.

Grandparents' argument that the "adequate care" factor favors their claim for custody boils down to the assertion that they are *better* able to care for the children than father is and that they will provide "better than adequate" care. Whether or not that claim is true, as to the rebuttal factor identified in ORS 109.119(4)(b)(A), only evidence that father is "unwilling or unable to care adequately" for the child is relevant in the process of determining whether grandparents have rebutted the presumption of parental fitness. See also *Troxel*, 530 U.S. at 72-73, 120 S.Ct. 2054 ("[T]he Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a judge believes a 'better' decision could be made."). We find that grandparents have not shown that father is "unwilling or unable to care adequately" for the children.

[7] We next consider whether grandparents have shown that they "[are] or recently [have] been the child[ren]'s primary caretaker[s]." ORS 109.119(4)(b)(B). This factor focuses on the interest in continuity of caregiving and the relationship between the child and the nonparent seeking custody. As noted, grandparents had an unusually close and positive relationship with the children for **736 many years, and mother and children (and, at times, father) lived with grandparents on occasion. After mother's death in March 1999, grandparents were the children's primary caretakers for more than three months. We find that grandparents have shown that they are or recently have been the children's primary caretakers.

The third factor identified in the statute is whether "circumstances detrimental to the child exist" if the relief sought by the nonparent is denied. ORS 109.119(4)(b)(C). In contrast to terms used in the other rebuttal factors, "circumstances detrimental to the child" is defined in the statute. ORS 109.119(8)(b) (2001). That definition states that the phrase includes, but is not limited to, "circumstances that may cause psychological, emotional or physical harm to a *112 child." Because the circumstances of living with father *may* cause such harm, grandparents assert, the evidence supports that rebuttal factor.

Father responds that this factor requires grandparents to show that the circumstances, if he retains custody of the children, would be *presently* detrimental to the children. He further argues that, if "detrimental circumstances" is defined in an open-ended way to include circumstances that *may* cause psychological, physical, or emotional harm to a child at some *future* time, that interpretation would reduce the showing required to rebut the parental presumption to a level that would be inconsistent with *Troxel* and essentially would reinstate a "best interest of the child" standard.

[8] Father is correct that the statutory rebuttal factor of whether "[c]ircumstances detrimental to the child exist if relief is denied," ORS 109.119(4)(b)(C), by using the present tense of the verb "exist," focuses on whether *present* circumstances cause *present* detriment to the child. In comparison, the definition of that phrase in ORS 109.119(8)(b) (2001) appears to broaden the permissible inquiry to include circumstances that "may" in the future cause harm to the child. It also is true that, although the vast majority of parents seek to avoid physical harm to their children, life in almost any family includes circumstances that "*may* cause psychological [or] emotional * * * harm." ORS 109.119(8)(b) (2001) (emphasis added). Our task, of course, is to interpret the statute as the legislature intended, and we look first to the words that the legislature used. Examining those words, we conclude that "circumstances detrimental to the child," as used in ORS 109.119(4)(b)(C), refers to circumstances that pose a serious present risk of psychological, emotional, or physical harm to a child. We reach that conclusion because the purpose of that rebuttal factor, within the context of ORS 109.119, is to aid the finder of fact in determining whether a nonparent has overcome the presumption that the legal parent acts in the best interest of the child. That presumption would be almost meaningless if it could be overcome by evidence that the circumstances of living with a legal parent "*may* cause psychological, emotional, or physical harm to a child." Based on the text and structure of the statute, we conclude that the legislature intended that, to rebut the statutory presumption that *113 the legal parent acts in the best interests of the child by showing that "circumstances detrimental to the child exist if relief is denied," the nonparent must demonstrate that the circumstances of living with the legal parent pose a serious present risk of psychological, emotional, or physical harm to the child.

