STUDY NOTE

GRANDPARENT CUSTODY DISPUTES AND VISITATION RIGHTS: BALANCING THE INTERESTS OF THE CHILD, PARENTS, AND GRANDPARENTS

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I. INTRODUCTION

In many cultures, the basic family unit is the extended family—three and even four generations living under the same roof, nurturing the children and caring for the elderly—with blended responsibilities. If a mother left behind young children, she felt it was only right for the children to be raised by aunts or grandmothers because that was in the children's best interest. Under the American legal system, however, the best interest of the child is a judicial determination that takes into account a myriad of tangible and intangible factors that are often grounded in outdated cultural norms.

The Most Important Thing[1] illustrates some of the heart- and gut-wrenching conflicts that can arise between parents and grandparents over custody and visitation. Generally, all parties involved will say they are concerned about and desire what is best for the child, but in reality their viewpoints are often skewed by their own personal interests, as well as cultural and generational differences. Thus the legal rights of the parent may conflict with the grandparent's idea of what is best for the child, and cultural ideas about child-rearing may conflict with legal standards.[2]

The courts focus on what is in the best interests of the child when making custody or visitation determinations. Conflicts between parents and grandparents often pit the parent's fundamental right to make decisions concerning the care, custody, and upbringing of their child with differing ideas of what is in the child's best interests. This Note will analyze the law regarding child custody and visitation rights of grandparents. Part II traces the development of a parent's fundamental right to rear their child. Part III explains the best interests of the child standard. Parts IV and V examine the current law on custody and visitation petitions with respect to the rights of grandparents.

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[1] Linda Smith, Monologue, *The Most Important Thing***,** 11 J.L. & FAM. STUD. 517 (2009); 2009 UTAH L. REV. 565.

[2] *Id.*

II. A PARENT'S RIGHT TO THEIR CHILD'S CUSTODY, CARE, AND NURTURE

Parents' fundamental right to the custody, care, and control of their child is found in the Fourteenth Amendment to the United States Constitution, which states: "No State shall . . . deprive any person of life, liberty, or property, without due process of law."[3] How parents may use their liberty interest to "bring up children"[4] is defined through a series of cases beginning in 1923.

In the first of these cases, *Meyer v. Nebraska*, a state statute prevented teaching foreign languages to a child before "successfully pass[ing] the eighth grade."[5] The Supreme Court determined that parents had a right to "control the education of their own."[6] Two years later, in *Pierce v. Society of Sisters*, the Supreme Court affirmed the "liberty of parents and guardians" to direct children when it struck down a compulsory public school attendance statute and allowed parents to choose private education for their children.[7] The court stated, "[t]he child is not the mere creature of the state, those who nurture him and direct his destiny have the right, coupled with the high duty to recognize and prepare him for additional obligations."[8] In *Wisconsin v. Yoder*, the court held that right of Amish parents to raise their children according to their religion, superseded compulsory high school attendance.[9] This parental autonomy over the care and control of their children includes the "presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions."[10] In 2000, *Troxel v. Granville* reaffirmed this deference to parental decisionmaking: "[i]n light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."[11] The presumption for parental autonomy in child-rearing, and the presumption in favor of fit parents making the best decision for the child,[12] make it difficult for a grandparent to obtain custody or visitation rights contrary to the wishes of a biological parent.

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[3] U.S. CONST. amend XIV, § 1.
[4] Meyer v. Nebraska, 262 U.S. 390, 399 (1923).
[5] *Id.* at 397.
[6] *Id.* at 401.
[7] Pierce v. Society of Sisters, 268 U.S. 510, 534–35 (1925).
[8] *Id.* at 535.
[9] Wisconsin v. Yoder, 406 U.S. 205, 232 (1972).
[10] *Parham*, 442 U.S. at 602.
[11] Troxel v. Granville, 530 U.S. 57, 66 n.3 (2000).
[12] *Parham*, 442 U.S. at 602.

