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Whose Child Is It, Anyway: The Demise of Family Autonomy and Parental Authority

JOHN DEWITT GREGORY*

More than two decades ago, the editors of a leading American family law casebook wrote in the book's Preface: "We believe that issues of state intervention in parent-child relationships, the problems of 'family privacy,' now deserve the prominence given to illegitimacy a decade ago."¹ This statement was both accurate and prescient at the time it was made, and subsequent events suggest that it remains so. The writers made their observation in an historical and constitutional context in which respect for and recognition of parental authority and family autonomy was well established and increasingly very much taken for granted.² Indeed, the United States Supreme Court had established the fundamental principle as early as the first quarter of the century in *Meyer v. Nebraska*,³ explicitly recognizing the right "to marry, establish a home and bring up children" as a "liberty" guaranteed by the Fourteenth Amendment, thus affording strong support to the prerogatives

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1. See CALEB FOOTE ET AL., *CASES AND MATERIALS ON FAMILY LAW* (2d ed. 1976). During the last three decades, of course, holdings of the Supreme Court have abolished virtually all distinctions based on illegitimacy. Similarly, scientific advances have radically reduced the number of cases in the related area of establishment of paternity. See generally JOHN DEWITT GREGORY ET AL., *UNDERSTANDING FAMILY LAW* (1993).

2. For an overview of U.S. Supreme Court cases that first recognized and subsequently reaffirmed the principal of family autonomy and its underlying values, see, e.g., *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); *Wisconsin v. Yoder*, 406 U.S. 205, 232-33 (1972); *Santosky v. Kramer*, 455 U.S. 745, 753-54 (1982); *Smith v. Organization of Foster Families*, 431 U.S. 816, 843-44 (1977); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40; *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

3. 262 U.S. 390 (1923).

of parents vis-a-vis the state. Summarizing the principles of *Meyer* and its progeny, one commentator has observed:

The traditional view of our society is that the care, control, and custody of children resides first in their parents; in fact "constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society." . . . This parental interest in family relationships has been defined as a liberty interest entitled to due process protection.⁴

As the last days of the current century approach, the principles of family autonomy and parental authority are under attack. The legal landscape is littered with examples of both legislative and judicial invasions of family privacy. Speaking metaphorically, I would suggest that during the years following *Meyer*, the state camel has poked its nose ever deeper into the family tent.

At common law, and for at least the first half of this century, state intervention into the lives of children and their parents on behalf of legal strangers was exceedingly infrequent. The most common departure from non-intervention, and a rare one indeed, occurred when courts gave standing and occasionally afforded some limited rights to a third party who had acted *in loco parentis* with respect to a particular child. Otherwise, the courts routinely recognized and protected the authority of a child's natural parent and rejected suits by grandparents, step-parents, live-in companions, and other legal strangers to the child.

Perhaps the first, and certainly the most persistent and sustained assault on the autonomy and authority of natural parents, has been mounted on behalf of grandparents.⁵ Although the common law treated grandparents as legal strangers, the legislatures of all fifty states have currently enacted statutes under which grandparents enjoy a right to visitation. One writer has observed that "[s]ince these statutes are the product of a combination of the lobbying efforts of grandparent groups and the sentimentality of the state legislatures they take so many different forms and limit visitation in so many different kinds of circum-

4. Ellen B. Wells, *Unanswered Questions: Standing and Party Status of Children in Custody and Visitation Proceedings*, 13 J. AM. ACAD. MATRIM. LAW 95, 109 (1955). To similar effect, another writer notes that the Supreme Court "has consistently held that matters touching on natural parent-child relationships and involving the custody and control of one's children are fundamental liberty and privacy interests protected by the Fourteenth Amendment. As such, they are entitled to the greatest constitutional protection." Marian L. Faupel, *The "Baby Jessica Case" and the Claimed Conflict Between Children's and Parents' Rights*, 40 WAYNE L. REV. 285, 289 (1994).

