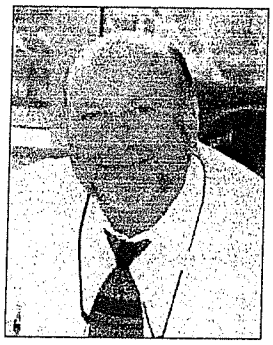
The View from a New York Private Practitioner in the Trenches: Rights of Grandparents to Visitation and Custody of Their Grandchildren

By Jerome A. Wisselman



Prior to the enactment in 1966 of Domestic Relations Law § 72, which for the first time permitted grandparents to seek visitation rights with their grandchildren, grandparental rights was a relatively obscure issue. Grandparents lacked standing to seek visitation at common law and, because there was no statutory basis upon which they could rely, they were deprived of the right to make an application for visitation.[1] Slowly given strength and relevance due to evolving social changes, grandparental rights has emerged over the last few decades as an important and visible area of law. The current matter before the U.S. Supreme Court, *Troxel v. Granville*,[2] is reflective of this emergence.

Today, grandparents are commonly involved with caring for their grandchildren. The death of a parent, divorce, drug or alcohol addiction of a parent, and the emergence of the two-income family are the most common underlying reasons for expanded grandparental involvement. Often, at the initial stages of this involvement, where there may be reasonable normalcy in the family structure, the grandparents are welcome relief-givers, who selflessly take on responsibilities they never dreamed of having at their stage of life. As time goes on, however, conflicts between grandparents and parents often develop. The subsequent breakdown in communication then leaves the grandchildren in the midst of the battlefield between their warring parents and grandparents, an unintended but often very real consequence of these disputes. Grandparents and their own children may become embroiled in litigation, ostensibly with a view towards insuring the best interests of the grandchildren, though the legal proceedings may exacerbate the already difficult situation between the family members. Depending upon the situation, grandparents may wish to petition the Court for visitation and, where warranted, custody of their grandchildren.

Visitation

In 1966, the legislature enacted § 72 of the Domestic Relations Law[3] which for the first time granted grandparents the derivative right to seek visitation rights, but only where their child had died. The grandparents were, in effect, given the right to assume the role of their deceased child, whose death triggered their rights to petition for visitation.

In 1975, Domestic Relations Law § 72 was amended in two ways. First, grandparents on either side were now given standing to bring a visitation proceeding where *either* one of the child's parents had died. Second, grandparents were given standing "where circumstances show that conditions exist which equity would see fit to intervene." The amended statute rested on the principle that "visits with a grandparent are often a precious part of a child's experience and there are benefits which devolve upon the grandchild *** which he cannot derive from any other relationship."[4]

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Subsequent to the 1975 amendment, it was commonly accepted that "equity would see fit to intervene" when there had been an abdication of parental responsibility, or where there had been a breakdown of the nuclear family.

The Court of Appeals, however, in *Emanuel S. v. Joseph E.*,[5] concluded that the grandparents' right to seek visitation was independent of the status of the parents, even when the nuclear family was intact. However, standing in such a situation is not automat-

ic (as it would be where one of the parents had died), but, rather, to be conferred by the Court in its discretion, after, and only after, examining all relevant circumstances. The Court provided the following considerations to be reviewed by the lower court: the nature and basis of the parent's objection to the visitation and the nature and extent of the grandparent–grandchild relationship, specifically whether there is a sufficient existing relationship with the grandchild, or in cases where that has been frustrated by the parents, a sufficient effort to establish one.[6] Then, only after the Court has determined that standing exists, will the next step, determining whether visitation is in the best interests of the child, be reached.

Thus, in all grandparental visitation matters, a two-step test is involved. One, to determine if there is standing, whether automatic or discretionary. Two, if standing exists, whether it is in the best interests of the child to have visitation with the grandparents.

While antagonism between the parties in and of itself will not be a bar to visitation,[7] where the antagonism is *extreme* and caused largely by the grandparent, it has been held that standing had not been achieved, and even if it were, visitation would not be in the children's best interests.[8]

Likewise, antagonism coupled with family dysfunction may also serve to deny visitation rights.[9] Where grandparents have been critical and demeaning and refused to accept responsibility for deterioration of the parties' relationship, the Court has denied standing.[10] Mere fights between a parent and the grandparents, however, without any untoward conduct on the part of the grandparents, was not found to interfere with the grandparents' standing to pursue visitation.[11]

When grandparents must resort to the Court to see the grandchildren, a family's complicated emotional entanglement is at the root of the struggle. But where parents cut off a longstanding relationship between the children and the grandparents, that is a bitter pill to swallow for the children, who most often love their grandparents and have had no part in the conflict. In fact, cessation of that relationship may be psychologically damaging to the children.

