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THE BIG LEGAL PICTURE: GRANDPARENTS PARENTING CHILDREN: A NEW FAMILY PARADIGM

SUMMER 2000

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Gerald Wallace, Esq.

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The Big Legal Picture: Grandparents Parenting Grandchildren: A New Family Paradigm

By Gerard Wallace

Introduction

The dramatic decrease in two-parent families, combined with the equally dramatic increase in the numbers of older persons, many of whom are living healthier and longer lives and the accompanying changes in family composition, will affect the future practice of elder law in many ways. The reconfiguration of family life will place an increasing number of grandparents and other aging relatives in the role of primary and secondary caregivers for children, and issues related to their care and control of children will emphasize the interplay of family and elder law. With many grandparents, great grandparents and other older relatives already their clients, elder law practitioners must become familiar with the legal issues that many of their clients are facing in their newly configured intergenerational families. Practitioners should also know about the resources available for such clients. This Article will present the legal issues faced by grandparent and other non-parent primary caregivers of children, an overview of the visitation case currently before the U.S. Supreme Court, a summary of bills recently introduced in the New York State Legislature, and a listing of resources.

I. Legal Issues for Non-Parent Primary Caregivers of Children

Older Americans are assuming primary responsibility for raising children whose parents are unavailable to care for them because of divorce, death, incarceration, substance abuse, disability, AIDS, or other circumstances. Although some non-parent caregivers provide full-time care to children for short periods, many provide this care for children over extended periods of time. Legal issues for these elder caregivers for children include their legal relationship with the children (custody, foster care, guardianship, adoption), maintenance of that relationship over time, authority to make educational, medical and other kinds of decisions for the children, financial and other assistance, and planning for care of the children after their own incapacity or death.

Many non-parent primary caregivers of children are grandparents.[1] Nationally, these grandparents have sole responsibility for more than four million children. The average age of such grandparents is 55, with many being in their sixties and seventies. Virtually all caregiving grandparents provide care to their grandchildren against great odds. Often they must cope with decreased physical endurance, increased isolation from their peers and loss of expected leisure time in their retirement years while experiencing the loss and support of their own children (the grandchildren's parents). Additional stress is caused by uncertainty about the future of their grandchildren either because the grandchildren's parents may return to claim them or because their own aging may mean they will be unable to continue caring for the children over the long term. Finally, the lack of financial resources to care for an expanded household often weighs heavily on the shoulders of grandparent caregivers who often live on fixed incomes.

Although grandparents raising grandchildren are acting as parents, state and federal law provide greater deference to parents based on their fundamental right to raise their children as they see fit. Natural or adoptive parents are secure in the knowledge that they cannot be deprived of their children without clear and convincing evidence of their unfitness as parents,[2] but grandparents have no such protection when serving as parents. Parents have the necessary legal authority for the successful rearing of children but grandparents do not. Parents are provided with financial and other forms of assistance such as social security benefits for surviving children, intestacy laws to ensure passage of their wealth to their children, foster care payments to persons who take care of needy children, adoption subsidies for foster parents who choose to adopt, and income tax credits to adoptive parents for the cost of private placement adoptions. Few forms of legal and financial assistance are provided to grandparents who are primary caregivers for children.

Whether caregivers are raising children informally or under court-ordered arrangements, they need legal recognition of their standing, authority to act as substitute parents, and security concerning their relationship with the children. In addition, access to public benefits where appropriate, financial assistance, housing, and other resources is critical. Many of these concerns can be addressed only through legislation and urgently require the attention of lawmakers to change laws and social policies that do not serve the needs of grandparent caregivers. States have yet to adapt their laws and social policies to the realities of the modern family.

I. A. Uncertainties about the Legal Status of Grandparent Caregivers

Generally, three kinds of legal status are available for grandparent caregivers: (1) informal caregiving without a court-ordered legal arrangement (sometimes called informal or physical custody); (2) court-ordered legal custody or guardianship of the person and/or property; and (3) foster care (kinship or non-relative) under the supervision of the state which retains legal custody of the child. Grandparents who adopt the children for whom they are caring assume the rights and responsibilities of natural parents.

I. A. 1. Informal Caregiver Authority

Without adequately understanding the advantages and disadvantages of each option, caregivers often choose to keep the caregiving arrangement informal because custody, guardianship, kinship foster care, and adoption require unwanted court (or state) intervention that is considered to be antagonistic to fragile family relationships.[3] Grandparents with legal custody and guardianship usually do not have much difficulty in making educational and medical decisions for the children in their care.[4] On the other hand, most informal grandparent caregivers who have only vague legal recognition are raising children without the educational and medical decision-making authority necessary for the successful and stable rearing of children.

Diverse statutory descriptive phrases make it difficult to paint a clear picture of the authority of informal caregivers in New York. For example, the informal relationship is variously described as:

- "Person in parental relation to a child"[5]
- "Person who has assumed the charge and care of the child"[6]
- "Person or persons having the actual custody of such minor or minors"[7]
- "Person having custody of the infant"[8]
- "Person with whom he [an infant] resides"[9]
- Anyone who has a child "chiefly dependent upon him for support and maintenance."[10]

Both the Education and Public Health laws provide limited statutory authority for "persons in parental relationship" who are defined as parents, guardians, step-parents and "custodians" (who are any person caring for children because the parents are deceased, mentally ill, incarcerated, have been committed to an institution, or have abandoned or deserted the children). Since frequently one or both parents still live in the community but are incapable of providing care, many informal caregivers do not fall within the definition of "custodian" and are limited in their abilities to make ordinary school and medical decisions for the children. In addition, the Education Law provides that persons in parental relationship have authority and responsibility for most educational needs,[11] but the Public Health Law states that they can consent only to immunizations.[12]

One possible solution to this problem would be to provide a simple mechanism by which the parents of the child could delegate their educational and medical decision-making authority to caregivers. Such a mechanism does not exist in New York State at this time.[13] Although the New York statutory general power of attorney permits, among other things, the delegation of powers related to "personal relationships and affairs,"[14] granting this power to an agent provides only sufficient authority for financial decisionmaking, but not for educational and health care decisionmaking. In many other states, such delegations are already possible. Washington, D.C., California, Minnesota, Delaware and a number of other states have specific legislation covering parental authorizations to informal caregivers.[15] Close to 20 states have adopted the Uniform Probate Code parental power of attorney.[16] Almost all delegations under these statutes are for limited periods of time, ranging from six months to two years, and tend to be renewable by the substitute caregivers. In New York, unfortunately, the lack of statutory authorization of parental delegations remains a limitation on the ability of parents to delegate or transfer their authority.

