LAW AND THE FAMILY

"Visitation Rights of Grandparents, Siblings and Others"

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'WILL YOU still need me; Will you still feed me, When I'm sixty-four" "When I'm

Sixty-Four" - The Beatles, 1967

Need them or not, you may have to have them, so says the Court of Appeals. No wonder people are all pumped up about the recent decision on grandparent rights by New York's highest court.

The loudest cries are sure to be family traditionalists. "There go the liberals trying to destroy the fiber of our morality!" has a catchy ring. Is this yet another assault against traditional family values and the decline of our morals. Opponents will take their cues and hide behind the flag and the American family. The staunchest supporters will seek relief from the perhaps Norman Rockwellian concept of "extended family," claiming hedonistic baby boomers need all the help they can get. What better way then with older, more stable values that, at least in theory, lie within the next generation up.

Devising strategies to meet commitments to work, children and play has more and more been a challenge to youth turned middle-aged. Add to that the vast increase in divorces, to 12.7 percent in 1989 from 2.9 percent in 1960, according to the U.S. Census Bureau - Mutual Status of Americans Ages 35-44; and reduction in marriage, to 75.9 percent in 1989 from 87.5 percent in 1960. The results: suffocating schedules that often must be handled single-handedly. Even with intact families the stress can be grueling.

Has the Court of Appeals added pressure or pleasure? An unwelcome, unexpected visit from grandma and grandpa? Or a cherished moment,

soon to be a fond memory of home-baked cookies and cocoa that will long be remembered by a loving grandchild?

Standing to Grandparents

In Emanuel S. v. Joseph E., [FN1] the Court of Appeals held that Domestic Relations Law (DRL) s72 may be applied to grant standing to grandparents seeking visitation with a grandchild when the nuclear family is intact and despite the parents' objection. In its decision, it rejected the holding of the Appellate Division.

The Appellate Division held that a petition for an order authorizing grandparent visitation pursuant to DRL s72 "must demonstrate the existence of some circumstance or condition, such as an untoward disruption of an established grandparent-grandchild relationship because of, e.g., a change in the status of the nuclear family, or interference with a "derivative" right, or some abdication of parental responsibility, before judicial examination of the best interest of the child with its attendant trauma, increased animosity and financial drain is to be undertaken. [FN2]

The Court of Appeals avoided the question of whether the parents' constitutional rights are violated if the Court allows visitation over their wishes when there is no claim that they are separated or unfit, since it was not before the Court. The award of visitation was not addressed. Rather, the petitioner demonstrated he had standing to seek the award and remitted the matter to Family Court to determine the issue of standing.

DRL s72 provides:

Special proceeding or habeas corpus to obtain visitation rights in respect to certain infant grandchildren where either or both of the parents of a minor child, residing within this state, are deceased, or where circumstances show that conditions exist which equity would see fit to intervene, a grandparent or the grandparents of such child may apply to the supreme court by commencing a special proceeding or for a writ of habeas corpus to have such child brought before such court; and on the return thereof, 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, to be given in such manner as the court shall prescribe, may make such directions as the best interest of the child may require, for visitation rights for such grandparent or grandparents in respect to such child. (Emphasis supplied.)

Newly Defined Circumstances

The threshold issue for seeking grandparent visitation under the statute, is to establish the right to seek visitation by coming within the provisions of "death or equitable circumstances" that permit the court to entertain the petition. Once a favorable conclusion is drawn, the grandparents must bear the burden of proving visitation is in the best interests of the grandchild.