In support of this factor, grandparents again point to evidence of father's substance abuse and anger control problems and his relationship with Oliver, who also has substance abuse and anger problems and who lost custody of two of her own three children. They emphasize the trial court's finding that father has limited insight, lies whenever it suits him, is insensitive to the children's emotional needs, and would end the children's longstanding child-parent relationship with grandparents. They further argue that father leads an unstable life, with frequent changes of jobs and residences. They note that, during the approximately nine months that children lived with father during 1999 and 2000, the family lived at four different addresses and that, as a result, Taryn attended three different schools during his first year of elementary school. For those reasons, grandparents argue, "circumstances **737 detrimental to the child[ren]" would exist if grandparents are denied custody.

[9] Applying the standard that we articulated above, we find that grandparents have shown, by a preponderance of the evidence, that awarding custody to father would pose a serious present risk of psychological or emotional harm to the

children. Based on the testimony of Vien and others, we find that father's lack of understanding of the children's emotional and developmental needs, his difficulty in controlling his own anger, and his lack of insight, considered together, pose a serious risk of psychological or emotional harm to the children. Father fails to recognize the emotional attachment that the children have to grandparents and other relatives of mother or the impact on the children of the family's changes of residence. Father was unable to acknowledge or identify a single possible shortcoming that he might have as a parent. Father similarly could identify no potential weakness that Oliver might have as a caregiver for the children, despite acknowledging her earlier marijuana and methamphetamine use, anger control problems, loss of custody of two of her *114 own children, and failure to complete a drug rehabilitation program. Vien stated that father likely would be "overwhelmed by the demands of single parenthood" and would need to rely on Oliver as a significant caregiver for the children. We find that Oliver's deficiencies as a caregiver, and father's complete failure to acknowledge any of them, both indicate a serious risk to the well-being of the children if father were granted custody.

[10][11] As to grandparents' assertions that father's frequent changes of jobs and addresses demonstrate "circumstances detrimental" to the children, our conclusions require some elaboration. In our view, the fact that a parent changes jobs or addresses frequently does not demonstrate "circumstances detrimental to the child" that are sufficient to rebut the presumption in favor of the parent. Although, other things being equal, frequent changes of school and residence are not ideal for children, such changes are a fact of life for many families. A parent who serves in the military, works for a large corporation, or labors in the fields may be required to move often. Such moves do not necessarily indicate that the parent fails to act in the best interests of the children. [FN12] In this case, however, the evidence is different. Although some of father's testimony was contradictory, it is apparent that most of his changes of jobs and residences, as reflected in this record, were not required by financial, employment, or other external circumstances. Rather, the evidence shows that father's moves were choices that he made independent of the necessities of life as described above but, instead, usually because he wanted to leave behind problems or conflicts with other people. The trial court found, for example, that father's testimony that he moved to Montana for a "fresh start" showed a "lack of insight into how to constructively deal with problems." Moreover, father's moves during the time that he had custody of the children often were abrupt and undertaken with minimal planning or consideration of the interests of the *115 children. Accordingly, although we emphasize that a parent's frequent changes of jobs and residences, by themselves, do not tend to show "circumstances detrimental to a child," when, as here, the parent chooses to move often not because of employment or other external considerations but simply because of a desire to move, and the parent fails to consider the impact of the moves on the child, those moves can be relevant to the determination whether the parent fails to act in the best interest of the child.

FN12. This court made a similar point in refusing to terminate parental rights in *State v. McMaster*, 259 Or. 291, 486 P.2d 567 (1971). Despite finding that the family situation had some characteristics that also are present here (although to a lesser degree), including "transiency" and "instability," this court stated that parental rights could be terminated only by showing "a more serious and uncommon detriment" than was caused by the parents' conduct there. *Id.* at 303, 486 P.2d 567.

Having reviewed the entire record, we find that circumstances detrimental to the children would exist if custody is granted to father.

The next rebuttal factor is whether the "legal parent has fostered, encouraged or **738 consented to the relationship between the child and the [nonparent]." ORS 109.119(4)(b)(D). This factor recognizes that if a parent encouraged or approved of a longstanding pattern of contact or informal custody arrangements involving a grandparent or psychological parent, then the legal parent, at least at one point, apparently believed that that relationship was beneficial, or at least not detrimental, to the child.