Additionally, even if children are living with persons in parental relationship, they need to fulfill other criteria in order to qualify for free tuition.[17] School districts often demand proof of legal custody or guardianship as a requirement for school admission or as documentation of residency. Court orders, however, are not required under the Education Law. Instead, students must prove by an examination of the totality

of the circumstances that they are permanent residents of the school district, intending to remain permanently in that district.[18] Under most circumstances, grandparent caregivers should not have to go to court to get children accepted (tuition free) for public school in the districts where they reside.

I. A. 2. Legal Custody versus Guardianship

The choice between legal custody and guardianship also lacks certainty. Some county family courts prefer to award legal custody, while others award guardianship of the person to all non-parents (or only to non-blood relatives). When there is a choice, the decision is invariably based on wrong information. In terms of their practicality, legal custody and guardianship at first appear to be interchangeable.[19] Both are capable of providing sufficient health, educational, and financial authority. However, practical distinctions exist. For instance, numerous laws referring to "parent or guardian"[20] do not include legal custodian, and without guardianship, private health insurance providers often refuse to cover dependent children. Unlike guardianship, where the guardian may or may not have actual physical control of the child, legal custody invariably means the actual care, maintenance, supervision and control of the minor. In contrast, other statutes place legal custodians alongside parents and guardians,[21] and some statutes also add informal custodians to these three.[22]

One advantage of guardianship for a grandparent is nevertheless worth mentioning. The Surrogate's Court Procedure Act provides that parents *and guardians* can petition either family court or surrogate's court for the appointment of a standby guardian.[23] They can also designate a standby in a writing similar to a will that states that the designation is effective upon the parent's or guardian's debilitation, incapacity, or death. For aging grandparents who are guardians, not legal custodians, the ability to appoint or designate a standby guardian can provide added security for their grandchildren's futures. Unfortunately, the statute is not always readily available to grandparents because many family courts prefer legal custody to guardianship proceedings.

I. A. 3. Kinship Foster Care

For kinship foster parents, the state retains custody of all children living with foster parents. Kinship foster parents are subject to regulation by the local child welfare agency and federal and state guidelines. They also are vulnerable to removal of children from their homes because they are not the parents of the children. And while until recently, the regulations regarding certification of kinship foster parents have been more lenient than those for non-kin foster parents, implementation of the Adoption and Safe Families Act (ASFA)[24] may necessitate one set of rules for both kin and non-kin foster parents.

ASFA has placed added pressure on child welfare systems to quicken the pace of adoption. To meet this goal, states are increasingly providing permanency alternatives for kinship foster parents. These alternatives, commonly called subsidized guardianship, usually continue a stipend, based solely on the needs of the children, to replace the foster care support previously available to the family.[25] Missouri now offers a stipend to all grandparent caregivers including non-foster parents.[26] Subsidized guardianship is not available in New York.[27]

I. B. 1. Maintaining Custodial Relationships

Unlike parents, third-party custodians (both formal and informal) do not have a fundamental constitutional interest in the permanency of their relationship with the children. Regardless of the nature of the legal relationship between the grandparents and the children, the grandparents' interests are subordinate to the interests of the parents. If the caregivers do not have court orders, parents can simply demand the return of the children and, if necessary, obtain assistance from law enforcement. In such instances, the grandparents' only recourse is to seek an *ex parte* custody order to delay the return of the children to their parents. If the caregivers have court orders, then the parent's demand must start with a court petition. Either situation results in a "third party custody dispute."

In third party custody disputes, New York State courts require an initial finding of "extraordinary circumstances" before the court can consider the usurpation of parents' rights. Once extraordinary circumstances have been found, the court evaluates the "best interest of the child" to determine custody. New York State courts require an initial finding of "extraordinary circumstances" in order to insure that the state does not usurp parents' rights. Once extraordinary circumstances have been found the court will evaluate the "best interests of the child." "Extraordinary circumstances" include parental unfitness, persistent neglect or abandonment. In *Bennett v. Jeffreys*,[28] the N.Y. Court of Appeals added "an unfortunate or involuntary extended disruption of custody" to the list of extraordinary circumstances.[29] In *Bennett*, a teenage mother had relinquished her newborn to a family friend under pressure from her mother. After seven years, she sought custody of the child. The Court decided

that the length of time in the care of the third party constituted an extraordinary circumstance and that it was in the child's best interest to remain in the only home she had ever known. This additional "extraordinary circumstance" requires a finding of both an uninterested parent and a prolonged stay with a non-parent.[30] The questions that haunt custodial grandparent caregivers are what will courts consider an "uninterested" parent and what length of stay with the grandparent will be required to warrant a finding of extraordinary circumstances.[31]

A number of states other than New York consider that after a certain length of time in the care of someone other than the parent, only the best interest of the child should be considered when deciding a custody dispute. Two states, Indiana and Kentucky, protect the security of grandparent caregivers and their grandchildren by deeming the grandparents to be "de facto custodians." When a child has been in the care of a grandparent for a certain amount of time, that caregiver has equal status with a parent in a custody dispute.[32] Guardians are also subject to custody challenges by parents.[33]

I. B. 2. Notification of Non-custodial Grandparents

A source of insecurity for non-custodial grandparents is that they have almost no rights to notification of custody, guardianship or adoption proceedings involving their grandchildren and may find, after the fact, that the children are in the legal control of others. A few states, like Florida,[34] provide for notification of adoption proceedings to grandparents if they have been primary caregivers for a certain period of time in the past. Once grandparents do find out about the legal custody, guardianship, or adoption of grandchildren, they can still petition for visitation under the grandparent visitation statute.[35]

II. Limitations on Public Benefits

Public benefit programs use broad definitions of caregivers, but these definitions are not uniform, and sometimes can leave out certain relatives, as well as grandparent caregivers.

II. A. Financial and Other Assistance

Temporary Assistance to Needy Families (TANF) provides that

> an allowance may be granted to the aid of such child who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with a person related to him by blood, marriage, or adoption eligible to receive aid to dependent children on his behalf pursuant to the federal social security act, the provisions of this chapter and regulations of the department.[36]

TANF grants may be based on the resources of both indigent caregivers and children, or of indigent children alone. Because both parents have a duty to support their children and their income is deemed available to their children, grandparents who adopt the children (and who are ineligible for public assistance because they have excessive income) will lose TANF grants based only on the income of the child.[37]

Regulations for the Food Stamp Program use the "household concept" for eligibility and benefit determinations.[38] Unlike TANF, children's applications cannot be separated from the application of their caregivers. Together they are considered as one household unit because children necessarily eat with the persons with whom they are residing.