An Order of Custody May Be the Answer

In many situations, visitation is not a sufficient or appropriate remedy for the grandparent or the grandchild. This may particularly be so where the grandparent has been raising the grandchild or where the parents are unable to take care of their own children. Commonly in these matters the parents are addicted to drugs or alcohol, or unable to cope with everyday life struggles and drift in and out of their children's lives, while the grandparents provide the stability vital to the grandchildren's emotional and physical health. Then, when years have passed, after the grandchildren have become rooted in their daily lives in the grandparents' home and community, the parents suddenly appear at the doorstep to "reclaim" the children, regardless of how this would affect the children.

To remedy this, a grandparent may apply for an Order of Custody of the grandchildren. However, this is not an easy matter to achieve. Courts do not like to intrude into the natural custodial relationships between the parents and their children. When confronted with an application for custody by a grandparent or non-parent, the Courts apply rigorous requirements before issuing such an order.

As with visitation, the Court of Appeals has provided a two-step procedure concerning custody disputes between the grandparent and a parent.[12] The grandparent must show:

(1) Extraordinary circumstances exist to warrant proceeding to step (2).

(2) If such extraordinary circumstances exist, a hearing will be held to determine whether it is in the best interests of the children to be in the custody of the grandparents, or the parents.

If extraordinary circumstances are *not* shown to exist, the grandparents will not get to step two. If, however, such circumstances *are* shown to exist, then a hearing will be ordered, with a determination to be made "in the best interests of the children." It is important to remember that this test is not reached unless the threshold determination is first made, that extraordinary circumstances exist. The fact that a grandparent can do a "better job" of parenting is not relevant to step one, and it will not, alone, serve as a basis for a custody award to the grandparent.

"Extraordinary circumstances" include situations where it can be shown that the parent is unfit, and has been held by the Courts to include, but is not limited to:

(1) Persistent neglect and abuse of child;

(2) Abandonment or surrender of the child;

(3) Psychological disturbances requiring frequent hospitalizations;

(4) Persistent drug problems and admissions to drug or alcohol rehabilitation clinics;

(5) Incarceration;

(6) Other conduct showing substantial disengagement with the child.

Where it is shown extraordinary circumstances exist, and that is in the best interests of the child to be with the grandparent, then the custody should be given to the grandparent.

A history of domestic violence and drug use by a biological father has served as a basis for the Court finding extraordinary circumstances.[13] Likewise, a voluntary surrender of a child by the father, and subsequent relinquishment of the child, has served to constitute extraordinary circumstances.[14] A period of prolonged custody of a child in the child's grandmother's acquaintance, together with the psychological bonding which had taken place and the potential for emotional harm if custody were transferred to the mother, served as a basis for awarding custody to the acquaintance.[15] The existence of the mother's chronic schizoid personality coupled with a protracted separation of the mother from the child and the attachment of the child to the father's fiancee warranted finding of exceptional circumstances and granting of custody to the nonparent fiancee.[16] However, it was also found that the protracted separation of a child from his father, without being coupled with any evidence of psychological trauma to the child by being removed from an aunt's custody, was not an extraordinary circumstance where father sought custody immediately after the mother's death.[17]

It is often difficult to determine exactly what circumstances will qualify as "extraordinary." Each judge may have a different interpretation of this. And even if you have an idea of what a particular judge may use as a benchmark, slight differences in the facts of a particular situation may lead to different results.

As a general rule, if the grandparents feel resolved in their hearts that it will be in the best interests of the grandchildren to be raised by them, it is time to move forward and assess whether extraordinary circumstances exist. Often the intangibles, such as motivation and commitment to achieve a result, can help the grandparent over the threshold in establishing the elements required to gain custody. It is not uncommon for the parents to end up consenting to the grandparents having custody where the parent does not wish to, or cannot afford to, engage in litigation, or where other life concerns are a priority to the parent. In other words, if the grandparents set the process for custody in motion, they may succeed because they meet the required tests, or because of the energy of the process itself. Determination, tempered by discretion, and coupled with a reasonably sound basis in fact, may lead to successful results. Grandparents are cautioned, however, to take such a position *only* when they earnestly believe the grandchildren will suffer detriment if left in the hands of the parents.

