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FIVE CRITICAL ISSUES IN NEW YORK'S GRANDPARENT
VISITATION LAW AFTER *TROXEL V. GRANVILLE*

STEPHEN A. NEWMAN*

Law guards us from all evils but itself.

—Henry Fielding

In 1936 the New York Court of Appeals showed wisdom and humility in making this observation about courts and childrearing:

The vast majority of matters concerning the upbringing of children must be left to the conscience, patience, and self-restraint of father and mother. No end of difficulties would arise should judges try to tell parents how to bring up their children. Only when moral, mental, and physical conditions are so bad as seriously to affect the health or morals of children should the courts be called upon to act.¹

Family law has turned over many times since then, but the essential truth the court grasped nearly seven decades ago still holds. It is a truth that the current Court of Appeals needs to reaffirm as it deals with an issue that inevitably will reach the Court soon: the nature and scope of grandparent visitation rights. The problems with these rights were highlighted — but not deeply explored — by the landmark decision of the United States Supreme Court in *Troxel v. Granville*.² While the implications of *Troxel* are far from clear, the case has prompted courts across the nation³ to reconsider their

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1. *People ex. rel. Sisson v. Sisson*, 271 N.Y. 285 (1936).

2. 530 U.S. 57 (2000).

3. A number of state high courts have ruled their statutes unconstitutional *per se* or as applied. See *In re Marriage of Howard*, 661 N.W.2d 183 (Iowa 2003); *Glidden v. Conley*, 820 A.2d 197 (Vt. 2003); *Roth v. Weston*, 789 A.2d 431 (Conn. 2002); *Camburn v. Smith*, 586 S.E.2d 565 (S.C. 2003); *Wickam v. Byrne*, 769 N.E.2d 1 (Ill. 2002); *Lulay v. Lulay*, 739 N.E.2d 521 (Ill. 2000); *State v. Paillet*, 16 P.3d 962 (Kan. 2001); *Linder v. Linder*, 72 S.W.3d 841 (Ark. 2002); *Rideout v. Riendeau*, 761 A.2d 291 (Me. 2000); *Neal v. Nesvold*, 14 P.3d 547 (Okla. 2000); *DeRose v. DeRose*, 666 N.W.2d 636 (Mich. 2003); *Blixt v. Blixt*, 774 N.E.2d 1052 (Mass. 2002).

grandparent visitation laws, taking into account both constitutional requirements and state public policy concerns.

In this essay, I will explore five distinct issues raised by litigation under the New York statute, Domestic Relations Law § 72. These five questions require careful consideration, but were not clearly answered by *Troxel*:

1. Should New York's "standing" requirements in grandparent visitation cases be strengthened to provide, at the outset of a case, protection for parents from the considerable burdens of grandparent litigation?

2. Should courts adopt a "strict scrutiny" standard to judge the constitutionality of grandparent visitation orders imposed upon parents?

3. How substantial is the "special weight" that, under *Troxel*, must be given to parental decisions on visitation?

4. What standard should the courts adopt for modifying or terminating grandparent visitation orders?

5. Should law guardians routinely be appointed in grandparent visitation cases?

To answer these questions, I will first examine in detail the many significant ways that grandparent visitation litigation burdens the fundamental right of parents to make child rearing decisions. The heavy burdens on parents and children created by litigation under the grandparent visitation statute in New York must be reduced in order to satisfy both *Troxel*'s constitutional mandate and the state's traditional interest in protecting families and children. I suggest that there are persuasive reasons to adopt an interpretation of DRL § 72 that significantly defers to parental choices about visitation, except in extraordinary cases where a child's need for grandparent contact is compellingly clear. In all other cases, judges should defer to parental childrearing decisions, in order to avoid coercive interventions that can do great harm to the family by invading its privacy, damaging the parent-child relationship, weakening parental authority, generating great stress on the family unit, and draining the family's financial resources.

I. THE NEW YORK STATUTE

Grandparent visitation rights, which did not exist at common law, were created by the New York State legislature in 1966. The statute, section 72 of the Domestic Relations Law, permitted grandparents to sue for visitation rights when one or both of the grandchild's parents died; the court then had to determine if the visitation was in the child's best interest.

In 1975, the statute was expanded to allow grandparents to sue even if a parent had not died, provided they could show that "equity would see fit to intervene." The statute, as amended, determined the standard for grandparent visitation in effect today, and reads in pertinent part as follows:

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 * * * or may apply to the family court * * * [and] the court, by order, after due notice to the parent or any other person or party having the care, custody, and control of such child * * * 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.

In June, 2003, the legislature further amended DRL § 72 to allow grandparents to seek custody of grandchildren when "extraordinary circumstances" dictated the need to give custody of a child to a grandparent. This amendment did not change the existing visitation standard. Rather it seems to have merely codified longstanding case law in New York that allows any third parties (not just grandparents) to seek custody in a court proceeding in limited, extraordinary circumstances, such as parental surrender, abandonment, abuse, or a prolonged period when the child is separated from the parent and bonds to another caretaking adult.⁴

The adoption of a legal standard that strongly favors parents showed that the legislature understood the need to give parents primacy over non-parents in the custody context. The legislature's

4. See *Bennett v. Jefferies*, 40 N.Y.2d 543 (1976); *Lucore v. Lucore*, 721 N.Y.S.2d 207 (N.Y. App. Div. 2001).

failure to correct the absence of parental primacy in the visitation portion of § 72 is puzzling, unless one assumes that in the waning days of the 2003 legislative session, when this bill was passed, last minute politics and interest group pressure by senior citizen groups dictated that the visitation section's problems be ignored. Unfortunately, bills passed at the end of the session in Albany are often voted on in a rush that doesn't allow legislators to carefully consider (or sometimes even to read) what they are passing.⁵ The bill was signed into law by the governor on October 7, 2003, to take effect ninety days later.

The legislative history of the grandparent visitation statute is sparse. In *Emanuel S. v. Joseph E.*,⁶ the Court of Appeals deemed the legislature's purpose to be a "humanitarian" one, to preserve the experience of grandparents as a "precious part" of the experience of childhood.⁷ The court quoted the sponsor of the 1975 statutory amendment to the effect that there might be a "variety of potential situations where the utilization of such a resource [i.e., visitation] could be of invaluable consequence to the children and ultimately the society."⁸

This made it appear that the legislature had not considered any limits to the situations it had in mind, but in fact examination of the entire paragraph in which the sponsor's comment appears shows that some particular kinds of situations were the source of the legislature's concern. Immediately prior to the sentence quoted by the court, the sponsor had said: "Cases of child abuse and child neglect are all too familiar. This bill seeks to enable the Court to intervene in certain situations to provide visitation rights for grandparents in respect to their grandchild if the situation warrants it."⁹ Another of the bill's sponsors had noted that "in the con-

5. See Editorial, *The Legislature's Last Moments*, N.Y. TIMES, June 19, 2003, at A24. See also ANDREW J. CHERLIN & FRANK F. FURSTENBERG, JR., *THE NEW AMERICAN GRANDPARENT: A PLACE IN THE FAMILY, A LIFE APART* 5 (Harvard U. Pr. 1992), stating: "State legislatures who worked for grandparents' rights undoubtedly were motivated by the increasing proportion of older voters Voting against grandparents is political suicide."

6. 577 N.E.2d 27 (N.Y. 1991).

7. *Id.* at 28.

8. *Id.*

9. N.Y. STATE LEGIS. ANNUAL 1975 at 51, quoted in *Emanuel S. v. Joseph E.*, 560 N.Y.S. 2d 211, 214 (N.Y. App. Div. 1990).

text of today's society with a high divorce rate, many disinterested parents do not concern themselves with the welfare of a child who is in the custody of the other parent."¹⁰ It was in these contexts, of divorce or child mistreatment, that the sponsors thought a child might need the state to override parental decision making to order visitation that could provide the child with a source of emotional support and even physical protection, when a parent's care was below minimum standards.

Over the years, the Court of Appeals decided only a handful of cases under the statute.¹¹ No case analyzed the difficulties that grandparent litigation posed for parents and children. No opinion squarely confronted the serious constitutional questions raised by the statute.¹² In other family law cases, the Court of Appeals strengthened parental rights,¹³ but it did not see any inconsistency in applying a grandparent visitation statute that allowed parental decisions to be superseded by a judge based only upon his own assessment of the "best interests of the child."¹⁴ Instead, the Court tended to give vague statutory terms like "where equity would see fit to intervene" an expansive reading.¹⁵ In sum, despite the statute's broad language, its invitation to encroach on parental due process rights, and its reliance on the unpredictable "best interest of the child" standard (which the Court itself has admitted "eludes ready definition")¹⁶, the statute found favor in the Court of Appeals.

10. Letter from New York State Senator Leon E. Giuffreda, to Counsel for the Governor (June 19, 1975), *quoted in Emanuel S.*, 560 N.Y.S. 2d at 213.

11. *See People ex rel Sibley v. Sheppard*, 54 N.Y.2d 320 (1981); *Lo Presti v. Lo Presti*, 40 N.Y.2d 522 (1976); *Layton v. Foster*, 61 N.Y.2d 747 (1984); *Emanuel S. v. Joseph E.*, 78 N.Y.2d 178 (1991).

12. The court did acknowledge the issue but declined to consider it in *Emanuel S. v. Joseph E.*, 78 N.Y.2d 178 (1991).

13. *Alison D. v. Virginia M.*, 77 N.Y.2d 651, 656 (1991) (recognizing right of fit parent "to choose with whom her child associates"; party acting as co-parent denied visitation rights); *Ronald FF v. Cindy GG*, 70 N.Y.2d 141 (1987) (same); *Matter of Hofbauer*, 47 N.Y.2d 648, 655 (1979) (giving "great deference" to parent accused of medical neglect of child).

14. The Appellate Division, Third Department, in *Ziarno v. Ziarno*, 726 N.Y.S.2d 820 (N.Y. App. Div. 2001) saw the problem, citing *Ronald FF v. Cindy GG*, 70 N.Y.2d 141, in support of its determination that a grandparent visitation order requires a compelling state purpose.

15. *Emanuel S. v. Joseph E.*, 78 N.Y.2d at 181.

16. *In re Michael B.*, 80 N.Y.2d 299, 312 (1992).

The state's lower courts went about the job of applying the statute. Some judges were untroubled by their broad authority to impose visitation orders upon unwilling parents. Others, however, found judicial intervention in decision making by fit parents to be ill-considered and unwise.¹⁷ Judge I. Leo Glasser, a New York Family Court judge later appointed to the federal bench, wrote in one of these cases:

If affection remains between members of the family there would be no need to invoke D.R.L. sec. 72. That statute would be called into play only in a case such as this where the relationship between grandparents and parents is a hostile one. . . . I believe ties of nature would prove far more effective in restoring kindly family relations than coercive measures that must follow judicial intervention. I would suggest that the legislature give serious consideration to the advisability of repealing D.R.L. sec. 72.¹⁸

II. *TROXEL v. GRANVILLE*

In June 2000, the U.S. Supreme Court handed down its decision in a grandparent visitation case, *Troxel v. Granville*.¹⁹ The case involved a petition brought by the Troxels, the grandparents, after their son committed suicide. Their grandchild's mother, Tommie Granville, had allowed visitation, but not enough for the grandparents, who decided to sue under a Washington state statute that permitted any third party to seek visitation if it was in the best interest of the child. The trial judge, musing about his own childhood experience with his grandparents,²⁰ ordered increased visitation.

Six justices agreed that Tommie Granville had been deprived of her constitutional right to make childrearing choices for her two daughters. Of the six justices voting to affirm the judgment for the mother, four (the plurality opinion authored by Justice O'Connor) found a parent's decision on visitation enjoys a presumption of cor-

17. A Queens County Family Court judge, Guy DePhillips, protested the law's mischief and likely unconstitutionality in *Doe v. Smith*, 595 N.Y.S.2d 624 (Fam. Ct. 1993) and *In re Farag*, 2001 WL 1263324 (Fam. Ct. Queens County 2002).

18. *Geri v. Fanto*, 361 N.Y.S.2d 984, 989 (Fam. Ct. 1974).

19. 530 U.S. 57 (2000).