The Child Health Plus Program, which provides health insurance to low-income families for children that do not qualify for Medicaid, uses a broader definition of caregiver, permitting any person upon whom a child is dependent to apply for the program, but the caregiver's income is counted in determining whether any premium must be paid.[39]

Other types of assistance use other definitions. Some categories are under-inclusive, not including full-time caregivers who are great-grandparents, step-grandparents, and aunts and uncles. The Internal Revenue Service grants an Earned Income Credit for a dependent child to an adult who has a "qualifying child," that is, a child who is: (1) a son, daughter, adopted child, grandchild, or stepchild; (2) under age 19, or under age 24 and a student, of any age and disabled; and (3) lived with the caregiver for more than one-half of the year. The Earned Income Credit is also available for any "foster" child, defined as any "child you cared for as your own child" for the entire year.[40]

Under the Social Security Program, children are ineligible for benefits based on earnings of their grandparent caregivers unless they are living full-time with their grandparents when the application for retirement benefits is made *and* the natural parents are dead or disabled, or the children are adopted, or considered to be adopted under the doctrine of equitable adoption. These limited circumstances omit many of

the common grandparent or relative caregiver situations.[41]

II. B. Housing for Multi-generational Families

Housing for aging caregivers of young children also poses many legal problems. Multi-generational housing has yet to become a policy priority. In New York City, senior housing units subsidized by the federal Housing and Urban Development Corporation are generally too small for families, and although the New York City Housing Authority has 42 buildings with senior housing, children are excluded. Grandparents in subsidized senior housing lose eligibility when children move in or the increase in their family size creates ineligibility.[42]

Efforts to provide special housing for grandparent caregivers are at the startup phase. In Manhattan, Presbyterian Senior Services is developing a 65-unit apartment building at 163rd Street and Prospect Avenue specifically for grandparents raising grandchildren. This project is modeled on the successful Grandfamilies House in Boston,[43] where extensive in-house services are offered along with apartment units tailored for elderly caregivers. The Buffalo municipal housing authority also is developing a plan to build housing for grandparent-headed families. For grandparents who live in "Naturally Occurring Retirement Communities" (NORCs), defined as housing in which seniors have aged in place and where over 50% of the seniors have below median income, services are now being developed which could include targeted services for seniors raising children.[44]

III. *Troxel v. Granville*: A Case For Grandparent Visitation Rights

On June 6th, the Supreme Court of the United States ruled in *Troxel v. Granville*[45] that the State of Washington's visitation statute was unconstitutional. Many media accounts portrayed this decision as a denial of visitation rights to all grandparents. Contrary to the claim of victory by parents' rights organizations, the American Association of Retired Persons (AARP) and the Brookdale Center on Aging's Grandparent Caregiver Law Center among others, noted that the decision did not substantially diminish grandparents' rights. Clearly, the decision in *Troxel v. Granville* does not amount to a clear cut victory for either side. Parents retained their protected liberty interests (although arguably not as strongly protected as before *Troxel*), and grandparents did not gain a right to visitation but retained their privilege to seek visitation (although subject to some judicial deference to parental denial of visitation).

Under review was the decision of the Washington State Supreme Court[46] which found its visitation statute unconstitutional because of its broad scope and failure to mandate a finding of harm to a child that would justify state interference. The Washington State visitation statute permitted "any person" to petition a superior court for visitation at "any time."[47] It contained no limiting conditions or threshold tests, and permitted judges to base their decision solely on the best interests of the child without consideration of the parent's wishes. At stake was a petition for visitation by the paternal grandparents for increased visitation with their deceased son's two daughters, who live with their mother Tommie Granville and their adoptive father.

III. A. Conflicting Interests in Third Party Visitation

In the arguments leading up to the Supreme Court's decision, numerous conflicting interests and standards were put forth. Differences in the definition of family and the rights of parents, children, and relatives were argued alongside differing views of what constituted state interference, what justified state interference, and whether the best interest test sufficiently protected the parties', the child's, and the state's interests.

The controversy evoked strong opinions from the public. *Troxel v. Granville dr*ew a great deal of media attention to the role that grandparents play in the lives of their grandchildren. The legal issues often involve visitation rights when the child's family changes through death, divorce or remarriage.[48] Needless to say, when grandparents must seek visitation through the courts, discord and acrimony are rampant in family relations, and parents already feel under attack.

But unlike other states, Washington State's visitation statute was not just about grandparents, parents, and grandchildren. The U.S. Supreme Court noted that Washington State's grant of permission to "any person" to petition for visitation with children was "breathtakingly broad" and that visitation could be ordered if found to be in the child's best interest without deference to the parents' authority.[49] Other states limit the privilege of seeking visitation to grandparents under certain circumstances, such as visitation sought by the grandparent after the death of the child's parent. These visitation rights are sometimes considered to derive from the right of the deceased parent. In addition, many state statutes permit grandparents to seek visitation when one of the living parents of the child opposes visitation. Only a few states permit a visitation proceeding when both parents oppose visitation.

In many states, grandparents must also show that they had a relationship with their grandchildren, or were prevented by the child's parents from having a relationship with their grandchildren, in order to seek visitation.[50] Other states limit the right to seek visitation to grandparents who were full-time (primary) caregivers. Once the requirements for standing to seek visitation are satisfied, however, all states use the best interest of the child standard to decide visitation rights. Some statutes explicitly require deference to parental decisions, and judges commonly apply a rebuttable presumption that parents act in their child's best interest.[51]

In this case, the Troxels, parents of the deceased father, had sought increased visitation with their son's out-of-wedlock children who live with their remarried mother. The mother, Tommie Granville, had agreed to the grandparents visiting their grandchildren once a month, but the Troxels wanted more. Unfortunately, not only was the statute unrepresentative of other state statutes, but the issues were further complicated by the grandparents' request for additional visitation.

The potential stakes were so high that over twenty *amici curiae* filed briefs by the end of November 1999. If the Court's decision had found the Washington State statutes unconstitutional on broader grounds, visitation between tens of thousands of grandparents and grandchildren could have ended.

III. B. Which Standard of Review?

In reaching its decision, the U.S. Supreme Court rejected at least two standards of review. Until this decision, the due process clause of the Fourteenth Amendment had generally been considered to include protection of parental autonomy as a fundamental liberty interest. In order to justify state intrusion, states must have a compelling reason, such as the prevention of substantial harm to children. The Washington Supreme Court had followed this standard and declared that the U.S. Supreme Court's earlier decisions clearly indicated that to comply with the U.S. Constitution's guarantee of privacy, non-parent visitation statutes must require proof that the absence of visitation will harm the child.[52] The Washington Supreme Court decided that the loss of contact between grandparents and grandchildren did not rise to the level of harm contemplated by the past rulings of the United States Supreme Court. The Washington Court also found the statutes at issue overly broad, both in the class of persons who could petition and in the lack of any threshold conditions.

The Washington Supreme Court's dissent asserted that parents' rights are not absolute and that the level of interference with those rights concerning visitation did not rise to the level of a compelling state interest. According to the Washington dissent, the U.S. Supreme Court cases cited by the majority combined family autonomy with another fundamental interest.[53] Since no other fundamental interest of the parents needed protection, harm was the wrong standard, and in its absence, the best interest test was a sufficient safeguard of the children's and parents' interests.

