New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
VOLUME 211–NO. 82 NEW YORK, FRIDAY, APRIL 29, 1994 PRICE $2.50

OUTSIDE COUNSEL

Whose Children Are They Anyway?

by Peter J. Galasso

Lisa teaches disabled children at a local elementary school. She is a divorced mother of three, the oldest having just celebrated his fifth birthday. Jessica, who is two years old, suffers from a congenital disorder that necessitates therapy three afternoons a week. Exhausted at the end of the day, Lisa can barely lift her arms after feeding, bathing and putting her children to sleep. She was granted sole legal custody of three children less than two months ago, yet she now finds herself back in court.

This time it is her ex-husband's parents who have brought the proceeding. The paternal grandparents insist that they be accorded visitation privileges, separate and apart from those of their son.

They do not contend that Lisa is unfit. To the contrary, Lisa has done an extraordinary job nurturing her children, especially after Mike left her for another woman, just five weeks after her twins returned home from a medically complicated delivery.

During Lisa's testimony, she reveals how draining her job has become, as she juggles caring for her needy students during the day and her own children at night. She complains that too often her students get the best part of what she has to offer, leaving her own children shortchanged during the week. Only on the weekends can Lisa spend quality time with them.

Confused by the absence of clarity in 'Emmanuel S.' and unmoved by the constitutional prerequisite of an 'overriding necessity,' judges too often allow these grandparent petitions to proceed to a heraing, which even if unsuccessful do not give rise to an award of attorney fees to the objecting parents.

Notwithstanding, Lisa does not begrudge Mike's weekend time with their children. The weekends should be shared. However, when Mike is unavailable for a weekend visit, Lisa would welcome the extra time with her children; time she does not want to share with his parents.

Mike has lived with his parents for the past two years, and has paid Lisa only minimal support since losing his job. To date, and along with his parents, Mike has taken full advantage of his scheduled weekends with his children. When he is unavailable, Mike wants his parents to exercise his visitation rights.

Lisa argues that this arrangement favors his parents over her. Yet, over her objections, and despite the fact that grandparents enjoy no commonlaw or constitutional right to visit with their grandchildren1 the Family Court grants the paternal grandparents visitation rights under his Judgement of Divorce.[2] Confounded and disappointed, Lisa gathers her belongings and exits the courtroom, remarking rhetorically, "Whose children are they, anyway?"

Historically, parents have enjoyed a well-recognized liberty interest in rearing and educating their children in accord with their own views.[3] In *Prince vs. Massachusetts*,[4] the U.S. Supreme Court Held that :

> 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 cannot supply or hinder. Intrusion into the relationship between parent and child requires a showing of an overriding necessity.

Notwithstanding such constitutional protections, pursuant to Domestic Relations Law§72, grandparents may petition either Supreme or Family Court for visitation with their grandchildren, even over the objection of fit, natural parents, enjoying an intact relationship.

Grandparents' Role

Because grandparents have represented an important influence on the lives of their grandchildren, as "reservoirs of information about family history and values,"[5] the courts have been sensitive to the special role they play.

As the Second Department recognized in *Emmanual S. v. Joseph E.*,[6] [DRL§72] rests on a humanitarian concern that 'visits with a grandparent are often a precious part of a child's experience and there are benefits which devolve upon the grandchild . . . which cannot derive from any relationship." While DRL§72 provides in relevant part:

> [W]here circumstances show that conditions exist under which equity would see fit to intervene, (upon application, the court) may make such directions as the best interest of the child may require for visitation rights from such grandparent or grandparents, in respect to such child (L. 1975 ch. 4321§1, as amended).

Thus, the Legislature has created a two -pronged test in determining an application made pursuant to DRL§72. First, the petitioning grandparents must establish standing. The standing inquiry involves an examination of the extent and nature of the grandparent-grandchild relationships prior to petition. As summarized by the Court of Appeals in *Emmanuel S.*[7]:

> Although an intact family is not beyond the reach of the stature, that fact and the nature and basis of the parents' objection to visitation are among the several circumstances which should be considered by courts deciding the standing question. Also an essential part of the inquiry is the nature and extent of the grandparent-grandchild relationship. 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.

Once standing has been found, the court proceeds to the second prong, which is to determine if visitation is in the best interest of the grandchild. Because standing and a child's best interests are necessarily tied to the nature of the parent's objections and the existing relationship between grandparent and grandchild, it is difficult to imagine a situation where standing is found but where visitation is deemed adverse to the grandchild's best interests.

Since grandparent visitation petitions generally arise as the result of a denial of a grandparent's attempt at visitation, by either neglectful or feuding spouses, family acrimony is ofttimes the impetus for the proceeding. As surmised by the Second Department in *Emmanuel S.*:

> Had the Legislature intended to extend the right to seek judicial intervention to "any grandparent," it could have been easily specified . . . We conclude that a petition for an order authorizing visitation pursuant to DRL§72 must demonstrate the existence of some circumstance or condition, such as 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.

Privacy Issue

Reversing the Second Department's holding, the Court of Appeals in *Emmanuel S.* found that the Legislature did not intend to condition relief under DRL§72 based upon the marital status of the parents. Although the nature and basis of the parents' objection to such visitation remains a relevant part of the inquiry, the status of the parents' relationship (i.e. divorced, separated or intact) is not dispositive of the standing issue.