5. See generally Catherine A. McCrimmon & Robert J. Howell, *Grandparents' Legal Rights to Visitation in the Fifty States and the District of Columbia*, 17 BULL. AM. ACAD. PSYCHIATRY & L. 355 (1989); Miriam B. Chaloff, *Grandparents' Statutory Visitation Rights and the Rights of Adoptive Parents*, 49 BROOK. L. REV. 149 (1982).

stances that it is extremely difficult to classify them.”⁶ The earliest enactments, exemplified by New York’s first grandparent visitation statute, enacted in 1966, permitted visitation by grandparents only when one or both of the child’s parents were dead. Today, however, some statutes are now couched in language so broad as to allow a court to grant visitation by a grandparent whenever it is in the best interests of the child. New York, for example, currently allows grandparents to petition for visitation “where circumstances show that conditions exist which equity would see fit to intervene. . . .”⁷

While grandparents have received the most favored treatment, rights of other third parties also enjoy legal recognition to an extent that was entirely unknown at common law and prior to the latter half of the twentieth century. In approximately one-third of the states, for example, statutes provide for visitation by stepparents, either expressly or in language authorizing nonparent visitation that is broad enough to include some stepparents.⁸ This mishmash of statutory provisions, with little uniformity or clarity, ranges from those that explicitly permit visitation by stepparents to those that include stepparents in lists of third parties who may be granted visitation rights. Typical of the latter group is an Oregon statute that affords standing to petition or intervene in custody or visitation proceedings to anyone “who has established emotional ties creating a parent-child relationship or an ongoing personal relationship with a child” and expressly includes, among others, stepparents and grandparents.⁹

Only Oregon, in the statute just noted, explicitly authorizes petitions for visitation by foster parents. The fact that foster parents do not enjoy the same legal position as stepparents and grandparents should not be surprising. The status of foster parent originates entirely in statutes and in contracts pursuant to which foster parents receive financial reimbursement from the state for providing child care that is designed to be temporary. Accordingly, for the most part, courts have routinely denied visitation, custody, or any significant rights to foster parents. Typical is the decision of the Supreme Court of Pennsylvania in *In re G.C.*,¹⁰ holding that foster parents do not have standing to seek or contest custody awards concerning their foster children.¹¹

6. HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES*, §19.7, at 828 (2d ed. 1988).

7. N.Y. DOM. REL. LAW § 72 (McKinney Supp. 1997-98).

8. See MARGARET M. MAHONEY, *STEFFAMILIES AND THE LAW* 129, 130 (1994).

9. OR. REV. STAT. § 109.119(1)(1995).

10. 1999 No. 18 M.D. 1997, 53 M.D. 1997, 1999 WL 562687 (Pa. July 22, 1999).

11. See also *Worrell v. Elkhart County Office of Family Services*, 704 N.E. 2d 1027 (Ind. 1998)(holding that former foster parents do not have standing to petition for visitation with their former foster children).

In recent years, however, legislatures in several states have begun to cast a large shadow over family privacy, providing new rights, including party status, for foster parents in a variety of proceedings. In New York, for example, statutes authorize certain foster parents to participate as parties in foster care review proceedings,¹² to petition for adoption of children whose parents have surrendered them, and to intervene in custody proceedings.¹³ Similarly, foster parents in Maine are entitled to petition for standing and intervenor status in any child protection proceeding that involves a child who lives or has lived in the foster parent's home.¹⁴

Some courts have moved just as vigorously as legislators, if not more so, in extending rights to foster parents and arguably stacking the deck against natural parents. Illustrative is the decision of the Supreme Court of South Carolina in *Greenville County Department of Social Services v. Bowes*.¹⁵ In *Greenville*, the county social services department took custody of an infant shortly after birth and placed the child in foster care. Five years later, after an unsuccessful effort to terminate the mother's rights, the department reunited the child with her mother, who acquired legal custody. Subsequently, the department filed a petition for removal and protective custody of the child, based on reports alleging physical abuse. Finding that the requisite standard of proof had not been satisfied, the court reversed the family court's order terminating the mother's rights.