The Court of Appeals has now liberally defined the "circumstances" or "conditions" under which "equity would see fit to intervene" to grant standing. Tellingly, it rejected any notion that the statute or its legislative history eliminated standing when the grandchild lives with fit parents in an intact nuclear family. The Court noted:

The nature and extent of the grandparent-grandchild relationship is an essential part of the inquiry. It is not sufficient that the grandparents allege love and affection for their grandchild. They must establish a sufficient existing relationship with their grandchild, or in cases where that has been frustrated by the parents, a sufficient effort to establish one, so that the court perceives it as one deserving the court's intervention. If the grandparents have done nothing to foster a relationship or demonstrate their attachment to the grandchild, despite opportunities to do so, then they will be unable to establish that conditions exist where "equity would see fit to intervene." The evidence necessary will vary in each case but what is required of grandparents must always be measured against what they could reasonably have done under the circumstances."

On July 10, 1989, the DRL was amended to allow a brother or sister or stepbrother or stepsister, or a proper person on his or her behalf if he or she is under the age of 18, to apply to the Supreme Court by special proceeding or a writ of habeas corpus, or make an application to the Family Court, for visitation rights with such brother or sister. Naturally, the determination is to be made based upon the best interests of the child. It appears that as a prerequisite for the court's exercise of its "best interest" discretion it must first find that "conditions exist which equity would see fit to intervene." The statute provides:

71. Special proceeding or habeas corpus to obtain visitation rights in respect to certain infant siblings Where circumstances show that conditions exist which equity would see fit to intervene, a brother or sister or, if he or she be a minor, a proper person on his or her behalf of a child, whether by half or whole blood, may apply to the supreme court by commencing a special proceeding or for a writ of habeas corpus to have such child brought before such court, or may apply to the family pursuant to subdivision (b) of section six hundred fifty-one of the family court act; and on the return thereof, 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, to be given in such manner as the court shall prescribe, may make such directions as the best interest of the child may require, for visitation rights for such brother or sister in respect to such child. (Emphasis supplied.)

In State ex rel Noonan v. Noonan, [FN3] the Supreme Court held that pursuant to DRL s71 a second wife has standing as a mother to bring a proceeding on behalf of her children for visitation with the children's half siblings of their father's first marriage. However, she cannot bring the proceeding on behalf of her child from a prior marriage who is a half sibling.

The resemblance between DRL s72 and DRL s71 lies with the legislatively imposed requirement for the court's exercise of its "best interest" discretion. It must first find that "conditions exist which equity would see fit to intervene." When contrasted, the two statutes vastly differ, given that DRL s72 permits the court to exercise its "best interest" jurisdiction where either or both parents is or are deceased.

Biological Parent

In Alison D. v. Virginia M., [FN4] the Appellate Division affirmed a judgment of the Supreme Court, which dismissed a habeas corpus proceeding to obtain visitation rights. The petitioner alleged she stood in loco parentis, under DRL s70 to the child, born by artificial insemination of the respondent, pursuant to the couple's decision to raise a family together. When the child was two years, four months old, the parties terminated their relationship but agreed to a visitation schedule between the petitioner and the child. In July, respondent terminated petitioner's communication with the child. Although DRL s 70 "does not explicitly define the term parent" the petitioner was not a biological parent, within the meaning of the statute and could not achieve standing under DRL s70 to apply for a habeas corpus writ to determine visitation rights.

The Court of Appeals affirmed. [FN5] It noted that pursuant to DRL s70 "either parent may apply to the supreme court for a writ of habeas corpus to have such minor child brought before such court; and [the court] may award the natural guardianship, charge and custody of such child to either parent *** as the case may require." Here, petitioner had no right under DRL s70 to seek visitation and, thereby, limit or diminish the right of the concededly fit biological parent to choose with whom her child associates. She was not a "parent" within the meaning of s70.

Petitioner conceded that she was not the child's "parent" but claims to have acted as a "de facto" parent or that she should be viewed as a

parent "by estoppel." Therefore, she claimed she had standing to seek visitation rights. These claims were insufficient under s70.