[12] Here, it is undisputed that father consented to the development over many years of a close relationship between grandparents and the children and that he agreed that children should live with grandparents in the immediate aftermath of mother's death. Father argues, however, that it would be unfair to him to permit his consent to allowing the children to live with grandparents during that time to be used to rebut the parental presumption. After all, father points out, he consented because he understood that he was not prepared on short notice to take custody of the children, and his consent properly could be seen as an action taken in the best interests of the children. At this point in the statutory analysis, however, we do not consider father's motives or intentions in consenting to the relationship between

grandparents and the children, but only whether he, as the legal parent, encouraged or consented to it. We find that he did. As we discuss later, however, we agree with father that this factor should not be accorded any weight in rebutting the parental presumption in this case, because the fact that father consented to grandparents serving as primary caregivers and *116 otherwise having a close relationship with the children does not indicate in any way that he does not act in the best interests of the children.

[13] The final rebuttal factor listed in the statute is whether the "legal parent has unreasonably denied or limited contact between the child and the [nonparent]." ORS 109.119(4)(b)(E). Like the factor just discussed, this factor focuses on the relationship between the child and a nonparent and, specifically, on the potential harm to a child's interest when a parent terminates or limits such a relationship. Grandparents argue that father "unreasonably denied or limited contact" between the children and grandparents, ORS 109.119(4)(b)(E), by moving the children with him and Oliver to Montana, in violation of a court order. The trial court, based on that action and the court's assessment of father's credibility in light of his trial testimony, stated, "Father's conduct convinces me that he will remove the children from this area if possible and will do all he can to eliminate contact between the children and the Grandparents." We agree.

Father argues that it is unfair to penalize him for limiting grandparents' contact with the children when grandparents also took steps to limit *his* contact with the children. He points out that, after the children spent two weeks with grandparents in July 1999, with father's consent, grandparents did not return the children to father. Instead, grandparents sought a court order *ex parte* contending that the children should remain with them. As noted previously, they obtained a court order, but it was vacated soon thereafter and the children were returned to father. Although father suggests that his conduct in taking the children to Montana was no different than grandparents' conduct in failing to return the children after the two-week visit and seeking a custody order, he is mistaken. Father left for Montana in violation of a court order, in breach of his promise to the trial judge, and without notice to grandparents or the court. Once in Montana, father refused to disclose his location and did not return the children until the court found him in contempt of court. We find that father unreasonably denied or limited contact between the children and grandparents.

*117 B. *Determination Whether Presumption Has Been Rebutted*

To summarize the discussion above, grandparents have shown that some, but not all, of the rebuttal factors are present in this case. We now consider whether the evidence here is sufficient to rebut the presumption that father acts in the best interests of the children. As we discussed above, our focus is not on specific factors but on whether, based on the totality of the circumstances, grandparents have rebutted the presumption that **739 father acts in the best interests of the children.

[14] In this case, we have found facts that support four of the factors, and we place particular emphasis on three of them: grandparents' role as primary caretakers to the children after mother's death; father's denial of contact between the children and grandparents by moving the children to Montana; and the risk to the children that granting custody to father will be detrimental to them. [FN13] ORS 109.119(4)(b)(B), (C), (E). First, grandparents were closely involved in the lives of the children for many years and stepped into the role of primary caretakers immediately upon mother's death; grandparents did not simply show up for the first time seeking custody after mother's death. Second, father's removal of the children to Montana not only prevented contact between grandparents and the children, but also violated a court order and father's in-court promise to a judge. Moreover, it significantly disrupted the children's lives, as discussed above. Finally, and most importantly, as to whether awarding custody to father would be "detrimental" to the children, we conclude that the evidence demonstrates that such an award would pose a serious present risk of psychological or emotional harm to the children. The statute requires us to examine whether the evidence in support of each identified factor (and any other evidence relevant to rebutting the presumption), when taken as a whole, rebuts the presumption. ORS 109.119(3)(a). Considering all the evidence, we conclude, on *de novo* review, that grandparents have rebutted, *118 by a preponderance of the evidence, the presumption that father acts in the best interests of the children.