20. *Id.* at 72.

rectness and is entitled to “special weight;”²¹ one suggested ruling unconstitutional *per se* the state of Washington’s broad visitation statute permitting judges to supplant parents in deciding what is best for children (Justice Souter);²² and one suggested giving the highest level of “strict scrutiny” to infringements of the parent’s constitutional childrearing right (Justice Thomas).²³

The plurality opinion authored by Justice O’Connor has been the touchstone for analysis of *Troxel* by state courts weighing the constitutionality of their own grandparent statutes. This is the correct approach, under the Supreme Court’s decision in *Marks v. United States*.²⁴ There, the Court observed that “when a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.”²⁵ This standard gives Justice O’Connor’s plurality opinion in *Troxel* the force of precedent.

That opinion identifies the “fundamental right” that belongs to parents to “make decisions concerning the care, custody, and control of their children” under the Due Process Clause of the Fourteenth Amendment.²⁶ This required the state of Washington to protect the mother’s right to “make decisions concerning the rearing of her own daughters.”²⁷ Significantly, the opinion declared that “there is a presumption that fit parents act in the best interests of their children Accordingly, so 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.”²⁸

21. *Id.* at 68.

22. *Id.* at 75-78.

23. *Id.* at 80.

24. 430 U.S. 188 (1977).

25. *Id.* at 193 (internal quotations marks and citations omitted).

26. *Troxel*, 530 U.S. at 65.

27. *Id.* at 68.

28. *Id.* at 58.

The plurality found that the state court had failed to give the parent's decision any "special weight," and failed to accord her the constitutional presumption that her decision about visitation was in her children's best interest. In fact, in the trial court it appeared the judge gave the parental decision no weight, and indulged his own personal belief that grandparent visitation was generally desirable for all children. In the view of Justice O'Connor, he merely substituted his own judgment about the child's best interests for that of the mother, with little evidence to support his conclusion that the mother's decision was wrong.

The plurality adopted Justice Kennedy's statement that the burden of litigating a visitation proceeding can itself be "so disruptive of the parent-child relationship that the constitutional right of a custodial parent to make certain basic determinations for the child's welfare becomes implicated."²⁹ The plurality recognized that "the litigation costs incurred by Granville on her trip through the Washington court system and to this Court are without doubt already substantial" and refused to remand the case, which would only have the effect of "forcing the parties into additional litigation that would further burden Granville's parental right."³⁰

It is apparent that the plurality wished to act with restraint in *Troxel*. The opinion expressly declined to set forth the full scope of the due process right it recognized, and it permitted the states to keep their broad statutes, as long as they adjusted their case-by-case applications of the law so as to respect the parent's fundamental child rearing right. In essence, the Court offered states the chance to analyze the needs of parents and children, define the appropriate interests of the state, and carefully explore the burdens that judicial intrusions into child rearing impose.

III. THE BURDENS OF GRANDPARENT VISITATION LITIGATION

After *Troxel*, the task of state courts is not simply the usual one of complying with the Court's dictates, but the more difficult one of confronting the issues raised by state interference in family affairs with more careful deliberation. States like New York, with broad statutes that speak vaguely of "equity" and "the best interest of the

29. *Id.* at 75 (quoting Kennedy, J., dissent at 80).

30. *Id.* at 75.

child,” must now pay more serious attention to the need to justify the use of governmental power in the constitutionally protected private realm of family life. As Justice O’Connor wrote in another substantive due process case, “. . . the purpose of heightened scrutiny is not to prevent government from placing children in an institutional setting, where necessary. Rather, judicial review ensures that government acts in this sensitive area with the requisite care.”³¹

To exercise “requisite care,” it is essential that the New York courts thoroughly analyze the burdens on families and children that grandparent visitation litigation inflicts. This section will explore the nature and scope of these burdens, as a necessary prelude to considering the five specific issues listed earlier.³²

For discussion purposes, I will break down the burdens that litigation imposes in these cases into seven categories:

- Invasions of family privacy
- Damage to parent-child communication
- Parenting “in the shadow of the law”
- Loss of family peace and tranquility
- Stress of lawsuits on children
- Financial burdens on the family
- The toll of judicial supervision, enforcement and relitigation on family life

A. *Invasions of family privacy*

Grandparent visitation litigation brings with it pronounced intrusions into a family’s privacy. The legal process enmeshes the family with a number of professionals whose job it is to probe into the family’s life to assess parental decision making, parental motives, children’s feelings, and children’s relationships.

The parent’s own lawyer must be told everything about the conflict between the parent and grandparent. The lawyer appointed to represent the child³³ will also seek detailed information about the family. Because the lawyer for the child has the power to

31. *Reno v. Flores*, 507 U.S. 292, 318 (1993) (O’Connor, J., concurring).

32. *See supra* text following note 3.

33. *See* N.Y. FAM. CT. ACT §§ 241, 249 (2003). Reported cases show the discretion to appoint a law guardian is routinely exercised in these cases. For criticism of this practice, *see infra* notes 167-75 and accompanying text.

make a critical recommendation to the judge, parents will feel compelled to provide whatever personal information and access to child, home and family the lawyer wants, in order to gain his support. Parents must also submit to the probing of experts who evaluate the family. Because these experts, like the law guardian, make important recommendations to the court, parents are compelled to disclose whatever the experts wish to know, however intrusive or personal their inquiries are.

Evidence, sometimes painful to recall and dwell upon, surrounding the parental decision against visitation must be reported to these attorneys, reduced to writing in affidavits for pre-trial motions (e.g., when grandparents seek visitation *pendente lite*), and ultimately testified to in open court. To counter the grandparent's case, parents sometimes must disclose the family conflict to other relatives and friends as well, in order to enlist their aid and participation in the case.³⁴

Disclosures to strangers about deeply felt problems with one's own parents or about painful memories from one's childhood can be embarrassing, disturbing, and emotionally distressing. The searching exploration into sensitive family problems permitted by these lawsuits is facilitated by the "best interests of the child" standard employed in the New York statute. This standard sets no discernible limit to the inquiry,³⁵ presumably allowing examination into any factor that might yield relevant data on, for example, a mother's parenting ability, her mental health, her interaction with her child, her dealings with her own parents, even her own childhood unhappiness and disappointments.³⁶

In one case, a grandfather sued both of his adult daughters for visitation with their children. Both women had to take the witness stand to explain their estrangement from their father because of his verbal abuse and callous behavior toward them and their mother

34. Matter of Gloria R., N.Y.L.J., Jan.11, 1994 at 22 (Sup. Ct. N.Y. County) (court hears testimony of child's aunt, uncle, other grandparents, and suing grandmother's ex-husband).

35. The Court of Appeals has said the best interests test in custody cases requires consideration of the "totality of the circumstances." Eschbach v. Eschbach, 56 N.Y.2d 167, 174 (1982). For a critique of the use of the best interests test in grandparent visitation cases, see Stephen A. Newman, *Overburdened Child's Best-Interest Test*, N.Y.L.J., May 28, 2003 at 2.

36. See, e.g., *Wilde v. Wilde*, 775 A.2d 535 (N.J. Super. Ct. App. Div. 2001).

during their childhoods. One of the women stated she would not have any more children if her father were forced back into her life.³⁷ In another case, a father had to detail the humiliations he suffered at the hands of his controlling father during childhood, including lack of privacy in the bathroom.³⁸ A third case included a deeply disturbed adult woman who provided evidence that her own mother, the petitioning grandmother in the case, was grossly deficient as a parent.³⁹

In a recent New Jersey case, a mother had to respond to in-laws who attacked her as vindictive, irrational, and vicious, a liar and a spendthrift who was implicated in her husband's suicide because she was greedy and forced her husband to work harder so she could spend their money.⁴⁰ The grandparents sued the mother less than five months after her husband, a police officer, had shot himself at home, in her presence. The relentless legal attack ended nearly a year and a half later, when an appellate court denied visitation and scolded the grandparents for their indecent litigation behavior.

The intrusions of this litigation resemble the probing done in traditional custody and visitation disputes. For these cases, one New York Family Court judge noted, "we are provided with forensic psychological reports, family assessments, home studies, CASA reports, DSS investigative reports, substance abuse reports, medical records, school records, law guardian reports, and legal memoranda. The Court is made privy to a family's most private behaviors."⁴¹

B. Damage to parent-child communication

Parents are forced by grandparent visitation lawsuits to communicate with their own children in ways they might otherwise regard as wholly inappropriate. They must prepare their child for the inquiries the child will face, and make their children available to meet and talk about their family with strangers (e.g., a mental

37. See *Doe v. Smith*, 595 N.Y.S.2d 624 (Fam. Ct. 1993).

38. *Matter of R and F., V.G. and K.*, N.Y.L.J., Dec.11, 1995 at 28 (Fam. Ct. N.Y. County).

39. See *supra* note 34 at 22. For further discussion of this case, see Stephen A. Newman, *The Dark Side of Grandparent Visitation Rights*, N.Y.L.J., June 14, 2000 at 2.

40. See *Wilde*, 775 A.2d 535.

41. *Laura LL. v. Robert LL.*, 719 N.Y.S.2d 823 (Fam. Ct. 2000).

health evaluator, a law guardian, and the judge). In doing so, the parents may feel impelled to justify their decisions to their children, and to disclose matters about themselves and the grandparents that they would not otherwise choose to reveal. Parents lose the chance to shield their children from knowledge of extended family strife when such knowledge may be upsetting or inappropriate for the children to learn.

The role of the child in the lawsuit may lead parents to a kind of parent-child role reversal, where parents try to persuade the child to their side, and the child sits in judgment of the parents' views. The child with his own lawyer and his own opportunity to speak privately with the judge becomes a power to be reckoned with in this litigation. Parents are put in the awkward, indeed unhealthy, position of soliciting their child's aid. A parent in this awkward situation may feel it necessary to deal with his own child in a circumpect way, distorting and undermining the parent-child relationship.

C. Parenting in the shadow of the law

The involvement of legal professionals brings with it not only intrusions on privacy but losses of family autonomy as well. This is most apparent when a judge issues orders telling a parent to yield to unwanted visitation. But a sense of loss of control over one's family life occurs at many other points during litigation. At the outset of a case, a lawyer for the grandparents may make a demand for visitation, coupled with the threat of costly litigation, that itself disturbs the parent's sense of normal authority over her own child.⁴² The parent must go out and find a lawyer to deal with the crisis. Her lawyer will advise the parent that a judge can indeed override her wishes, based in substantial part upon the judge's assessment of the child's best interest, a legal standard that is vague and unpredictable.

The parent who cares about the outcome of the case will seek the lawyer's advice on matters otherwise normally decided by the parent. To win the lawsuit, the parent must behave as a client, listening to her lawyer's advice about how to behave with respect to the other key figures in the case, including her child and the child's

42. For an example of such a lawyer's letter, see Wilde, 775 A.2d 535.

lawyer. Parenting issues, including what to say to one's child about the grandparent, how to prepare the child before a grandparent visit ordered *pendente lite*, and how much, if any, visitation to offer the grandparent, become not just parenting decisions, but strategic legal moves. During the course of the entire litigation, parents are compelled to make parenting decisions "in the shadow of the law."⁴³

D. *Loss of family peace and tranquility*

Charles Breitel, a former Chief Judge of the New York Court of Appeals, memorably called one disputed visitation case "a mass of hopelessly conflicting unpleasant cross-accusations."⁴⁴ He was referring to a battle between parents, but the same can be said of litigation waged between grandparents and parents.⁴⁵ This litigation is stressful for all involved, and its demands can destroy the family's tranquility, alter family dynamics, and disturb the family environment for both children and their parents.

The high degree of anxiety and turmoil felt by parents sued by grandparents stems from several aspects of this litigation. First, for the average citizen, lawsuits of any kind are, in the words of Benjamin Cardozo, "catastrophic experiences."⁴⁶ From the point of view of a parent-defendant in a visitation case, a lawsuit represents coerced involvement in an unfamiliar and bewildering process, requiring great investments of time and money, loss of privacy, and a tawdry mix of accusation, conflict, and confrontation. The adversary system, premised upon the clash of parties in open court, encourages the parties to fully articulate their conflict with each

43. This phrase is borrowed from Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

44. *Braiman v. Braiman*, 44 N.Y.2d 584, 587 (1978).

