THE BEST INTERESTS OF THE CHILD TEST AND ITS APPLICABILITY TO GRANDPARENTAL VISITATION[1]

Elliott Scheinberg

The heartfelt rush generated by the sight of a grandparent bouncing a grandchild on his or her lap, a scene from Norman Rockwell's Americana, makes the notion of anti-grandparental visitation painful. At the core of this emotionally charged controversy lie combatants each seeking to negotiate demarcation lines around a child: resistant parents asserting their constitutional autonomy to raise their child without state intervention versus senescent grandparents attempting to link their grandchild's reach to an earlier heritage.

The development of the branch of law dedicated to grandparental visitation in New York originated as legislative offspring[2] nearly two generations ago in 1965, with a subsequent amendment in 1975, and has received expansive readings which permit visitation even in the face of an intact nuclear family[3] and post adoption.[4]

A recent commentary erroneously urged that the phrase "the best interests of the child"produces an automatic award of visitation. Were this premise accurate in the least there would no disagreement that such a sweeping reading could pose uncertain consequences to children because not all grandparents offer positive experiences, their advanced stages in life notwithstanding. DRL §72 was never intended to provide grandparents with an automatic right of visitation even upon the death of their own child; §72 is a procedural vehicle only[5] devoid of substantive rights. It is only after standing has been established that a court must consider whether visitation is in the best interests of the child[6]. Standing may be conferred in a court's discretion after an examination of all

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[1] N.Y.L.J., Nov. 21, 2003.

[2] The right to seek and obtain grandparental visitation does not exist in common law. Hacker v. Strongson, 141 N.Y.S.2d 859 (N.Y.Sup., 1955): "No matter how sympathetic...there is no power in the court to deprive the natural parent of the right to the custody of his child, in the absence of proof that the welfare of the child is impaired.."

[3] Coulter v. Barber, 214 A.D.2d 195, 632 N.Y.S.2d 270 (3rd Dept., 1995).

[4] Sibley on Behalf of Sheppard v. Sheppard, 54 N.Y.2d 320, 429 N.E.2d 1049, 445 N.Y.S.2d 420 (1981).

[5] Simmons v. Sheridan, 98 Misc.2d 328, 329, 414 N.Y.S.2d 83, 84, aff'd , 79 A.D.2d 896, 435 N.Y.S.2d 871, order aff'd by 54 N.Y.2d 320, 429 N.E.2d 1049, 445 N.Y.S.2d 420 (1981); Lo Presti v. Lo Presti, 40 N.Y.2d 522, 387 N.Y.S.2d 412, 355 N.E.2d 372 (1976).

[6] Sibley on Behalf of Sheppard v. Sheppard, id.

the relevant facts[7]. New York requires the conjunctive satisfaction of a two prong test before visitation may be granted.[8]

> "The determination of grandparent visitation applications is a two-step process...The threshold question to be decided is petitioner's standing. Where...one of the child's biological parents is deceased, the grandparents have standing to pursue visitation...Where both parents are alive, the threshold standing question is resolved by determining whether the circumstances of the case show that conditions exist which equity would see fit to intervene. Once standing is established, either automatically or in equity, the court turns to the second step – a determination of whether visitation by the grandparents is in the child's best interest.[9]"

Smolen v. Smolen[10] elaborated on the pre-standing considerations when both parents are alive:

> "...DRL §72...first requires an examination of the parties' behavior. What, if anything, have the grandparents done to be deserving or undeserving of court intervention, and what is the basis of parental objections to visitation[11]? When both parents are living, standing is conferred only when there are special factors which make court intrusion into family autonomy appropriate, i.e. where there is possible harm to the child, or where the parental decision making is based on factors which are immaterial to the child's best interest."

Critical behind such pre-standing inquiries where both parents are alive is "the nature and extent of the existing grandparent-grandchild relationship:"[12] (1) an ongoing existing relationship, or (2) efforts made to establish a relationship measured against the reasonableness of the circumstances so that the court perceives it as one deserving the court's intervention. Allegations of love and affection for the grandchild, standing alone, are insufficient.[13] In *Emanuel S. v. Joseph E.* the Court of Appeals held:[14]

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[7] Emanuel S. v. Joseph E., 78 N.Y.2d 178, 181, 577 N.E.2d 27, 29 , 573 N.Y.S.2d 36, 37 (1991); Lyng v. Lyng, 112 A.D.2d 29, 29, 490 N.Y.S.2d 940, 941 (4th Dept., 1985).