In the course of reaching its decision, however, the court found that it was not an abuse of discretion to permit the child's former foster parents to intervene and to submit evidence against the mother. Ironically, the court noted that a termination proceeding pits the natural parent against the state rather than the child, and that "the State marshals an array of public resources and has the power to shape the historical events that form the basis for termination."¹⁶ Indeed, the court observed that in the case before it, "Mother has struggled through years of litigation fighting what must seem an overwhelming foe. DSS has had custody . . . for the child's entire lifetime and has contributed to the lack of bonding between Mother and her child."¹⁷

It is troubling that in addition to confronting the vast power of the state, over which she eventually prevailed, the mother in *Greenville*

12. See N.Y. SOC. SER. LAW § 392(c) (McKinney 1998).

13. N.Y. FAM. CT. ACT § 3839(c) (McKinney 1998).

14. ME. REV. STAT. ANN. tit. 22, § 4005-A (2) (West 1998).

15. 437 S.E. 2d 107 (S.C. 1992).

16. *Id.* at 111 (citations omitted).

17. *Id.*

was also beset by the self-interested efforts of legal strangers. Further, the South Carolina decision is not an isolated example of judicial permission for intervention by foster parents in termination of parental rights proceedings. In *In re Harley C.*,¹⁸ the Supreme Court of Appeals of West Virginia held that foster parents have standing to intervene in abuse and neglect proceedings and are parties to the action, with the right to appeal trial court decisions in such cases.

The 1970s witnessed a rash of statutory enactments permitting or requiring orders for grandparent visitation. What appears to be the first reported appellate court case addressing the rights of stepparents to visitation was decided in 1977,¹⁹ and the earliest case I have found dealing with visitation claims by former foster parents dates from 1979.²⁰ During the last decade, still another group of legal strangers, so-called "co-parents," has challenged the authority of natural parents.

The typical scenario underlying these claims is found in the decision of the New York Court of Appeals in *Alison D. v. Virginia M.*,²¹ the first such case decided by the highest court of any state. In this case, Alison D. and Virginia M., who lived together, decided to have a child and to share the rights and responsibilities of child rearing. Virginia M., after artificial insemination, gave birth to a baby boy. After more than two years, during which both women shared in providing child support and child care and in making parental decisions, they separated. Eventually the natural mother, Virginia M., terminated Alison D.'s visitation, and Alison D. sued for visitation rights. The New York Court of Appeals affirmed the lower court's decision dismissing the action. Applying the governing statute, the court observed:

Traditionally, in this State it is the child's mother and father who, assuming fitness, have the right to the care and custody of their child, even in situations where the nonparent has exercised some control over the child with the parent's consent. 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.²²

18. 509 S.E. 2d 875 (W. Va. 1998).

19. See *Spells v. Spells*, 378 A.2d 879 (Pa. Super. Ct. 1977).

20. See *In re Melissa M.*, 421 N.Y.S.2d 300 (Fam. Ct. 1979).

21. 572 N.E.2d 27 (N.Y. 1991).

22. *Id.* at 29 (citations omitted). New York's Domestic Relations Law provides that "either parent may apply to the supreme court for a writ of habeas corpus to have such minor child brought before such court; and on the return thereof, the court . . . may award the natural guardianship, charge and custody of such child to either parent . . . as the case may require. . . ." N.Y. DOM. REL. LAW §70(a) (McKinney 1988 & Supp. 1997-98).

The New York Court of Appeals was not the first court to reject claims for visitation initiated against lesbian mothers by lesbian former coparents,²³ and courts in other jurisdictions subsequently rendered similar decisions.²⁴ But as the end of the century approaches, the tide clearly has begun to turn.

Soon after the New York court declined to recognize these coparent visitation claims, an intermediate appellate court in New Mexico remanded such a case for an evidentiary hearing on whether visitation would be in the best interests of the child.²⁵ More significantly, the Supreme Court of Wisconsin in *In re Custody of H.S.H.-K.*²⁶ reconsidered its position on visitation rights for lesbian partners of legal parents and departed radically from an earlier decision declining to recognize those rights. The court held that the Wisconsin statute that governed visitation did not apply to the petition before it because the legislature intended the statute to apply only to cases involving dissolution of marriage. Nevertheless, the court reached the startling conclusion that the legislature did not intend that the visitation statute "be the exclusive provision on visitation," nor that it "supplant or preempt the courts' long standing equitable power to protect the best interest of a child by ordering visitation *in circumstances not included in the statute.*"²⁷

