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From the Editor

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The first case I ever handled was a grandparents' rights case, really. It was in the law school's student clinic. Of course, 15 years ago grandparents had no special statutory rights to maintain a relationship by visiting with their grandchildren. But these grandparents (my first clients!) brought their petition for adoption pleading the same circumstances that have prompted each of the 50 states to grant rights to visitation over the objection of a parent: They had tended and loved two lively little boys—now age five and eight—from infancy. They had stood in for the biological parents. Now they worried that their relationship with the boys had no legal status.

The mother was their daughter. They were sad about that, since they had lived the lives of the principled, hard-working poor—agricultural workers, mostly, in a county where nothing much grew very well. The father had been identified as a result of the state campaign to make unmarried fathers responsible for child support.

The parents had the legal right to return and take the boys any day, anywhere, although neither parent had shown any interest except for the flashy present or the long-promised day's outing. Seldom the work and the worry, never the constancy of a parent's concern.

Because the grandparents sought adoption, they could use a considerable body of common-law decisions, based on specific facts that urgently pleaded the interests of the child. The courts prefer adoption by a family member over another with a similar relationship. Most compelling is the existence of the parent-child relationship, with the grandparent filling a parent's role. The child looks to the grandparent for care and guidance.

Before an adoption can take place, the parents must relinquish their rights to parent the child permanently, or the petitioner must show that the parent is permanently unfit. A lesser standard of proof is required to show the need for custody, that the parent is currently unfit. Some grandparents must settle for the decree of temporary custody rights before returning to court. For some, that's a gift because it exceeds the day-to-day worry that their own grown child, now a stranger, will take their grandchild away and no authority can help them.

The states' creation for grandparents (and sometimes any relative) that provides rights without the obligations of custody or

adoption is a statutory right to visitation, somewhat analogous to the right of a noncustodial parent when there is no marital home. This legal situation is, perhaps, ironic in an era when divorcing parents are encouraged to adopt shared custody agreements and make a private peace of their differences over timing and circumstances of the children's visits. Grandparents are permitted to seek the right to visit on a schedule objectionable to the children's custodial parent(s), or indeed over the parents' outright rejection of any grandparent visitation.

The states opened the door to grandparent petitions by establishing the specific circumstances in which the grandparent can bring a petition before the court. Statutes typically have restricted grandparents' opportunities to petition to times when the circumstances of the parent-child family are being heard in the courts, such as a divorce or a child custody hearing for the parents. For clarity, one could imagine for a moment analogous circumstances in which a spouse with no separation or custody action seeks to petition for visiting rights with a child that are opposed by his or her spouse. Such matters are deemed private unless the criminal court intervenes because of the state's interest in preventing a crime. The law created the marriage that established the family, which is intact. The state prefers to say: Go and settle it among yourselves; we have no business here.

Grandparents can also petition the courts for visitation in the event of the death of a parent or adoption by a stepparent. Although no action regarding the child's status and support specifically is before the court, the changes in the family have an important impact on the child that implicate the state's interests in a child's welfare.

Grandparents' rights have expanded incrementally over the past decade. Some state legislatures, like Wisconsin's, have enacted provisions that allow grandparents to seek visitation if the couple never married, and therefore are outside the sphere of the state's interests in the marital home. The circumstances of the grandmother who lobbied for this change in Wisconsin law are poignant: She was the primary caretaker for her grandchild for over two years while the parents were impaired by substance abuse. The parents, over time, got their act together enough to make a home and take the child to their care—and refused the grandmother all access to her. Yet, under the law, the grandmother could *never* petition because the parents had not formalized their union and could part without court action. In sympathetic recognition of a catch-22, the state legislature approved a provision allowing grandparent petitions at any time when the parents had never married.

The result of this grandmother's petition to the court is unknown, however. It was never filed. By the time of the enactment, the parents had married. A time for petition, should it arrive, must wait for some other triggering event.

The law's view in the various states has been the subject of two articles in *Elder's Advisor* (Roth, Vol. 1, No. 1, page 51 and Braun, Vol. 1, No. 3, page 5). Some states rely more heavily than others do on the petitioner's recent financial support as evidence of a parentlike relationship. The state of Arizona ends grandparent visitation rights upon adoption of a child by a stepparent, based on the conservative view that the adopted child is solely and in all aspects a member of the adopting family.

The issues of grandparent visitation are now before the Supreme Court, on appeal of a Washington case styled *Troxel v. Granville.*[1] The facts are particularly well suited to sorting out the hard questions in grandparents' rights, since the Washington statute offers broad petitioner's rights that are the most likely to give pause to even a strong grandparents' rights advocate. That is, the state allowed the courts to decide whether the petition should be heard, even if the family care of the child had no significant changes, such as a death, or any issues of care or custody before the courts.

The two Troxel children, whose circumstances are at issue in the case, live in a household with four half-siblings; their mother, Tommie Granville; and their stepfather. The other children living in the household are full siblings born to these parents, who never married. The Troxel children's father, Brad Troxel, the suing grandparents' son, committed suicide in 1993.

The grandparents, the Troxels, won a decree in 1995 ordering visitation by the grandparents with the two grandchildren for one weekend a month, one week in the summer, and four hours on each of the children's birthdays. The appeals court reversed in 1997, finding that standing for such a visitation

petition could take place only when some matter of custody is pending.[2] The Washington state supreme court went further, declaring the state's visitation rights statutes to violate the constitutional rights of parents, who have the fundamental right to rear a child absent a showing of harm to that child.[3] That is, a showing that visitation is "in the child's best interests" is insufficient to justify the state in infringing on the parent's rights.