45. For a discussion of this aspect of grandparent cases, see Stephen A. Newman, *The Dark Side of Grandparent Visitation Rights*, N.Y.L.J., June 14, 2000 at 2 ("Behind the benign language about equity lies some of the most meanly fought disputes in the entire field of family law Litigants may find their lives and characters denounced, their past failures revealed in the most caustic light, and their intimate relationships subjected to ruthless and stinging scrutiny.").

46. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 128 (1921). Judge Learned Hand expressed a similar view: "As a litigant I should dread a lawsuit beyond almost anything else short of sickness and death." Learned Hand, *Address Delivered Before the Association of the Bar of the City of New York*, 3 LECTURES ON LEGAL TOPICS 89, 105 (1926).

other, with professional advocates shaping and sharpening the dispute.

The litigation process is inherently stressful and arduous. It requires an intense focus, over a long period of time, at great cost, on an intractable dispute. For parents sued by grandparents, the harsh features of the adversary system are magnified. The stakes are not merely economic, but highly emotional and personal: control over one's own children. In the litigation, parents face accusations not about their conduct in the world at large, but in their own homes. They are accused of not raising their children correctly and not acting in their children's best interest. In depositions and at trial, parents face hostile questioning about their personal lives by the lawyer for the grandparents. Attacks on a parent's character are permitted in the broad ranging inquiry allowed under the "best interests of the child" test.⁴⁷ The litigation can extend over years.⁴⁸

A parent sued by his or her own parents must confront deep seated psychological issues. Anger, hurt, and disappointment built up in childhood are inflamed, and issues of control between parent and adult child come to the fore. The "child" has ostensibly gained adulthood and independence, yet is thrust into a legal battle seeking to undo that independence. The subtext in such cases is often dominance and submission, with the grandparent seeking to reestablish authority and control.⁴⁹ For the parent, the lawsuit becomes an attack upon his or her status as an adult.

Lawsuits brought against divorced parents, or against a parent whose spouse has died, create special hardships. Grandparent litigation too often comes at a time of great emotional upheaval in the family, when a divorce, or the death of a parent, creates a crisis for the child. Children at such time naturally depend upon the strength and comfort of the caretaking parent. That parent, too, needs peace of mind, solace, and time to reorganize her life. Con-

47. *Wilde*, 775 A.2d at 542.

48. *See, e.g.*, *Seymour v. Glen S.*, 596 N.Y.S.2d 410 (N.Y. App. Div. 1993) (over 3-1/2 year span between petition, filed April 1989, and decision on appeal reversing visitation order, in January 1993).

49. *See for example*, a grandfather's effort to control his adult son in *Matter of R and F, V.G. and K.*, N.Y.L.J., Dec. 11, 1995 at 28 (Fam. Ct. N.Y. County); a controlling grandmother suing her son in *Matter of Gloria R.*, N.Y.L.J., Jan. 11, 1994 at 22 (Sup. Ct. N.Y. County).

sider the difficulty faced by a parent struggling with bereavement or the emotional crisis of divorce, now having to confront an antagonistic grandparent bringing a lawsuit against her, demanding visitation rights. That parent, the principal emotional support for her children, should not be forced to engage in hostile litigation over her child rearing decisions, absent some clear and compelling circumstances that call into question those decisions.

Yet the New York statute grants automatic standing to a grandparent when the child has suffered the most traumatic of events, the death of a parent.⁵⁰ Ideally, a bereaved parent would turn to a loving grandparent for help and support. But this ideal comes into being not by coercion, but by virtue of nurturing family relationships. The burden of grandparent litigation only makes life more stressful for the custodial parent and her child at a time of elevated vulnerability and stress.

E. Stress of visitation lawsuits on children

Because children are sensitive to their parent's anxieties, tensions in the parents' lives are felt by them. Psychologist Andre Derdyn, noting that these lawsuits often come after a divorce or the death of one parent, observes that the child is likely to see the lawsuit through his parent's eyes:

A grandparent's filing suit for visitation during times of children's great losses and changes occasioned by death, divorce, or remarriage of parents or adoption by stepparents can only be experienced as yet another stress or threat by the child's primary caretaker, and, therefore, by the child. At times when the child's need for stability and security and for being certain upon whom he can depend are very high, such legal initiatives by grandparents are likely only to add to the child's already excessive emotional turmoil, if for no more reason than the initiation of such litigation being seen as a threat to the integrity and economy of the family by the parent or parents.⁵¹

50. N.Y. DOM. REL. LAW § 72 (2003).

51. Andre P. Derdeyn, *Grandparent Visitation Rights: Rendering Family Dissension More Pronounced?*, 55 AMER. J. ORTHOPSYCHIATRY 277, 285 (1985). As one parent observed, "my six year old child got very angry at this grandparents for doing this to his mom." Telephone interview with Tracy Wilde (January 4, 2004).

The link between parental well-being and the child's welfare has been affirmed by courts as well. The Illinois Supreme Court in *Marriage of Collingbourne*⁵² recently observed:

. . . the best interest of the child cannot easily be severed from the interests of the custodial parent with whom the child resides, and upon whose mental and physical well being the child primarily depends. Because the principal burden and responsibility of child rearing falls upon the custodial parent, there is a palpable nexus between the custodial parent's quality of life and the child's quality of life.

Parents who are distracted by the demands of litigation, and distressed by it emotionally, may exhibit what psychologists Judith Wallerstein and Joan Kelly, in their study of divorce, termed "diminished capacity to parent."⁵³ Children receive less attention from the stressed parent, and less sensitivity to their needs. If the grandparent lawsuit is initiated after a parent's death or following parental divorce, the child most in need of parental attention and support may receive less, because of the legal battle the parent is engaged in. Further, as a practical matter, parents may need to take time from caring for their child in order to earn extra money to pay for the lawsuit.

Another source of distress to children stems from the adults' talk about the lawsuit. If the child is seeing the grandparents, perhaps under a temporary order of visitation, she may hear (or overhear) the grandparents speak in a critical or demeaning way about the parent. Animosity between parties to such lawsuits is inevitable, and the suppression of all expression of that animosity may be too much to expect of either grandparent or parent.

Denigration aside, visits to the grandparents under a temporary court order may be extremely uncomfortable for the child, knowing as she does that her parents do not want her to be there

52. 791 N.E. 532, 547 (Ill. 2003); *see also* *Burgess v. Burgess*, 913 P.2d 473 (Cal. 1996); *Tropea v. Tropea*, 87 N.Y.2d 727 (1996) (it is important to child's welfare how well custodial parent fares; acknowledging it may be better to sacrifice non-custodial parent's "accustomed close involvement with children's everyday life" to further "the custodial parent's efforts to start a new life or to form a new family unit").

53. WALLERSTEIN & KELLY, *SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE* 215-21 (1980).

and are actively opposing the visitation in court. "Every time that a child departs the parental home for visitation that has been ordered by the court, the anger felt by the parents who must relinquish the child and the anger felt by the grandparents who must take the child under such circumstances will exacerbate the emotional wounds inflicted on all participants during the initial battle."⁵⁴

A child may feel unsettled by the basic idea of the litigation: that his parent's sense of what is best for him is being challenged; that his parent is not in charge, but must submit to a judge's decision; and that the usual source of authority in the family, the parent, can be displaced. Near-absolute parental authority is the norm for childhood, especially for younger children, and children need the security that such authority gives them.⁵⁵

Grandparent visitation litigation is a variant of traditional custody and visitation fights, aptly termed "poisonous" by an Albany family court judge.⁵⁶ Like custody battles between warring parents, grandparent visitation cases are sometimes fought not just *over* the children, but *using* the children. In *Wilson v. McGlinchey*, the Appellate Division, Third Department found that the relations between the petitioning grandparents and their married daughter and son-in-law were marked by "obvious, albeit controlled, hostility during visitation and by the use of the child as a pawn in their ongoing personal battle." The court concluded: "Exposing Sarah [the child] to the coldness, stress, tension and battling hostility which have characterized . . . the parties' interactions . . . is not in her best interest."⁵⁷

In grandparent visitation cases, the conflict itself affects the child's ability to benefit from contact with the grandparent. It is wrongheaded to presume that contact like that which occurs in harmonious, non-litigating families will also occur in combative, litigat-

54. David A. Martindale, *Troxel v. Granville: A Nonjusticiable Dispute*, 41 FAM. CT. REV. 88, 89 (2003).

55. JOSEPH GOLDSTEIN *et al*, BEFORE THE BEST INTERESTS OF THE CHILD 25 (The Free Press 1979); Andrew S. Watson, *Children, families, and courts: Before the Best Interests of the Child and Parham v. J.R.*, 66 VA. L. REV. 653 (1980).

56. *Laura LL. v. Robert LL.*, 719 N.Y.S.2d 823 (Fam. Ct. 2000).

57. *Wilson v. McGlinchey*, 760 N.Y.S.2d 577 (N.Y. App. Div. 2003).

ing families.⁵⁸ As psychologist David A. Martindale observes, “When, in the name of preserving relationships between children and others whom we deem to be important, we expose children to overt disharmony between their parents and members of the extended family, we run the risk of doing more harm than good.”⁵⁹

Finally, children may be troubled by their own role in the litigation. They are often assigned a law guardian and invited to talk to the judge.⁶⁰ If in the course of litigation, they are asked to choose between the contending adults, they risk loyalty conflicts:

Children are likely to encounter loyalty conflicts during the judicial proceedings, and if a visitation petition is granted loyalty conflicts are likely to be maintained over time as the child remains the focus of the intergenerational conflict. Because a child already experiences distress owing to the triggering conditions linked to a visitation petition (e.g., parental divorce or death), it is hard to see how further legal conflict between family members can assist the child in coping.⁶¹

A child who contradicts the wishes of a parent may suffer parental disapproval, or worse, a sense of having betrayed the key figure in his or her life.

F. Financial burdens affecting parenting

In a society in which a middle class mother must choose between buying medicines for herself and a place in an after-school tennis program for her son,⁶² forcing parents to pay the high costs of litigation can put severe strains on the family budget.

58. Martindale, *supra* note 54, at 88 (concluding that “the incalculable benefits to children that are derived from their interactions with members of the extended family are only realized when the relationships between the extended family and the nuclear family are reasonably harmonious”).

59. *Id.* at 89.

60. See *Wenskoski v. Wenskoski*, 699 N.Y.S.2d 150 (N.Y. App. Div. 1999); *Shadders v. Brock*, 420 N.Y.S.2d 697 (Fam. Ct. 1979).

61. Ross A. Thompson, *et al*, *Grandparent Visitation Rights: Legalizing the Ties that Bind*, 44 *Am. Psychologist* 1217, 1220 (1989).

62. Stephanie Strom, *For Middle Class, Health Insurance Becomes a Luxury*, *N.Y. TIMES*, Nov. 16, 2003 at 33 (describing financial plight and choices that working parents in America face because of the high costs of health insurance).

Attorneys in New York charge substantial fees.⁶³ Courts lack the statutory authority for fee-shifting in grandparent visitation cases, so parents bear the full brunt of these fees.⁶⁴ Reported cases in New York fail to reveal parents' legal fees, but other states' cases show them to be substantial: a California father incurred attorney's fees and costs of \$69,950.87 in defending against a grandmother's efforts to obtain custody of his child.⁶⁵ Other professionals in these cases also charge significant fees. A Kings County court awarded a law guardian in a grandparent visitation case payment at the rate of \$200 per hour; a social worker in the same case was awarded payment at the rate of \$90 per hour.⁶⁶

The high costs of litigation reduce parental autonomy by reducing parental choice. In *Troxel*, Justice Anthony Kennedy recognized the costs of litigation as a matter of deep concern for parents compelled to defend a grandparent visitation lawsuit. "If a single parent who is struggling to raise a child is faced with visitation demands from a third party, the attorney's fees alone might destroy her hopes and plans for the child's future."⁶⁷ Working parents have present day expenses and try to save for the future when they can. The biggest future expense, for many, is a college education for the children. Funding a lawsuit may mean spending all of one's savings, leaving nothing for the children's future education.