[8] Emanuel S. v. Joseph E., id.

[9] Ziarno v. Ziarno, 285 A.D.2d 793, 793, 726 N.Y.S.2d 820, 821 (3rd Dept., 2001).

[10] 185 Misc.2d 828, 832, 713 N.Y.S.2d 903, 906 (N.Y.Fam.Ct., 2000).

[11] Also, see, Luma v. Kawalchuk, 240 A.D.2d 896, 896, 658 N.Y.S.2d 744, 746 (3rd Dept.,1997); Emanuel S. v. Joseph E., at 182.

[12] Kenyon v. Kenyon, 251 A.D.2d 763, 763, 674 N.Y.S.2d 455, 456 (3rd Dept., 1998).

[13] Emanuel S. v. Joseph E., at 182; Canales v. Aulet, 744 N.Y.S.2d 851, 295 A.D.2d 507 (2nd Dept. 2002).

[14] Emanuel S. v. Joseph E., at 182.

> "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 aforementioned commentary presented a 1992 study[15] in support of the abolitionist view which opined: "[M]ost grandparents are not so intimately involved in their grandchildren's lives. They do not have parent-like relationships with them. One major study showed grandparents were usually secondary figures and 'only rarely a primary source of psychological support for the child.'" The conclusions of that study to the contrary notwithstanding, a recent bill in the Legislature, which would amend DRL §72, FCA §651(b) & (d), FCA §1017(1), and Social Services Law §384-a(1-a), to enhance the procedural rights of grandparents seeking custody of minor children, thereby, evidencing a growing recognition of the impact made by grandparents on the lives of their grandchildren. The legislative metronome apparently marks a very different pace from those opposed to grandparental visitation. The preamble to the proposed legislation is compellingly instructive:

> "Legislative intent: The legislature hereby finds that, with 413,000 children living in grandparent headed households in New York State, grandparents play a special role in the lives of their grandchildren and are increasingly functioning as caregivers in their grandchildren's lives. In recognition of this critical role, that many grandparents play in the lives of their grandchildren, the legislature finds it necessary to provide guidance regarding the ability of grandparents to obtain standing in custody proceedings involving their grandchildren..."

In the landmark decision, *Troxel v. Granville,*[16] the United States Supreme Court declined the wholesale opportunity to strike down grandparental visitation statutes *per se*. Justice Sandra Day O'Connor, writing for the plurality, featured a more recent study by the U.S. Dept. of Commerce:[17]

> "The demographic changes of the past century make it difficult to speak of an average American family...While many children may have two married parents and grandparents who visit regularly, many other children are raised in single-parent households... Understandably, in these single-parent households, persons outside the nuclear family are called upon with increasing frequency to assist in the everyday tasks of child rearing. In many cases, grandparents play an important role. For example, in 1998, approximately 4 million children--or 5.6 percent of all children under age 18-- lived in the household of their grandparents.
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> ...Because grandparents and other relatives undertake duties of a parental nature in many households, States have sought to ensure the welfare of the children therein by protecting the relationships those children form with such third parties. The States' nonparental visitation statutes are further supported by a recognition, which varies

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[15] Andrew J. Cherlin and Frank F. Furstenberg., Jr., "The New American Grandparent: A Place in the Family, A Life Apart", at 169

[16] 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000)

[17] Id., at 63

from State to State, that children should have the opportunity to benefit from relationships with statutorily specified persons--for example, their grandparents."