The court said:

"It has long been recognized that, as between a parent and a third person, parental custody of a child may not be displaced absent grievous cause or necessity. [FN6] To allow the courts to award visitation - a limited form of custody - to a third person would necessarily impair the parents' right to custody and control (id). Petitioner concedes that respondent is a fit parent. Therefore she has no right to petition the court to displace the choice made by this fit parent in deciding what is in the child's best interests. [FN9] ***

We declined petitioner's invitation to read the term parent in section 70 to include categories of nonparents who have developed a relationship with a child or who have had prior relationships with a child's parents and who wish to continue visitation with the child. [FN7]

Family Privacy

DRL ss71 and 72 are statutes that permit the court to intrude into the privacy of the family. Courts have cautiously but legitimately invaded the privacy and autonomy of the family from time to time. Where it is essential to protect a child from physical or sexual abuse, intrusion is, without a doubt, necessary. A situation perhaps not quite as compelling but nonetheless one in which intrusion may be justified is where the child has established a meaningful relationship with a non-parent and it would be traumatic or detrimental to the child to completely sever that relationship. Existing New York law, however, requires a non-parent to establish first unfitness of the parent or other extraordinary circumstances when seeking custody. [FN8]

For many years grandparents had no legal claim to custody or visitation, and the relationship was subject to absolute parental authority. [FN9]

Since 1966, New York has given a statutory right to grandparents to seek visitation where either or both parents of a minor child residing within this state, are deceased, or where circumstances show that conditions exist that equity would see fit to intervene.

Since 1976, visitation may be awarded to grandparents in matrimonial actions. [FN10] The 1976 amendment added the following to DRL s240: "Such direction [of a court in a matrimonial action] may provide for reasonable visitation rights to the maternal or paternal grandparents of any child of the parties." In New York, the statute provides that

grandparents may obtain visitation rights even though their child is not deceased and the nuclear family is intact; in other words, the custody/visitation claims of grandparents are not "derivative." [FN11]

Under DRL s72 where there is an intact family, the threshold requirement is that equity would see fit to intervene before the court will consider the "best interests" of the child.

Commenting on statutes such as DRL s72, Professor Clark says: "If the grandparent's claim is upheld, the custodian, who is often a hardpressed single parent, will then be subject to deadlines and requirements which interfere with her own relationship with the child. For all these reasons, the statutes and decisions dependant upon them are simply ill-advised. The Law should return to the position taken before grandparent visitation statutes were enacted. If the custodial parent has a firm objection to the visitation claim, that claim should be denied except perhaps in the rare case in which the child is old enough to have a strong preference and wishes to visit the grandparent." [FN12]

This right or personal privacy includes "the interest in independence in making certain kinds of important decisions." [FN13]

While the outer limits of this aspect of privacy have not been marked by the court, it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions "relating to marriage, [FN14] procreation, [FN15] contraception, [FN16] family relationships [FN17] and child rearing and education." [FN18]

Protected Choices

The constitutionally protected right of privacy extends to an individual's liberty to make choices. It does not automatically invalidate every statute in this area. The individual's liberty must be regulated in ways that do not infringe protected individual choices. A burdensome law or regulation may be validated by a sufficiently compelling state interest. In Roe v. Wade, for example, after determining that the "right of privacy ... encompass[es] a woman's decision whether or not to terminate her pregnancy," [FN19] the U.S. Supreme Court cautioned that the right is not absolute, and that certain state interests (in that case, "interests in safeguarding health, in maintaining medical standards, and in protecting potential life") may at some point "become sufficiently compelling to sustain regulation of the factors that govern the abortion decision." [FN20] "Compelling" is the key word. Where a decision as fundamental as whether to rear or have a child is involved, regulations imposing a burden on it may be justified only by compelling state interests, and must be narrowly drawn to express only those interests. [FN21]

Parents have a right under the Fourteenth Amendment to raise their families as they see fit. [FN22] As stated by the Supreme Court, "the custody, care and nurture of the child [should] reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." [FN23]

There are those who suggest that permitting grandparent visitation, where there is an intact family, over the natural parents' objection, unconstitutionally impinges upon the integrity of the family without a compelling state interest. The state, in its role as parens patriae, has determined that, under certain limited circumstances, grandparents should have continuing contact with the child's development if it is in the child's best interest. When one or both of the parents have died, the child usually suffers great emotional stress. By enacting s72, the Legislature originally recognized that, particularly where a relationship between the grandparents and grandchild has been established, the child should not undergo the added burden of being severed from his or her grandparents, who may also provide the natural warmth, interest and support that will alleviate the child's misery.