Limited by the facts on appeal, the Court of Appeals elected, however, to pass on the privacy issue raised by the respondents, stating:

> Respondents contend also that their constitutional rights are violated if the court allows visitation over their wishes when there is no claim that they are separated or unfit. The question is not before us. We are not addressing an award of visitation, but only whether petitioner has standing to seek it

Id. at 39

Nearly a decade before, in *People ex. rel. Sibley v. Shepard*[8] the Court of Appeals upheld the constitutionality of DRL§72 as applied to "adoptive" grandparents. Although it has an opportunity to reaffirm that decision in *Emmanuel S.*, it failed to do so. The Court's reluctance to even address the privacy claim in *Emmanuel S.*, where the respondents were the children's natural parents, suggests that DRL§72, under certain circumstances, may still be susceptible to constitutional challenge.

Hence, the question left unanswered by the Court in *Emmanual S.* is whether New York's standard for state intervention into family matters (i.e., where equity would see it fit to intervene) should be pre-empted by the U.S. Supreme Court's more restrictive standard (i.e. overriding necessity), before such interference may be permitted. In that regard, Judge Demaro, then of the Family Court,[9] lamented:

> §72 of the Domestic Relations Law has forced this court to decide "best interest" issues, not as and between adversarial natural parents and not for any compelling abuse or neglect situation (Family Court Act §1012). While the court has followed the mandates of §72, it did so with great discomfort. The court would be remiss if it did not elude to its trepidation in usurping the prerogative of a natural parent with custody in deciding what is best for his/her child . . . It appears to this court that a parent with custody, whose right to parent has not been limited by an Article 10 proceeding, and whose custody has not been abrogated pursuant to *Bennett v. Jeffreys*, (40NY2D543), may not have his best interest decisions as to whom his children have contact with replaced by this court's concept of "best interest." Even with regard to grandparents and siblings, the court finds that the states do not possess some all encompassing general parens partriae role in parenting (citations omitted). Such role, though permitted is limited . . . as the state interest is not "compelling." This court verily believes that DRL §72 is repugnant to the privacy rights of citizens as assured by the U.S. Constitution, 14th Amendment (and 9th Amendment) *Roe v. Wade*, 410 U.S. 113.[10]

Aside from such constitutional obstacles, the viability of the implicit pleading predicate of an "untoward disruption of an established grandparent-grandchild relationship" was also left open by *Emmanual S.*

Antagonism alone is not a recognized prerequisite for court intervention. However, the issue is whether a "disruption" in the grandparent-grandchild relationship contemplates that the availability of DRL§72 relief is limited to situations where visitation is being denied.

Ostensibly, DRL§72 should be interrupted to at least require that visitation first be denied before the state takes its turn at rearranging a custodial parent's schedule with her children.

However, because that door remains slightly ajar, DRL§72 petitions aimed at obtaining independent rights of grandparent visitation, in addition to the visitation privileges already voluntarily extended by the parents, have become the newest method for impeding a parent's constitutional right of privacy, as well as her time with her children.

Divorced parents already suffer from the inherent burdens placed upon them to divide time with their children between one another. And because children naturally spend time in school and with their friends, little time is left for the custodial parent.

When a grandparent demands a share of that time, despite already having adequate opportunity to pass on the "precious pearls of wisdom" they are so revered for imparting, parents such as Lisa find the empathic odds against them as they struggle to be heard.

Confused by the absence of clarity in *Emmanual S.*, and unmoved by the constitutional prerequisite of an "overriding necessity," judges too often allow these grandparents petitions to proceed to a hearing, which even if unsuccessful do not arise to an award of attorney fees to the objecting parents.

Certainly, divorced parents have it tough enough without having to litigate with their diminished resources against grandparents simply hungry for more time with grandchildren. Before parents are told how to raise their children and with whom they must associate, the courts are cautioned to pause and ask "Whose children are they, anyway?"

(1) *LoPresti v. LoPresti*, 40 NY2d 522, 387 NYS2d 412 (1976).

(2) *Anonymous v. Anonymous*, Queens County, Judge LeBow (199).

(3) U.S. Constitution, 14th Amendment; New York Constitution Art. I 6; see also Roe V. Wade, 410 U.S. 113, 153 (1973); *Pierce v. Society of Sisters* 268 U.S. 510, 535 (1925); *Meyer v. State of Nebraska* 262 U.S. 390, 399 (1923).

(4) *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

(5) Lawson, Carol, "Taking Family Feuds to Court And Into State Legislatures," *The New York Times* May 24, 1990, page C1, 6; see also Abraham J. Heller, "Court-Directed Grandparent Visitation in an Intact Functioning Family: Therapeutic or Intrusive?" Vol. 22 Family Law Review No. 4.

(6) 161 AD2d 83, 560 NYS2d 211 (2d Dept. 1990) rev'd on other grounds, 78 NY2d 178, 573 NYS2d 36 (1991).

(7) 78 NY2d 178, 573 NYS2d 36 (1991).

(8) 54 NY2d 320, 445 NYS2d 420 (1981) (wherein a child was adopted by his paternal grandparents after his single mother died, and the court permitted the maternal grandmother, over the objections of the new adoptive parents, to have visitation with her grandchild).

(9) Now a Supreme Court Justice in Nassau County.

(10) *In the Matter of Mary Smith v. John Jones* 155 Misc2d 254, 587 NYS2d 506 (Family Court, Nassau County, 1992) (visitation denied based upon court's finding that the grandparents might undermine the relationship between parent and child).

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