In addition, the Washington Supreme Court decided that because the statute failed to contain a requirement that the court must find harm to the child before ordering visitation, the statutes *on their faces* violated the U.S. Constitution. During oral arguments on January 12th, both Chief Justice Rehnquist and Justice Scalia referred to the facial challenge, but the remarks of the Justices left unclear whether they would base their decision on the facial challenge. Neither the harm standard nor the facial challenge eventually provided the basis for the Supreme Court's decision.

Faced with uncertainty regarding the standard and scope of review, the briefs of the parties and the *amici* covered a wide range of arguments, some focusing on what constitutes harm, interference, and even family, and others addressing whether the best interest test adequately protects the interests of all of the parties. Briefs also considered the nature of the interests of parents, grandparents, children, and states. Both parties in oral argument spent considerable energies debating whether the best interest standard sufficiently protected the parents' interests.

III. C. For the Parent, Tommie Granville

The Coalition for the Restoration of Parental Rights argued that neither precedent nor justification exists for granting grandparents the right to impose their will on parents, and that the coerced removal of children from the parent's custody is a greater interference than those interferences which the Court previously found unjustifiable. Furthermore, they argued that the visitation proceeding itself is a cause of substantial harm to children.

The Domestic Violence Project et al. also asserted that the threshold of parental unfitness had not been crossed and that, absent such a finding, "intrusions" into parental authority are not "acceptable." To permit state legislatures to define fundamental constitutional rights would create different fundamental rights in different states.

The National Association of Counsel for Children focused on the Washington State statutes' failure to provide threshold tests that would inhibit standing by any person under any circumstances. The Association saw this as placing an impermissible burden on parents. However, the Association asked that the Court defer judgment on children's rights, because this case is the wrong vehicle for a sweeping decision.

The Christian Legal Society and *the National Association of Evangelicals* conceded that narrowly drawn grandparent visitation statutes could serve a compelling state interest. They argued, however, that the Fourteenth Amendment's Due Process Clause protects the autonomy of the family, providing "fundamental rights" that warrant strict scrutiny, not a "sliding scale." This right is doubly protected in this instance because it is combined with another fundamental right, free speech, inasmuch as parents must be free to communicate their values, a form of "expressive communication" protected by the First Amendment.

III. D. For the Grandparents, the Troxels

The National Conference of State Legislatures, Council of State Governments, National Association of Counties, U.S. Conference of Mayors, et al. argued that the Washington Supreme Court applied the wrong standard and that the Supreme Court's precedents actually did not require strict scrutiny. "Absent infringement of some other constitutional right, State action which implicates the parental liberty interest in bringing up children must be sustained if it has a reasonable relation to some purpose within the competency of the State." (citing *Wisconsin v. Yoder*).

Grandparents United for Children's Rights, Inc. proposed that children had the right to "liberty and protection in maintaining relationships with their grandparents" and that the best interest standard protected this right.

The AARP pointed to the far-reaching consequences of the Court's decision and argued that the fragmentation of family life necessitated extraordinary efforts to provide children with stability. Furthermore, the AARP argued that states had not awarded grandparents any rights, but the opportunity to provide a benefit to children. The AARP also found the intrusion not a "substantial infringement of parents' rights."

Finally, *the Grandparent Caregiver Law Center of the Brookdale Center on Aging at Hunter College* argued that visitation statutes were inherently concerned with the harm caused to children by the forcible cessation of contact with persons who had established loving relationships with them and that the state interest in preventing this harm justified an inquiry into the best interest of the child.

III. E. Oral Arguments

In January's oral arguments, the Justices, six of whom are grandparents, focused their questions on the need for finding a harm to be prevented and whether the best interest test adequately protects parental interests. Justice O'Connor opened with an inquiry about harm to the child. But the attorneys for both parties continued to center their arguments on the best interest test. The grandparents' attorney argued that harm was not the touchstone of the case because intrusion on the family was minor, that the liberty interest had adequate protection, and that the best interest standard provided the best outcome. The Justices appeared skeptical of these assertions. The parent's attorney argued that deference to parental child-rearing should make the subjective intention of the parent (to act in the child's best interests) the measure of what is in the child's best interests. Justice Scalia expressed incredulity at the use of a subjective standard.

When the U.S. Supreme Court finally rendered its decision, the Court attempted to incorporate much of the arguments put forth by both sides, and the ruling appears more important for what is implied than asserted.

III. F. The Supreme Court's Decision

Justice Sandra Day O'Connor authored the plurality opinion which was joined by Chief Justice Rehnquist and Justices Ginsburg, and Breyer. Justices Souter and Thomas wrote separate concurrences; and Justices Scalia, Stevens, and Kennedy authored separate dissents.

Commentators originally thought the U.S. Supreme Court had accepted review because a conflict regarding the constitutionality of visitation statutes had arisen. The Supreme Court of Washington State had agreed with Florida, Kentucky and Tennessee in finding their visitation statutes unconstitutional.[54] Other states had reached the opposite conclusion.[55] In states that declared their visitation statute unconstitutional, reasoning was centered on the need for states to find harm to the child.

Instead of resolving the issue, the plurality declared that the constitutionality of visitation cases should be decided on a case by case basis—not by examining the statute *per se*, but by examining the particular application of the statute to a particular case.

This declaration amounts to a victory for grandparents because no state statute automatically becomes unconstitutional.

Nevertheless, the language of the opinion contained statements extremely favorable to parental rights. Justice O'Connor wrote: "[S]o long as a parent adequately cares for his or her children (*i.e.* is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." This would appear to settle the question in favor of the parent, Tommie Granvile whose fitness was not in question, except that in her next sentence, Justice O'Connor declared that in this case intervention is permissible. Justice O'Connor found the application of the statute unconstitutional because the trial judge "gave no special weight at all to Granville's determination of her daughters' best interests." This strongly suggests that so long as courts apply a presumption that a parent's denial of visitation is in the child's best interest, fit parents receive adequate protection from unwarranted state interference. Thus, judicial decisions that contain explicit explanations of why the presumption has been rebutted should be constitutional.[56]

The Court apparently chose not to limit all state interference with families to instances where parents were unfit. The plurality opinion circumvented the necessity for proof of parental unfitness, and two dissenters clearly did not limit state interference to unfit parents. Justice Kennedy's dissent recognized that there could arise cases "in which a third party, by acting in a caregiving role over a significant period of time, has developed a relationship with a child which is not necessarily subject to absolute parental veto." Justice Stevens considered that the trial judge had given sufficient deference to the parent's denial of visitation. He also asserted that there may be instances where a child's interest deserves protection even if it is not directly related to a potential harm to the child.