The question is, when the natural parents are alone and the family intact, should the state be allowed to determine to what extent the child's contacts with its natural family be influenced?

The courts have held a natural parent has a right to raise his or her child and the child a right to be raised by his or her parent. [FN24]

Absent extraordinary circumstances, narrowly categorized, it is not within the power of a court, or, by delegation of the Legislature or court, a social agency, to make significant decisions concerning the custody of children, merely because it could make a better decision or disposition.

Neither decisional rule or statute can displace a parent because someone else could do a "better job" of raising the child in the view of the court (or the Legislature), so long as the parent or parents have not forfeited their "rights" by surrender, abandonment, persisting neglect, unfitness or other extraordinary circumstances These "rights" are not so much "rights," but responsibilities which reflect the view except when disqualified or displaced by extraordinary circumstances, parents are generally best qualified to care for their own children and therefore entitled to do so." [Bennett v. Jeffreys (1976) 40 NY2d 543, 387 NYS2d 821, 356 NE2d 277, later app (2d Dept.) 59 App Div 492, 399 NYS2d 697.]

The policy in New York State is that it is desirable for children to grow up with a normal family life in a permanent home and that such circumstance offers the best opportunity for children to develop and thrive. [FN25] The

state has indicated parents are entitled to bring up their own children unless the child's best interests would be thereby endangered. [FN26] The custody, care and nurture of the child reside first with the natural parents [FN27] and this right is an interest far more precious than any property right. [FN28]

Parents' Rights

A long line of cases supports and substantiates parents' rights. This right is essential and is protected by the Due Process Clause of the United States Constitution [FN29] and the constitutional right of privacy. [FN30] The parent's rights are superior to all others unless he or she surrenders that right or is proved to be unfit to be a parent. [FN31] The natural parent is presumed to be entitled to custody of his or her child unless shown by clear and convincing evidence to be unfit to parent the child or the parent voluntarily surrenders the child for adoption or consents to the child's adoption. [FN32] The state may not deprive a natural parent of the custody of a child absent surrender, abandonment, persistent neglect, unfitness or other like extraordinary circumstances. [FN33] Such circumstances do not arise merely because a court or a social agency believes it can decide more wisely than the parent or believes it has found someone better to raise the child [FN34] or solely because it is in the child's best interests. [FN35] Furthermore, a finding of extraordinary circumstances does not justify depriving a natural parent of the custody of a child; instead it triggers the court's right to make a disposition that is in the child's best interests. [FN36]

The constitutional principles of due process and protecting privacy prohibit governmental interference with a parent's right to supervise and rear a child except on a showing of overriding necessity. The leading New York decision to date construing DRL s72, is Lo Presti v. Lo Presti, [FN37] which held that pursuant to DRL s72, grandparents may obtain visitation rights and which gave an approving and broad construction to the statute. Notably, Lo Presti involved a circumstance where the family was not intact.

DRL s72 is deemed not to be limited to derivative rights. The statute was also sustained as constitutional, in People ex rel Sibley v. Sheppard [FN38] where the Court of Appeals held that to grant visitation rights to the maternal grandmother or a grandchild whose mother had died and whose father was in prison and who had been adopted was not an unconstitutional invasion of family privacy, where the family was not intact. The Court reasoned:

Permitting grandparent visitation over the adoptive parents' objection does not unconstitutionally impinge upon the integrity of the adoptive family.

