NONPARENT VISITATION: WHOSE BEST INTEREST?

Joel R. Brandes

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On Sept. 15, the United States Supreme Court granted certiorari [FN1] to Troxel v. Granville, [FN2] an appeal of three consolidated cases from the Supreme Court of Washington involving the constitutionality of its non-parent visitation statute. This is one case that will cause a lot of debate.

In Wolcott v. Wolcott, the mother's former companion, a non-parent, sought visitation with her child. In Troxel v. Granville, the paternal grandparents of children born out of wedlock sought visitation after their son had died. The Wolcott and Troxel petitions were denied for lack of standing. In Smith v. Stillwell, visitation was granted to the surviving family of the mother's deceased husband.

The Washington statute authorizing the proceeding provided: "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." [FN3]

Fundamental Right

The Supreme Court of Washington held that while the statute granted standing to the petitioners in all of the cases, it was unconstitutional because it impermissibly interfered with a parent's fundamental interest in the "care, custody and companionship of the child." It reasoned that a parent has a constitutional right to rear his children without state interference, which has been recognized both as a fundamental liberty interest protected by the Fourteenth Amendment and as a fundamental right derived from the constitutional right of privacy.

Where a fundamental right is involved, the exercise of a state's police power in a manner that interferes with that right is justified only if the state can show

it has a "compelling interest." The state may only interfere with a parent's right to rear his or her child where some harm threatens the child's welfare. It concluded that no compelling state interest was shown here, because the statute did not contemplate any harm or potential harm to the child that would be prevented by granting third-party visitation rights.

The court held that, as there was no threshold requirement in the statute of a finding of harm to the child as a result of the discontinuance of visitation, the statutory standard of "best interest of the child" was insufficient to serve as a compelling state interest overruling a parent's fundamental rights.

For many years New York grandparents had no legal claim to custody or visitation, and the grandparent-grandchild relationship was subject to absolute parental authority. [FN4] This changed in 1966, when Domestic Relations Law (DRL) 72 was enacted. It gave grandparents an independent right to seek visitation with their grandchildren. It provides:

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 ... and ... the court, by order, after due notice ... 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.

DRL 72 was sustained as constitutional in People ex rel. Sibley on Behalf of Sheppard v. Sheppard, [FN5] an adoption case where the nuclear family was not intact. The Court of Appeals held that to grant visitation rights to the maternal grandmother of a grandchild whose mother had died, whose father was in prison, and who had been adopted, was not an unconstitutional invasion of family privacy. The Court said that permitting grandparent visitation over the adoptive parents' objection did not unconstitutionally impinge on the integrity of the adoptive family, where it is in the child's best interest.

In Emanuel S. v. Joseph E, [FN6] the Court of Appeals held that DRL 72 may be applied to grant standing to grandparents to seek visitation with a grandchild when the nuclear family is intact and despite the parents' objection. It did not address the question of whether the parents' constitutional rights are violated if the Court allows visitation over their wishes, when there is no claim that they are separated or unfit.

The threshold issue for seeking grandparent visitation under New York statute is to establish "standing" to seek visitation by coming within the provisions of "death of one parent, or equitable circumstances exist which equity would see fit to intervene," which permit the Court to entertain the petition.

Circumstance for Intervention

If both parents are alive, grandparents must establish that "equity would see fit to intervene" before they have the right to try to meet the burden of establishing that visitation is in the "best interests" of the child. The Court of Appeals liberally defined these "circumstances" in Emanuel S.:

It is not sufficient that the grandparents allege love and affection for their grandchild. They must establish a sufficient existing relationship with their grandchild, or in cases where that has been frustrated by the parents, a sufficient effort to establish one, so that the court perceives it as one deserving the court's intervention. If the grandparents have done nothing to foster a relationship or demonstrate their attachment to the grandchild, despite opportunities to do so, then they will be unable to establish that conditions exist where "equity would see fit to intervene.

While we believe that it is in the best interest of children that they have a loving relationship with their grandparents and frequent visitation with them, it may violate the constitutional "right of privacy" and the Fourteenth Amendment to the Constitution to award grandparent visitation over the objection of the natural parents. Troxel will apparently decide these questions.

State laws authorizing grandparent visitation have been upheld by the Supreme Courts of Kentucky [FN7] and Missouri, [FN8] and have been found to be unconstitutional by the Supreme Courts of Tennessee [FN9] and Georgia. [FN10] These cases differ from Troxel in that all involved intact families.

It appears that the Troxel court adopted the same rationale and relied upon the same precedent as the Georgia Supreme Court did in Brooks v. Parkerson, [FN11] where the Court held that its grandparent visitation statute [FN12] violated the constitutionally protected interest of parents to raise their children without undue state interference.

The statute granted any grandparent the right to seek visitation of a minor grandchild by filing an original action for visitation rights, by intervening in certain existing actions including those where the custody of a minor child is in issue, or by proceeding where there has been an adoption in which the child has been adopted by a blood relative or a stepparent. The statute further provided that "the court may grant any grandparent of the child reasonable visitation rights upon proof of special circumstances which make such visitation rights necessary to the best interests of the child."