Six justices wrote *dicta* that conceivably could permit state statutes to increase the class of persons who may seek visitation to include persons who assume parental duties. The plurality mentioned favorably the possibility that grandparents and other relatives who have undertaken "duties of a parental nature" might seek visitation. Justices Kennedy and Stevens suggested that grandparents and persons who acted as caregivers may seek visitation.

The Court appeared to search for a way to balance the interests of parents and those who had substantial relationships with children. The plurality noted that the "cost" of permission to seek visitation was the burden placed on parent-child relationships. Other opinions admitted that under a number of circumstances state intervention is permissible so long as the causes for interference sufficiently outweigh the reasons for the parent's denial of visitation. In effect, the Court left open a wide avenue for grandparents and other relatives to pursue visitation.

While the plurality opinion noted that the "breathtakingly broad" statute permitted "any person"—"at any time" to seek visitation, the four Justices did not base their ruling on the statute's broadness, although their comments make it likely that statutes this broad would be found unconstitutional.

Interpretation of the Court's decision is assisted by recognizing what the Court chose not to do. The plurality chose not to address the need for a finding of harm, but rather validated the use of a rebuttable presumption as a sufficient safeguard of parental interest. Justice Souter affirmed the facial unconstitutionality because he saw the class of persons who could seek visitation as too broad. He too chose not to address the harm issue. While Justices Kennedy and Stevens addressed this issue, they rejected the harm standard as too confining and not an accurate reflection of the Supreme Court's previous rulings. Justice Scalia not only did not address the harm standard, but he did not comment on any test, because he would leave visitation statutes squarely in the hands of state legislatures. He declared that parental interests were not mentioned in the Constitution and thus are not a proper subject for the Supreme Court's review. Although Justice Thomas did not expressly refer to the harm standard, he alone opined that strict scrutiny was the proper standard of review, and therefore implicitly limited state interference to situations where there is a potential for harm to the child. The reasoning of the case appears to quiet the debate over the harm standard while tacitly avoiding a direct renunciation of it.

While the Supreme Court's ruling leaves much that can be implied and little that is easily confirmed, it clearly safeguards state grandparent visitation statutes from constitutional challenges. Grandparents are not in danger of losing their visitation privileges.

In New York, to have standing to seek visitation, courts have interpreted the grandparent visitation statute to demand a showing by grandparents that they have a relationship with their grandchild or have been prevented by the parents from establishing such

a relationship.[57] This threshold test provides initial protection to fit parents from unreasonable petitions for visitation. Because New York's courts have coupled this threshold test with a strong reluctance to order visitation that is destructive to the parent-child relationship, the statute, as usually applied, offers little opportunity for a constitutional challenge. New York's grandparents will continue to be able to seek visitation, and they will continue to have an uphill battle to convince courts that their petition should be granted.

IV. Legislative Initiatives in New York State

Prior to the 1990s, New York was active in its pursuit of assistance for non-parent caregivers. In 1966, the State enacted the first grandparent visitation statute. In 1975, the State Legislature enlarged the conditions for seeking visitation and permitted grandparents to petition in the face of the united resistance of intact nuclear families; i.e., both natural parents. A year later, the N.Y. Court of Appeals recognized that under certain extraordinary circumstances non-parents could be awarded custody. In the late 1980s, the state enacted one of the first standby guardian statutes and was one of the first states to offer foster care payments to relatives.

For the past few years, a number of bills pertaining to non-parent caregivers have languished before the State Legislature. Some of these bills contain elements of a complete continuum—recognition, authority, security, financial and resource assistance—but until late March this year, comprehensive packaging had yet to emerge. The following is a summary of recent legislative initiatives in New York State related to grandparents and other non-parent caregivers.

A07052/S6000 (Parental Authorization of Caregivers) would provide for a written instrument similar to a power of attorney that would permit parents to sign over responsibility for school enrollment, attendance and activities, and medical decisionmaking, to any persons of their choice who are primary caregivers of their children. The parents would choose what authority to transfer and could revoke their authorizations at will. Any authorized caregiver possessing such a properly notarized instrument would have the authority to make most of the necessary day-to-day decisions for children in their care. Both educational and medical providers would be released from liability for their reliance on this authorization. This Bill could lessen the number of unnecessary family court petitions for custody or guardianship, because school districts and medical providers could no longer ask for court orders before accepting a primary caregiver's authority.

S2976 (Concurrent Kinship Adoption) and **A4829 (Kinship Guardianship)** create new legal relationships for kinship foster parents and their charges. Both Bills predate the federal 1997 Adoption and Safe Families Act (ASFA) which placed increased emphasis on permanency planning for children in foster care, but which exempted kinship foster parents from that mandate. AFSA left kinship foster parents in a legal limbo, in need of alternative permanency plans.

"Concurrent Kinship Adoption" hybridizes adoption law and legal custody, enabling kin to adopt without terminating parental rights. Instead, concurrent custodial rights would be shared by both sets of parents with primary custody awarded to the new kinship adoptive parents. Kinship adoption may enable caregivers to qualify for the federal adoption subsidy.

"Kinship Guardians" would be ineligible for the federal adoption subsidy. In order for kinship guardians to qualify for federally subsidized guardianship, New York must seek a waiver from the federal government.[58] This Bill, like concurrent kinship adoption, permits parents to maintain visitation with children. Kinship guardians would be ineligible for the federal adoption subsidy, but if New York made application for permission to use federal money to pay for subsidized guardianship; the permanency outcome would be the same. This bill, like concurrent kinship adoption, permits parents to maintain visitation with children.

S1970/A3328 (Grandparent Resource Centers) would establish centers in each of the 59 local Area Agencies on Aging (AAAs). These centers would help link grandparents with relevant service delivery systems in the local community. They would be modeled on New York City's successful Grandparent Resource Center, part of the Department for the Aging. These resource centers could offer a hotline for information and referral, technical assistance and training for support groups, publications, educational seminars, and conferences.

S1621/A2795 (great-grandparents) and **S1531/A603 (step-grandparents)** would add great-grandparents and step-grandparents (in addition to grandparents) as persons authorized by Domestic Relations Law § 72 to petition either the supreme courts or family courts for visitation with children. Both Bills deal with the reality of our fragmented families. In the past, these Bills have passed one of the

houses. However, no movement on these two Bills may be possible until the Supreme Court of the United States renders its decision on grandparent visitation sometime this June.

A2542 would extend the list of persons who can seek visitation to include any relative within the third degree of consanguinity. Like grandparent visitation, the constitutionality of this measure will be affected by the pending U.S. Supreme Court case.

S4058/A1888 would allow grandparents who have the written permission of their grandchildren's parents or persons having legal custody to participate in school parent associations or parent-teacher associations in New York City.