However, the Court also set limitations on parental decisionmaking, including restrictions on child labor or breaking laws in the name of religion.[13] Parental control "may be subject to limitation . . . if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens."[14] In *Santosky v. Kramer*, the Court allowed state intervention in parental authority to protect a child from abuse and neglect, as long as the state gave sufficient due process protection to parents when seeking to terminate parental rights.[15]

III. THE BEST INTERESTS OF THE CHILD STANDARD

Although Justice Cardozo is often credited with creating the "best interests analysis" as early as 1925,[16] and even though some courts believed they were acting in the "best interests" of children when awarding their mothers custody if the children were of "tender years," the adoption of the Uniform Marriage and Divorce Act (UMDA) in 1970 actually created the multi-factor best interest analysis.[17] This approach, used among all jurisdictions today, allows courts to look at the "totality of the circumstances,"[18] in determining in which home environment a child would be happiest and most successful.[19]

According to the UMDA, courts may use this best interests approach to determine custody by taking into account: the wishes of the parent(s); the wishes of the child; the relationship between the child and parent(s), siblings, or "any other person who may significantly affect the child's best interest"; the child's adjustment to home, school, and community; and the physical and mental health of all individuals involved.[20] The court may not consider irrelevant conduct of a proposed custodian in determining who should have custody of the child.[21] This provides courts with flexibility in custody determinations, because they are no longer required—or even encouraged—to base decision on only one factor.[22]

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[13] Prince v. Massachusetts, 321 U.S. 158, 166–67 (1944) (stating "neither rights of religion nor of parenting are beyond limitation," and allowing for state regulation of school attendance, child labor, health or other things affecting the child's welfare).

[14] *Id.* at 166 (stating "the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare"); *see also Yoder*, 406 U.S. at 233–34.

[15] Santosky v. Kramer, 455 U.S. 745, 747, 766–67 (1982).

[16] Finlay v. Finlay, 148 N.E. 624, 626 (1925).

[17] UNIF. MARRIAGE & DIVORCE ACT § 402, 9 U.L.A. 561 (1987).

[18] *See, e.g.*, Morton v. Morton, 158 A.D.2d 458, 458 (1990).

[19] *See In re* Baby M., 537 A.2d 1227, 1260 (1988).

[20] UNIF. MARRIAGE & DIVORCE ACT § 402, 9 U.L.A. 561 (1987).

[21] *Id.*

[22] *Id.* (comments in the 1998 main volume).

Although some variation exists among different states as to the factors that ought to be considered when making custody determinations, uniformity exists to the extent that all states now recognize the importance of analyzing *several* factors, as opposed to one.[23] The best interests approach incorporates the idea of parental autonomy, for "there is a presumption that fit parents are in the best interests of their children."[24]

IV. A GRANDPARENT'S INTEREST IN THE CUSTODY OF THEIR GRANDCHILD

A. In Loco Parentis

The theory of *in loco parentis*, meaning "in the place of a parent," [25] presumes that an individual, although not a biological parent, nevertheless acts in the parent's stead by fulfilling all of the roles and obligations of a parent.[26] Grandparents often fall within this category when they care for most, if not all, of their grandchildren's needs as a parent would without expecting or receiving payment for their care. This fits the extended family model, but is also the basis by which some grandparents argue that they have a stronger right to custody because they will, in fact, be a better "parent" than the biological one.

B. Grandparent Custody Petitions

While parents have the legal right to the custody, care, and control of their children,[27] there are many situations where a grandparent assumes the role of primary caregiver for their grandchild. Situations such as divorce, death, immigration regulations, and inability of a parent to care for the child often put grandparents in a parental role.[28] However, a grandparent's parental role in their grandchild's life does not give a grandparent the legal right to the custody, care and control of their grandchild.[29]

Courts are reluctant to sever parental bonds, finding that "so long as a parent adequately cares for his or her children (is fit)," there is no reason for the State to "inject itself into the private realm of the family" to further question that parent's ability to make the best decisions for their child.[30] Thus, only when a parent is

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[23] *See* MARK S. GURALNICK, INTERSTATE CHILD CUSTODY LITIGATION 4 (1993).

[24] Troxel v. Granville, 530 U.S. 57, 68, (2000).

[25] BLACK'S LAW DICTIONARY 803 (8th ed. 2004).

[26] *See* Gribble v. Gribble, 583 P.2d 64, 66 (Utah 1978); Jones v. Barlow, 154 P.3d 808, 811 (Utah 2007).

[27] *Troxel*, 530 US at 68.

[28] *See* James Wilson Douglas, *The Grandkids & Your Rights*, 31 FAM. ADVOC. 22, 22 (2008).

[29] *See id.* at 22.

