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GRANDPARENT VISITATION: BEST INTERESTS TEST IS  
NOT IN CHILD'S BEST INTERESTS

*Katharine T. Bartlett\**

I apologize that Dean Katharine Bartlett cannot be here today as planned. I have her remarks here, by fax, and I will try to convey her points in her own words.

Kate starts out this way. She says: "I am for grandparents visiting their grandchildren when the parents allow it. I am against court-ordered grandparents' visitation over the objections of the parents except in very limited and narrowly defined circumstances." She then goes on to tell us something very personal about herself. "I myself grew up on a family farm next door to my grandparents, and my siblings and I spent an hour or two a day at their place doing barn chores and other things. My own three children have very good supportive relationships with their grandparents, which my husband and I have encouraged."

"In other words," she says, "I understand that grandparents can be wonderful resources for children." However, she opposes court-ordered grandparents' visitation because she believes that more than access to their grandparents, children need parents who have the kind of autonomy and responsibility that include deciding with whom their children are going to spend time. This does not mean, she acknowledges, that all parents make good decisions about such things. It means that as a general rule that most children will be better off when we leave such matters up to their parents rather than to a court. Any different approach, and especially any case-by-case approach in which a court tries to decide what is in a "child's best interest," leaves us in a situation of second guessing parents' decisions, which does not, as a general matter, serve children's interests well. "Would I have lost something significant if my parents had cut off contact with my grandparents?" she asks. "Sure, I would have. But the real question is: if they had cut off contact would it have been in my interest for my grandparents to have been able to petition the court for court-ordered visitation?" "I don't think so," she says.

The kind of grandparents' visitation worth protecting, she notes, is the kind that is supported, arranged, and maintained by parents. "Courts should not be able to overrule parents on whether children should see their grandparents except in those still relatively uncommon circumstances in which grandparents have actually functioned as parents with the consent of the parent over some significant period of time or where there has been a finding of dependency, abuse, or neglect." Although the specific issue of grandparent visitation is not addressed by the American Law Institute in its new *Principles of the Law of Family Dissolution*, for which she has served as Co-Reporter, the standard she articulates is consistent with those Princi-

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\* Dean and A. Kenneth Pye Professor of Law, Duke University School of Law; B.A., 1968, Wheaton College; M.A., 1969, Harvard University; J.D., 1975, University of California at Berkeley. Dean Bartlett was unable to attend the symposium due to illness. Her comments were delivered by Associate Dean Joyce McConnell of the West Virginia University College of Law.

ples.

By "functioning as parents," Bartlett means grandparents who have actually lived with the child and provided the kind of ground-level care and exercised the kind of day-to-day responsibility that comes with being a parent. In fact, she says, any adult who has functioned as the child's primary parent over a significant period not only should have visitation with the child but, in appropriate circumstances, the possibility of custody. But without a functional parent-child relationship she believes that the decision-maker about whom the child should spend time with should be the parent, not the court. A court should be no more allowed to intervene to allow grandparent visitation than it is to order parents to make their children available for visitation by the kind next door neighbor or the wonderful loving babysitter or the rich aunt who can afford to take the child to Europe. "I hope," she says, "that the parent would allow access to all these folks who are beneficial to the child. Children benefit from exposure to caring and loving adults." But absent actual functioning for a significant period of time as a parent, no parent should be put to the burden of defending against a decision not to allow such exposure.

Often at this junction, she says, someone asks: "Shouldn't we be doing what's best for the child, not what's best for the parent?" I'm sure that thought popped into some of your minds. She insists, "this is the wrong question. The question is not whether the child's interest should be served. The child's best interest is everyone's goal. The problem is how to best serve this goal." Some think the answer lies in grandparents, or courts. Bartlett prefers parents, saying that there are good reasons why in this society we assume that parents are best situated and best motivated to make decisions in the child's best interest. Parental prerogatives are best viewed not as an alternative to the child's best interest, but as the key component.