FN13. Although we have found that father consented to grandparents' role as primary caregivers after mother's death, for the reasons discussed previously, 337 Or. 115-16, 91 P.3d at 737-38, we conclude that, in this case, that fact is not evidence that rebuts the presumption that father acts in the best interests of the children.

C. Consideration of Whether Awarding Custody to Grandparents Is in Best Interests of the Children

Based on our finding that grandparents have rebutted the parental presumption, the statute provides that we "shall grant custody" to grandparents "if to do so is in the best interest of the child[ren]." ORS 109.119(3)(a). Making that determination is a separate statutory inquiry from whether the presumption that the parent acts in the best interest of the child has been rebutted under ORS 109.119(4)(b). Here, however, we have explored the evidence in the record thoroughly in our discussion above, and it would serve no purpose to review that evidence again. It is sufficient to state that we conclude, based on the evidence in the record, that granting custody to grandparents is in the children's best interests.

V. FATHER'S CONSTITUTIONAL ARGUMENTS

Our conclusion that granting custody to grandparents is in the children's best interests does not end our inquiry, however, because father argues that, applied in this manner, ORS 109.119 violates his state and federal constitutional rights. We begin with father's state constitutional argument.

A. Father's State Constitutional Argument

Although father does not argue that ORS 109.119 is facially unconstitutional, he does assert that, if the statute is applied so as to deny him custody here, then that application of the statute would violate the "remedy clause" of Article I, section 10, of the Oregon Constitution, which provides that "every man shall have remedy by due course of law for injury done him in his person, property, or reputation." [FN14] In reaching that conclusion, father relies upon cases in which this court has held that the remedy clause prohibits the state from eliminating a common-law cause of action for injury to a *119 right protected by Article I, section 10, unless the state provides a constitutionally adequate substitute. However, father's advocacy falls far short of demonstrating **740 how any "remedy," as that term is used in Article I, section 10, is implicated at all by the legislative choice embodied in ORS 109.119. We therefore do not address the subject further.

FN14. Article I, section 10, provides:

"No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay, and every man shall have remedy by due course of law for injury done him in his person, property, or reputation."

B. Father's Federal Constitutional Argument

We now turn to father's federal constitutional argument. As we noted at the outset, father does not argue that ORS 109.199 is unconstitutional on its face. He does claim, however, that the statute is unconstitutional in its application unless the evidence introduced to rebut the statutory presumption that a parent acts in the best interests of the child demonstrates that the legal parent is *unable* to care adequately for the child or that custodial placement with the legal parent will *harm* the child. That is so, father argues, because *Troxel* holds that the Due Process Clause requires that "at least some special weight" be given to a fit parent's determination of what is in the child's best interest. 530 U.S. at 70, 120 S.Ct. 2054. Father asserts that, if the statute allows the constitutional "presumption that fit parents act in the best interests of their children," *id.* at 68, 120 S.Ct. 2054, to be rebutted by evidence short of demonstrating either present harm to the child or the parent's inability to care for the child, then that application of the statute violates the parent's due process rights.

[15] Father certainly is correct that ORS 109.119, as we have interpreted it above, permits the presumption that the legal parent acts in the best interest of the child to be rebutted by evidence that does not rise to the level of showing that the legal parent is *unable* to care for the child or that granting custody to the legal parent *will cause harm* to the child. That is the state of the evidence in this case. Father is wrong, however, in arguing that *Troxel* requires some showing beyond that made by grandparents in this case.

As our earlier discussion of *Troxel* demonstrates, that case does not sweep as broadly as father asserts. *Troxel* specifically declined to address the so-called "harm" standard, and it also failed to articulate an "inadequate care" requirement. Rather, the due process right that the Supreme *120 Court affirmed in *Troxel* is important, but limited: a court may not override a parent's decision about the care or custody of a child simply because the court determines that the decision is not in the child's best interest, as the trial court did in *Troxel* regarding a grandparent's interest in visitation. Instead, the court must presume that a fit parent's decision is in the best interest of the child, and the court may reach a decision contrary to the wishes of the parent only if there is evidence sufficient to overcome that presumption. *Troxel* goes no further.

