

2000

# The Dark Side of Grandparent Visitation Rights

Stephen A. Newman

*New York Law School*, [stephen.newman@nyls.edu](mailto:stephen.newman@nyls.edu)

Follow this and additional works at: [https://digitalcommons.nyls.edu/fac\\_other\\_pubs](https://digitalcommons.nyls.edu/fac_other_pubs)

---

## Recommended Citation

Newman, Stephen A., "The Dark Side of Grandparent Visitation Rights" (2000). *Other Publications*. 419.  
[https://digitalcommons.nyls.edu/fac\\_other\\_pubs/419](https://digitalcommons.nyls.edu/fac_other_pubs/419)

This Article is brought to you for free and open access by the Faculty Scholarship at DigitalCommons@NYLS. It has been accepted for inclusion in Other Publications by an authorized administrator of DigitalCommons@NYLS.

## *THE DARK SIDE OF GRANDPARENT VISITATION RIGHTS; Perspective*

New York Law Journal  
June 14, 2000 Wednesday

Copyright 2000 ALM Media Properties, LLC All Rights Reserved Further duplication without permission is prohibited

### **New York Law Journal**

**Section:** Pg. 5, (col. 2); Vol. 223

**Length:** 1609 words

**Byline:** Stephen A. Newman

### **Body**

---

#### **Perspective**

On June 6, the U.S. Supreme Court handed down its decision in **Troxel v. Granville**, a case in which paternal grandparents sued a mother to obtain substantial visitation time with their two grandchildren. The plaintiffs sued under a Washington state statute that permitted any person to petition a court at any time for visitation rights, to be granted when visitation may serve the best interests of the child.

Even though this statute was described as breathtakingly broad in Justice Sandra Day O'Connor's plurality opinion, it was ruled unconstitutional not on its face, but only as applied to a mother who had granted some visitation to the grandparents even before the lawsuit began. The trial court's order for increased visitation, Justice O'Connor wrote, was based on the judge's mere disagreement with the mother, and violated the fundamental right of parents to make decisions concerning the care, custody and control of their children guaranteed by the Due Process Clause of the Fourteenth Amendment.

The plurality did not discuss the precise scope of the parental right involved. By considering the extremely broad statute to be facially valid, it left all visitation statutes, New York's among others, safe

from attack. The single direction given by the plurality to state courts in the application of such laws was sparse: they must accord at least some special weight to a fit parent's decision about visitation.

### **An Institution in Transition**

Although **Troxel** seems modest in scope, there is something to be said for not reading detailed rules of family law into the federal constitution. The family is an institution in transition, and few can predict how the social experiments being tried now will fare over the coming decades. The 50 states ought to have substantial leeway in fashioning law to deal with the changes in family life and family structure now taking place. Each state needs to be free to work out its own set of policies and standards to meet the needs of families and children.

In New York, this task is likely to fall to judges. The state's Grandparent Visitation Statute (Dom. Rel. L. 72), last significantly amended in 1975, surely will satisfy federal constitutional standards after **Troxel**. Under our statute, grandparents must first have standing to sue, based upon (1) the death of one or both of the child's parents, or (2) a showing that equity would see fit to intervene. If standing exists, the court may grant visitation as the best interest of the child may require. Although the statute is very broad, it is more limited than the one in **Troxel** because it is confined to grandparents (not any person) and it requires more than solely a best interests determination.

The courts must give concrete meaning to the two very broad phrases in the current statute: when equity shall see fit to intervene and the best interests of the child. And they must determine if federal or state due process clauses invalidate specific applications of the statute. In doing these things, judges must be guided by past experience with grandparent litigation. The state's trial judges have the most experience with these cases, and some of them have discovered what may be the most important feature of the entire visitation issue. Behind the benign language about equity lies some of the most meanly fought disputes in the entire field of family law. This sort of litigation is not always a wholesome effort to restore relationships between stereotypically sweet, loving grandparents and their adored grandchildren. Instead, it is often bitter litigation between unhappy family members, marked by accusation and recrimination. The parties dredge up longstanding family grievances and expose each other's defects as parents and as people.

Grandparent cases most resemble child custody contests between divorcing parents, litigation generally agreed by family lawyers and judges to be ugly and damaging to all involved. 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.