[30] *Troxel*, 530 U.S. at 68–69.

considered unfit, or a child has been abandoned, does a grandparent have a case for custody, and even then the outcome is not determinative. The heightened burden of proof is on the grandparent to prove why it is not in the child's best interests to remain or be placed with his or her biological parents.[31]

Some factors courts may look to in determining the rights of a grandparent are the extent to which the parent encouraged the relationship, whether the child lived with the grandparent, whether the grandparent completed "parental functions for the child to a significant degree," and whether they established a "parent-child bond."[32] Meeting these factors is not determinative, however, because the only persons having a legally vested interest in the custody of a child are his parents.[33] The grandparent's age, mental and physical abilities, responsibility for caring for others, relationship with the grandchild and additional factors will be used to determine whether a grandparent is a fit parent.[34]

The lack of grandparent clout in gaining custody, regardless of previous relationship, is reinforced statutorily. Custodial statutes rely on the best interests of the child for determination of custody, regardless of relationship. Under nearly all adoption statutes, voluntary termination of parental rights also terminates all grandparental rights, including visitation.[35] The policy reason behind this stance is that the biological parent(s) made a thoughtful and reasoned choice in determining that the best interests of the child would be better served with a third party rather than with the grandparents.[36]

V. A GRANDPARENT'S INTEREST IN VISITATION WITH THEIR GRANDCHILD

A. Grandparents' Visitation Rights to Grandchildren

While grandparents carry slightly more weight than others in third party custody litigation, the past several decades have shown a marked increase in statutory visitation rights for grandparents in situations involving divorce or the death of one parent.[37] Although variations exist among the different state statutes, all fifty states have enacted grandparent visitation laws.[38] Not only have all the

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[31] Douglas, *supra* note 34, at 22–23.

[32] V.C. v. M.J.B., 163 N.J. 200, 223 (2000).

[33] *Cf.* Wilson v. Family Services Division, Region 2, 572 P.2d 682 (Utah 1977) (holding that a grandmother did not have any priority claim in grandchild's adoption).

[34] *Id.* at 23–24.

[35] *See* Kasper v. Nordfelt, 815 P.2d 747, 750 (Utah Ct. App 1991).

[36] *Cf. id.*

[37] *See* Catherine A. McCrimmon & Robert J. Howell, *Grandparents' Legal Rights to Visitation in the Fifty States and the District of Columbia*, 17 BULL. AM. ACAD. PSYCHIATRY L. 355, 356 (1989).

[38] Erica L. Strawman, *Grandparent Visitation: The Best Interests of the Grandparent, Child, and Society*, 30 U. TOL. L. REV. 31, 34 n.8 (1998); *see* ALA. CODE § 30-3-4 (Supp.

states addressed the issue of grandparent visitation rights, but so has the U.S. Supreme Court in the seminal case of *Troxel v. Granville*.[39]

In *Troxel*, the court analyzed a Washington statute that allowed third parties to ask the court for visitation rights, and also provided the court with discretion to award visitation even in instances where visitation was found to be against the custodial parent's wishes.[40] In addressing the grandparent's claim for visitation, the Superior Court of Skagit County "issued an oral ruling and entered a visiting decree" awarding visitation to the child's paternal grandparents, even though the time and extent of the ordered visitation was against the mother's wishes.[41] The mother appealed, but the Washington Court of Appeals remanded the case "for entry of written findings of fact and conclusions of law."[42] On remand, the trial court established that grandparent visitation was truly in the grandchildren's best interests.[43]

