No. 99-138

In The

**SUPREME COURT OF THE UNITED STATES**

November Term 1999

In The Matter of the Visitation of

NATALIE ANNE TROXEL AND
ISABELLE ROSE TROXEL, Minors,

JENNIFER AND GARY TROXEL,
*Petitioners,*
v.

TOMMIE GRANVILLE,
*Respondent.*

On Writ of Certiorari to the
Supreme Court of Washington

# BRIEF FOR THE GRANDPARENT CAREGIVER LAW CENTER OF THE BROOKDALE CENTER ON AGING AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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The Grandparent Caregiver Law Center of the Brookdale Center on Aging of Hunter College of the City University of New York is a not-for-profit legal support center for grandparents who are the sole caregivers of their grandchildren in the absence of the children's parents. The interdisciplinary center offers the caregiving grandparents guidance and information on custodial issues and income and health care benefits that facilitates their ability to care for needy youngsters who have lost their parents as a result of death, illness, incarceration, or substance abuse. The Center's objectives include training of social workers, educators, school administrators, and other advocates who come in contact with caregiving grandparents and engaging in administrative and legislative reform. The Grandparent Caregiver Law Center is affiliated with the Citywide Kincare Task Force in New York City.

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[1] In accordance with Supreme Court Rule 37.6, *amicus curiae* represents that no party other than counsel for *amicus curiae* authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, has made a monetary contribution to the preparation or submission of this brief. The petitioner and respondent have consented to the filing of the brief, and *amicus* has filed the letters of consent with the Clerk of the Court, pursuant to Supreme Court Rule 37.3.

## STATUTES INVOLVED

The Washington statutes in question in this visitation petition are:

Former Revised Code of Washington 26.09.240 which provides:

"The court may order visitation rights for *a person other than a parent when visitation may serve the best interests of the child* whether or not there has been any change of circumstances. A person other than a parent may petition the court for visitation rights at any time. The court may modify an order granting or denying visitation rights whenever modification would serve the best interests of the child." (Emphasis added.)

And Revised Code of Washington 26.10.160(3) which provides:

"Any person may petition the court for visitation rights at any time including, but not limited to, custody proceedings. The court may order visitation rights for *any person when visitation may serve the best interests of the child* whether or not there has been any change of circumstances." (Emphasis added.)



## SUMMARY OF ARGUMENT

Children depend on role models in their formative years to develop well-rounded personalities and the absence of role models can have profound consequences for the emotional stability of children. This justifies Washington State's determination that the forcible loss of important relationships between children and other persons is a harm that the State may seek to prevent. Considering the realities of family life, it is reasonable for states to decide to include all persons among those whose contacts with children merit this protection. In providing this protection, the use of the best interests test allows courts to reach fair outcomes that adequately consider the interests of all the parties. Therefore, the Washington statutes in question are a permissible use of state power.

## ARGUMENT

### I. PREVENTION OF THE SERIOUS HARM TO CHILDREN INHERENT IN VISITATION DISPUTES IS A COMPELLING STATE INTEREST

Because of the potential for serious psychological harm to children, there no longer is room in our jurisprudence for parents to maintain total hegemony over who may visit their children. After divorce or the death of one parent, the remaining parent, who had shared child rearing with others, sometimes forcibly ends the child's contact with them. In these and other similar situations, parents' interests should be subordinated to the interests of their children. Almost forty

percent of the nation's families do not contain two parents.[2] Over five million children live in households where a grandparent is present.[3] Over two million of these grandparents are primary caregivers for children.[4] Millions of other grandparents are involved in the raising of their grandchildren. In addition, the present day variations in family arrangements seem boundless. In this fluid diversity of persons with ties to children, the only remaining constant is the children's interests. Unless the Washington statutes are found to be constitutional, the daily court interventions in family life will be rendered invalid, and the already torn fabric of family unity will be ripped to shreds by an inappropriate partiality that fails to protect family life by catering to one remnant of the family.

Even if the Washington Supreme Court rightly decided that the constitutionally protected interests of parents was at stake, the Washington statutes would still survive heightened scrutiny because the state has a compelling state interest in the prevention of a serious harm to children – the harm that comes

[2] Ariel Halpern et al, *Snapshots of America's Families* [hereinafter *Snapshots of the American Family*], at *Children's Environment and Behavior*, C-2 (Urban Institute, 1999). Sixty-three percent of families are two parent families. This figure includes families where one or both parents are adoptive parents or where both parents are adoptive parents.

[3] Ken Bryson and Lynne Caspar, *Nearly 5.5 Million Children Live with Grandparents*, (Census Bureau Reports, July 1, 1999).