S4887/A5038 would require that authorized adoption agencies provide to the court a signed statement from the adoptive parents, acknowledging that the natural grandparents could retain visitation rights after the adoption of their grandchildren.

S3394 would create a commission to study the need for an increase in compensation for law guardians and assigned counsels. Increased compensation is backed by Chief Judge Judith Kaye who made it part of her recommendations to the Committee to Promote Public Trust and Confidence in the Legal System. Oftentimes, grandparents feel that their role as caregivers is not understood. For law guardians and assigned counsels in family courts, the compensation increase would strengthen their ability to adequately represent families.

A120/S255 would raise the maximum age of male persons in need of supervision to 18. Family courts would have jurisdiction to supervise both males and females until they reached this age. Boys, between 16 and 18, who were runaways or difficult to control, would now come under the jurisdiction of family courts, and caregivers would have court assistance in controlling them.

A10429, the "Grandparents Guardianship Act," would solve numerous problems that grandparent caregivers confront in family courts, the foster care system and public assistance. The Bill would create a specific legal status, called grandparent guardianship, apart from legal custody or guardianship, with safeguards against unwarranted reunification and loss of visitation (by defining the period of time in a grandparents' care that warrants a presumption that it is in a child's best interest to remain in their care). Also provided are a stipend, equal to 75% of the foster care rate, for grandparent guardians, and assigned counsel to grandparent guardians in legal custody, guardianship, adoption, and visitation proceedings. When child welfare personnel approach grandparents to take over the care and custody of children, this Bill requires written acknowledgment from grandparents that they do not want to seek to become kinship foster parents. This acknowledgement would insure that caregivers had the chance to become kinship foster parents.[59] The Bill also adds provisions for the creation of grandparent resource centers in each county office for the aging.

This bill combines provisions from the most recent legislation around the country with other comprehensive solutions to many of the legal problems grandparent caregivers are facing. Based on the principle that just as parents are the natural guardians of their children, so too are grandparents their natural substitute guardians, the Bill affirms that grandparents are doing the job that the state would have to do, but for their sacrifice. While there are still other issues, like respite[60] and child care, the proposed Grandparent Guardianship Act would offer great relief to overburdened elderly caregivers and reflects many of the solutions recommended by the Grandparent Caregiver Law Center.

V. Resources for Caregiving Grandparents

Assistance for grandparent caregivers includes support groups, referral services, and newsletters. The following is a short review of some of the programs now available in New York State.

- *The State Office for the Aging (SOFA)* offers technical assistance to county area offices on aging in setting up grandparent support groups and also publishes a statewide newsletter, called "Kincare Connection."
- *Cornell Cooperative Extensions*, *Catholic Charities*, the *Jewish Board of Family and Children's Services*, and the *Federation of Protestant Welfare Agencies* all offer assistance.
- Grandparent organizations, like *Grandparents Reaching Out* on Long Island and *Miracle Makers* in Brooklyn, provide both support groups, some respite services, and legal referrals.
- The *New York City Department for the Aging (DFTA)* has a very successful Grandparent Resource Center. The Center helps to set up support groups, publishes reference materials, including a resource guide, and provides a helpline.

- The *Brooklyn Grandparents Coalition* publishes its own newsletter (many organizations are doing this) and has an extensive array of activities and services for grandparents.
- *Family Services of Westchester* created a county reference guide that other counties now use as a template for their own guides.
- *The Brookdale Foundation* offers limited financial support for agencies interested in developing programs for caregiving grandparents.

VI. About the Grandparent Caregiver Law Center

The Grandparent Caregiver Law Center (GCLC) of the Brookdale Center on Aging of Hunter College, CUNY, is a not-for-profit program, funded with support from the Interest on Lawyer Account (IOLA) Fund of New York State and private foundations. The program is unique in the United States because it combines research and policy analysis with hands-on assistance to grandparent caregivers and to professionals who help address the grandparents' real-world problems. Although there are growing numbers of support groups for grandparents, often initiated by social service agencies, which focus on grandparent caregivers, no other existing organization has this particular combination of legal and practical problem-solving expertise.

The GCLC, a member of the multi-agency Kincare Taskforce of New York City, is the major source for legal information on issues related to grandparents in New York State. The Center offers assistance to non-attorney advocates, public schools, religious institutions, the aging services network, the child welfare system, legislators and other government officials, legal professionals, and individual grandparents concerning their rights and authority in the absence of the children's parents. The Center has contributed to successful outcomes of family disputes for countless numbers of grandparents, improving the well-being and future prospects for the children involved.

The Center publishes a series of booklets for grandparents in English and Spanish, and has written professional articles and county reference guides for grandparents in New York State. The materials are subject to ongoing legal and editorial review to insure that they remain up to date. In addition, a monograph written by the current director, Gerard Wallace, "*The Dilemma of Kinship Care: Grandparents as Guardians, Custodians and Caregivers—Options for Reform*," has been published by the Government Law Center at Albany Law School. Most recently the Center's Director submitted an *amicus curiae* brief to the Supreme Court of the United States in support of the rights of grandparents to request visitation with their grandchildren. The brief was featured in the monthly "Supreme Court Debates," published by the Congressional Digest.

Endnotes

1. While grandparents naturally have a special relationship with their grandchildren, many others, both relatives and non-relatives, are providing care. In this Article, reference is usually made to grandparent caregivers; however, the legal issues, other than visitation, are fairly similar for grandparents and other non-parental caregivers.
2. *Santosky v. Kramer*, 455 U.S. 745 (1982), *on remand,* 89 A.D.2d 738, 453 N.Y.S.2d 942 (3d Dep't 1982).
3. Renee S. Woodworth, *You Are Not Alone . . . You Are One in a Million*, 75 Child Welfare League of America Journal of Policy, Practice, and Program 619, 631 (Sept./Oct. 1996).
4. While guardianship and legal custody offer legal recognition, they too present uncertainties about decision-making authority. For example, legal custody implies the ability to make medical decisions, but there is no statutory basis for this authority. *See* N.Y. Public Health Law § 2504. Also, both legal custody and guardianship are temporary and could be barriers to school admission and relocation of residence. *See In re Linton*, 12/18/98 NYLJ 38 (col. 3). In foster care, legal custody remains with the state which must authorize educational and medical decisions.
5. This phrase is used in both the Education Law and the Public Health Law. The Public Health Law omits step-parents. Both definitions omit legal custodians and full-time informal caregivers of children whose parents are present in the community. N. Y. Educ. Law § 3212 and N.Y. Public Health Law § 2164.
6. N.Y. Pub. Health Law § 442.
7. N.Y. Ben. Ord. Law § 2.
8. N.Y. Art & Cult. Aff. Law §§ 35.03(2)(c), 35.05.
9. N.Y. Civ. Prac. L. & R. § 309(a).
10. N.Y. Ins. Law § 4305(c)(1); *See also* §§ 3216 (a)(3), 4235(f)(1), 4304(d)(1).
11. N.Y. Educ. Law § 3212(2). *See also* N.Y. Educ. Law § 4111 (Indian child truant returned to person in parental relation; schooling record, issuance, person in parental relation); N.Y. Educ. Law § 3222 (school records); N.Y. Educ. Law § 4402 (Committee on Special Education can deal with person in parental relationship); N.Y. Educ. Law § 4107 (person in parental relation to an Indian child can be held criminally responsible for attendance), N.Y. Educ. Law § 4106 (duties of person in parental relation to Indian children). *See also,* Individual Education Plans (IEPs), 34 U.S.C. § 300.20(a). *But,* parents and guardians retain exclusive powers for some school situations. Only parents and guardians can consent to school drug testing, N.Y. Educ. Law § 912-a; receive tuition reimbursement, N.Y. Educ. Law § 562; consent for employment certificate, N.Y. Educ. Law § 3217, N.Y Educ. Law § 2119 and farm work permits, N.Y Educ. Law § 3226; and in attendance conflicts with religion of parent or guardian, can be absent from education, N.Y Educ. Law § 3204.