New York courts, at all levels, have reverberated support behind the humanitarian goal sought to be achieved by our grandparental visitation statute:

"The amended statute, as several courts have recognized, rests on the humanitarian concern that " '[v]isits with a grandparent are often a precious part of a child's experience and there are benefits which devolve upon the grandchild * * * which he cannot derive from any other relationship.'"[18]

"[DRL §72] was enacted to enable children deprived of the society of their grandparents by the untimely death of a parent to maintain the bonds of kinship...the court...must be guided by the humanitarian purpose of the statute and by an independent evaluation of the best interest of the children affected."[19]

"Neither the Legislature nor this Court is blind to human truths which grandparents and grandchildren have always known.'"[20]

"[T]he courts have recognized that visits with grandparents are a beneficial experience for a child and are to be encouraged."[21]

Never, though, has it been captured any better: "a child cannot be loved by too many people."[22]

In thwarting a constitutional challenge against DRL §72, *Fitzpatrick v. Youngs*[23] pointed towards FCA §§3, 7, 10, 651 and DRL §5 as examples of State intervention in parental relationships with children:

"The best interests of the child is the governing standard in many of these situations, to the point that best interests of a child in most cases justify intervention by the State as parens patriae. In short, the legislative policy of this State appears clear that, in an appropriate case, the best interests of the child can take precedence over the parent's right to the care, custody and control of the child. An infant's welfare is accorded a

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[18] Emanuel S. v. Joseph E., 78 N.Y.2d 178, 181, 577 N.E.2d 27, 29, 573 N.Y.S.2d 36, 37 (1991).

[19] Ehrlich v. Ressner, 55 A.D.2d 953, 953, 391 N.Y.S.2d 152, 153 (2nd Dept., 1977).

[20] Weisman v. Weisman, 107 A.D.2d 805, 806, 484 N.Y.S.2d 640, 641(2nd Dept., 1985).

[21] Lyng v. Lyng, 112 A.D.2d 29, 29, 490 N.Y.S.2d 940, 941 (4th Dept., 1985).

[22] Davis v. Davis, 186 Misc.2d 344, 347, 717 N.Y.S.2d 503, 506 (Family Court, 2001).

[23] 186 Misc.2d 344, 717 N.Y.S.2d 503 (N.Y.Fam.Ct., 2000).

higher place on the pedestal of personal human rights in this State than parental control of that child."

Moreover, not all pronouncements are susceptible to or even capable of reduction to a bright line test, especially those involving human spirit or angst. The terms "equity", or "equitable", for example, like "the best interests of the child,"[24] are unshapen, similarly incapable of quantification or precise measure, and have, nevertheless, served as judicial beacons in countless decisions.

Very significantly, in *Matter of Michael B.,*[25] the Court of Appeals itself emphasized that the "'[B]est interest(s) of the child' is a term that pervades the law relating to children – appearing innumerable times in the pertinent statutes, judicial decisions and literature – yet eludes ready definition." The glaringly ineluctable conclusion that the Court of Appeals favors a fluid application of "the best interests of the child" test and rejects a conveniently graded yardstick as neither possible nor even desirable is readily gleaned from three Court of Appeals decisions, two of which appear as amongst the most oft cited in child custody literature: (a) "[T]he only absolute in the law governing custody of children is that there are no absolutes,"[26] (b) "Any court in considering questions of child custody must make every effort to determine 'what is for the best interest of the child, and what will best promote its welfare and happiness'...As we have recently stated [*Friederwitzer*], there are no absolutes in making these determinations; rather, there are policies designed not to bind the courts, but to guide them in determining what is in the best interests of the child'";[27] and (c) *Matter of Michael B.* That the appeals court is conclusively prepared to offer a definition of "the best interests of the child" when deemed necessary is evidenced by *Matter of Michael B.* wherein it defined the term for cases arising under Social Service Law ¶392(5-a) thereby manifesting its unequivocal intent not do so in other matters – *expressio unius est exclusio alterius*.

In sum, the best interests of the child test functions as a weave of interlocking probes working in tandem to produce a just result with the child as the first and foremost consideration at every stage.

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[24] In Smith v. Jones, 155 Misc.2d 254, 259, 587 N.Y.S.2d 506, 510 (N.Y.Fam.Ct., 1992), the court observed that the criteria for "equity" and "best interest" are "extremely vague" terms.

[25] 80 N.Y.2d 299, 604 N.E.2d 122, 590 N.Y.S.2d 60 (1992).

[26] Friederwitzer v. Friederwitzer, 55 N.Y.2d 89, 93, 432 N.E.2d 765, 767, 447 N.Y.S.2d 893, 895 (1982).

[27] Eschbach v. Eschbach, 56 N.Y.2d 167, 171, 436 N.E.2d 1260, 1262, 451 N.Y.S.2d 658, 660 (1982).