The State as parens patriae, has determined that, under certain limited circumstances grandparents should have continuing contacts with the child's development if it is in the child's best interest.

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FN1 __ NYS2d __, __ NYS2d __, New York Law Journal, July 3, 1991, P. 21, Col. 2.

FN2 (1990, 2d Dept.) 161 AppDiv2d 83, 560 NYS2d 211

FN3 (1989) 145 Misc2d 638, 547 NYS2d 525.

FN4 (1990, 2d Dept.) 155 AppDiv2d 11, 552 NYS2d 321.

FN5 77 NY2d 651, 569 NYS2d 586 (1991).

FN6 Citing Matter of Ronald FF. v. Cindy GG., supra 70 NY2d at 144, 517 NYS2d 932, 511 NE2d 75; see also, Matter of Bennett v. Jeffreys, 40 NY2d 543, 549, 387 NYS2d 821, 356 NE2d 277.

FN7 Citing accord, Nancy S. v. Michele G., 228 Cal App 3d 831, 279 Cal Rptr. 212 (1st Dist., 1991).

FN8 Ponzini v. Ponzini (1987) 135 Misc2d 468, 515 NYS2d 974. See also Re Adoption of Male Infant L. (1984) 61 NY2d 420, 474 NYS2d 447, 462 NE2d 1165 and Re Nadia Kay R. (1986, 2d Dept.) 125 AppDiv2d 674, 509 NYS2d 862, app den NY2d 608, 507 NE2d 322.

FN9 See Foster and Freed, "Grandparents Visitation:, Vagaries and Vicissitudes," NYLJ, June 23, 1978, p 1; Ibid 6-27-78, p 1; and Id 6-28-78, p 1 reprinted 23 St. Louis Uni L J 643 (1979).

FN10 See Laws 1976, Ch 133.

FN11 Frances E. v. Peter E. (1984) 125 Misc. 2d 164, 479 NYS2d 319.

FN12 See Clark, The Law of Domestic Relations in the United States, 20.7 at 542-543: "Although the Constitution does not explicitly mention any right of privacy, the Supreme Court has recognized that one aspect of the "liberty" protected by the Due Process Clause of the Fourteenth Amendment is a "right of personal privacy, or a guarantee of certain areas or zones orprivacy." Roe v. Wade, 410, US 113, 152 (1973).

FN13 Whalen v. Roe, 429 US 589, 599-600 (1977).

FN14 Loving v. Virginia, 388 US 1, 12 (1967).

FN15 Skinner v. Oklahoma ex rel Williamson, 316 US 535, 541-542 (1942).

FN16 Eisenstadt v. Baird, 405 US at 453-454; id., at 460, 463-465 (White J., concurring in result).

FN17 Prince v. Massachusetts, 321 US 158, 166 (1944).

FN18 Pierce v. Society of Sisters. 268 US 510, 535 (1925); Meyer v. Nebraska, [262 US 390, 399 (1923); Roe v. Wade, supra, at 152-153. See also Cleveland Board of Education. La Fleur, 414 US 632, 639-640 (1974).

FN19 410 US., at 153.

FN20 Id., at 154.

FN21 Id., at 155-156 and cases there cited.

FN22 (See Prince v. Massachusetts, 321 US 158, 64 S.Ct. 438, 88 LEd. 645; Pierce v. Society of Sisters, 268 US 510, 45 S.Ct. 571, 69 L.Ed. 1070; Meyer v. State of Nebraska, 262 US 390, 43 S.Ct. 625, 67 L.Ed. 1042; People v. ex rel. Kropp v. Shepsky, 305 NY 465, 113 NE2d 801; Matter of Zorach v. Clauson, 303 NY 161, 100 NE2d 463, affd. 343 US 306, 72 S.Ct. 679, 96 LEd. 954).

FN23 Prince v. Massachusetts, supra, at p. 166, 64 S.Ct. at 442.

