Grandparent Custody Rights: Best Interest of the Child or Interference with a Parent's Preprogative?

by Margaret Klaw and Mary A. Scherf

Spring 2000, Vol. 63, No. 1

The Supreme Court of the United States is diving headfirst into the thorny area of grandparents' custody rights this session in *Troxel v. Granville*, 137 Wash. 2d 1, 969 P.2nd 21 (1998) (cert. granted 1999 U.S. Lexis 474). This is a timely development. Cases involving the custody rights of parties other than a child's biological parents are burgeoning as the family rapidly changes, outdistancing the efforts of legislatures and the courts to keep pace. The traditional nuclear family mother, father and their biological children living together is now only one of many family structures. Children live in blended families, with same sex parents, single parents and, increasingly, outside the care of either parent.

In many states, including Pennsylvania, grandparents have been given a special statutory status to seek partial custody or visitation over the objection of the parent. While it is not the special status of grandparents, but any third party's ability to override a parent's choice that is now under constitutional review, it should come as no surprise that grandparents are at the heart of the debate. When the nuclear family falters, we often look first to grandparents as the logical refuge for children. According to 1996 census data, in more than 1.4 million American families, neither parent is present and children are being cared for solely by their grandparents.

Courts and legislatures have approached the status of grandparents and other third parties on a patchwork basis. Pennsylvania's domestic relations statutes affecting grandparent visitation have received fairly regular legislative attention in order to define "grandparents' rights," beginning in 1981 with efforts to preserve contact between grandparents and grandchildren after the parents' relationship ends and, most recently in 1996, by expanding those circumstances in which grandparents can seek primary physical custody of their grandchildren. (See 23 Pa.C.S.A. §§5311-5313).

All of this policy-making arises against a backdrop where the best interest of the child is the time-honored legal standard against which all competing claims have been measured. However, if a "best interest" analysis were to be applied to any third-party petition on a case-by-case basis, a child's individual circumstances and cultural roots could result in any number of persons (such as grandparents, stepparents, significant others, extended family, godparents, family friends) asserting claims to and obtaining partial custody or visitation rights.

What limits to such broad-based assaults on the wishes of the biological parent(s), if any, make sense? What do children actually need? Is ongoing contact with grandparents or other nurturing non-parents the child's right, and worth protecting despite the impact of protracted custody litigation, or is it an impermissible interference with a parent's prerogative? Who makes up the "family" we seek to protect? And who will be the best protector of a child's rights the parent, a third party, the court or an independent advocate? These are questions Troxel may begin to answer on a national basis.

Troxel Case

Troxel v. Granville involves a challenge to Washington state statutes that permitted grandparents and other third parties to petition for custody rights. The case involved Natalie and Isabelle Troxel, the daughters of Brad Troxel and Tommie Winn (nee Granville). Brad and Tommie, who were never married, separated in 1991 and Brad moved in with his parents. Natalie and Isabelle spent weekends with their father at the elder Troxels' home until May 1993, when Brad committed suicide.

Although initially the girls continued to visit their grandparents regularly, Tommie eventually limited the contact to one visit per month. In response, the Troxels filed a petition for visitation rights and subsequently were awarded visitation with Natalie and Isabelle one weekend per month, one week in the summer, and four hours on each grandparent's birthday.

Tommie appealed the decision. During the pendency of the appeal, she married Kelly Winn, who adopted Natalie and Isabelle. The Washington Court of Appeals then reversed the visitation order and dismissed the Troxels' petition, holding that they lacked standing to seek visitation since no custody action was pending at the time they filed their petition.

The Washington Supreme Court granted review of *Troxel* and consolidated it with two other cases involving challenges to grandparents' and other third parties' standing to petition the court for visitation and to the awarding of visitation itself. With respect to the Troxels' case, the court found that, while the grandparents did have standing under the applicable statutes, those statutes were unconstitutional as they impermissibly interfered with parents' constitutionally protected interests.

The court's analysis acknowledged that the rights of parents to raise their children without state interference is a fundamental liberty interest protected by the Fourteenth Amendment and a fundamental right derived from the privacy rights inherent in the Constitution. As fundamental rights are involved, state interference can be justified only by a compelling interest and the interference must be narrowly tailored to meet only the compelling state interest involved.