1998); ALASKA STAT. § 25.24.150 (1996); ARIZ. REV. STAT. ANN. § 25-409 (Supp. 1998); ARK. CODE ANN. § 9-13-103 (1998); CAL. CIV. CODE § 3102 (West Supp. 1998); COLO. REV. STAT. § 19-1-117 (Supp. 1995); CONN. GEN. STAT. ANN. § 46b-59 (West 1995); DEL. CODE ANN. tit. 10, § 1031 (Supp. 1997); FLA. STAT. ANN. §752.01 (West 1997); GA. CODE ANN. § 19-7-3 (Supp. 1998); HAW. REV. STAT. § 571-46(7) (1993); IDAHO CODE ANN. § 32-719 (1996); 750 ILL. COMP. STAT. ANN. 5/607(b)(1) (West Supp. 1993); IND. CODE ANN. § 31-17-5-1 (West Supp. 1993); IOWA CODE ANN. § 598.35 (West Supp. 1998); KAN. STAT. ANN. § 38-129 (Supp. 1997); KY. REV. STAT. ANN. § 405.021 (West 1991); LA. CIV. CODE ANN. art. 136(B) (Supp. 1998); ME. REV. STAT. ANN. tit. 19A, §§ 1801-1805 (1998); MD. CODE ANN., FAM. LAW § 9-102 (West Supp. 1997); MASS. ANN. LAWS ch. 119, § 39(d) (LexisNexis Supp. 1992); MICH. COMP. LAWS. ANN. § 25.312(7b) (West Supp. 1979); MINN. STAT. ANN. § 257.022 (West 1992); MISS. CODE ANN. § 93-16-3 (Supp. 1998); MO. ANN. STAT. § 452.402 (West 1997); MONT. CODE ANN. § 40-9-102 (1997); NEB. REV. STAT. § 43-1802 (1988); NEV. REV. STAT. § 125A.340 (1996); N.H. REV. STAT. ANN. § 458-17-d (1992); N.J. STAT. ANN. § 9:2-7.1 (West Supp. 1999); N.M. STAT. ANN. § 40-9-2 (LexisNexis 1994); N.Y. DOM. REL. LAW § 72 (McKinney Supp. 1998); N.C. GEN. STAT. § 50-13.2 (1995); N.D. CENT. CODE § 14-09-05.1 (1997); OHIO REV. CODE ANN. §§ 3109.051, 3109.11 (West 1996); OKLA. STAT. ANN. tit. 10, § 5 (West 1998); OR. REV. STAT. § 109.121 (1995); 23 PA. CONS. STAT. ANN. §§ 5311-12 (West 1991); R.I. GEN. LAWS § 15-5-24.1 to –24.3 (1996); S.C. CODE ANN. § 20-7-420(33) (Supp. 1997); S.D. CODIFIED LAWS §§ 25-4-52 to 25-4-54 (1992); TENN. CODE ANN. § 36-6-302 (Supp. 1997); TEX. FAM. CODE ANN. § 153.433 (Vernon 1998); UTAH CODE ANN. § 30-5-2 (Supp. 1998); VT. STAT. ANN. tit. 15, §§ 1011–1016 (1989); VA. CODE ANN. §§ 20-107.2, 20-124.1 (West Supp. 1998); WASH. REV. CODE ANN. § 26.09.240 (West 1997); W.VA. CODE § 48-2B (Supp. 1998); WIS. STAT. ANN. § 767.245 (West Supp. 1997); WYO. STAT. ANN. § 20-7-101 (1995).

[39] Troxel v. Granville, 530 U.S. 57 (2000).

[40] *Id.* at 60–61.

[41] *Id.* at 61.

[42] *Id.*

[43] *Id.*

The Court of Appeals then "reversed the lower court's visitation order and dismissed the Troxels' petition for visitation," finding that without an imminent custody action, "nonparents lack standing to seek visitation" under the Washington law.[44] The Washington Supreme Court affirmed the holding of the Court of Appeals, disagreeing on the standing issue, but holding that the statute "unconstitutionally infringe[d] on the fundamental right of parents to raise their children," in part because it required no "threshold showing of harm," and was too broad by allowing *any* third party to seek court-ordered visitation.[45]

The U.S. Supreme court, after granting certiorari, upheld the Washington Supreme Court's judgment, and noted that "the Troxels did not allege, and no court has found, that Granville was an unfit parent. That aspect of the case is important, for there is a presumption that fit parents act in the best interests of their children."[46] Presumably, in instances where parents are found "unfit," courts will be more inclined to grant visitation rights to grandparents, as they have greater freedom to "inject [themselves] into the private realm of family" and determine the best interests for the children when parents are failing to do their job of caring well for their children.[47] Notwithstanding the outcome of *Troxel*, wherein the grandparents' sought-after visitation order was ultimately denied, states can use *Troxel* as a guide in enacting their own legislation. In so doing, states can more fully ensure that the constitutional liberties of all parties involved, including those of the child, the grandparents, and the parents, are protected, and that the child's best interests are truly served.

Although in the monologue the court denied the Abuela's custody petition, consideration of the child's best interest and relationship with her Abuela prompted the order for the child's summer visitation in Boston.

B. An Example of Legislation at Work: Grandparent Visitation Rights in Utah

Section 30-5-2 of the Utah Code grants standing to grandparents for visitation and outlines their visitation rights. Subsection (2) states that notwithstanding a presumption that "a parent's decision with regard to grandparent visitation is in the grandchild's best interests," such a presumption may be overridden by the court after an analysis of various factors that "the court considers to be relevant," which may include, but are not limited to, the following criteria:

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[44] *Id.* at 62.
[45] *Id.* at 63.
[46] *Id.* at 68.
[47] *Id.* at 68–69.