The Georgia court noted that the Supreme Court has long recognized a constitutionally protected interest of parents to raise their children without undue state interference and that parents had comparable interests under the state constitutional protections of liberty and privacy rights. It looked to the extent of permissible state infringement on that interest, concluding that the Supreme Court has made it clear that state interference with a parent's right to raise children is justifiable only where the state acts in its police power to protect the child's health or welfare, and where parental decisions in the area would result in harm to the child.

The Court found that state interference with parental rights to custody and control of children is permissible only where the health or welfare of a child is threatened. The Georgia statute fell short both in its apparent attempt to provide for a child's welfare and in its failure to require a showing of harm before visitation could be ordered. The Court held that, even assuming that grandparent visitation promotes the health and welfare of the child, the state may only impose that visitation over the parents' objections upon a showing that failing to do so would be harmful to the child.

The Court found irrelevant to its constitutional analysis that it might, in many instances, be "better" or "desirable" for a child to maintain contact with a grandparent. The statute was held unconstitutional under both the state and federal constitutions because it did not clearly promote the health or welfare of the child and did not require a showing of harm before state interference was authorized.

We agree with the analysis of the Georgia and Washington courts, which conclude that where a decision relating to a child is involved, regulations imposing a burden on it may be justified only by compelling state interests, and those regulations must be narrowly drawn to express only those interests. Compelling state interest exists only when the health and welfare of the child is threatened.

When the natural parents are alive, does the state have a compelling state interest sufficient to allow it to determine, in the "best interest of the child," the extent to which the child's contacts with its natural family should be interfered with? We think not, absent a showing of harm to the child.

Parental Rights

The Supreme Court has held that the custody, care and nurture of a child resides first with his or her natural parents, and that right is far more precious than any property right. [FN13] The New York Court of Appeals has recognized that a natural parent has a right to raise his or her child, and that custody of a child may not be awarded to a third party "absent extraordinary circumstances, narrowly categorized." It has held that

it is not within the power of a court, or, by delegation of the Legislature or court, a social agency, to make significant decisions concerning the custody of children, merely because it could make a better decision or disposition. Neither decisional rule or statute can displace a parent because someone else could do a "better job" of raising the child in the view of the court (or the Legislature), so long as the parent or parents have not forfeited their "rights" by surrender, abandonment, persisting neglect, unfitness or other extraordinary circumstances.

It is only when these conditions are found to exist that the court will then consider the "best interest" of the child. [FN14]

The "best interest" analysis is not reached in New York custody proceedings brought by grandparents or third parties unless there is a finding of harm to the child such that the parents have forfeited their custody "rights" by surrender, abandonment, persisting neglect, unfitness or other extraordinary circumstances. It logically follows that there is no compelling reason for the state to enact a visitation (custody) statute that interferes with the rights of the natural parents and reaches a "best interest" analysis in grandparent visitation proceedings without a similar finding.

The constitutional principles of due process and privacy protection prohibit state interference with the custody of the child, over parental objection, unless and until there is a showing of harm to the child without that interference. A

grandparent visitation statute that applies the "best interest" analysis and does not require a showing of harm to the child before state interference can be authorized is unconstitutional.

FN(1) US, 120 S.Ct . 11.

FN(2) 31 Wash 2d 1, 969 P2d 21.

FN(3) RCW 26.10.160(3).

FN(4) See Foster and Freed, "Grandparents Visitation:, Vagaries and Vicissitudes," New York Law Journal, June 23, 1978, p 1; Ibid June 27, 1978, p 1; and Id June 28, 1978, p 1 reprinted 23 St. Louis Univ L J 643 (1979).

FN(5) 54 NY2d 320 (1981).

FN(6) 78 NY2d 178.

FN(7) King v. King, 828 S.W2d 630 (Ky. 1992).

FN(8) Herndon v. Tuhey, 857 SW2d 203 (Mo. 1993).

FN(9) Hawk v. Hawk, 855 SW2d 573 (Tenn., 1993).

FN(10) Brooks v. Parkerson, 265 Ga. 189, 454 SE2d 769 (Ga.,1995).

FN(11) Brooks v. Parkerson, supra.

FN(12) OGCA 19-7-03.

FN(13) Stanley v. Illinois, 405 U.S. 645, 92 S. Ct. 1208, 31 LEd2d 551 (1972).

FN(14) Bennett v. Jeffreys, 40 NY2d 543 (N.Y., 1976).

JOEL R. BRANDES HAS LAW OFFICES IN GARDEN CITY AND NEW YORK CITY. HE CO- AUTHORED LAW AND THE FAMILY NEW YORK (9 VOLS.) AND LAW AND THE FAMILY NEW YORK FORMS (BOTH, PUBLISHED BY WESTGROUP). BARI B. BRANDES, A MEMBER OF THE FIRM AND CO-AUTHOR OF ANNUAL SUPPLEMENTS TO LAW AND THE FAMILY NEW YORK 2D., ASSISTED IN PREPARING THIS ARTICLE.