12. N.Y. Public Health Law § 2164.

13. The arrangements that parents and grandparents have created without state involvement exist apart from lawful custody as it is defined in the Domestic Relations Law. However, they are a form of "custody" and in practice family courts recognize the person who has informal custody and provide notice to "a party having care, custody, and control," N.Y. Dom. Law § 71 and "any person who has physical custody," N.Y. Dom. Rel. Law § 75-e. *But see* N.Y. Civ. Prac. L. & R. § 1201. Regarding the authority of informal caregivers, statutes offer only limited powers. Statutes permit the delegation of parental authority for transfers of "care and custody" to the local social service department, N.Y. Soc. Serv. Law § 384-a(1), and for certain recreational activities, N.Y. Envtl. Conser. Law §§ 1-0920, 1-0715.

14. N.Y. Gen. Oblig. Law § 5-1502I, "Personal Relationships and Affairs" provides that the agent may be appointed: "to do any other act or acts, which the principal can do through an agency, for the welfare of the spouse, children, or dependents of the principal or for the preservation and maintenance of the other personal relationships of the principal to parents, relatives, friends and organizations." While it can be argued that this authority includes education and medical, in practice it has been used exclusively for financial needs. This subdivision specifically refers to real and personal property. N.Y. Gen. Oblig. Law § 5-1502I(14).

15. *See, e.g.*, D.C. Code Ann. § 16-4901.

16. UPC § 5-102.

17. Free tuition requires residence in the school district. N.Y. Educ. Law § 3202.

18. 34 Educ. Dept. Rep. 551, 603; 35 Educ. Dept. Rep. 61; *In re Moncrieffe*, 121 Misc. 2d 395 (Surr. Ct., Nassau Co. 1983).

19. In 1996, the Government Law Center (GLC) at Albany Law School mailed surveys to family courts, surrogate's courts, and law guardians asking what were the practical distinctions between legal custody and guardianship of the person. The answers were often contradictory. Some respondents considered the two interchangeable or stated that the differences were obscure. *See* responses to the GLC questionnaire concerning the practical distinction between legal custody and guardianship, published in Appendix A of the report by Gerard Wallace and Megan Miner, "The Dilemma of Kinship Care: Grandparents as Guardians, Custodians, and Caregivers—Options for Reform," Albany Law School Government Law Center, April 1998). *See also*, Sandra B. Edlitz, "Guardianship and Custody: Is There a Distinction?," New York Law Journal (March 21, 2000).

20. *See, e.g.*, N.Y. Al. Bev. Law § 65-c (2)(b) (Only a parent or guardian can give alcoholic beverages to a person under the age of 21); N.Y. Al. Bev. Law § 99-f (Only a parent(s) or lawful guardian(s) can petition the liquor authority to obtain a special permit allowing any person under the age of 18 to perform as an entertainer in an establishment licensed to sell alcoholic beverages); N.Y. Civ. R. Law § 509 (Only a parent or guardian can provide written consent for the use of a minor's portrait or picture for advertising purposes); N.Y. Dom. Rel. Law § 15 (Only a parent or guardian may consent to the marriage of a minor, unless to the minor's knowledge neither parent nor guardian is living, then the written consent of the "person under whose care or government the minor or minors may be before a license shall be issued"); N.Y. Ment. Hyg. Law § 9.90 (Only a parent or guardian or the mental hygiene legal service may consent to the transfer of a mentally ill minor); N.Y. Pub. Health Law § 1399-ff (only a parent or guardian can make a complaint regarding sale of tobacco products to their child); N.Y. Soc. Serv. Law § 384 (1)(d) (Adoption); N.Y. Veh. & Tr. Law § 2410 (Only a parent or guardian can allow an unattended child under 16 to operate an ATV upon their property); N.Y. Ins. Law § 321(c) (Only a parent or guardian can consent to release of medical information.); N.Y. Pub. Health Law § 2442 (Only a parent or guardian or a "person legally empowered to act on behalf of the human subject" may consent in writing to human research upon a minor); N.Y. Pub. Health Law § 2961 (18) and § 2967 (Only a parent [who has custody of the minor] or a legal guardian can consent to orders not to resuscitate). N.Y. Gen. Oblg. Law § 3-112 (Only a parent, guardian, local social services department, or foster parent is liable for property damages caused by a minor). In addition, the authority of non-parent legal custodians to make medical decisions is not routinely included in custody orders and no statutory authority permits them to do so.

21. *See, e.g.,* N.Y. Civ. Prac. L. & R. § 1201 (an infant can appear by representation in court only by his parent(s) guardian, or legal custodian).

22. *See, e.g.,* N. Y. Dom. Rel. Law § 15(2) (Parents or guardians can consent to marriage); N.Y. Dom. Rel. Law § 15 ("[I]f there is no parent or guardian of the minor or minors living to their knowledge, then the town or city clerk shall require the written consent to the marriage of the person under whose care or government the minor or minors may be before a license shall be issued."); N.Y. Art & Cult. Affr. Law § 35.05 (Only a "parent or parents having custody, or other person having custody of the infant" may acquiesce to court approval of a contractual obligation binding an infant, or to obtain or consent to the employment or exhibition of such minor as a model); N.Y. Civ. Prac. L. & R. § 309(a) (A parent or guardian or "any other person with whom he reside" may be the recipient of personal service upon an infant); N.Y. Educ. Law § 3212 (Only a person in parental relation to a child can take charge of a child's education). *See also* N.Y. Pub Health Law § 2164 (a similar definition of a person in parental relation to a child provides that such a person can consent to immunization).