Cost plays a role in limiting parents' options in the litigation. Indeed, this litigation offers parents Solomon-like dilemmas. The

63. Parents who seek an experienced attorney may face very substantial attorney fees. As an example, Tracy Wilde, parent and party to *Wilde v. Wilde*, 775 A.2d 535 (N.J. Super. Ct. App. Div. 2001), paid \$350 per hour in attorney fees, for a total of \$86,000. Telephone interview with Tracy Wilde (January 4, 2004). Studies have shown that legal costs have led low and moderate income Americans to forego needed legal services. See Susan D. Carle, *Re-Valuing Lawyering for Middle Income Clients*, 70 *FORDHAM L. REV.* 719, 724-25 (2001); Janet Stidman Eveleth, *Is Middle Class America Denied Access to Justice?*, 29 *Md. B.J.* 44, 45 (1996). On rare occasions, an appellate court will mention the problem. See, e.g., *Meyer v. Meyer*, 441 N.W.2d 544 (Minn. Ct. App. 1989); *Sinsabaugh v. Heinerscheid*, 428 N.W.2d 476 (Minn. Ct. App. 1989) (Foley, J., concurring).

64. *Follum v. Follum*, 755 N.Y.S.2d 145 (N.Y. App. Div. 2003). Grandparents also must pay their own fees, but they can take the cost into account in deciding whether to litigate; parents who are forced into the lawsuit cannot.

65. *In re Marriage of Perry*, 61 Cal. App. 4th 295, 311 (1998).

66. *Principato v. Lombardi*, N.Y.L.J., September 3, 2003 at 19 (Sup. Ct. Kings County).

67. *Troxel v. Granville*, 530 U.S. 57 at 101 (Kennedy, J., dissenting).

more parents fear grandparent contact as a threat to their child, the more they will choose to sacrifice their own and the child's basic material well-being, now and in the future, in order to fight the grandparent lawsuit. The pressure of high costs may lead an economically pressed parent to settle a case by offering visitation, against her better parental judgment, in order to avoid bankrupting the family.⁶⁸ Other parents may choose to abandon savings, go into debt, and forego purchases of clothing, after school programs, and vacations in order to buy more litigation services. A Maine trial judge put the matter succinctly in *Rideout v. Riendeau*: "If a parent were required to defend against such [a grandparent visitation] suit they may have to make sacrifices that are detrimental to the child. For example, instead of being able to buy the child a winter jacket, the parent may have to pay an up-front fee to the attorney."⁶⁹

The problem of cost is compounded for many parents by the timing of the lawsuit. Grandparents have automatic standing under DRL § 72 to bring visitation lawsuits after the death of either one of the grandchild's parents. The death of a parent, however, often brings its own significant economic distress to the surviving parent. Litigation costs, on top of the losses occasioned, for example, by the death of a wage-earning parent, may be crushing.

Similarly, a visitation lawsuit that follows parental divorce imposes new costs on top of the economic toll of the divorce itself. Single mothers with custody routinely suffer a decrease in their standard of living after divorce, and often have difficulty collecting child support payments.⁷⁰ For a family of limited means, divorce itself can "result, post-divorce, in circumstances more closely resem-

68. For a case in which judge reported that finances led two mothers strongly opposed to capitulate, see *Farag v. Malaty*, 2001 WL 1263324 (N.Y. Fam. Ct. 2001) (discussing *Doe v. Smith*, 595 N.Y.S.2d 624 (Fam. Ct. 1993)). The imbalance of resources often favors grandparents, who have more time and money to indulge themselves in litigation to get what they want. See *Roth v. Weston*, 789 A.2d 431 (Conn. 2002) (quoting *Rideout v. Riendeau*, 761 A.2d 291, 310 (Me. 2000) (Alexander, J. dissenting)).

Commenting on custody litigation, Professor Robert J. Levy and practitioner Gary Skoloff state that "fairly and fully prepared and well-tried custody contests cost more than most clients can afford or are willing to pay. Money and lawyers' interest in it inevitably constrain lawyers' behavior in custody cases." Robert J. Levy & Gary Skoloff, *Custody Doctrines and Custody Practice: A Divorce Practitioner's View*, 36 Fam. L.Q. 79, 84 (2002).

69. *Rideout v. Riendeau*, 761 A.2d 291, 310 (Me. 2000) (Alexander, J., dissenting).

70. Paul K. Legler, *Child Support Enforcement Reform*, 17 FairShare 8 (June 1997).

bling actual economic suffering for both parties.”⁷¹ A single parent striving to make ends meet after divorce will be hard pressed to pay for the defense of a visitation lawsuit.

Finally, costs of the visitation lawsuit can diminish parenting time. The lawsuit itself requires a substantial investment of time that is inevitably taken from at-home time rather than from work time. Even more significantly, high costs may cause a parent to seek overtime work, or to take on a second job, to raise defense funds. As a consequence, the parent loses time with her child, and the child is deprived of parental supervision and care. For working parents, this cost of litigation is a serious infringement on child rearing.

G. The toll of judicial supervision, enforcement and relitigation on family life

Grandparent visitation orders are exceedingly long term. If not modified or terminated in future litigation, the order lasts for the remaining years of the child’s minority. For young children, the order can last well over a decade, rivaling the length of some school desegregation orders.⁷²

Courts are ill equipped to supervise family relationships, and it is not surprising that visitation orders issuing after hostile litigation generate continuing enforcement issues.⁷³ As the Supreme Court of Vermont has observed, “The ability to enforce an order, and the availability of contempt to redress a parent’s otherwise reasonable decision on visitation, can allow the grandparent to assert considerable control over the family. Grandparents may turn to the court for relief each time they perceive the parent is not following the court order and thereby ask the court to micromanage the parent’s otherwise constitutionally protected right to raise the child free from state interference.”⁷⁴

Visitation orders are judicially-created experiments with the family. A judge is gambling that the burdens inflicted by interfer-

71. *Sperling v. Sperling*, 567 N.Y.S.2d 538, 543 (N.Y. App. Div. 1991).

72. *See, e.g., Missouri v. Jenkins*, 515 U.S. 70 (1995) (broad scope of original school system-wide order issued in 1985 reduced after ten years).

73. *See, e.g., Wilson v. McGlinchey*, 760 N.Y.S.2d 577 (N.Y. App. Div. 2003); *Martindale, supra* note 54 (each forced visitation breeds renewed anger in the parties).

74. *Glidden v. Conley*, 820 A.2d 197, 206 (Vt. 2003).

ence with parental autonomy, by litigation-heightened conflict between the generations, and by family financial stresses, will be overcome by the positive effects of grandparent-grandchild contact. Except in situations when the child desperately needs outside help, the gamble is a chancy one.⁷⁵ Family relationships are complicated, and family problems resist easy solutions, court ordered or otherwise.

When parties to a visitation lawsuit return to court, the judge has to decide whether to continue the experiment, modify it, or end it. Parties may argue over whether the child was truly ill and missed visits, whether the child's changing schedule of extracurricular and social activities requires adjustment of visitation, or whether the grandparent has upset the child on visits. The opportunities for relitigation are endless. Determining the true facts of each disputed incident is difficult enough; healing the breach of trust between the parties that underlies the continuing friction is far beyond the power of the court.

It is tempting for the court to try to identify the misbehaving party who is not cooperating with visitation, but faultfinding only exacerbates the ill-will between the parties. Even if a parent is found to be causing visitation problems, the court faces the task of choosing a remedy. Contempt of court proceedings allow the judge to put the offending parent in jail.⁷⁶ But such a move is contrary to the whole point of the court's intervention, which is to do

75. For cases in which a visitation order had to be terminated after an unsuccessful experience, see *Janczuk v. Janczuk*, 760 N.Y.S.2d 222 (N.Y. App. Div. 2003); *Liantonio v. Davanzo*, 756 N.Y.S.2d 480 (App. Div. 2d Dept. 2003); *Matter of Florence L.*, N.Y.L.J., January 14, 2000, at 30 (Fam. Ct. Nassau County); *Barry v. Chefales*, 586 N.Y.S.2d 989 (N.Y. App. Div. 1992).

76. *Marallo v. Marallo*, 513 N.Y.S.2d 204 (N.Y. App. Div. 1987) (reducing mother's jail sentence from alternate weekends for six months to same for three months); *Thompson v. Vanaman*, 515 A.2d 1254, 1256 n.1 (N.J. Super. Ct. App. Div. 1986) (sentencing mother to ten days in jail for failure to comply with grandparent visitation order). While contempt proceedings do not often appear in the official reports, the jailing of a parent occasionally attracts attention in the nation's press. See Kimberley Hayes Taylor, *Mother Says She'll Allow her 10-year old Daughter to Visit Her Grandmother; One Night in Jail Was Enough to Halt a 4-year Feud Over Visitation Rights*, MINN STAR TRIB., Jan 31, 1996 at 1A; Michael Shaw, *Woman Wages Fight in Court for Right to See Granddaughter; Mother has gone to jail rather than comply with court-ordered visitation; Hearing is set for Wednesday*, ST. LOUIS POST-DISPATCH, Dec. 12, 1999 at C2; Maimon Alan, *Parents Struggle with Court-ordered Grandparent Visitation*, LOUISVILLE, KY. COURIER-JOURNAL, March 24, 2001.

what is best for the child. Putting a parent in jail is hardly a child-friendly act. Even the threat of imprisonment is frightening, and dramatically increases the stress on the parent and on the family unit. If a parent is given the choice of complying with the order rather than going to jail, she may “give in,” but the added resentment and cost generated by the contempt proceedings further embitters the parties, puts the child in the middle of the escalating clash of wills of parent and grandparent, and communicates to the child the depth of distrust felt by the parent toward the grandparent.⁷⁷ What child wouldn’t feel anxiety over visitation so ardently opposed by her parent? What judge could feel confident that the child’s best interests are being served by contempt proceedings in these cases?

IV. THE FIVE CRITICAL ISSUES

The heavy burdens that grandparent visitation litigation imposes on parents and children, as described above, must inform any discussion of the legal issues surrounding this litigation. That these burdens are relevant to the interpretation of New York’s statute can hardly be in doubt, when that statute relies upon determinations of “equity” and “the best interest of the child.” That they are also relevant to the constitutional questions raised in the course of visitation proceedings is made clear by Justice Anthony Kennedy’s statement in *Troxel v. Granville*:

It must be recognized . . . that a domestic relations proceeding in and of itself can constitute state intervention that is so disruptive of the parent-child relationship that the constitutional right of a custodial parent to make cer-

77. Some parents choose to endure a jail sentence. In one case known to the author, a bitter litigation (still pending in Nassau County, New York) has extended over seven years, shadowing a child’s life from age three to age ten. The parent in the case was ordered to allow visitation, and later, on a motion for contempt, was sent to jail for a week upon a finding that he was not cooperating in carrying out the court’s order. The mutual hostility continues, and in the latest series of motions, the grandparents are seeking a new contempt order, and the child’s father is seeking to terminate visitation based on an independent mental health evaluator’s report that the grandparents are telling the child that her father was somehow responsible for the child’s mother’s death in an automobile accident. The father estimates he has spent \$70,000 in legal fees. Author’s interview, March 21, 2003 (the parent showed me the documents in his case, but requested anonymity).

tain basic determinations for the child's welfare becomes implicated. The best interests of the child standard has at times been criticized as indeterminate, leading to unpredictable results. If a single parent who is struggling to raise a child is faced with visitation demands from a third party, the attorney's fees alone might destroy her hopes and plans for the child's future. Our system must confront more often the reality that litigation can itself be so disruptive that constitutional protection may be required; and I do not discount the possibility that in some instances the best interests of the child standard may provide insufficient protection to the parent-child relationship.⁷⁸

With these understandings in mind, I proceed to a discussion of five legal issues that require the attention of the courts of the state of New York.

ISSUE #1: Should New York's "standing" provisions in grandparent visitation cases require grandparents to make a significant threshold showing before the state permits full scale litigation to proceed?

The *Troxel* plurality expressly agreed with Justice Kennedy's statement, and noted that the litigation costs incurred by the parent "are without a doubt already substantial."⁷⁹ Rather than remanding the case for further proceedings, "forcing the parties into additional litigation that would further burden Granville's parental right,"⁸⁰ the Supreme Court chose to terminate the litigation in favor of the parent.

Perhaps even more critical than putting an end to litigation, however, is screening it at an initial stage, so that non-meritorious cases do not proceed through the full litigation process. If the litigation itself burdens the constitutional right, as the previous section of this essay demonstrates, state courts must make some effort to limit the damage. As Professor Andrew Watson trenchantly suggested twenty-four years ago, courts must "deal with the issue of the

78. 530 U.S. 57, 101 (2000).