FN24 Bennett v. Jeffreys (1976) 40 NYS2d 543, 387 NYS2d 821, 356 NE2d 277, later app (2d Dept.) 59 AppDiv2d 492, 399 NYS2d.

FN25 Soc. Services L 384 b (1)(a)(i).

FN26 Serv L 384 b (1)(a)(ii).

FN27 Stanley v. Illinois (1972) 405 US 645, 31 L Ed 2d 551, 92 S Ct 1208.

FN28 Lassiter v. Department of Social Services (1981) 452 US 18, 68 LEd2d 640, 101 S Ct 2153, reh den 453 US 927, 69 LEd2d 1023, 102 S Ct 889.

FN29 U.S. Constitution Fourteenth Amendment.

FN30 Stanley v. Illinois (1972) 405 US 645, 31Ed 2d 551, 92 S Ct 1208; Re Marie B (1984) 62 NY2d 352, 477 NYS2d 87, 465 NE2d 807.

FN31 Re Adoption of Male Infant (1984) 61 NY2d 420, 474 NYS2d 447, 462 NE2d 1165.

FN32 See Soc Services L 383 (6) and State ex rel Dunn v. Catholic Home Bureau for Dependent Children (1987, 1st Dept.) 125 AppDiv2d 106, 512 NYS2d 82.

FN33 Re Adoption of Male Infant L. (1984) 61 NYS2d 420, 474 NYS2d 447, 462 NE2d 1165; William I. v. Schnectady County Dept. of Social Services (1984, 3d Dept.) 102 AppDiv2d 482, 478 NYS2d 120.

FN34 Re Adoption of Male Infant L. (1984) 61 NYS2d 420, 474 NYS2d 447, 462 NE2d 1165; Re Mitchell (1979, 4th Dept.) 70 AppDiv2d 367, 421 NYS2d 443, later app (4th Dept.) 83 AppDiv2d 797, 443 NYS2d 966, revd 56 NYS2d 77, 451 NYS2d 41, 436 NE2d 491.

FN35 Re Sheila G. (1984) 61 NY2d 368, 474 NYS2d 421, 462 NE2d 1139; Re RR (1979) 48 NY2d 117, 421 NYS2d 863, 397 NE2d 374; Re K. (Anonymous) (1979) 47 NY2d 374, 418 NYS2d 339,391 NE2d 1316; Re Y (1978, 1st Dept.) 66 AppDiv2d 723, 411 NYS2d 326, on remand 102 Misc2d 215, 423 NYS2d 394 revd (1st Dept) 77 App Div 433, 433 NYS2d 580, revd 54 NY2d 824, 443 NYS2d 722, 427 NE2d 1187, on remand (1st Dept.) 86 AppDiv2d.

FN36 Re Adoption of Male Infant L. (1984) 61 NYS2d 420, 474 NYS2d 447, 462 NE2d 1165; Merritt v. Way (1983) 58 NY2d 850, 460 NYS2d 20, 446 NE2d 776, Bennett v. Jeffreys (1976) 40 NY2d 543, 387 NYS2d 821, 356 NE2d 277, later app (2d Dept.) 59 AppDiv2d 492, 399 NYS2d 697; State ex rel Dunn v. Catholic Home Bureau for Dependant Children (1987, 1st Dept.) 125 AppDiv2d 106, 512 NYS2d 82 ec; ci Re D. (1978) 97 Misc2d 859, 412 NYS2d 733; Dickson v. Lascaris (1978) 97 Misc2d 610, 411 NYS2d 995, aff (4th Dept.) 75 App Div 47, 428 NYS2d 544, revd 53 NY2d 204, 440 NYS2d 884, 423 NE2d.

FN37 (1976) 40 NY2d 522, 387 NYS2d 412, 355 NE2d 372, 90 ARL3d 217.

FN38 (1981) 54 NYS2d 320, 445 NYS2d 420, 429 NE2d 1049

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