23. N.Y. Surr. Ct. Proc. Act § 1726.

24. U.S. Pub. Law 105-89, enacted in November of 1997, lessened efforts to reunify children with parents convicted of certain felonies, mandated criminal record checks of all foster and adoptive parents and any one else who is residing in their homes, and compelled states to initiate termination of parental rights proceedings whenever a child was in the care and custody of the state for at least 15 of the past 22 months.

25. *See, e.g.*, Cal. Welf. & Inst. Code §§ 11360-11370.

26. Mo. Rev. Stat. § 208.029.

27. There are two bills that could provide for subsidies before the New York Legislature. *See* this article, Part V. Legislative Initiatives in New York State. The only mechanism in New York for softening the family disunity caused by relative adoption is N.Y. Soc. Serv. Law 383-c, which permits surrendering parents to condition their surrender on the agreement of the adoptive (foster) parents for continued contact between the natural parent(s) and the child(ren). Such agreements, unlike private placement adoption agreements, are legally enforceable.

28. *Bennett v. Jeffreys*, 40 N.Y.2d 543 (1976).

29. *Id.* at 550.

30. Carol A. Creaky, Continuity of Residence as Factor in Contest Between Parent and Nonparent for Custody of Child Who Has Been with Nonparent—Modern Status, 15 A.L.R. 5th 692, citing *Bannister v. Bannister,* 81 App. Div. 2d 91 (1981 2d Dep't). Courts will often couple the time period with the fact that the

child has a psychological bond with the third party or would be harmed by removal, but the extended disruption is the foundation for a finding of extraordinary circumstances.

31. Indigent grandparent caregivers with informal custody also are not assured of assigned counsel. Family courts usually do not provide counsel unless indigent grandparents have court orders. *See,* Family Ct. Act § 262. Courts usually will not find a prolonged disruption of custody when the parent remains in the grandparent's home, despite the assumption of parental duties by the grandparent.
32. *See,* Indiana H.B. 1445 (1999) and Ky. Rev. Stat. Ann. § 403.270.
33. *In re Linton*, 12/18/98, NYLJ, 38, (col.3).
34. Fla. Stat. § 63.0425.
35. N.Y. Dom. Rel. Law § 72.
36. N.Y. Soc. Serv. Law § 349(B)(1).
37. N.Y. Soc. Serv. Law § 349(C).
38. Code of Rules and Regulations of the State of New York. Ch. II, Regulations of the Dept. of Social Services, Part 387, Food Stamps Program, § 387.1(w).
39. For information, contact the Children's Defense League, 212-697-2323.
40. I.R.S. Schedule EIC (Form 1040A) instruction booklet, at 2, 42. Note the expansive definition of "foster child."
41. In deciding who has been equitably adopted, the Social Security Administration will include a child who is adopted by a surviving spouse after the death of a worker, and will accept any child deemed to be equitably adopted under state law. U.S.C. § 216. In New York, equitable adoption is possible in limited situations where the natural and adoptive parent(s) had reached an agreement before the death of the adoptive parents. *Rodriguez v. Morris*, 136 Misc. 2d 103 (Surr. Ct., Suffolk Co. 1987).
42. Naomi Karp, *Legal Problems of Grandparents and Other Kinship Caregivers*, GENERATIONS, Journal of the American Society on Aging, Vol. XX, No. 1 (Spring, 1996).
43. Boston Aging Concerns Young & Old United, Inc. (BAC-YOU) and the Women's Institute for Housing and Economic Development developed the project using an old YMCA building.
44. For more information, contact the Department for the Aging, Senior Housing, at 212-442-0917.
45. *Troxel v. Granville*, 530 U.S. __ (2000). Supreme Court Docket # 99-138.
46. *In re Smith,* 137 Wash. 2d 1 (1998).
47. Former Revised Code of Washington § 26.10.160(3).
48. Approximately one in ten grandparents have been primary caregivers for children. After the children are returned to their parents, those parents sometimes cease contact with the grandparents. Grandparents may then be forced to seek visitation in the courts to maintain contact with the grandchildren for whom they previously cared.
49. Statutes in Hawaii, Massachusetts, Virginia, and Connecticut have laws permitting judges to grant visitation or custody to persons unrelated to children. For example, see Conn. Gen. Stat. Ann. § 46b-59. Courts in Wisconsin, Pennsylvania, and Massachusetts have granted some visitation to non-natural parents.
50. N.Y. Dom. Rel. Law § 72 permits grandparents to seek visitation whenever "equity" would see fit. Courts have interpreted "equity" to give standing to grandparents who have had a relationship with their grandchildren or been thwarted by the parents from having such a relationship, despite the opposition of both natural parents.
51. Stephen Elmo Averett, *Grandparent Visitation Right Statutes*, BYU J. Pub. L. (1999).
52. *Citing Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); and *Prince. v. Massachusetts*, 321 U.S. 158 (1944).
53. For example, parental autonomy and religious freedom, *Wisconsin v. Yoder*, 406 U.S. 204 (1972).
54. Violated U.S. Constitution, *Brooks v. Parkerson*, 265 Ga. 189 (1995); violated state constitutions, *Hawk v. Hawk*, 855 S.W.2d 573 (Tenn.1993) and *Beagle v. Beagle*, 678 So.2d 1271 (Fla.1996).
55. Over a dozen states have found statutes constitutional. *See, e.g., King v. King*, 828 S.W.2d 630(Ky. 1992) (cert. denied). *See also,* Kathryn Katz, *Mandated Visitation with Grandparents in Intact Families: The Need for Reform*, Aging Matters, Government Law Center at Albany Law School (Winter, 1998).
56. The Supreme Court cited the grandparents' attempt to increase visitation as an aggravating circumstance which combined with the trial judge's failure to apply the traditional rebuttable presumption favoring parental decisions resulted in the visitation order being unconstitutional.
57. *Emmanuel S. v. Joseph E.,* 78 N.Y.2d 178 (1991*). See also*, Practice Commentaries by Alan D. Scheinkman, N.Y. Dom. Rel. Law § 72 (McKinney, 1999).
58. The U.S. Department of Health and Human Services (HHS) has a five-year waiver program for funds available through Title IV-E of the Social Security Act. Eight states and the District of Columbia have received waivers.
59. Many county child welfare agencies, despite the preference for kinship foster care in N.Y. Fam. Ct. Act § 1017(1) and N.Y. Soc. Serv. Law Law § 384-a(1-a), attempt to avoid offering kinship foster to grandparents. *See also,* State of New York Office of the State Comptroller, Division of Management Audit, Department of Social Services Kinship Foster Care Report, 95-106 (Nov. 22, 1996) and AFSA.
60. The National Family Caregiver Support Program, part of the current proposed renewal of the Older Americans Act, provides funds for caregivers' respite. A percentage of this is earmarked for elderly relatives who are raising children. U.S. Sen. 707; H.R. 1341.

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