In *E.N.O. v. L.M.M.*,²⁸ the Supreme Judicial Court of Massachusetts, addressing a similar set of facts, managed to reach the same result with what seems to me to be an even more astonishing display of judicial legerdemain. The court took note of the natural mother's assertion that there was no statutory authority in the jurisdiction for ordering visitation to one standing in a parent-like position. Further, the court acknowledged that the best interest standard is somewhat amorphous. Nevertheless, the court concluded that the source of the Probate Judge's authority to award visitation could be found in its equity jurisdiction, and that the woman who shared a committed relationship with the child's natural mother was a *de facto* parent of the child in a nontraditional family.

23. *See, e.g.*, Nancy S. v. Michelle G., 279 Cal. Rptr. 212, 219 (Ct. App. 1991) (concluding that nonbiological lesbian coparent could not establish existence of legally cognizable parent-child relationship); Curiale v. Reagan, 272 Cal. Rptr. 520, 522-23 (Ct. App. 1990) (holding that plaintiff lacked standing to assert visitation or custody claim against former partner).

24. *See, e.g.*, *In re Interest of Z.J.H.*, 471 N.W.2d 202 (Wis. 1991).

25. *See* A.C. v. C.B., 829 P.2d 660, 662 (N.M. Ct. App. 1992).

26. 533 N.W.2d 419, 420 (Wis. 1995).

27. *Id.* at 424-25 (emphasis supplied).

28. 711 N.E.2d 886 (Mass. 1999).

The mischief in the court's decision is clearly identified by the lone dissenter, who observed:

The probate court's order in this case was wholly without warrant in statute, precedent, or any known legal principle, and yet the majority of this court has upheld it. As such, the opinion the court delivers today is a remarkable example of judicial lawmaking. It greatly expands the courts' equity jurisdiction with respect to the welfare of children and adopts the hitherto unrecognized principle of de facto parenthood as a sole basis for ordering visitation. Even while expanding judicial authority and making an addition to the common law, the court speaks as though the decision were nothing extraordinary. In light of the denigration of parental rights and the judicial infringement on the province of the Legislature effected by the court's decision, all without an acknowledgment of the novelty of that decision, I must respectfully dissent.²⁹

The opinions in the coparent visitation cases just discussed are not the only recent examples of the enthusiastic willingness of courts to exercise discretion in derogation of traditional principles of family autonomy and parental authority. In *King v. King*,³⁰ for example, the Supreme Court of Kentucky upheld the constitutionality of a statute under which the trial court had ordered visitation by a child's grandfather over the objections of the child's married parents. In support of its determination, the court stated:

This statute seeks to balance the fundamental rights of the parents, grandparents and the child. At common law, grandparents had no legal right to visitation. However, the [legislature] . . . determined that, in modern day society, it was essential that some semblance of family and generational contact be preserved. If a grandparent is physically, mentally and morally fit, then a grandchild will ordinarily benefit from contact with the grandparent. . . . *The grandparent can be invigorated by exposure to youth, can gain an insight into our changing society, and can avoid the loneliness which is so often a part of an aging parent's life. These considerations by the state do not go too far in intruding into the fundamental rights of parents.*³¹

The dissent accurately and properly characterized the court's opinion as "mak[ing] little pretense of constitutional analysis," depending on "the sentimental notion of an inherent value in visitation between grandparent and grandchild," and worst of all, reaching the "conclusion that a grandparent has a 'fundamental right' to visitation with a grandchild."³² Despite these flaws in the court's opinion, other courts

29. *Id.* at 894.

30. 828 S.W.2d 630 (Ky. 1992).

31. *Id.* at 632 (citation omitted) (emphasis added).