Thus, the state legislature set the standard for protection of the health, safety, and welfare of the grandchild, and authorized courts to consider whether and when visitation by a particular grandparent is in the child's best interests. The Washington court rejects that authorization as a violation of the parent's ability to make basic decisions about the child's upbringing. The legal protection for such parental authority is most clearly established as a liberty interest based on the 14th Amendment due process clause, illustrated in education cases beginning in the 1920s.[4]

The grandparent petitioners assert that their visitation rights do not infringe on the parent's fundamental rights in any ways analogous to the classic cases. This is just visiting with the child, maintaining a relationship for the good of the child. That's all. And, indeed, some statutes and court opinions require that court-ordered visitors refrain from undermining the parent's authority or interfering with the parent's instruction. In any case, the court, through its order, has some supervision of the relationship.

At least one other state supreme court, Tennessee's, has struck down a similarly broad grandparent visitation statute that allowed petition even if the family was "intact." Other states, including Kentucky and Connecticut, have upheld visitation statutes with very broad petitioner's rights.

The question is a hard one for the law, based on the diverse facts of family life and the speculative nature of society's interests in a specific relationship for the child.

Some knowledge of caretaker grandparents is useful to understand the situation. Most grandparents begin to care for a grandchild on a part-time basis, to help the parents succeed or to ensure better care for the child. Among those grandparents with day-to-day responsibility for a grandchild, about one-fourth live with a parent, usually in the grandparent's home—three generations together.

Among the three-fourths of sometime-caretaker grandparents who come to undertake responsibility for absent parents, many report their child was unable to care for the grandchild due to substance abuse or mental illness, or both. In some situations, the authorities pointed out the need to the grandparent, or the child asked for care; in others, the grandparent found that the child was never bathed, or that the child roamed the streets late at night.

A majority of grandparents caring for grandchildren report that they fell into the role because of the clear need for child care. Most say they would gladly return to a role more appropriate to their own time in life.

On the other hand, the parent and child who must accommodate the visits in grandparent visitation cases are assumed to make their own lives together. Grandparents who petition the courts have somehow been unable to establish visiting that is agreeable to their grandchild's parent. That may arise from no fault in either party, but rather a difference of lifestyles or principles or views.

Or, as might be the case with the Troxels and Granville, the grandparents are a reminder of a very different time now superseded by a new, lively family life. Is it narrow or wise to have only limited contacts with the Troxels? If Granville thinks a monthly visit is enough, what evidence must the Troxels put forward to show that they should have more time? Evidence suggests that, in contrast to many grandparents' cases, Granville agreed to a more modest schedule of visiting for the Troxels.

The questions are many. Most fundamental is the extent to which the right to grandparent visitation is solely to benefit the child, or whether and when it is justified by the desires of the grandparent. For example, is it compelling that the grandparent cared for a sickly newborn for, say, the child's first year, loved the child, hopes to contribute to that child's life and well-being—but the child does not remember the grandparent? Or, perhaps in the months or years of separation, the child has been told things that, however untrue, create distance from or fear of the grandparent?

In any case, if the parent opposes the visits, can there be a relation that becomes comfortable and supportive for the child? For the parent? Or does

the visitation order more likely lead to strife and resentment along with accommodation?

If current support is a substantial factor in visitation rights in many courts, are future benefits of the grandparenting relationship—say, a college scholarship fund established to grow over the years—relevant to a decision of a court? Should the parent be free to disregard such a benefit to the child? Must the grandparent establish the method and pattern of contribution in order to be deserving of the visitation decree?

Finally, the motives and concerns of the grandparents deserve a look. I have talked on this topic to audiences of grandparents, and the stories are often bitter and angry. The father, who complained to 50 of us that his daughter always had s___ for brains is not merely speaking the truth, whatever it may be. The grandmother who could not stop recycling the details of her grievances cannot move on to the relationship she seeks merely by means of a court order.

The questions are not novel. They have been asked of any person who comes to court seeking approval for a relationship with a child. The couple in my first case provides a good example. The fact that they lived on SSI—a form of welfare—rather than Social Security, because their employers had never paid into the fund for their employees, posed a major obstacle to their fitness as adoptive parents. Their ages, both about 70, could have been an obstacle. Any record of unlawfulness or substance abuse or any other unfavorable matter could have been raised against their petition. In the limited sampling of grandparents' rights cases to reach the courts thus far, such matters are seldom discussed in any detail.

In any case, the Supreme Court is likely to have philosophical difficulties with this thorny clash of parents and grandparents, because it is also a clash between states' rights and federal nullification of laws existing in all states to protect the welfare of citizens. This Court is on a states' rights roll. Could the Justices possibly check their momentum to throw out grandparents' rights, asserting that they offend the Constitution? Such rights can only run afoul of the parents' right to privacy—a value this Court has not recently found in their copies of the Constitution.

I have a small wager with a friend who says the Court will fail to issue an opinion in this case before them. The Justices will be unable to find an acceptable reason to reject the states' views of grandparents' rights. Maybe I should hedge my bets. Any takers?

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May 2000

Endnotes

1. 120 S. Ct. 606 (1999) (No. 99-138). The case was argued on January 12, 2000.

2. *See In re* Visitation of Troxel, 940 P.2d 698 (1997).

3. *See In re* Custody of Smith, 969 P.2d 21 (1998) (consolidating the case with two others).

4. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972) (limiting the state's interference with family privacy and parental authority to decisions that jeopardize the health or safety of the child or have potential significant social burdens); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (striking down a law requiring parents to send children to public schools); Meyer v. Nebraska, 262 U.S. 390 (1923) (striking down a state law prohibiting teaching of foreign languages to children).