[4] United States Department of Health and Human Services, Administration on Aging, National Aging Information Center, www.aoa.dhhs.



when children are forcibly separated from a loved one.[5]

The harm which Washington State seeks to prevent in the present case (the finality of the loss of a loving relationship with grandparents) can reasonably be considered of greater magnitude than the harm prevented in *Prince v. Massachusetts.*[6] In addition, the prevention of the loss of a substantial relationship with a person who has much to contribute to the maturation of a young child is worthy of state protection because of its potential for another harm – the substantial social burden caused by a child's being brought up without adequate role models.[7]

Families end up in family courts because they are in trouble. When family relations have deteriorated to the point where parents seek to ostracize relatives (or other caregivers),

[5] In a court's initial application of a best interests analysis, the person being deprived of visitation must necessarily show some unsatisfactory condition related to the child; *i.e.*, some harm, such as the loss of a substantial beneficial relationship, is required in order to overcome the burdensome weight that a court proceeding (and an award of visitation) would place on the parents and the children. For example, New York's grandparent visitation statute, Domestic Relations Law. § 72 (McKinney Supp. 1999), places no restriction on the opportunity for grandparents to seek visitation when each or both parents are dead or when "conditions exist where equity would see fit to intervene". Nevertheless, New York's case law has developed the requirement that there be a substantial relationship with a child or that attempts to establish such a relationship were thwarted by the parent(s) before a court may intervene. *See, Matter of Emanuel S. v. Joseph E.*, 78 N.Y.2d 178, 573 N.Y.S.2d 36, 577 N.E.2d 27 (1991).

[6] The selling of magazines in a public place, *Prince v. Massachusetts*, 321 U.S. 158, 64 S. Ct. 438, 8 L. Ed. 645 (1944).

[7] "If it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens". *Wisconsin v. Yoder*, 406 U.S. 205, 230, 92 S. Ct. 1526, _, 32 L. Ed 2d 15, _ (1972).

a dire situation already exists that has gone beyond the point of dialogue. The ostracization will seriously affect all members of that family for the rest of their lives. This conclusion does not need a reference to a scientific source. Humankind commonly knows it. It is the very stuff from which childhood emotional trauma is made. It is the type of loss that can be unbearable when caused by death, geographical relocation, or willful disengagement, but which seems irreconcilable for a child whose mother or father instigated it. Because the permanent forced cessation of loving relationships with children is such a drastic act, states are justified in considering it "inherently harmful".

The grandparents' petition here, like other petitions for visitation, does not rest on an assertion of a fundamental right, but rather, rests on a combination of harms and "family" interests that is founded in our paramount interest in a child's welfare and our traditional recognition of both nuclear and extended families.[8] This combination of serious harm and family interests gives the state a compelling reason to provide the opportunity for non-parents to keep beneficial relationships with children, despite some intrusion upon nuclear families. In the end, the grandparents' claim is stronger because it is based on the reality of family life, and prevents the forced separation of children from those who have participated substantially in their nurturing.

[8] *Moore v. City of East Cleveland*, 431 U.S. 494, 506, 97 S. Ct. 1932, 1939-40, 52 L. Ed. 531, _ (1977).



## II. TO PERMIT "ANY PERSON" TO PETITION FOR VISITATION IS A REASONABLE USE OF STATE POWER

To decide that the loss of contact with only a certain class of persons merits prevention will fail to protect a substantial number of children. The intact nuclear family is approaching minority status - less than sixty-three percent of families contain two parents.[9] This fact forces judges and legislatures to reconsider laws concerning the definition of family and the protections and responsibilities placed upon them. For instance, Indiana has created a "De Facto Custodian" law that defines a de facto custodian as a primary caregiver and financial supporter of a child, if the child is under three years old and has lived with that person for at least six months, or if the child is over three years old and has lived with that person for more than one year. A de facto custodian has the same legal standing as a parent in a custody dispute.[10]

Once the traditional parameters of biological parents and their children is crossed, it is not a simple task to define who should be excluded from the family.[11] Faced with this

[9] *Snapshots of America's Families*, at *Children's Environment and Behavior*, C-1. This percentile contains families with one natural and one adoptive parent families and those with two adoptive parents, so the actual percentile of families with two natural parents is still lower.

[10] Indiana H.B. 1445, (effective July 1999).

[11] Within the societal and constitutional tradition of protecting the family unit, what members of a family are protected appears to change with the interest that warrants protection. In *Michael H. et al v. Gerald D.*, 491 U.S. 110, 125, S. Ct. 2333, 2343, 105 L. Ed. 2d 91, _, (1989), the family could not "be stretched so far as to include a relationship" between the biological father, the mother, and the child. In other instances, the protection accorded the family unit extended beyond the marital family: to

task, states can decide that their state interest in protecting families is reasonably served by a classification that does not identify a particular group of family members, but chooses to include all possible persons as family members, whether related or non-related, so long as their interests are subordinate to the best interests of the child.

To do otherwise, would risk the loss of important sources of emotional stability for children. Such sources might include: other children and young adults who grew up with children; unrelated persons or aunts and uncles with whom children had lived for a substantial part of their lives; uncles who provided a paternal relationship for fatherless children; great-grandparents; and parents of deceased mothers whose children are in the custody of fathers who abused the children's mother.