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Public Involvement in Grandparental Issues Is Increasing

Great strides are being made to understand the nuances of, difficulties of, and needs of, grandparents involved with caring in one way or another for their grandchildren. Organized seminars and conferences in which these matters are being addressed are becoming regular occurrences. Legislators and other public officials are becoming more actively involved in learning how to help families deal with the legal, financial, and social issues which confront grandparents raising their grandchildren. However, further education is still necessary for those professionals involved with making decisions or having influence on these matters.

U.S. Supreme Court Decision in *Troxel v. Granville*

The U.S. Supreme Court has determined that the manner in which a broad-based Washington State statute, RCW 26.10.160(3) was appealed was unconstitutional. The statute provides as follows:

> Any person may petition the Court for visitation rights at any time including, but not limited to, custody proceedings. The Court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances.

Grandparents around the country were waiting with baited breath for the Court's ruling in *Troxel v. Granville*,[18] the facts of which follow:

Natalie Troxel, 10 years old, and Isabel Troxel, 8 years old, are the children of Brad Troxel and Tommie Granville, and the grandchildren of Jennifer and Gary Troxel. Brad and Tommie were never married. Their relationship ended and they separated in June, 1991, when Natalie was one and one-half years old and six months prior to Isabel's birth. After the separation, Brad lived with his parents and regularly brought Natalie and Isabel to the paternal grandparents' home for weekend visitation.

In May 1993, Brad committed suicide. Thereafter, the grandparents saw Natalie and Isabel regularly, though not overnight. In October 1993, the mother informed the grandparents that she did not want them to see the children more than one short visit per month. The grandparents didn't agree with this, and as a result were not permitted to see the grandchildren at all between October and December 1993.

In December 1993, the grandparents commenced an action pursuant to the Washington statute seeking Court-ordered visitation with their granddaughters. They were granted visitation by the lower court, as follows: one weekend per month from Saturday, 4:30 p.m. until Sunday, 6:00 p.m., one week during the summer, and visits on each of the grandparent's birthdays.

The mother appealed, objecting to overnight and summer visitation. During the appeal, the mother married Mr. Wynn, who later adopted Natalie and Isabel. The Court of Appeals of Washington, based on a standing argument made by the mother, revised and modified the visitation order in accordance with her request. The Washington Supreme Court then granted a review of the matter and, in December 1998, held that the underlying statute, RLW 26.10.160(3) was unconstitutional, thereby vacating the original visitation order in its entirety. The U.S. Supreme Court affirmed the decision of the Washington Supreme Court but only as to how statute was applied to the particular case before it. The Court did not rule on due process arguments of parents and grandparents and did not rule that grandparental visitation statutes were unconstitutional. This clearly supports the position of grandparents. However, the Court's language also recognized the presumptive right of birth parents to decide with whom their children should visit, subject, of course, to rebuttal in appropriate cases. The bottom line is that the New York grandparental visitation statute which is far more limited then the Washington statute, has been left intact. As long as it is applied judiciously by the courts, it should withstand any attacks upon its constitutionality.

A View from the Trenches

The following anecdotes are based upon actual cases handled by the writer.

In re B

Thomas was only three weeks old when his parents decided to give him to the paternal grandparents to raise. One year later, Thomas' father died. Thereafter, the mother visited with Thomas at his grandparent's home sporadically. For a period of over one year she did not see him at all. Then, when Thomas was six years old, the mother filed a writ of habeas corpus against the grandparents, requesting immediate custody of Thomas, in spite of the fact that Thomas had lived his entire life, except for 3 weeks, with his grandparents. On the first return date of the writ, the New York Family Court Judge immediately returned Thomas to the mother. Can you imagine what effects this had upon Thomas?

Our firm was thereafter retained by the grandparents. We learned that the grandparents had never sought an order of legal custody, and that the judge indicated that unless the mother could be proven to be unfit, the grandparents would not be successful in establishing extraordinary circumstances required to get to step two, the best interests issue. Shortly after being retained, we commenced trial, and we were able to show that the mother was virtually an absentee parent, that the grandparents were quite capable and cared for Thomas as well as anyone could. We also provided the Court with case law indicating that prolonged periods of non-custody of a child by a parent and acquiescence of custody in another during this same period can rise to the level of extraordinary circumstances, allowing the case to move to a best interests hearing. While, generally speaking, the fact that a grandparent or any non-parent can do a better job than the parent of raising a child is not in and of itself sufficient to deprive a parent of custody, once the extraordinary circumstances threshold is met, the grandparents (or other third party) are then on equal footing with the parent and a showing that it would be best for the child to be with the grandparents will be enough.