Troxel does require the state to give "some special weight" to the interest of a parent in decisions regarding a child. ORS 109.119, as we have interpreted and applied it here, responds to that mandate and appropriately protects father's due process rights. In our factual findings and legal conclusions, we have followed the statute and presumed that father acts in the best interests of the children. We have considered a petition by grandparents who have the status, under the statute, of psychological parents. We have examined factors reasonably identified by the legislature as relevant to making a custody decision, and we have concluded, by a preponderance of the evidence, that the evidence in support of those factors overcomes the presumption that father will act in the best interests of the children. Father received the deference to his due process rights that *Troxel* requires. For the foregoing reasons, we award custody of the children to grandparents, with parenting time, as determined by the trial court, to father.

Finally, we pause to recognize the limitations of the appellate process in dealing with cases of this kind. As we noted at the outset, we have reviewed the record *de novo* and also have determined (with the parties' agreement) not to remand to the trial court for additional development of the record. We have done so, in large part, because of the need for finality in this case. That important consideration, however, carries with it the consequence that we have reviewed a record that now is three years old. The children certainly have changed during that **741 time, and the lives of father and grandparents also may have changed in ways that, if part of the record, would cause us to view some of the issues in this case differently than we have. But that unfortunate temporal *121 handicap of appellate decisionmaking does not diminish the need for a final resolution to these proceedings, which this disposition provides.

The decision of the Court of Appeals is reversed, and the judgment of the circuit court is affirmed.

337 Or. 86, 91 P.3d 721

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958 P.2d 199

153 Or.App. 655, 958 P.2d 199

(Cite as: 153 Or.App. 655, 958 P.2d 199)

▷

Court of Appeals of Oregon.
 In the Matter of the MARRIAGE OF Titilola Yetunde DENIS, Respondent,
 and
 Gabriel Olujimi Denis, Appellant.
 9603-63255; CA A97046.

Argued and Submitted Jan. 15, 1998.

Decided April 29, 1998.

The putative wife filed a petition for dissolution. The putative husband filed a counter-petition, seeking a judgment annulling the marriage. The Circuit Court, Multnomah County, Michael S. Loy, J., entered a judgment of annulment and awarded support to the putative wife. The putative husband appealed. The Court of Appeals, De Muniz, P.J., held that the trial court had authority to award support to the putative wife, even though the marriage was void ab initio.

Affirmed.

West Headnotes

[1] Marriage ↪62

253k62 Most Cited Cases

Trial court had the authority to award support to the putative wife after entering a judgment of annulment, even though the marriage had been declared void ab initio based upon the putative wife's failure to obtain a legal divorce from her previous husband. ORS 107.105(1)(d).

[2] Marriage ↪54(1)

253k54(1) Most Cited Cases

(Formerly 253k54)

Putative husband was bound by his agreement with the putative wife to pay spousal support of \$650 for eight months after their marriage was declared void ab initio.

****199*655** Robert Harris argued the cause for appellant. With him on the brief was Harris & Vigna.

No appearance for respondent.

Before De MUNIZ, P.J., and HASELTON and LINDER, JJ.

***657** DE MUNIZ, Presiding Judge.

Husband appeals an award of support in this annulment of a void marriage. We review *de novo* and affirm.

At the time of trial, husband was 43 and wife was 37. Both had been previously married. The parties were married in December 1993 and separated in January 1996. In May 1995, the parties learned that the United States Immigration & Naturalization Service did not recognize wife's divorce from her first husband. [FN1] On the advice of counsel, wife ****200** divorced her previous husband. Husband then refused to remarry wife.

FNL. Wife has not appeared in this appeal. Before the marriage ceremony, wife did not have permanent

residency status in the United States. In her trial memorandum, she stated that she is a citizen of Nigeria and applied for permanent residency status based on her marriage to husband, who is an American citizen. Wife had previously been married to and divorced from another Nigerian citizen. She further explained:

"The Immigration Service does not recognize a divorce unless the country granting divorce has jurisdiction over the parties as 'jurisdiction' is defined by the United States. As neither [wife] nor her first husband resided in Nigeria at the time of the divorce the Immigration and Naturalization Service decided that Nigeria did not have jurisdiction over [wife] and her first husband and determined that [wife] had never been divorced for immigration purposes. As the Immigration Service did not recognize [wife's] divorce, it refused to recognize the marriage of the parties [here] for Immigration purposes and did not give [wife] a green card."