The court then discussed the two sources of the state's power to intrude on family autonomy: the police power to protect citizens from threats to their health or safety, and the parens patriae power that allows the state to act on behalf of a child where the child has been harmed or is subject to threat from harm. However, the court determined that the Constitution does not permit the state to interfere with child-rearing decisions in the absence of actual harm or threat of harm to the child.

The Troxels and other petitioners argued that a judicial determination that visitation is in the best interest of the child is a sufficiently compelling justification to override the parent's opposition, despite no showing of harm or threatened harm to the child. The court soundly rejected this argument, stating:

"Short of preventing harm to the child, the standard of best interest of the child is sufficient to serve as a compelling state interest overruling a parent's fundamental rights. State intervention to better a child's quality of life through third-party visitation is not justified where the child's circumstances are otherwise satisfactory. To suggest otherwise would be the logical equivalent to asserting that the state has the authority to break up stable families and redistribute its infant population to provide each child with the 'best family.' It is not within the province of the state to make significant decisions concerning the custody of children merely because it could make a 'better' decision." Id. at 29.

The court did not acknowledge that there are circumstances where arbitrarily depriving a child of a significant relationship could cause severe psychological harm and implied that such circumstances could justify state intervention to override the parent's wishes. However, since the statute required only a "best interest" determination, rather than a threshold showing of finding of harm to the child if the significant relationship were cut off, it failed to meet constitutional requirements.

One member of the Washington Supreme Court vigorously dissented with respect to this constitutional analysis. Justice Philip Talmadge accused the majority of ignoring the "realities and complexities of modern family life" by giving almost absolute and undue deference to the rights of biological parents. He noted that many children form close attachments to adults other than their biological parents and that stepparents, foster parents, grandparents and others often become psychological parents to children whose nuclear families are not intact.

Justice Talmadge also took issue with the majority's assertion that the state's power cannot be exercised to assure the best interest of a child in the absence of threat of harm. Rather, he said, the court must engage in a balancing test, weighing the extent of the infringement on parental autonomy against the state's responsibility to promote the physical and mental health of the child. He found that the ordering of grandparent visitation, so long as it is found to be in the child's best interest, is permissible when this balancing test is applied, as it constitutes only a minor infringement on parental rights.

Effect on Pennsylvania Law
While the majority and dissenting opinions of the Washington Supreme Court give us some idea of the arguments that are being considered by the Supreme Court of the United States, it is less clear what effect the high court's decision could have on Pennsylvania's grandparent visitation statutes. Our statutes are far narrower in the scope of potential petitioners, in the configuration of families where such petitions may be filed, and in the standard to be applied by the court when they are filed than the ones at issue in Troxel.

Potential Petitioners
The Washington statutes permitted any person to petition the court for visitation rights at any time. Pennsylvania's statutory scheme is limited to grandparents and great-grandparents. Is there a legitimate reason why grandparents should be treated differently from other close and loving relatives whose contact with a child ends in the event of divorce? Why should, for example, an aunt and uncle who had daily contact with a niece since birth, not be permitted to ask the court to continue that relationship?

The answer may lie less with a legal distinction than with the special cultural significance we as a society place on the grandchild-grandparent relationship, with its emphasis on the continuity of generations and the passing down of family heritage and traditions. Do those cultural values make the relationship any more important, from the child's perspective, than a relationship with an aunt or uncle? What about the completely unrelated adult who has a close and special relationship with a child? Is blood lineage significant? Is marriage significant?

Family Configuration
Our statutes allow grandparents and great-grandparents to petition for reasonable partial custody or visitation rights of grandchildren or great-grandchildren in only the following three instances: when a parent (the petitioner's child) has died; when the parents are divorced or have been separated for more than six months; or where the grandchild has resided with the grandparents for a period of at least twelve months and was then removed from their home by the parents.

In some measure, we are permitting grandparents to "stand in" for the relationship that their deceased, divorced or separated child had with his or her children; the rights awarded are essentially derivitate in nature. Visitation rights under the Washington statute were not. A petition for visitation by a grandparent or other third party could be filed in Washington against an intact family; that is, one where both parents agree that their child should not have contact with the petitioner.

From the perspective of the parent against whom such a petition is filed, it may not matter whether she is defending against a claim by her ex-husband's parents or by her current husband's parents; however, looking at the emphasis on the rights of biological parents set forth by the Washington Supreme Court, and considering current cultural norms, most people would probably agree that a challenge to an intact family is a qualitatively different and graver type of interference with child-rearing from that in a separated family.