32. *Id.* at 633 (Lambert, J., dissenting).

have unquestioningly latched on to the reasons and the results in *King*. In *Herndon v. Tuhey*,³³ for example, the Supreme Court of Missouri upheld that state's grandparent visitation statute with lavish quotations reflecting enthusiastic agreement with the wrongheaded ruling in *King*.³⁴

As I suggested earlier in this essay, at the midpoint of this century and beyond, parents of children enjoyed a significant degree of constitutionally protected security from state courts meddling in their relationships with their children on behalf of legal strangers. There are at least two developments that have placed family autonomy and parental authority in danger. First, the best interest of the child is now firmly established as the prevailing standard in child custody, visitation, and other legal matters that concern children. I shall not undertake to describe here the extensive scholarly writings and judicial opinions that criticize sharply and reflect strong reservations about this pervasive best interests of the child standard.³⁵ Suffice to say that

the best interests of the child standard is both vague and indeterminate and gives precious little guidance to judicial decision makers. It provides to judges the invitation, which they frequently accept with alacrity, to engage in virtually untrammelled exercises of discretion in deciding issues of child custody and visitation. It serves poorly the interests of children in custody or visitation cases, speaking rather to the interests of contending adults.

The standard lacks any settled meaning and is more a rubric than an analytical tool for deciding child custody and visitation cases. . . .³⁶

A second means of diminishing traditional notions of family autonomy and parental authority is to invent novel and eccentric definitions of family and parent. These days, cases and commentary concerning family law, perhaps influenced by the Humpty Dumpty school of linguistics,³⁷ are replete with references to psychological parents, coparents, functional parents, de facto parents, and parents by estoppel, all of whom may enjoy judicially bestowed rights that may be equal to or superior to those of a child's natural parents.

33. 857 S.W.2d 203 (Mo. 1993).

34. See also *Michael v. Hertzler*, 900 P.2d 1144 (Wyo. 1995); *Campbell v. Campbell*, 896 P.2d 635 (Utah Ct. App. 1995).

35. See John DeWitt Gregory, *Blood Ties: A Rationale for Child Visitation by Legal Strangers*, 55 WASH. & LEE L. REV. 351, 385-88 (1998).

36. *Id.* at 387.

37. "'When I use a word', Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean—neither more nor less'." LEWIS CARROLL, *THE ANNOTATED ALICE: ALICE'S ADVENTURES IN WONDERLAND AND THROUGH THE LOOKING GLASS* 269 (Martin Gardner ed., Bramhall House 1960) (1871).

Let me say that a few courts have resisted the kinds of invasions of parental prerogatives that I have described. Most notably, in *Hawk v. Hawk*,³⁸ the Supreme Court of Tennessee held that the state's grandparent visitation statute was unconstitutional. After reviewing Supreme Court decisions, the court in *Hawk* observed that although it is "often expressed as a 'liberty' interest, the protection of 'childrearing autonomy' reflects the Court's larger concern with privacy rights for the family."³⁹ The court also rejected the grandparents' claim that a finding that visitation is in a child's best interest creates a compelling state interest that overrides objections to visitation by a fit parent. Instead, the court noted that both federal and Tennessee law require that state interference with a parent's right to raise a child be based on a showing of harm to the child's welfare.⁴⁰

Recent decisions by the highest courts of Georgia,⁴¹ Florida,⁴² North Dakota,⁴³ and Washington⁴⁴ also have found grandparent visitation statutes to be unconstitutional. However encouraging these decisions may appear to be, it would be rash to believe that they herald a trend, and quixotic to hope that they will be prototypical of the ways in which courts will address the claims of legal strangers to other people's children in the twenty-first century. It is altogether as likely that the decisions are merely judicial fingers in the constitutional dike, and that the next century will witness the destruction of whatever remains of family autonomy and parental authority.

38. 855 S.W.2d 573 (Tenn. 1993).

39. *Id.* at 578.

40. *Id.* at 580-81.

41. *See* *Brooks v. Parkerson*, 454 S.E.2d 769, 774 (Ga. 1995).

42. *See* *Beagle v. Beagle*, 678 So. 2d 1271, 1272 (Fla. 1996).

43. *Von Eiff v. Azicri*, 720 So. 2d 510 (Fla. 1998).

44. *Troxel v. Granville*, 969 P.2d 21 (Wash. 1998), *cert. granted*, 1999 WL 551940.

