



Grandparent—grandchild contact: a right or a privilege?

Rosemarie Bell

The Grandparents' Day Act, Manitoba

WHEREAS grandparents play an important, nurturing role in family life and are a valuable link between generations;

AND WHEREAS grandparents should be honoured and appreciated for their guidance and wisdom;

THEREFORE ... in each year, the first Sunday in September after Labour Day is to be known throughout Manitoba as "Grandparents' Day."

Norman Rockwell's iconic painting of the beaming grandma and grandpa proudly serving the family Thanksgiving turkey is the *Grandparents' Day Act* made visible – but is it true to life? There are two basic assumptions about children, their parents and their grandparents:

1. parents have the fundamental right to decide the care, custody, and control of their children¹

2. societies all over the world believe that an involved extended family, and particularly grandparents, can enhance children's lives.

Many families find a balance between these two principles.

That balance can be seriously disrupted by marriage breakdown, divorce and re-partnering, death, longstanding family disputes, and cultural, religious, or lifestyle clashes. Any of these common situations can damage or end the grandparent/grandchild relationship. In cases of severe conflict, when can a grandparent's wishes override a parent's choices?

In highly-conflicted cases, the first premise out the window is the Norman Rockwell view of grandparents. Quite simply, not all grandparental contact is good for children.

Applying the right law is not straightforward.² Five provinces (Québec, British Columbia,³ Alberta,⁴ Manitoba,⁵ New Brunswick⁶) and one territory (Yukon⁷) have passed laws which specifically include grandparents. Other provinces permit access applications by non-parents without naming grandparents. The federal *Divorce Act*⁸ permits non-parents to apply for access.

The Québec *Civil Code* is strongly-worded:

Article 611. In no case may the father or mother, without a grave reason, interfere with personal relations between the child and his grandparents. Failing agreement between the parties, the terms and conditions of these relations are decided by the court.

Contrast Québec with Alberta, where there is no assumption that children have a right to a relationship with their grandparents or that grandparents have a right to a relationship with their grandchildren.

But no matter what the law says, grandparents everywhere face the same dilemma: is court-ordered contact better for children than no contact at all? Most likely the child is already traumatized by a divorce, a death, or a bitter family quarrel – probably the event that triggered the estrangement in the first place. Should her life be even more disrupted by a court battle between her parents and grandparents? And how do grandparents define success, if their access order just makes the child the focus of endless conflict? By the time grandparents go to court, the family history is way past happy endings.

Over the past decade, judges have moved away from the assumption that grandparent/grandchild contact is good for children even when legal intervention is required to maintain it. This shift began in the United States with the 2000 Supreme Court case of *Troxel v. Granville*.⁹ The Supreme Court said that as long as a parent adequately cares for her children, the state should not interfere. Parents have a constitutionally-protected right to make decisions about their children's contact with grandparents.

One year later, the Ontario Court of Appeal heard the case of *Chapman v. Chapman*.¹⁰ Grandmother Esther applied for access to her two grandchildren, aged 8 and 10. The children's parents, Larry and Monica, lived together. They believed that Esther was a negative influence

And how do grandparents define success, if their access order just makes the child the focus of endless conflict? By the time grandparents go to court, the family history is way past happy endings.

on them and their children. The parents agreed some contact might be beneficial, but Esther wanted more time than Larry and Monica would allow. Esther asked for 45 hours of visiting time a year. Larry and Monica offered 27 hours. The trial judge granted 44 hours. The parents appealed.

The parents said they were fit, competent and loving parents and they, not Esther and not the courts should decide how often their children see their grandmother. The Court of Appeal agreed. Madam Justice Abella said the real question was whether “the disruption and stress generated by the grandmother’s insistent attempts to get access on her own terms are in the children’s best interests.”¹¹ Although there was evidence that Larry and Monica were also unreasonable and inflexible, the family was functioning well.

Larry and Monica were dedicated parents who were protecting and nurturing their children. The law presumes that they (and every other fit and competent parent) act in their children’s best interests, even if others do not see it that way. Unless parents demonstrate an *inability* to act in their children’s best interests, their right to make decisions and judgments should be respected. Parents alone have a legal duty to care for their children, and this includes deciding about whom they see, how often, and under what circumstances.

The law is a blunt tool. It cannot fix family problems. Even the most favourable legislation (such as Québec’s) may prove to be an empty legal remedy in cases of serious intergenerational conflict. The highly contested cases are the ones that end up in court, but even when grandparents ‘win’ the legal battle, success is far from assured.¹²

Parents alone have a legal duty to care for their children, and this includes deciding about whom they see, how often, and under what circumstances.

Notes

1. This column does not apply to child protection cases.
2. Law changes over time and differs between jurisdictions. Be sure to use up-to-date law where you live.
3. British Columbia *Family Relation Act*, Section 35 (1).
4. Alberta *Family Law Act*, Section 35(1).
5. Manitoba *Child and Family Services Act*, Section 78(1).
6. New Brunswick *Family Services Act*, Section 1.
7. Yukon *Children’s Act*, Section 33(1).
8. *Divorce Act* Section 16 (1).
9. 120 S. Ct. 2054 (2000).
10. [2001] O.J. No. 705 (Ont. C.A.)
11. *Chapman v Chapman*, Paragraph 20.
12. For a thorough discussion of this topic, see the Department of Justice’s *Grandparent-Grandchild Access: A Legal Analysis*, found at http://www.justice.gc.ca/eng/pi/fcy-fea/lib-bib/rep-rap/2003/2003_15/toc.html

Rosemarie Boll is Staff Counsel with the Family Law Office of Legal Aid Alberta, in Edmonton, Alberta.