Husband has refused to consent to wife's application for permanent residency. Wife's son from her previous marriage is a United States citizen. Wife testified that she has been in the United States for over seven years and has filed a hardship application to stay and to work. She anticipated that the application process would take five to six months.

Wife then brought this action entitled "Petition for Dissolution of Marriage, Express Domestic Partnership, Implied Domestic Partnership." Husband filed a response and counter petition, alleging that, at the time of the marriage ceremony, wife lacked the capacity to marry because she was already married. Husband sought, *inter alia*, a judgment "[a]nnulling this marriage." Following a hearing, the court entered a "Judgment of Annulment" declaring, according to the parties' stipulation, that the marriage was "annulled and void from the beginning based upon [wife] having another living husband at the time of her marriage to [husband]." The judgment also awarded wife support of *658 \$1,200 for six months and \$650 a month for an additional eight months.

[1] On appeal, husband argues that the court was without jurisdiction to award "spousal" support when the marriage was void from the beginning. ORS 107.105 provides, in part:

"(1) Whenever the court grants a decree of marital annulment, dissolution or separation, it has power further to decree as follows:
" * * * * *

"(d) For the support of a party, such amount of money for such period of time as it may be just and equitable for the other party to contribute[.]"

Husband argues that the issue is whether "marital annulment" includes a void marriage under ORS 107.005(1), [FN2] or only a voidable marriage under ORS 107.015. [FN3] Husband argues that only voidable marriages are within the statute and, thus, the court was without authority to award support.

FN2. Under ORS 107.005(1),
"[a] marriage may be declared void from the beginning for any of the causes specified in ORS 106.020; and, whether so declared or not, shall be deemed and held to be void in any action, suit or proceeding in which it may come into question."

ORS 106.020(1) provides:
"The following marriages are prohibited; and, if solemnized within this state, are absolutely void:
"(1) When either/party thereto had a wife or husband living at the time of such marriage."

FN3. ORS 107.015 provides:
"The annulment or dissolution of a marriage may be decreed for the following causes:
"(1) When either party to the marriage was incapable of making such contract or consenting thereto for want of legal age or sufficient understanding;
"(2) When the consent of either party was obtained by force or fraud;
"provided that in the situations described in subsection (1) or (2) of this section the contract was not afterward ratified."

*659 Husband relies on the following language from *Dibble v. Meyer*, 203 Or. 541, 546-47, 278 P.2d 901, 280 P.2d 765 (1955):

"Void marriages are invalid from the beginning and may even be attacked collaterally. That is not true of voidable

marriages. The additional relief as to support money, custody of children, property rights, etc., which the court is authorized to grant as part of its decree of annulment of a voidable marriage and for divorce is the same. ORS 107.100. In effect, and as a practical matter, no distinction whatever is made between postnuptial and antenuptial grounds for the termination of the marriage relation. In both cases the marriage relation is terminated by the decree, and the parties are prohibited from remarrying third persons until the expiration of six months thereafter. ORS 107.110."

Dibble, however, does not assist husband. In *Dibble*, the issue was whether the guardian of an incompetent person could continue a suit to annul the incompetent's allegedly voidable marriage after the incompetent had died. The court held that the guardian could not, as the incompetent's death terminated the marriage, and, thus, the court lost jurisdiction **201 of the subject matter. *Id.* at 549, 278 P.2d 901, 280 P.2d 765. The language on which husband relies here is part of the court's explanation of procedural differences relating to void and voidable marriage. It does not answer whether a void marriage is within ORS 107.105.