In *In re B*; the court ultimately found that extraordinary circumstances did exist and returned Thomas to the grandparents after trial. Unfortunately,

Thomas had suffered post traumatic stress disorder as a result of his removal to the mother on return of the writ, and after the trial, an order was issued denying her any contact with Thomas.

In re F

During the early years of the parents' marriage, the paternal grandparents subsidized the mother and father's educational and living expenses. The father became a doctor and the mother obtained a masters degree. Two children were born of the marriage. After their births, the paternal grandparents cared for the children on weekends, during summer vacations, and whenever else they were needed. When the children were ages six and four respectively, their father died. Shortly thereafter, the mother refused to allow visitation to the grandparents. Petitions for visitation were filed. The mother continued her strenuous objections to visitation throughout the proceedings which she vociferously defended. At trial, the mother failed to appear, claiming emotional distress, though her counsel did appear to conduct cross-examination. After trial, the Court ordered weekend visitation from Friday through Sunday, one weekend per month. The mother then remarried and moved to another state, and has yet to comply with the order, requiring ongoing enforcement proceedings.

This case reveals a common pattern when the grandparents' child dies and the surviving spouse wants to go on to a new life without reminders of the connections to the old life. Grandparents are often successful in these types of matters, but an assessment must be made as to the emotional cost to all involved, being mindful of the right of the children to have their grandparents in their lives and to have a connection to the father's side of the family.

In re T

Mrs. T had two children, a boy and a girl, currently ages 40 and 35 respectively. Mr. T, the stepfather of the children, and Mrs. T married 25 years ago, the second marriage for each of them. Mr. T treated the children in every way as his own, and trained the stepson to become an employee of his business. Later the son married, and he and his wife lived with Mr. and Mrs. T in an extension of their home built especially for them. The grandparents and the children spent time together regularly, even enjoying vacations together. After birth of a grandson, they saw each other daily and the grandparents watched their grandson on weekends and during other periods when requested to do so. Relations thereafter broke down, leading the paternal grandmother and her own son to have several verbal altercations, as a result of which the son and his wife moved away. The son also left the stepfather's business. Thereafter, the grandparents were refused all requests for visitation with their grandson.

At trial, both of Mrs. T's children testified that when they were younger, Mrs. T constantly provoked both of them verbally and physically, and that she continued up until the current time to be intrusive and controlling.

The Court carefully considered the testimony over a two-week trial, and found that the grandmother had in fact been overbearing and intrusive for most of her children's lives, and denied her standing to proceed to a best interests hearing.

This matter evidenced that while animosity between the parents and grandparents may not alone be sufficient to deny visitation, where the animosity is based upon extreme conduct by the grandparent, standing will be denied.

While the statute provides a procedural vehicle for obtaining visitation,[19] (*LoPresti v. LoPresti*) there is no guarantee the visitation will be ordered, even if standing is shown.

Benefits Available to Grandparents

Benefits may be available to grandparents who have physical or legal custody of their grandchildren. Grandparents may become kinship foster parents where a grandchild has been removed from the home by a court order due to a finding that the child was neglected or abused, or by a voluntary placement agreement, signed by the parent or guardian (or other person with the care of the child) which gives the care and custody of the child over to an authorized social services agency acting on behalf of the State. Upon qualification, a grandparent may receive kinship foster payments to help provide for the grandchild's needs. Application may also be made to Medicaid to cover health care costs. The downside to kinship foster care is that you are subject to scrutiny by Department of Social Services while legal custody remains with the Department. The grandparents can also apply for financial assistance for themselves through Temporary Assistance to Needy Families (TANF), if they are in need.

Grandparents who are neither kinship foster parents nor in need may still apply for TANF benefits if the grandchild is not being supported by a parent who is away from home. If the parent is at home, the

parent must apply for benefits unless mentally or physically unable to do so, in which case the grandparents may then apply.