There are lots of things, Bartlett argues, that the majority of us might agree are good for children. The question really, for us, is which one of those should courts be able to order parents to do. Many Americans, including many American judges, think going to church is good for children. Should we order parents to take their children to church? Of course not – although sometimes disputes over religious upbringing of children are one of the issues that comes between parents and grandparents. We might agree that children should be taught by their parents to give some of their spare time to visiting the elderly and helping the poor – worthy lessons for children, she says. But would we want courts to order parents to force their children to do those things? "I'm utterly convinced," she says, "that children benefit significantly" – and I actually agree with Dean Bartlett on this matter, not that I disagree with anything she said before, but this one really struck me — "that children benefit significantly from a regular, and early, bedtime routine." All of us who have been there know that. They behave better, they learn better, and they are more cheerful. She says, "If I were a judge should I be able to order parents to put their first graders to bed by 7:30 p.m. every night? I would be tempted, but I doubt most of us would want to live in the kind of society that would allow this." This is no different from a court forcing grandparents' visitation with a child against the wishes of the parents.

She also anticipates the question: "Should children be given a voice in

this decision? Should children be asked, ‘Do you want more visitation than you are currently getting with your grandparents?’” Bartlett answers clearly: “Children do not, and should not, bear the responsibility about how they should be raised.” This is up to parents, she says, and neither the state nor the children themselves.

She explores a number of myths and misconceptions about grandparent visitation. One myth is that court-ordered grandparent visitation is necessary to protect children from abuse or neglect. There are other laws that she points out – laws that are narrowly tailored to ensure that there are reasonable and constitutionally sufficient grounds for intruding on the parent’s prerogatives. Where intervention is appropriate and a substitute placement is sought, family members are usually favored, which is appropriate.

Another myth is that without court ordered visitation, children will lose the loving support of their grandparents. First, parents can allow contact, and they usually do, when they feel it is beneficial to the child. Ordinarily parents do not need to be required by a court to allow the child to visit with the grandparents. Second, Bartlett points out that we sometimes have an idealized or romanticized vision of all grandparents and the positive role that grandparents play in the lives of the children. There are some situations in which grandparents are not loving and caring, and they may be interfering or meddling. In other words, there may be good reason why the parents choose not to allow access by the grandparents to the child.

A third myth is that courts can sort grandparents whose contact with the child would be beneficial to the child from those whose role is not positive. With the exception of real abuse and neglect (and even this is often difficult for courts), it is simply asking too much of courts to say when parents are making good decisions and when they are not. Courts are simply not well situated to tell the difference, particularly with respect to matters as subjective and complex as with whom their children should associate. “How can courts reliably distinguish love from spite, from jealousy, or from pettiness?” Bartlett asks. Even when courts think they can do this, the possibility of bias under the wide-open best-interests test that exists in most jurisdictions needs to be accounted for. For example, judges who assume that single parenthood is aberrant, and not good for children, are going to be more likely to challenge the single parent’s decision about grandparent access to the child than they are the two-parent family’s decision. As a matter of the probabilities, a number of other potential biases may also enter into the judge’s view of a grandparent visitation petition. Judges are more likely to identify with grandparents, as they are more likely to be of similar age and station in life. They are not likely to be able to spot subtle power struggles, such as when a father’s parents seek visitation in order to support a noncustodial father’s effort (unconscious or otherwise) for more control over the family relationship. “Those favoring court-ordered visitation have, I’m afraid, a naive faith,” she says, “in the wisdom of courts to second guess and micro-manage parents on how to raise their children.”

Bartlett describes the legal context for grandparent visitation, noting that while all states allow some non-parent visitation, they have different approaches as to who may claim non-parent visitation and under what circumstances. For example, while some states provide only for grandparents, others allow some other relative – aunt, uncle, siblings – and Washington, Connecticut and Alaska – have a

broad statute which reads “any person.”

As for when visitation is ordered, she points out that court-ordered visitation ordinarily is not available except in the context of family dissolution, or the death of one of the parents. Only seven states do not have such limits.