As the question is one of statutory construction, it is to be answered by first examining the text and context. A marriage may be declared void in an annulment proceeding brought under ORS chapter 107. ORS 107.005; ORS 107.015; see *Dibble*, 203 Or. at 546, 278 P.2d 901, 280 P.2d 765 (either party may institute suit for annulment of a void marriage); *Lahey v. Lahey*, 109 Or. 146, 153, 219 P. 807 (1923) (court not empowered to annul bigamous marriage in absence of adequate pleading). [FN4] Under *660 ORS 107.105(1)(d), a court has the authority to award support "[w]henever the court grants a decree of marital annulment." (Emphasis supplied.) In a judgment of annulment, the court may award support for "a party," ORS 107.105(1)(d); it is not limited to an award of "spousal support." Thus, text in context demonstrates that the court had the authority to award support to wife here.

[FN4]. A void marriage also may be collaterally attacked in "any action, suit or proceeding in which it may come into question." ORS 107.005(1); see *Dibble v. Meyer*, 203 Or. 541, 546, 278 P.2d 901, 280 P.2d 765 (1955) ("Void marriages are invalid from the beginning and may even be attacked collaterally. That is not true of voidable marriages."); *Emmons et al v. Sanders, et al.*, 217 Or. 234, 342 P.2d 125 (1959) (in action concerning title to real property, trial court was correct in holding that marriage was void).

Husband argues, however, that, because a void marriage has never legally existed, giving "the parties the statutory benefits of a marriage * * * is tantamount to recognizing a common law marriage," which Oregon does not do. Thus, husband contends, if support is awarded in the case of a void marriage, "it would reward those who enter into void marriages over those who just live together without the benefit of marriage." However, that is a policy argument that must be addressed to the legislature. Whether or not the legislature determines that it is "just and equitable" to make support available to a party who just "lives with" a partner, it has determined that equity may require support for a party who has sought the benefit of marriage even though the marriage is later declared void. [FN5]

[FN5]. That does not appear to be a "reward" but, rather, a legislative recognition of the intertwining personal and financial relationships that may result even though a marriage is actually "void."

Husband here sought annulment, the parties stipulated that the marriage was void *ab initio*, and the court entered a judgment of annulment so declaring. Under ORS 107.105, the court was authorized to award support in that judgment. On our *de novo* review, we agree with the trial court that it was just and equitable to do so in this instance in the amount awarded.

[2] Husband also assigns error to the award of spousal support of \$650 for eight months. That amount represented husband's share of the parties' debts that he agreed should be paid as spousal support. He now seeks to repudiate that agreement and argues that we should not uphold it because the court was without authority to make the award. See *Fisher and Fisher*, 148 Or.App. 208, 213, 939 P.2d 149 (1997) (court did not have authority to include interest obligation on equalizing judgment as spousal support for 48 months). *661 Therefore, husband contends, the agreement is against public policy and we should not enforce it. We find no basis here to invalidate the parties' agreement. See *Schaffer v. Schaffer*, 57 Or.App. 43, 47, 643 P.2d 1300 (1982) (court did not modify support award of property settlement agreement that included both support sums and property sums payable together as alimony); *Lockard and*

Lockard, 89 Or.App. 640, 750 P.2d 522, rev. den. 306 Or. 79, 757 P.2d 853 (1988) (parties' stipulation to property division that was fair and equitable was binding).

Husband's remaining assignment of error does not require further discussion.

Affirmed. No costs to either party.

153 Or.App. 655, 958 P.2d 199

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OR CONST Art. XV, § 5a

C

West's Oregon Revised Statutes Annotated Currentness

Constitution of Oregon

[Article XV. Miscellaneous \(Refs & Annos\)](#)

→ § 5a. Marriage policy

It is the policy of Oregon, and its political subdivisions, that only a **marriage** between one man and one woman shall be valid or legally recognized as a **marriage**.

Added by voter initiative (Measure 36, approved Nov. 2, 2004), eff. Dec. 2, 2004.

HISTORICAL AND STATUTORY NOTES

2004 Electronic Pocket Part Update

Ballot Measure 36 (2004), initiated by the voters as Petition No. 150, and submitted to and ratified by the electorate in the General Election of Nov. 2, 2004, added this section to the Constitution.

O. R. S. Const. Art. XV, § 5a, OR CONST Art. XV, § 5a

Current with amendments received through November 2, 2004

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