Again, we must ask does it make a difference to the child? Does the child stand to suffer less by having a relationship with a grandparent end if the child is in an intact family? Most importantly, should this determination be made in advance, in all cases, as in Pennsylvania where the grandparents would have no standing in such an instance, or is it better to leave this decision to the court on a case-by-case basis?

Or perhaps, as a practical matter, is the potential for expensive and harassing litigation between disgruntled family members so great that we must close the courthouse doors to whole categories of petitioners despite the fact that some legitimate claims may not be heard?

Awarding Visitation
The Supreme Court of the United States will undoubtedly consider the standard for awarding visitation once standing is conferred. Our statute probably would not survive under the Washington Supreme Court's analysis. We have no requirement of a threshold showing of harm to the child if the visitation is not ordered; we, like the state of Washington, say the court must consider the best interest of the child.

However, our legislature placed an important qualifier in our law that is not in the Washington statute: partial custody or visitation can only be ordered for a grandparent if the court finds that it would not interfere with the parent-child relationship. While surely this is a difficult standard to apply if a parent is opposing contact between his child and the petitioning grandparent, doesn't an order allowing contact over the parent's objection by definition interfere with the parent-child relationship? it seems to resonate with the balancing test suggested by Justice Talmadge in his dissent, i.e., a minor infringement on a parent's child-rearing decision might be permissible but a major infringement may not be.

We can expect that the Supreme Court will address all three of these issues in *Troxel*, thus enabling lawyers, advocates and policy-makers to examine our own statutes in light of their constitutional analysis.

The Center for Children's Policy Practice & Research Amicus Brief in *Troxel v. Granville*
by Barbara Bennett Woodhouse

Despite their importance to ordinary citizens, custody and visitation cases rarely reach the Supreme Court of the United States. When the court grants *certiorari* in a family law case, it is treading on unfamiliar ground. "Friend of the Court" briefs can play an important role in helping the justices situate the issues in a broader family law context. Not surprisingly, *Troxel v. Granville* generated a flurry of amicus briefs. Among them was a brief submitted by the Center for Children's Policy Practice & Research at the University of Pennsylvania (CCPPR), a newly formed project of the Schools of Law, Medicine and Social Work.

The mission of CCPPR at Penn is to mobilize the resources of a nationally known university around issues of importance to children. CCPPR is especially concerned with children at risk of entering the child welfare system or already in the system.

When CCPPR learned that the Supreme Court had granted certiorari to consider the constitutionality of a grandparent visitation statute, we assembled an interdisciplinary team to brief the Supreme Court on the potential impact of its ruling on children in formal or informal foster care.

The team included, in addition to myself, third-year Penn law student Sacha Coupet (who holds a Ph.D. in psychology) and third-year Penn law student Keren Rebin, visiting from Harvard Law School. Dr. Annie Steinberg from the medical school contributed her expertise in child and adolescent psychiatry, and Drs. Richard Gelles and Carol Williams from the School of Social Work provided input on family sociology and the child welfare system, assisted by social work student Alyssa Burrell Cowan.

Our task was to explore any unforeseen consequences of the decision in *Troxel* for 600,000 children living in foster care and 3,500,000 children living in grandparent-headed households, highlighting the issues of children's relationships with extended family from a sociological and psychological, as well as a legal, standpoint.

The CCPPR brief argued that a statute granting standing to "any person at any time" to seek visitation is unconstitutionally broad. But the brief also points to current research on the role of grandparents and extended families in providing a safety net for families in crisis. It stresses the diversity of American family forms and the need to examine each child's situation in context. CCPPR's brief urges the court to avoid sharpening the battle of rights over children by making broad pronouncements about parents' rights that might adversely impact the functioning of extended family relationships or deprive kinship caregivers of any legal protection.

The justices had obviously done their homework and peppered the advocates with highly specific questions. Their hypotheticals probed not only the specific facts of the case but its ramifications in other contexts. How would a decision that parents have the right to block a child's contact with extended family affect a grandparent with whom a child had lived since birth? How would a decision requiring a showing of "harm" as a predicate to non-parent visitation be implemented by a real world judge in a complex case?

Whatever the justices decide, they will have had the benefit not only of the parties' arguments, focusing on their own case and controversy, but of a wider range of amicus curiae briefs analyzing the issues from every perspective.

(Barbara Bennett Woodhouse is a professor of law and co-director of the Center for Children's Policy, Practice & Research at the University of Pennsylvania.)