79. *Id.* at 75.

80. *Id.*

permissible invocation threshold for the due process intrusion into a family's privacy."⁸¹

A fair consideration of the burdens of litigation makes it imperative for New York to adopt effective threshold techniques for screening out non-meritorious visitation claims. Before fit parents are put through stressful, lengthy, expensive and exhausting proceedings that challenge their constitutionally protected right to raise their children without interference by the state, a court ought to determine at the outset whether the litigation in fact is firmly grounded.⁸²

New York's current statute makes a feeble attempt to limit grandparent visitation litigation by providing two alternative grounds for grandparent "standing." The first provides automatic standing for grandparents when a grandchild's parent has died. The second gives all other grandparents standing to bring a visitation claim whenever "equity would see fit to intervene."

The problem with the automatic grant of standing is apparent: it requires absolutely no inquiry at the outset of the case. No matter how weak the relationship between the grandparent and the grandchild, how deep the dysfunction in the extended family, or how inappropriate visits might be for the child, the grandparent has standing to sue. No threshold showing on the merits must be made, and the grandparent can force a full scale best interests trial. Even a grandparent who has been grossly irresponsible can put a fit parent through the rigors, privacy invasions, and high costs of this litigation.⁸³

81. Andrew S. Watson, *Children, Families, and Courts: Before the Best Interests of the Child and Parham v. J.R.*, 66 VA. L. REV. 653, 673 n.77 (1980).

82. Several other states have embarked on this inquiry. See *Glidden v. Conley*, 820 A.2d 197 (Vt. 2003) (finding visitation "proceedings, and the potential for further proceedings . . . can be considered so burdensome to Glidden that his right to raise Amanda without interference by the State is implicated."); *Blixt v. Blixt*, 774 N.E.2d 1052, 1065-66 (Mass. 2002); *In re Howard*, 661 N.W.2d 183 (Iowa 2003) (Iowa Supreme Court requires threshold showing pursuant to state constitution). The U.S. Supreme Court recognized the drawbacks of adversarial family litigation in *Parham v. J.R.*, 442 U.S. 584, 604-610 (1979).

83. See, e.g., *Ziarno v. Ziarno*, 726 N.Y.S.2d 820 (N.Y. App. Div. 2001); *Matter of Cecilia L.*, N.Y.L.J., Sept.15, 1998 at 30 (Fam. Ct. Nassau County) ("controlling, unforgiving and myopic" grandmother without reason blames children's mother for death of grandmother's son; automatic standing). Presumably a grandmother living with a

The fact that a parent has died does not detract from the remaining parent's autonomy and privacy rights. *Troxel* itself involved a single parent whose partner had committed suicide. The New York statute may be assuming that the child who has lost a parent has the need for attentive and consoling grandparents, but assumptions based upon the ideal family, as *Troxel* reminds us, cannot dislodge the constitutional liberty of parents to raise their own children.⁸⁴ Moreover, responsible surviving parents may choose different ways to help their children with this crisis; courts do not have a basis for intervening in the family simply because a parent dies.⁸⁵

Curing the problem of automatic standing may be accomplished in different ways. This element of the statute may be declared unconstitutional (under the federal due process clause, or under the state constitution), leaving the rest of the statute intact.⁸⁶ Or the court may construe the "best interest of the child" language of the statute, which covers all cases regardless of how standing is achieved, to require the state courts to perform a merits-based screening inquiry, separate and apart from the statute's standing requirement.

New York's second basis for standing, when "equity would see fit to intervene," potentially can be more protective of the parent, but has its own problems. Like "the best interest of the child," this test turns on a broad, indeterminate phrase, open to subjective interpretations and to dilution in the hands of judges who favor

convicted sex offender, see *Glidden*, 820 A.2d 197, would have automatic standing in New York if one of children's parents were not living.

84. *Troxel*, 530 U.S. at 65.

85. "We recognize that the death of a biological parent may be a traumatic event for a child and that a family may deal with that tragic event in many different ways. Some parents may decide that counseling is beneficial for the child; others may disagree. Some parents may decide that the child should spend more time with the deceased biological parent's grandparents, siblings or close friends. Others may restrict those relationships." *Von Eiff v. Azicri*, 720 So.2d 510, 516 (Fla. 1998). Some grandparents may become very hostile, blaming the surviving parent for the death. *Matter of Cecilia L.*, N.Y.L.J., Sept.15, 1998 at 30 (Fam. Ct. Nassau County); *Smith v. Jones*, 587 N.Y.S.2d 506 (Fam.Ct. Nassau County 1992).

86. See, e.g., *Von Eiff*, 720 So.2d at 516; *In re Raquel Marie X*, 76 N.Y.2d 387 (1990). All grandparents would then have to satisfy the equity-based standing requirement.

grandparent visitation as their ideological preference.⁸⁷ At least one Appellate Division case seems to have narrowed the focus of equity standing to the question of whether the grandparent has some existing relationship with the child or has no such relationship but has tried to create one and been rebuffed by the parent.⁸⁸ But a grandparent with no relationship of significance to the child should be denied standing. There is no basis on which a grandparent who is a virtual stranger to the child can prove visits will be in the child's best interest. If the grandparent has an existing relationship with the child, this alone should not suffice; the grandparent should be required to show facts that indicate a compelling reason exists for ordering visitation. Equity should strive to ensure that the heavy burdens of litigation detailed above will not be imposed unnecessarily, and unconstitutionally, upon the parent and child.

Another Appellate Division has suggested that the equity-based standing test requires the same evidence as the best interest test and so the two issues should be tried together in one hearing.⁸⁹ This seems consistent with the statements made about equity standing in *Emanuel S. v. Joseph E.*, to the effect that all relevant facts must be examined in the standing inquiry, including the "nature and basis of the parents' objection to visitation" and the "nature and extent of the grandparent-grandchild relationship."⁹⁰ This interpretation renders the equity test valueless as a barrier to litigation.

Equity standing, if it is to screen out cases, must have some teeth. Without a narrowing interpretation, it stands now, in the words of one family court judge, as "an incentive to litigation."⁹¹ Grandparent plaintiffs should be required to show that their claims are likely to succeed on the merits. The constitutional presumption that fit parents are acting in their child's best interest should operate at this stage, to eliminate cases that do not appear to involve extraordinary and compelling circumstances that justify overriding

87. *Fitzpatrick v. Youngs*, 717 N.Y.S. 2d 503 (Fam. Ct. 2000); *Toney v. Rendace-Toney*, 228 N.Y.L.J., Sept. 30, 2002 at 35 (Sup. Ct. Nassau County).

88. *Augusta v. Carouso*, 617 N.Y.S.2d 189 (N.Y. App. Div. 1994), *lv. app. disp.*, 85 N.Y.2d 857 (1995).

89. *Luma v. Kawalchuk*, 658 N.Y.S.2d 744 (N.Y. App. Div. 1997); *see also Smolen v. Smolen*, 713 N.Y.S.2d 903 (Fam. Ct. 2000) (hearing on both issues at once is commonplace in New York).

90. *Emanuel S.*, 577 N.E.2d at 39.

91. *Farag*, 2001 WL 1263324.

the parent's wishes.⁹² In addition, stricter pleading requirements that demand a detailed, verified complaint from grandparents might help courts identify weak cases.⁹³ If the parents choose to contest the facts at this stage, a hearing can be held to resolve factual differences. Grandparents who fail to demonstrate a likelihood of success on the merits should not be allowed to proceed.

ISSUE #2: Should grandparent visitation orders be subject to "strict scrutiny" review?

As Justice Thomas pointed out in his concurring opinion in *Troxel*,⁹⁴ "strict scrutiny" is the appropriate standard for judging infringements of the fundamental right recognized by the Supreme Court. Several state high courts have come to this conclusion as well.⁹⁵ At least one commentator, however, has suggested the Court has moved away from strict scrutiny review in substantive due process cases involving family rights, based upon the Court's supposed "pragmatic" view of family privacy.⁹⁶ This, however, does not seem justified by a close reading of *Troxel* and its predecessors.

Significantly, the *Troxel* plurality's discussion of substantive due process doctrine expressly invoked two Supreme Court precedents that recognized the strict scrutiny standard. Justice O'Connor's opinion, quoting *Washington v. Glucksberg*, observed that the constitution provides "heightened protection against government interference" with substantive rights recognized under the due process clause.⁹⁷ *Reno v. Flores*,⁹⁸ immediately cited next, expressly states — at the precise page cited by the plurality — that the substantive component of the due process clause "forbids the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tai-

92. See *infra* notes 94-106 and accompanying text. The basis for a requirement of extraordinary, compelling circumstances is suggested in the analysis of Issue #3.

93. See, e.g., *Blixt v. Blixt*, 774 N.E.2d 1052, 1065-66 (Mass. 2002).

94. *Troxel*, 530 U.S. at 80.

95. See, e.g., *Roth*, 789 A.2d 431, 442 (Conn. 2002).

96. See David D. Meyer, *Who Gets the Children? Parental Rights after Troxel v. Granville: Constitutional Pragmatism for a Changing American Family*, 32 RUTGERS L.J. 711 (2001).

97. 530 U.S. at 64 (quoting *Glucksberg*, 521 U.S. 702, 720 (1997)).

98. 507 U.S. 292 (1993).

lored to serve a compelling state interest.”⁹⁹ This is an unambiguous statement endorsing the use of the strict scrutiny standard.

Further support for the use of strict scrutiny comes from the fact that the plurality expressly classified the right of parents to the care, custody, and control of their children as “fundamental” and noted with special emphasis that it was “perhaps the oldest of the fundamental liberty interests recognized by this Court.”¹⁰⁰ Justice O’Connor also observed that “the State’s recognition of an independent third-party interest in a child can place a substantial burden on the traditional parent-child relationship.”¹⁰¹ This echoes the joint opinion of Justices Souter, Kennedy and O’Connor in *Planned Parenthood of Southeastern Pa. v. Casey*,¹⁰² which held that “substantial obstacles” and “undue burdens” on the exercise of a fundamental right would result in a finding of unconstitutionality.¹⁰³

Justice Souter, concurring in *Troxel*, indicated that the parental interest in visitation decisions is an extremely significant one: “The strength of a parent’s interest in controlling a child’s associates is as obvious as the influence of personal associations on the development of the child’s social and moral character.”¹⁰⁴ Exposing children to certain people, on a regular basis (and often with overnight visits and longer vacation stays) entails exposing the children to those people’s ideas, their personalities, their opinions, their prejudices, their lifestyles, their child rearing practices, and, perhaps, their vices. Caring parents take seriously the responsibility of determining who will actively participate in the child’s life. Overriding such parental choices is no small matter. As the Supreme Court of North Dakota put it in *Hoff v. Berg*,¹⁰⁵ “Deciding when, under what conditions, and with whom their children may associate

99. *Id.* at 301-302 (emphasis in original).

100. *Troxel*, 530 U.S. at 65.

101. *Id.* at 64.

102. 505 U.S. 833 (1992).

103. *Id.* at 877; see also *Washington v. Glucksberg*, 521 U.S. 702, 767 n.8 (1991) (Souter, J., concurring).

104. *Troxel*, 530 U.S. at 78.

105. 595 N.W.2d 285 (N.D. 1999).

is among the most important rights and responsibilities of parents.”¹⁰⁶

The burdens imposed by grandparent visitation litigation and by visitation orders that can span very long periods of time make strict scrutiny the best choice for assessing the constitutionality of these orders.

ISSUE #3: How much “special weight” must the parent’s decision be given, to give effect to the constitutional presumption that parents act in the best interest of their children?

The *Troxel* court did not explore the magnitude of the “special weight” that it held must be given parental decisions on visitation. In some prior opinions of the Court, the term has been invoked to signal substantial deference. For example, in *Rodrigues v. Hawaii*, the Court stated that “special weight” is given to a verdict of acquittal, absolutely precluding a new trial.¹⁰⁷ In *Guardians Ass’n v. Civil Serv. Comm.*, the Court attributed “special weight” to well-established administrative interpretations of a statute, requiring courts to defer to the agency even if the court would choose to interpret the statute differently.¹⁰⁸ At the least, this indicates the term can imply considerable deference to those whose opinion is entitled to “special weight” in court.