What do petitioners ordinarily need to show? We tend to think of best interest of the child as the main standard, Dean Bartlett says, but in fact, it is only one possibility. Twenty-seven states require as a threshold showing, before best-interests is even relevant, proof of some kind of prior relationship between the grandparent and the child. Some jurisdictions are quite strict in what is required. For example, Minnesota allows a grandparent to petition only after he or she has lived with the child for more than twelve months. In New Mexico the period is six months; in Texas, six months. Wyoming also requires a prior residential relationship. In Mississippi, the grandparents must have established “a viable relationship.” In Nebraska, the grandparents must have established “a significant beneficial relationship.” North Carolina requires “a substantial relationship” between grandparent and child. In Pennsylvania, for grandparents’ visits, the child must have resided with the grandparents for twelve months and the grandparents must have provided for the physical, social, and emotional needs of the child, as long as the relationship began originally with the consent of the parent or a court order; if these requirements are met, visitation and even custody may be ordered. In Georgia, the court has to find that the health or welfare of the child would be harmed unless visitation is granted. Bartlett’s point here is that there is a wide range of states requiring more than a showing that visitation is in the best interests of the child. In a number of jurisdictions, she points out that grandparent visitation statutes have been found to be unconstitutional, especially when the nuclear family is intact. These jurisdictions include not only Washington – with *Troxel v. Granville* on review at the Supreme Court at the time of this conference – but also Georgia, Tennessee, Connecticut, Nevada and North Carolina. She also notes a presumption in two states – Rhode Island and California – against grandparent visitation.

In regards to the best-interest test, Bartlett feels that it is appropriate only in contests between parents, when the parents have equal standing and need a tie-breaker. It is not, she insists, the appropriate standard where the contest for visitation of the children is between a parent and a third party. She said in third-party disputes there have to be good reasons to overrule parents, and that these reasons should have to meet certain specified criteria. Here again, her analogy is abuse or neglect standards, with all of the protections that we have currently as a matter of constitutional law.

The appropriate specific criteria in grandparent visitation cases is, until *Troxel* is decided, an open question. Insofar as the *Troxel* state court opinion might be read to say that a grandparent could have visitation only where there would otherwise be harm to the child, the Washington Court may have gone too far, Bartlett suggests. She says that if a grandparent has functioned as a parent in a significant caretaking relationship with the child, approved by a parent at its inception, that might be significant enough to pass constitutional muster. When the functional parent threshold is not met, visitation should not be permitted. The facts of *Troxel*, she states, exemplify the difficulties with court-ordered visitation. The father had

died, the mother had remarried, and the mother's new husband had adopted the children. The husband also had other children of his own. The mother had parents, the husband had parents, and they were trying to juggle all of the different adult relationships with the children. The mother did allow the grandparents to see the children one day a month, but had decided that this was all that could be handled. The grandparents wanted more – two weekends per month with overnights, along with parts of Christmas, Thanksgiving, Easter, Fourth of July and their birthdays.

We could quibble whether the mother in this case had allowed enough access by the grandparents to her children. Anyone one of us might have allowed more, or less. Even if the mother had allowed *no* visitation, however, Bartlett states that courts shouldn't have second-guessed the mother. It is too hard to determine who is right, the grandparents or the mother, and there is more harm than good to be done in trying to do so. This is no different from the "fact" that some parents give their children too much allowance for their own good, others not enough; some parents impose too strict curfews on their teenagers, others not strict enough. We don't ask courts to monitor these decisions, except in very extreme – usually dangerous – situations.

To protect the good decisions of parents, Bartlett argues that we must protect the bad decisions as well, because it is too much to expect judges to tell the difference – and too damaging to society more generally when we allow them to try.

Parents, not courts, should decide with whom their children should spend time. Court reversal of a parent's decision raises all kinds of problems. It means judges can impose their own ideals about family life. It means judges can substitute their views for those of the parents about what is good for children. Court-ordered grandparent visitation means parents having to defend their parenting decisions in public. It means parents having to decide between defending a case by a third party or giving in to a claim of visitation. It means litigation, which is both financially and emotionally costly. It means parents having their decisions overruled and having to live with the intrusion of unwanted adults in the child's life.

Bartlett concludes by summarizing her argument:

Allowing courts to overrule parents is not good for children. The best interest of the child standard may sound appealing but, as an untethered guide to deciding where parental autonomy ends and the state's authority begins, it is not, in fact, in the best interest of the child. The main point here is that parental autonomy is not the enemy of the child; it is the best way this society knows to protect the child's best interests.

Katharine Bartlett, thank you.