Endnotes

1. *LoPresti v. LoPresti*, 40 N.Y.2d 522, 526, 355 N.E.2d 372, 374, 387 N.Y.S.2d 412, 414 (July 1976).
2. 137 Wn.2d 1, 969 P.2d 21 (1998). Cert. granted, October 1999.
3. § 72. Special proceeding or habeas corpus to obtain visitation rights in respect to certain infant grandchildren. Where either or both of the parents of a minor child, residing within this state, is or are deceased, or where circumstances show that conditions exist which equity would see fit to intervene, a grandparent or the grandparents of such child may apply to the supreme court by commencing a special proceeding or for a writ of habeas corpus to have such child brought before such court, or may apply to the family court pursuant to subdivision (b) of § 651 of the family court act; and on the return thereof, the court, by order, after due notice to the parent or any other party or party having the care, custody, and control of such child, to be given in such manner as the court shall prescribe, may make such directions as the best interest of the child may require, for visitation rights for such grandparent or grandparents in respect to such child.
4. *Emanuel S. v. Joseph E.*, 78 N.Y.2d 181, 577 N.E.2d 27, 573 N.Y.S.2d 36 (July 1991), *citing In re Ehrlich v. Ressner*, 55 A.D.2d 953, 391 N.Y.S.2d 152, *quoting Mimkon v. Ford*, 66 N.J. 426, 437, 332 A.2d 199, 204.
5. *Supra.*
6. *See In re Seymour S. v. Glen S.*, 189 A.D.2d 765, 592 N.Y.S.2d 410 (2d Dep't, January 1993) denying standing; *In re Agusta v. Carousso*, 208 A.D.2d 620, 617 N.Y.S.2d 189 (2d Dep't, October 1994) *lv. app dism.*, 85 N.Y.2d 857, 624 N.Y.S.2d 375 (February 1995).
7. *See LoPresti v. LoPresti, supra.; In re DiBerrardino v. DiBerrardino, infra.*
8. *In re Gloria R*, New York Law Journal, January 11, 1994, p. 22, col. 4 (New York Co., Saxe, J.)
9. *DiBerrardino v. DiBerrardino*, 229 A.D.2d 539, 645 N.Y.S.2d 848 (2d Dep't, July 1996).
10. *Coulter v. Barber*, 214 A.D.2d 195, 632 N.Y.S.2d 270 (3d Dep't, October 1995).
11. *In re Kenyon v. Kenyon*, 251 A.D.2d 763, 674 N.Y.S.2d 455 (3d Dep't, June 1998).
12. *See Bennet v. Jeffreys*, 40 N.Y.2d 543, 356 N.E.2d 277, 387 N.Y.S.2d 821 (September 1976).
13. *In re Benzon v. Sosa*, 244 A.D.2d 659, 663 N.Y.S.2d 938 (3d Dep't, November 1997).
14. *See In re Antoinette M. v. Paul Seth G.*, 202 A.D.2d 429, 608 N.Y.S.2d 703 (2d Dep't, March 1994), *lv. app. den.*, 83 N.Y.2d 758, 615 N.Y.S.2d 875, 639 N.E.2d 416 (June 1994).
15. *In re Pauline G. v. Carolyn F.*, 187 A.D.2d 589, 590 N.Y.S.2d 124 (2d Dep't, November 1992).
16. *In re Benjamin B. v. Cathy B.*, 234 A.D.2d 457, 651 N.Y.S.2d 571 (2d Dep't, December 1996), *lv. app. den.*, 89 N.Y.2d 812, 657 N.Y.S.2d 405 (March 1997).
17. *In re Eger v. Garafalo*, 251 A.D.2d 770, 674 N.Y.S.2d 176 (3d Dep't, June 1998).
18. 137 Wn.2d 1, 967 P.2d 21 (1998).
19. *LoPresti v. LoPresti, supra.*

Jerome A. Wisselman is an attorney who has actively practiced in the family law area for over 20 years. He has litigated cases in every aspect of family law, including numerous grandparental custody and visitation matters. He has written articles on family law issues for various publications, and has conducted workshops on these matters.

Mr. Wisselman graduated with a B.A. in Accounting from Queens College of the City University of New York in 1969, and obtained his Juris Doctor from Brooklyn Law School in 1972. He also attended the Masters of Law program in Taxation at New York University School of Law.

In 1976, Mr. Wisselman opened his own practice, concentrating in family and matrimonial law. From 1976 to the present, his firm has represented grandparents in many phases of family law litigation.

Mr. Wisselman has also been actively involved with lobbying for changes in legislation concerning grandparental issues, and has attended numerous conferences, including those sponsored by Mayor Giuliani and Governor Pataki concerning grandparental issues, and the White House Mini-Conference on the Aging held at Albany Law School. He also has served on the Advisory Boards of the New York State Assembly Committee on the Aging, and Brookdale Foundation.

As an advocate for grandparental rights, Mr. Wisselman is committed to helping effectuate the changes necessary to meet the needs of grandparents in a rapidly changing society which is making greater demands upon them to care for and support their families, even as they approach, or are in, retirement.