In *Troxel*, the Court linked the special weight requirement to the presumption that parents act in their children’s best interest.¹⁰⁹ This presumption, grounded in Supreme Court precedent,¹¹⁰ is itself of constitutional dimension. But the presumption’s strength is also an unresolved issue.

Applying the special weight requirement in *Troxel* itself was not difficult, because the facts revealed that the Washington trial court had given no weight at all to the parental decision.¹¹¹ The plurality did not need to say anything about the amount of evidence that

106. *Id.* at 291. Moreover, the time involved in visitation is not trivial, especially to a parent with work commitments and limited time to spend with her own child.

107. 469 U.S. 1078, 1080 (1984).

108. 463 U.S. 582, 621 (1983).

109. *Troxel*, 530 U.S. at 58.

110. *See, e.g.*, *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Parham v. J.R.*, 442 U.S. 584 (1979).

111. *Troxel*, 530 U.S. at 57.

would suffice to overcome the presumption. It merely recognized that giving zero weight to the parent's opinion, and to the presumption that supports it, is obviously insufficient.

Presumptions in the law can range widely in effect, from conclusive presumptions to presumptions that are rebuttable with any credible evidence that runs contrary to the presumption. New York's legendary Chief Judge, Benjamin Cardozo, dealt with the problem of defining the proper scope of a legal presumption in *In re Findlay*.¹¹² New York law presumed that a child born to a married woman is the legitimate child of her marriage to her husband. Looking at the precedents, Cardozo found the presumption could be rebutted, but he observed that "there have been varying statements of the cogency of the evidence sufficient to repel it."¹¹³ Some courts had said the contrary evidence had to be clear and convincing, others that it must be "strong and irresistible," still others that it must be proved "beyond all reasonable doubt." Cardozo then ventured his own conclusion: "What is meant by these pronouncements, however differently phrased, is this, and nothing more, that the presumption will not fail unless common sense and reason are outraged by a holding that it abides."¹¹⁴

The strong presumption of legitimacy in *Findlay* stemmed from a strong public policy in its favor. As the Court of Appeals had previously stated in *Hynes v. McDermott*, "The law presumes morality, and not immorality; marriage, and not concubinage; legitimacy, and not bastardy."¹¹⁵

How strong the presumption should be favoring a parent's childrearing decisions depends in large measure on the perceived importance of the public policy behind it. If the policy is deemed of only limited significance, the presumption can be brushed aside by "the mere balance of probability."¹¹⁶ If the policy is of great consequence, the presumption should be a formidable obstacle to parties seeking to overthrow it.

The presumption that parents act in their child's best interest is premised upon deeply embedded American beliefs and legal tra-

112. 253 N.Y. 1 (1930).

113. *Id.* at 7.

114. *Id.* at 8.

115. *Hynes v. McDermott*, 91 N.Y. 451, 459 (1883).

116. *Id.* (quoting Lord Lyndhurst in *Morris v. Davies*, 5 Clark & F. 163 (1836)).

ditions. Culturally and legally, we value parental autonomy and respect family privacy. “The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.”¹¹⁷ Parents raise children, not the State. “It is cardinal with us that the custody, care and nurture of the child reside first with the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.”¹¹⁸ Applying these sentiments in a grandparent visitation case, the Supreme Court of North Dakota declared: “Keeping State intervention in the matter of child rearing to a minimum, consistent with necessity, is essential to the American ideal.”¹¹⁹

The authors Joseph Goldstein, Anna Freud, and Albert J. Solnit, in their book *Before the Best Interests of the Child*, cite the psychological needs of children as a reason to support a strong degree of state deference to parental decisions. “Children . . . react even to temporary infringement of parental autonomy with anxiety, diminishing trust, loosening of emotional ties, or an increasing tendency to be out of control. The younger the child, and the greater his own helplessness and dependence, the stronger is his need to experience his parents as his lawgivers — safe, reliable, all-powerful, and independent.”¹²⁰ They caution that “any interference with family privacy alters the relationships between family members and undermines the effectiveness of parental authority.”¹²¹

117. *Yoder*, 406 U.S. at 232.

118. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (citing *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)).

119. *Hoff v. Berg*, 595 N.W.2d 285, 289 (N.D.1999).

120. JOSEPH GOLDSTEIN *et al.*, *BEFORE THE BEST INTERESTS OF THE CHILD* 25 (1980).

121. *Id.* at 24. *See also* Watson, *Children, Families, and Courts: Before the Best Interests of the Child and Parham v. J.R.*, 66 VA. L. REV. 653 (1980) (suggesting the autonomy of parents should be near-absolute). “Parental authority is first and foremost a biological derivative that predates any external legal structure.” *Id.* at 666. “[L]aws can easily thwart or complicate parental responses. For this reason alone, there should be great reluctance to disrupt the near-absolute authority parents exercise in the child-rearing process.” *Id.* at 667. He notes that laws like compulsory school attendance, child labor bans, and immunization requirements “set precise limits on parental decisions, thus minimizing the discretion of the state to intrude,” and focus on the compelling needs of the state, rather than the amorphous best interests of the child. *Id.* *See also* Emily

The New York Court of Appeals has long embraced the importance of family privacy and independence from unwarranted government intrusion. In 1936 the Court wrote: "No end of difficulties would arise should judges try to tell parents how to bring up their children. Only when moral, mental, and physical conditions are so bad as seriously to affect the health or morals of children should the courts be called upon to act."¹²² The parent-child relationship itself cannot be readily subjected to oversight and regulation, for it "is one of the strongest, yet most delicate, and most inviolable of all relationships."¹²³

State intervention into childrearing has been extremely circumspect, limited to the universally recognized and essential state interests in protecting the health and safety of children. These interests are most apparent in state laws prohibiting child abuse and neglect,¹²⁴ requiring safety measures such as seat belts,¹²⁵ restricting child labor,¹²⁶ and allowing youth access to medical aid to treat venereal diseases without parental notice.¹²⁷

Even in the context of child neglect law, where the state's interest in a child's health and safety is most compelling, the state Court of Appeals has mandated substantial deference to parental decisions. In *In re Hofbauer*,¹²⁸ the Court ruled that parents could not be ordered to provide their child with conventional medical treatment, even though the alternative treatment they chose involved a drug (laetrile) that had been widely criticized by the government

Buss, *Adrift in the Middle: Parental Rights After Troxel v. Granville*, 2000 SUP. CT. REV. 279 (2000).

122. *People ex. rel. Sisson v. Sisson*, 271 N.Y. 285, 287-88 (1936).

123. *Corey L. v. Martin L.*, 45 N.Y.2d 383, 392 (1978). A California court stated that one purpose behind the legal presumption favoring parental autonomy "is to diminish the uncertainties and discontinuities that can afflict the parent-child relationship whenever third parties (lawyers as well as judges) episodically intrude through an ill-equipped adversarial process in which decisions are subject to reconsideration and eventual appellate review." *Mentry v. Mentry*, 142 Cal. App.3d 260 (1983).

124. *See* N.Y. FAM. CT. ACT § 1012 (2003).

125. *See* N.Y. VEH. & TRAF. LAW § 1229-c (McKinney 2003).

126. *See* N.Y. LAB. LAW §§ 130-44 (McKinney 2003).

127. *See* N.Y. PUB. HEALTH. LAW § 2305(2) (2003) ("A licensed physician, or in a hospital, a staff physician, may diagnose, treat or prescribe for a person under the age of twenty-one years without the consent or knowledge of the parents or guardian of said person, where such person is infected with a sexually transmissible disease, or has been exposed to infection with a sexually transmissible disease.").

128. 47 N.Y.2d 648 (1979).

and the medical profession. The parent's decision, the Court wrote, must be accorded "great deference," and must prevail so long as they have "provided for their child a treatment which is recommended by their physician and which has not been totally rejected by all responsible medical authority."¹²⁹

In reversing the lower court's finding of child neglect, the Court of Appeals concluded that the judicial inquiry

cannot be posed in terms of whether the parent has made a "right" or "wrong" decision, for the present state of the practice of medicine . . . very seldom permits such definitive conclusions. Nor can a court assume the role of a surrogate parent and establish as the objective criteria with which to evaluate a parent's decision its own judgment as to the exact method or degree of medical treatment which should be provided, for such standard is fraught with subjectivity.¹³⁰

If *Hofbauer* mandates great deference in the medical neglect context, it is hard to justify less deference in the grandparent visitation context, where decisions do not involve matters of life and death. The *Hofbauer* court's respect for parental autonomy, its concerns about judicial subjectivity, and its acknowledgment of the difficulty of identifying a "right" or "wrong" decision, are even more pertinent in the grandparent visitation context. Interventions in medical neglect cases are grounded in medical science. Interventions in parents' decisions about child rearing are grounded in uncertain social science, where practitioners differ widely among themselves, engage in constant debate, and rarely converge on tenets of child raising that enjoy universal acceptance.¹³¹

Significantly, the Court of Appeals in *Ronald FF v. Cindy GG* identified the right "to choose those with whom her child associates" as a "fundamental right" that cannot be overcome except in furtherance of "some compelling state purpose."¹³² The case re-

129. *Id.* at 655-56.

130. *Id.*

131. See ANN HULBERT, RAISING AMERICA: EXPERTS, PARENTS, AND A CENTURY OF ADVICE ABOUT CHILDREN (Knopf Publishing Group 2003); STACY SCHIFF, *Because I Said So*, N.Y. TIMES BOOK REVIEW, April 27, 2003 at 9.

132. 70 N.Y.2d 141, 144-45 (1987). Because of the parent's fundamental right, the court refused to extend *Bennett v. Jeffreys*, 40 N.Y.2d 543 (1976), which allowed cus-

jected a visitation claim by a third party acting as a co-parent to a child. If co-parents are not allowed to seek visitation rights, it follows that ordinary grandparents should not be allowed to seek them, absent compelling circumstances.¹³³

Hofbauer's concern about subjective judicial judgments has been echoed in grandparent visitation opinions of the highest courts of several states. The Tennessee Supreme Court, in an early landmark case requiring a showing of harm before grandparent visitation could be ordered, wrote of the trial judge: "Reflecting on his own relationship with his grandparents, the trial judge insisted that he, too, would sue for visitation rights if his children denied him access to his grandchildren."¹³⁴ The Court expressly disapproved the "unquestioning judicial assumption that grandparent-grandchild relationships always benefit children."¹³⁵ Recognizing the temptation to rely on personal beliefs in judging these cases, the Florida Supreme Court observed: "It is not our judicial role to comment on the general wisdom of maintaining intergenerational relationships. We must refrain from expressing our personal thoughts as either grandparents or future grandparents."¹³⁶ In *In re Howard*, the Iowa Supreme Court condemned reliance on "sentimentality" in deciding these cases.¹³⁷

In New York, some trial judges have been so committed to grandparent visitation rights that they've granted visitation without even bothering to hold hearings.¹³⁸ Other judges have displayed their own personal preference for visitation in their opinions, as did a Jefferson County Family Court judge who wrote of his determination to enforce "the moral obligations of familial relationships,"

tody to be awarded to a non-parent in the event of "extraordinary circumstances," to a claim for visitation.

133. Breaking a child's bonds with those acting as co-parents can cause trauma to the child, and granting visitation in such situations should, in the author's opinion, qualify as a compelling state purpose. See the persuasive dissent of Judge Kaye in *Alison D. v. Virginia M.*, 77 N.Y.2d 651 (1991).

134. *Hawk v. Hawk*, 855 S.W.2d 573, 582 (Tenn.1993).

135. *Id.* at 581.

136. *Beagle v. Beagle*, 678 So.2d 1271, 1277 (Fla. 1996).

137. 661 N.W.2d 183 (Iowa 2003).