> (a) the petitioner is a fit and proper person to have visitation with the grandchild;
> (b) visitation with the grandchild has been denied or unreasonably limited;
> (c) the parent is unfit or incompetent;
> (d) the petitioner has acted as the grandchild's custodian or caregiver, or otherwise has had a substantial relationship with the grandchild, and the loss or cessation of that relationship is likely to cause harm to the grandchild;
> (e) the petitioner's child, who is a parent of the grandchild, has died, or has become a noncustodial parent through divorce or legal separation;
> (f) the petitioner's child, who is a parent of the grandchild, has been missing for an extended period of time; or
> (g) visitation is in the best interest of the grandchild.[48]

Although the statute provides for various factors that the court may consider in making a custody determination, ultimately the decision of how to balance those various factors rests with the court. Accordingly, under Utah law, judges may provide varied reasoning or cite to different factors to explain how and why they came to the conclusion that they did in deciding whether to order that grandparent visitation be allowed. Ultimately *how* courts reach a decision is not nearly as important as *what* decision they reach, provided that the outcome is in the child's best interests. Furthermore, so long as a state's grandparent visitation statute is drafted in such a way as to provide deference to a "fit" parent's opinion, as is Utah's statute, the legislation will most likely withstand constitutional challenges,[49] and thereby assist grandparents in obtaining and maintaining their visitation rights with grandchildren.

C. The Future of Grandparent Visitation Rights

Several groups of older Americans, collectively referred to as the "gray lobby" (consisting primarily of members of The National Retired Teachers Association, American Association of Retired Persons, The National Council of Senior Citizens, and The National Council on Aging) have joined together to fight for and protect the right to spend time with their grandchildren.[50] As family units continue to evolve and as new trends emerge, more emphasis will be placed on involving grandparents in the lives of grandchildren. As one court noted while citing social science literature, grandparents are able to "influence their families" in four significant ways: 1) by serving "as a stabilizing influence;" 2) by acting as

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[48] UTAH CODE ANN. § 30-5-2 (2007).

[49] *Cf.* Campbell v. Campbell, 896 P.2d 635, 642–43 (Utah Ct. App. 1995) (upholding Utah's visitation statute as constitutional).

[50] *See* Strawman, *supra* note 42, at 34 n.9.

the "family watchdog," to keep a lookout to protect the grandchildren from harm; 3) by playing the role of arbitrator between parents and children; and 4) by helping grandchildren understand their heritage.[51]

Another court, noting the special relationship that exists between grandparents and grandchildren stated " . . . visits with a grandparent are often a precious part of a child's experience . . . . "[52] Furthermore, a grandchild receives benefits from his or her interactions with a grandparent that he or she "cannot derive from any other relationship."[53]

VI. CONCLUSION

The family model is changing drastically and becoming more complicated—it is not unusual to find families with several sets of parents, stepparents, and step-grandparents. Domestic partnerships create *de facto* step parents and grandparents. Subsequent divorces and remarriages may leave a trail of grandparents, and *de facto* grandparents and step-grandparents, all of whom are certain that their continued involvement in the lives of the children leads to stability, and that that they have a right to continued contact.

Courts and legislatures acknowledge the benefits and positive impact that grandparents can have on their grandchildren's lives, as can be seen by clear statutory rights to visitation given certain circumstances. But the right to visitation and involvement in grandchildren's lives is not absolute because "parental rights are fundamental and constitutionally protected."[54] Parents deemed fit are able to deny grandparents access to their children when they decide it is in the best interests of the child.[55] There is a presumption that parents are acting in the best interests of their child, even if they deny grandparent visitation, but this presumption can be overcome if there is evidence of abuse, neglect, or a special need to continue the child-grandparent relationship.

It is certainly in the best interests of the children to have these disputes resolved with civility rather than rancor, and with cooperation rather than by court order. Perhaps just as mediation and related methods of alternative dispute resolution have become popular—and even mandatory to solve certain conflicts in family law—so too will they be used to assist grandparents in obtaining visitation.

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[51] Michael v. Hertzler, 900 P.2d 1144, 1150–51 (Wyo. 1995).

[52] *See* Strawman, *supra* note 42, at 44 (citing Mimkon v. Ford, 332 A.2d 199, 204 (N.J. 1975)).

[53] *Id.* (citing Mimkon 332 A.2d at 205).

[54] Div. of Youth and Fam. v. A.R.G., 179 N.J. 264, 286 (2004).

[55] *See generally* Moriarty v. Bradt, 177 N.J. 84, 108–09 (2003); *see also* Linder v. Linder, 348 Ark. 322, 352–53 (2002).

A non-litigation centered approach may help drastically increase the likelihood that not only will the outcome of visitation-related litigation be in the best interests of the child, but also the process by which that outcome is obtained.[56]

[56] Troxel v. Granville, 530 U.S. 57, 75 (noting that "the burden of litigating a domestic relations proceeding" can be extremely disruptive to a child's life (citation omitted)).