As for the children the litigation is ostensibly designed to serve, they are placed at the center of intergenerational warfare that creates intense loyalty conflicts for them, threatens to undermine their parents' authority, and humiliates either their parents, their grandparents, or both. They learn about family problems that parents might otherwise choose to shield them from, and they suffer from the tremendous emotional toll that litigation against their parents exacts. These lawsuits come at a very high cost - the loss of security, harmony, and peace in the family setting that children need.

Several cases in New York illustrate the destructive potential of this litigation. **Matter of Gloria R.** featured a well-to-do grandmother living on Park Avenue who sued her son and daughter-in-law. Gloria R., in the words of Judge David B. Saxe, was a well-educated, urbane and composed 70-year old woman. She described herself as a loving mother and grandmother, unfairly excluded from her grandchildren's lives. What better candidate for grandparent visitation rights?

But in court, all of her now adult children took the witness stand to testify against her. Alfred, the 46-year-old father of the grandchildren, told of his mother's harsh treatment of himself, his brother and his sister when they were children. According to the judge's opinion, Alfred claimed that his mother made his childhood continuously miserable by treating him with unrelenting contempt. He stated that his mother made every effort to prevent him from ever having a meaningful conversation with his siblings by prohibiting such conversations unless she was present to monitor them. Her mistreatment of his sister Beverly was described in graphic detail: Gloria forced Beverly to eat, and when she would not, slapped her face, screamed in her ears, knocked her down to the floor, pulled and kicked her into her room. Even tickling was recalled as sadistic: Gloria tickled Beverly until she could not breathe.

Beverly took the stand and accused Gloria of abusive hitting and sexual groping. Beverly appeared to Justice Saxe to be an extremely disturbed individual, a living Exhibit A for Gloria's bad parenting. Another brother, Clifford, echoed his siblings' reports of parental unfitness. Gloria's former husband

joined the fray, testifying to Gloria's excessive corporal punishment of the children. He even offered a psychological theory about Gloria (that she became mentally unstable after the suicide of her own mother and then started abusing her own children).

Gloria R. lost her bid for visitation. The judge found her self-centered, severely critical, unforgiving and willing to impose her will on others whenever she could. Undoubtedly, he was right. But one can fairly ask whether this family's civil war should ever have been fought out in a court of law. A statute that speaks vaguely of equity and the best interest of the child can act as a spur to legal action, unless judicial decisions raise high barriers to this brand of litigation and limit the opportunities for parties to initiate it.

Another family's grief was put on display in **Doe v. Smith**. A grandfather sought visitation with his two adult daughters' children. Both daughters refused. At a hearing in Queens Family Court before Judge Guy DePhillips, the two women described their father as hostile, distant and verbally abusive to them in childhood. As adults, they avoided and deeply distrusted him. One vowed that if the court imposed visitation, she would opt to have no more children.

### **'Beyond Purview of Law'**

Judge DePhillips wisely observed that the case presented a tragedy in human interpersonal relationships which is basically beyond purview of the law. Surprisingly, the Appellate Division reversed Judge DePhillips, claiming that the grandfather's efforts to contact the daughters and their children sufficed to give him standing to bring the case, the issue at the hearing. It remanded the case for a second hearing to decide whether the best interests of the children would be served by visitation. The parties were thus urged to continue their stressful combat in another round of hearings that promised only more expense and misery for all concerned.

Although New York's Grandparent Visitation Statute is undoubtedly safe after **Troxel**, past New York cases demonstrate the dark side of grandparent visitation litigation. These legal battles can be terribly destructive to all involved - parents, grandparents, and, most importantly, children. The law must take account of the fact that grandparents who are warm and loving people will rarely need visitation statutes. Their grown children will be happy to have them involved in their lives. But grandparents who seek to

control, oppress or manipulate their offspring unfortunately find the law of visitation to their liking, for it provides a ready club to use in the ongoing intergenerational family struggle. In applying the New York statute, our courts must consider these unpleasant realities. Concepts like equity, the best interests of children, and parental rights are flexible, and can be interpreted so as to ensure that the New York visitation statute does not become an unwitting instrument for the disruption of the lives of families and children. The law has a role to play when extraordinary circumstances exist, such as the exclusion of a grandparent who has spent years raising a grandchild. But the vast majority of intergenerational conflicts should be left to the mental health profession.

**Load-Date:** August 5, 2011