138. See *Schoffman v. Schoffman*, 524 N.Y.S.2d 209 (N.Y. App. Div. 1988); *Quintela v. Ranieri*, 499 N.Y.S.2d 562 (N.Y. App. Div. 1986).

which he believed particularly included visits with grandparents.¹³⁹ A Nassau County Supreme Court judge in another grandparent visitation case quoted this remark with approval.¹⁴⁰

Across the country, judges' subjective beliefs about the value of grandparents have tainted many visitation cases. An Ohio judge who gave no weight at all to a parent's decision on visitation showed his unthinking adherence to the cause of grandparent rights by referring to the child's mother as a "third party."¹⁴¹ A Michigan judge ordering visitation stated: "Grandmothers are very important. I don't say that just because I am one, but I do believe they are important. I have a niece who doesn't have any and she borrows grandparents"¹⁴² A California appeals court criticized the trial judge's "vague generalizations about the inherent goodness of a loving relationship between grandparents and grandchildren."¹⁴³ Another California judge ignored facts showing no significant relationship between the child and grandparents and disregarded evidence that the grandparents sometimes yelled and cursed during telephone conversations with the child and her mother; instead, he granted the visitation petition with the comment: "I don't see any problem with the [grandparent] being similar to a Disneyland dad. . . . I am a grandparent. That seems to be what we do for grandchildren."¹⁴⁴

Justice O'Connor's *Troxel* opinion similarly noted the trial judge's reliance on personal experience. She quoted the Washington state judge as saying: "I look back on some personal experiences. . . . We always spent as kids a week with one set of grandparents and another set of grandparents, [and] it happened

139. *Fitzpatrick v. Youngs*, 717 N.Y.S.2d 503, 507 (Fam. Ct. 2000). The judge claimed to find support for this notion in *Troxel*, 530 U.S. 57, itself.

140. *Toney v. Rendace-Toney*, N.Y.L.J., Sept.30, 2002 at 35, (Sup. Ct. Nassau County).

141. *Oliver v. Feldner*, 776 N.E.2d 499, 509 (Ohio Ct. App. 2002) (quoting and reversing the trial court).

142. *DeRose v. DeRose*, 643 N.W.2d 259, 260 (Mich. Ct. App.2002), *aff'd*, 666 N.W.2d 636, 638 (Mich.2003) (quoting trial judge).

143. *In re Marriage of Harris*, 112 Cal. Rptr. 2d 127, 143 (Cal. Ct. App. 2001).

144. *Punsly v. Ho*, 105 Cal. Rptr. 2d 139, 146-47 (Cal. Ct. App. 2001).

to work out in our family that [it] turned out to be an enjoyable experience."¹⁴⁵

A judge's subjective beliefs favoring grandparent claims, even if not openly expressed in a written opinion, can influence the judge's decision in various ways. The trial judge has great discretion in assessing the credibility of witnesses, in resolving conflicting testimony, in attaching significance to submitted evidence, and in weighing recommendations of law guardians and forensic evaluators. All of these tasks may be influenced by subjective beliefs and values of the judge.¹⁴⁶ Unfortunately, there is little likelihood of detection of these influences in the process of appellate review, for, as the Court of Appeals noted in a custody case, "weighing of these various factors requires an evaluation of the testimony, character and sincerity of all the parties involved in this type of dispute In matters of this character, the findings of the nisi prius court must be accorded the greatest respect."¹⁴⁷

The "best interest of the child" test plays a role in facilitating subjective judging in these cases. The test is useful in the divorce context, where a judge must choose between two parents who have strong primary attachments to their child. Psychological tenets about the significance of bonding with a primary caretaker, the value of liberal visitation with the non-custodial parent, and the importance of nurturing skills, provide a sound basis for decision making in these cases.¹⁴⁸ But when dealing with secondary figures in the child's life (and most grandparents are secondary figures¹⁴⁹)

145. *Troxel*, 530 U.S. at 61 (quoting from the record's Verbatim Report of Proceedings).

146. For discussion of the psychological aspects of custody decisions, see Stephen A. Newman, *A Tale of Two Cases: Reflections on Psychological and Institutional Influences on Child Custody Decisions*, 34 N.Y.L. SCH. L. REV. 661 (1989).

147. *Eschbach v. Eschbach*, 56 N.Y.2d 167, 173 (N.Y. 1982) (internal quotation marks and citations omitted).

148. See WALLERSTEIN & KELLY, *SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE* 215-221 (1980); GOLDSTEIN, FREUD & SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* (The Free Press 1973).

149. The most significant national study of grandparenting found that the vast majority of grandparents, dubbed "companionate grandparents" by the researchers, preferred lives that were independent from their children and grandchildren; they spent regular but very limited time with the grandchildren in occasional visitation, largely on "recreational or ceremonial occasions." Grandparents were "only rarely a primary source of psychological support for the child." ANDREW J. CHERLIN & FRANK F. FUR-

there is no way to predict the impact of such relationships on the child's life or to declare a parental decision against exposure to such figures to be wrong, except in a narrow band of cases where the child's needs for help or protection are very clear.¹⁵⁰ Parents regularly make decisions not only about grandparents, but about uncles, neighbors, coaches, nannies, tutors, playmates, and others who seek contact with their children, and judges rightly have no say in those choices. Such parental decisions are based on non-scientific judgments that parents must make using intuition, observation, experience, and assessment of risk. In the absence of extraordinary, compelling circumstances, judges have no reliable basis for interfering with such decisions.¹⁵¹

The problem of subjective judgment is compounded by the influential power of cultural stereotype. Grandparents enjoy a positive image in society.¹⁵² They present themselves to outsiders as kindly and loving, motivated only by the desire to see their grandchildren. The stereotype is supported by many adults' genuinely positive experiences with their grandparents. But the overwhelming majority of American grandparents do not have to sue in order to see their grandchildren. It is only when there is serious animosity and a breakdown of intergenerational relationships that

STENBERG, JR., *THE NEW AMERICAN GRANDPARENT: A PLACE IN THE FAMILY, A LIFE APART* 169, 183-84 (1992).

150. See, e.g., *Davis v. Davis*, 725 N.Y.S.2d 812 (Fam.Ct. 2001) (grandmother involved with child since birth, father is in prison, teenage mother is depressed, finds parenting difficult, is receiving preventive services from child welfare agency after charges of neglect against her).

151. For further discussion of the limits of the best interest test, see Stephen A. Newman, *Overburdened Child's Best-Interest Test*, N.Y.L.J., May 28, 2003 at 2.

152. Thompson *et al.*, *Grandparent visitation rights*, FAM.& CONCILIATION CTS REV. 9, 13 (1991):

Despite the very limited research evidence pertinent to these issues [of whether children will benefit from grandparent visitation or be harmed by its denial], opinion concerning the importance of the grandparent-grandchild relationship abounds in court decisions concerning grandparent visitation [citations omitted]. These opinions often draw on popular and traditional portrayals of the grandparenting role as family historian, mentor and teacher of grandchildren, source of unconditional love and comfort, indulgent playmate, and mediator of family conflict.

... Research findings indicate that contemporary grandparenting is considerably more ill defined, individualized, and contingent than traditional portrayals would suggest.

parents and grandparents go to court to resolve their disputes. These cases do not present the typical extended family, but the deeply troubled extended family.

Stereotypes about grandparents inhibit honest and candid discussion. Justice O'Connor's opinion in *Troxel* acknowledged the difficulties of family life in modern America, but only mentioned the troubles of single parents who rely upon grandparents to serve as parental surrogates for their children. She did not express the unpleasant realities about members of the older generation who defy the cultural stereotype — those grandparents who are selfish, unkind, and controlling; those who disapprove of their children's spouses and continue to express their disapproval for years; those who relentlessly criticize their own children's parenting; those who oppressed and even abused their now adult children during childhood. These grandparents exist, and appear in the reported cases.¹⁵³

New York should incorporate into its grandparent visitation law a substantive standard that requires substantial deference to parental choices about visitation, except in extraordinary circumstances where a child's need for grandparent contact is compellingly clear. It can accomplish this by interpreting the "best interest of the child" language in DRL § 72 to require this showing.¹⁵⁴

153. See, e.g., *Canales v. Aulet*, 744 N.Y.S.2d 851 (N.Y. App. Div. 2002) (grandmother's disruptive, sometimes violent propensities); *Farag*, 2001 WL 1263324 (grandmother implicitly encourages father's domestic assaults on mother, calls child by the name of father's ex-girlfriend rather than the child's proper name); *Grant v. Richardson*, 697 N.Y.S.2d 17 (N.Y. App. Div. 1999) (grandmother denigrates children's father; her own husband is prone to domestic violence); *Wenskoski v. Wenskoski*, 699 N.Y.S.2d 150 (N.Y. App. Div. 1999) (insensitive, meddling grandfather exacerbates child's psychological difficulties after parental divorce); *C.M. v. M.M.*, 672 N.Y.S.2d 1012 (Fam.Ct.1998) (grandparent failed to protect child from abuse); *Richard YY v. Sue Z.Z.*, 673 N.Y.S.2d 219 (N.Y. App. Div. 1998) (grandfather fails to prevent sexual contact between boys at his home); *Luma v. Kawalchuk*, 658 N.Y.S.2d 744 (N.Y. App. Div. 1997) (domineering and abusive grandfather); *Smith v. Jones*, 587 N.Y.S.2d 506 (Fam. Ct. 1992) (grandmother interferes with mother's ability to parent, at vulnerable time for child); *Matter of Rita VV*, 619 N.Y.S.2d 218 (N.Y. App. Div. 1994) (grandfather rejects child due to Puerto Rican heritage).

154. Other states have interpreted their "best interests" tests to require a showing of significant harm before grandparent visitation or custody is granted. *Glidden v. Conley*, 820 A.2d 197 (Vt. 2003); *Blixt v. Blixt*, 774 N.E.2 1052 (Mass. 2002); *Linder v. Linder*, 72 S.W.3d 841 (Ark. 2002); *Clark v. Wade*, 544 S.E.2d 99 (Ga. 2001). In New York,

The Court of Appeals can reinforce this standard by adopting an elevated standard of proof that requires grandparents to prove their case for visitation by clear and convincing evidence, instead of by a preponderance of the evidence. The U.S. Supreme Court has on rare occasion required a higher standard of proof in a civil lawsuit as a constitutional mandate. The most relevant family law example is *Santosky v. Kramer*.¹⁵⁵ In that case, the Court, as a matter of procedural due process, raised the standard of proof in a termination of parental rights suit initiated by the state of New York. In so doing, the Court balanced the importance of the parental interests, the state interests, and the risk of error. One of the Court's concerns in *Santosky* was the risk of judicial subjectivity in applying the New York law's vague legal standards, a problem that appears in grandparent visitation suits as well. Other considerations discussed by the Court, however, were unique to the termination of parental rights setting, such as the presence of the state as the party opposing the parents, and the exceedingly high stakes for parents of irreversible termination of rights to their children.

Although *Santosky* can be distinguished from grandparent visitation cases, there is still a salutary function to be played by the clear and convincing evidence standard in the visitation context. A higher standard of proof serves to support and protect parents' substantive due process rights by signaling that the law is not indifferent to the risk of error with respect to the imposition of visitation upon an unwilling parent. As explained in *Marriage of Peters*:¹⁵⁶

The degree of burden of proof applied in a particular situation is an expression of the degree of confidence society wishes to require of the resolution of a question of fact. The burden of proof thus serves to allocate the risk of error between the parties, and varies in proportion to the gravity of the consequences of an erroneous resolu-

the Court of Appeals has long recognized the canon of statutory construction that calls for construing a statute in a manner that "removes doubt of its constitutionality." *People v. Barber*, 289 N.Y. 378, 385 (1943). For an excellent discussion of state decisions requiring a showing of harm to the child on constitutional and statutory grounds, see Joan Catherine Bohl, *Grandparent Visitation Law Grows Up: The Trend Toward Awarding Visitation Only When the Child Would Otherwise Suffer Harm*, 48 *DRAKE L.REV.* 279 (2000).

155. 455 U.S. 745 (1982).

156. 61 Cal. Rptr. 2d 493 (1997).

tion. Preponderance of the evidence results in the roughly equal sharing of the risk of error. To impose any higher burden of proof demonstrates a preference for one side's interests. Generally, facts are subject to a higher burden of proof only where particularly important individual interests or rights are at stake. . . .¹⁵⁷

The constitutional liberty interests of parents is surely a "particularly important individual interest" in grandparent visitation litigation. An elevated standard of proof supports that interest, and in addition, would discourage the initiation of such burdensome litigation, curb judicial reliance on personal preferences and cultural stereotypes, and restrain judicial interference in child rearing decisions that are not susceptible to "right" and "wrong" judgments by the state.