Another example of the loss of important sources of emotional stability occurs when young unwed mothers rely on third parties (grandparents, relatives, or others) to assist in child rearing. This arrangement frequently continues until the mothers form new relationships with males who want the third parties excluded.[12] The persons, who were the primary caregivers for a substantial part of the children's lives, and the

a grandmother and her two grandsons, *Moore v. City of East Cleveland*, 431 U.S. at 493; to an aunt and niece, *Prince v. Massachusetts*, 321 U.S. 158, 64 S. Ct. 438, 8 L. Ed. 645 (1944); and to a non-marital father, *Stanley v. Illinois*, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972) and *Caban v. Mohammed*, 441 U.S. 380 (1979), 99 S. Ct. 1760, 60 L. Ed. 2d 297 (1979).

[12] Thirty-two percent of all U.S. births are to unmarried women. *Snapshots of America's Families*, at *Children's Environment and Behavior*, C-2. This figure does not include children who are born to a married couple but are raised by a single parent or a third party.



children find themselves forbidden from contacting each other.[13] In a significant number of these and other instances, parents simply lack the emotional maturity to care for children,[14] and their children are left without anyone who can provide them with emotional stability.

Under these realities of family life, it is reasonable for the Washington legislature to decide to provide protection to any persons whose visits with the children would serve the children's best interests. By providing such an opportunity, Washington's legislature chose to protect the de facto family unit's relationships and to intervene in these intra-family disputes only when necessary to preserve the common "family" interest in the welfare of children.

## III. THE BEST INTERESTS TEST REACHES FAIR OUTCOMES

The use of the best interests standard offers the broadest avenue to reach fair outcomes. In *Michael H. et al v. Gerald D.*, 491 U.S. at 134, Justice Stevens, writing a concurring opinion, relied on California Civil Code Annotated § 4601(West Supp. 1989) as the foundation of his opinion. In quoting the statute, Justice Stevens emphasized the language of the California statute which is similar to that of the Washington statutes in question here:

[13] In many instances, grandparents have been the caregivers. Ken Bryson and Lynne Caspar, *Nearly 5.5 Million Children Live with Grandparents*, (Census Bureau Reports, July 1, 1999).

[14] "Nationally, 9 percent of all children lived with a parent who felt highly aggravated". *Snapshots of America's Families*, at *Adult's Environment and Behavior*, D-2.

" '[R]easonable visitation rights [shall be awarded] unless it is shown that the visitation would be detrimental to the best interests of the child. In the discretion of the court, reasonable visitation rights may be granted *to any other person having an interest in the welfare of the child.*' (Emphasis added.)."

*Michael H. v. Gerald D.*, 491 U.S. at 134.

Justice Stevens' concurring opinion in *Michael H. v. Gerald D.*, while assuming that a constitutional due process right exists and is available to the biological father who had sought visitation, found that right to be fairly protected by Cal. Civ. Code § 4601. Justice Stevens wrote, "Because I am convinced that the trial judge had the authority under state law both to hear Michael's plea for visitation rights and to grant him such rights if Victoria's best interests so warranted, I am satisfied that the California statutory scheme is consistent with the Due Process Clause of the Fourteenth Amendment". *Michael H. v. Gerald D.*, 491 U.S. at 137. The fundamental fairness of the best interests test invoked by Justice Stevens in the California case applies equally to the best interest of the child standard in the Washington State case. Just as the natural father's assumed liberty interest was accorded adequate protection within the best interests analysis of the California trial court under Cal. Civ. Code. § 4601, *Michael H. v. Gerald D.*, U.S. 110 at 134-35, so too, are the parents' interests protected under the Washington statutes.

Moreover, the hearing of such a dispute falls within the equity powers of any court charged with resolving



family disputes.[15] If courts of equity may award visitation without a legislative grant of power, a statutory embodiment of this power is not beyond a state's power.

Here, where conflicting harms are so personal in nature, the best interests test provides the finest tool for allowing the court to focus on the persons most likely to be injured – the children. Its use protects them from the loss of meaningful relationships that may offer the only solace to children caught within troubled families

## CONCLUSION

For the foregoing reasons, the Grandparent Caregiver Law Center of the Brookdale Center on Aging urges this Court to correct the constitutional error in the decision below. The Court should reverse the judgment of the Washington State Supreme Court and remand the case with directions to grant the grandparents reasonable visitation with their grandchildren.

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[15] *Custody of Smith*, 137 Wash. 2d at 36, citing *Roberts v. Ward*, 126 N.H. 388, 493 A.2d 478 (1985). *See also* the dissent in *Shriver v. Shriver*, 7 Ohio App.2d 169, 174, 219 N.E.2d 300, 303 (1966). "[T]he privilege of visitation, which the Common Pleas Court, in a proper case, in the exercise of its equity powers and judicial discretion, grants".

Respectfully submitted,
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