The higher standard of proof may be imposed as a matter of state constitutional law or of the state high court's own supervisory authority.¹⁵⁸

ISSUE #4: What standard should be adopted for modification or termination of grandparent visitation orders?

In *Matter of Florence L.*,¹⁵⁹ a family court judge was asked by a married couple to terminate a grandparent visitation order that had been entered on consent a year and a half earlier. The court assumed the parents had to show "changed circumstances" in order to challenge the continuation of the court's initial order.

Parents seeking restoration of their constitutional child rearing rights should not have the state place an obstacle in the way of this effort, as a threshold showing of changed circumstances requires. Instead, the state should be wary of extending its interference for

157. *Id.* at 495 (citations omitted).

158. *See, e.g., In re Marriage of Harris*, 112 Cal.Rptr. 2d 127, 141-142 (2001) (stating, "necessary to assure adequate deference is accorded to a fit parent's decisions about raising his or her children"); *Roth v. Weston*, 789 A.2d 431 (Conn. 2002) (Supreme Court of Connecticut imposes a clear and convincing standard of proof under its supervisory powers).

159. N.Y.L.J., January 14, 2000, at 30 (Fam. Ct. Nassau County).

too long, and at the least, freely permit parents ruled by court orders to challenge those orders.¹⁶⁰

The changed circumstances standard is derived from traditional custody disputes, when one parent must show that changed circumstances justify modifying an existing custody order to serve the best interest of the child.¹⁶¹ The child's interest in stability is an important factor weighing against modification in these cases.

The analogy to custody-visitation disputes between parents is an obvious one, but it is inapt in some key respects. First, in parent-parent custody disputes, neither party has a superior right to the child's custody.¹⁶² In parent-grandparent visitation disputes, one party, the parent, does have a superior constitutional right to make child rearing decisions.¹⁶³ The parent should be able to assert the constitutional right whenever the compelling reason for overriding it has passed. There should be no presumption in favor of maintaining the order.

Second, the child's clear interest in a continuing, stable life with a primary caretaking parent is very different from the child's interest in stability with an extended family visitor. The latter interest is countered by the child's interest in the psychological security afforded by having a parent who can make autonomous decisions for him¹⁶⁴ and in avoiding the disruptions that ongoing grandparent visitation orders cause.¹⁶⁵ Continuing animosity between parent and grandparent also raises the child's interest in not being at the center of intractable, ongoing family conflict.

A better analogy may be to the state's ordering a child to be placed in temporary foster care. The state must take care not to

160. When the initial order is entered on consent of the parties, *see e.g., In re Florence*, N.Y.L.J., Jan. 14, 2000, it seems particularly unfair to place an extra burden on parents who later challenge the continuation of the order.

161. *See Friederwitzer v. Friederwitzer*, 55 N.Y.2d 89 (1982).

162. N.Y. DOM. REL. L. § 240 (McKinney 2003) (no prima facie right to custody in either parent).

163. *Troxel*, 530 U.S. 57. The liberty interest that favors parents also implies that grandparents who lose a petition for visitation should have to show compelling new facts in order to bring the petition again, to spare the family the renewed burdens of these proceedings. *See Gloria R. v. Alfred R.*, 631 N.Y.S.2d 1011 (Sup. Ct. N.Y. County 1995).

164. *See supra* note 51 and accompanying text.

165. *See* text accompanying notes 32-61.

unduly extend such interference in the family, unless that intervention continues to be warranted. The New York social services law requires the state to do what it can to restore parents to their full parental rights, and requires the court periodically to monitor the necessity for continuing state care.¹⁶⁶

Like foster care orders, grandparent visitation orders should be considered temporary deprivations of parental child rearing rights, and the state should similarly take care not to extend its interference unnecessarily. If a parent is burdened with the effort of seeking review of the order after a reasonable time has passed living under it, at least the state should not further burden the parent with a required threshold showing before hearing the parent's case for ending or modifying the order. Instead of having to prove changed circumstances, the parent should only need to show the requisites exist for restoration of her constitutional child rearing rights. That showing, as this paper suggests, should be that no extraordinary and compelling circumstances exist which justify the state in continuing to override parental child rearing choices.

ISSUE #5: Should a Law Guardian for the child be routinely appointed in grandparent visitation cases?

A reading of reported grandparent visitation decisions indicates that law guardians are often appointed to represent children.¹⁶⁷ This practice can have significant negative effects on children and parents, and it is imperative that the courts reconsider the routine appointment of these lawyers.

Overlooked by both trial and appellate courts is the fact that the law guardian appointment itself undermines the parent-child relationship. Children come to understand, early in the proceedings, that their lawyer is not controlled by their parents, and that the lawyer can take a position contrary to their parent's position. The children see that their parents are not trusted to protect them in this situation. The legal system's distrust is communicated to the

166. N.Y. SOC. SERV. L. § 392 (McKinney 2003).

167. Discretionary power to appoint law guardians for children in these cases is vested in the courts by FAM. CT. ACT § 249 (2003). The lawyer may be appointed very soon after the petition is filed, *see e.g.*, *Levy v. Levy*, N.Y.L.J., Mar 22, 2001, at 28 (Sup. Ct. Kings County).

parents as well, despite the fact that no impropriety or malfeasance has been shown to support such an attitude of distrust.

The children are asked to confide in this stranger, and to answer personal questions about their life at home. The law guardian will want to interview the child out of the hearing of the parents, to get answers not influenced by them. Children are induced to speak about their parents without having to respect their parental authority, and in disregard of their family's privacy.

This lawyer empowers children, who may have no understanding of the reasons underlying their parents' decision about the grandparent, to ask for a new decision. If children speak against the parental decision, they aid in the effort to overthrow parental authority, *undermining that authority in the process*. Moreover, the initial rift between parent and grandparent can be extended to divide parent from child.¹⁶⁸

The law guardian's appointment is a source of stress for the parents, further invades their family privacy, and makes parenting more difficult. The parents' own lawyer will indicate the importance of winning the support of the law guardian. This lawyer is yet another stranger — one who lacks the official position of the judge or the training of the family evaluator — that must be provided access to the family and to personal information about each of its members. The parents now have to convince not only the judge, but the children's lawyer, that their decision on visitation is in their children's best interests. Parents may be offended by the lawyer's questioning of their parental decisions, or insulted by the lawyer's statements about them.¹⁶⁹

This lawyer can represent the wishes of the child or advance the child's best interests as the lawyer perceives them, as well as conduct his own investigation.¹⁷⁰ Inevitably, the lawyer brings his or her own subjective experiences and beliefs about grandparents

168. See JOSEPH GOLDSTEIN *et al.*, BEFORE THE BEST INTERESTS OF THE CHILD 112 (1979) ("The appointment of counsel for the child without regard to the wishes of the parent is a drastic alteration of the parent-child relationship. . . . It intrudes upon the integrity of the family and strains the psychological bonds that hold it together.").

169. See examples given in Betty D. Friedlander, *Law Guardian Bias: Do We Know It When We See It?*, 1 Ann. 2002 ATLA-CLE 495 (2002).

170. See *Koppenhoefer v. Koppenhoefer*, 558 N.Y.S.2d 596, 599 (N.Y. App. Div. 1990).

and their proper role in children's lives. Without professional training in psychology or human relations, there is no guarantee that the lawyer will add anything to the case except his own subjective opinion and another attorney's fee.¹⁷¹ It is not surprising that law guardians have sometimes come up with their own best interests recommendations that are idiosyncratic and occasionally downright foolish.¹⁷² The case of *Richard YY v. Sue ZZ*¹⁷³ illustrates the point. A grandfather who had his grandson and two other boys in his home had failed, on several occasions, to protect the grandchild from sexual activity. Despite his awareness of the problem, the grandfather made only weak, ineffectual efforts to prevent repeat incidents. The mother, with unassailable good reason, saw the grandfather as uncaring and irresponsible, and refused further visitation. The grandfather sued under D.R.L. § 72. The court correctly denied his petition, and rejected the law guardian's peculiar recommendation that the grandfather have visitation, supervised in the mother's own home.

The appointment of law guardians in these cases can be distinguished from their more appropriate appointment in juvenile delinquency, child abuse, or child neglect proceedings. In delinquency cases, the child is the target of quasi-criminal proceedings and needs a lawyer to avoid the serious consequences of loss of liberty. In abuse and neglect proceedings, the child's health and safety is at issue. In both of these types of case, an authorized official (police officer or caseworker) has made a threshold decision that legal action is warranted. In divorce cases where custody is at issue, some courts suggest that a law guardian should be appointed in some of these cases. The law guardian's presence is still intrusive, but the parents themselves have initiated the proceedings that put the child's custody into question and lead to the lawyer's appointment. Further, the law guardian's recommendation will at least support one of the parents. Law guardians in grandparent vis-

171. See *Principato v. Lombardi*, N.Y.L.J., Sept. 3, 2003 at 19 (Sup. Ct. Kings County) (awarding guardian fees of \$200 per hour).

172. See GOLDSTEIN, *supra* note 168, at 18 (observing that it is a "fantasy" to assume that lawyers, experts, and other participants in cases involving children's issues are always the most skilled, the most sensitive and the most competent personnel.).

173. 673 N.Y.S.2d 219 (N.Y. App. Div. 1998).

itation cases, by contrast, may side against both parents,¹⁷⁴ in a proceeding not initiated by either one of them, and contribute to the disturbances in parent-child relationships that these proceedings induce.¹⁷⁵

V. CONCLUSION

When litigation pits grandparents against ordinary, fit parents, a host of burdens arises that plague the family unit and negatively affect both parents and children. These burdens extend beyond the intrusions of coercive court visitation orders and lengthy court supervision of those orders over the years of a subject child's minority. The litigation itself imposes heavy burdens on family privacy, parental autonomy, and the parent-child relationship, even before a final judgment ordering visitation is entered.

The Supreme Court in *Troxel v. Granville* identified this issue as one of constitutional dimension, but left it to the states, and to future cases, to explore its true scope. This article lays bare those problems, and urges a deeper understanding on the part of New York state judges of the damage that this litigation inflicts. This understanding, and the traditional respect New York accords family privacy and parental autonomy in child rearing, should lead to an interpretation of New York grandparent visitation law that firmly controls this litigation.

The vague and elusive "best interest of the child" standard, employed in the New York visitation statute, does not provide a useful way to resolve child rearing disputes that are not clear-cut. Instead, it provides shelter for judges who are inclined to substitute their own subjective judgments and personal opinions for those of fit parents. To reform the legal regime in New York, I suggest these changes:

174. See, e.g., Matter of Florence L, N.Y.L.J., Jan. 14, 2000, at 30 (Fam. Ct. Nassau County).

175. See supra, notes 33-61 and accompanying text. See also *In re Marriage of Mentry*, 190 Cal.Rptr. 843, 849 (1983) (stating that one purpose behind the legal presumption favoring parental autonomy "is to diminish the uncertainties and discontinuities that can affect the parent-child relationship whenever third parties (lawyers as well as judges) episodically intrude through an ill-equipped adversarial process in which decisions are subject to reconsideration and eventual appellate review").

(1) New York's threshold standing requirements should be strengthened to provide protection for parents and children at the outset of grandparent visitation litigation.

(2) The courts should adopt a "strict scrutiny" standard to evaluate the constitutionality of grandparent visitation orders imposed upon parents.

(3) The "best interests of the child" language in the New York statute should be construed to require deference to parental choices about visitation, except in extraordinary circumstances where a child's need for grandparent contact is compelling and is demonstrated by clear and convincing evidence.

(4) To modify or terminate a grandparent visitation order, a parent should not have to prove changed circumstances, but should only need to show that no extraordinary and compelling circumstances exist which justify the state in continuing to override parental child rearing choices.

(5) Law guardians for children in grandparent visitation cases impose additional burdens on families in these proceedings, and they should not be routinely appointed.

The law's role in family life is limited by cultural and constitutional tradition. Law should support ordinary parenting, and intervene only when such intervention is truly essential to the welfare of the child. Children have a need for peace and harmony in their lives, and a need for parental guidance. They depend on their parents for basic physical and emotional needs. These needs cannot be met under New York's present grandparent visitation regime.