

Joint Performance Review Committee

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Introduction

The loss of a loved one is perhaps the most grievous of human experiences. Divorce and custody litigation can bring out the worst of our human nature. People who once loved each other are now enemies in a legal battle that trickles down to the children and other family members. The stakes are high and often result in a win-lose situation. The factors in deciding the best interest of the child is complex. Parties with a vested interest often report events from their vantage point which borders on dishonesty. This can cause a great deal of uncertainty as to whom is telling the truth. Judges often refer to mental health counselors to help discern this complicated situation. However, mental health professionals are not always properly trained to effectively perform this duty. This brief presentation does not purport to have all the answers but hopes to provide an introduction of some of the issues. It is hoped that this Counselor's input will be of value to the Legislators of Arkansas who are delegated with the task of formulating laws that are in the best interest of our citizens.

Definitions

Troxel v. Granville - In 2000, the United States Supreme Court made a decision in the case of *Troxel v. Granville* that had a significant impact on the visitation rights of grandparents. In *Troxel*, the Supreme Court struck down a Washington statute that provided that any interested person could be granted visitation whenever the visitation was in the child's best interests. The Court found the statute unconstitutional because it was overbroad in that any person could petition for visitation at any time, and also the presumption that a fit parent would act in the best interests of the child was not recognized. The reasoning of the Supreme Court was that the due process clause of the Constitution prohibited the states from interfering with the fundamental right (14th amendment) of parents to make decisions concerning the care, custody and control of their children. Subsequently, the Arkansas Legislature took action to align with the doctrine in *Troxel v. Granville*. The law was revised in 2003 and again in 2009. As a result of *Troxel*, and the cases that followed, Arkansas redrafted its grandparent visitation statutes to allow a grandparent to seek visitation under certain circumstances when they have established a significant and viable relationship with their grandchild and harm would result to the child if visitation is denied.

Grandparent Visitation - Arkansas statutes dealing with grandparent visitation are relatively long and detailed. Grandparents may request visitation rights if the parents' marital relationship has been severed by death, divorce, or legal separation. In addition, visitation may be requested if the child is in the custody or under the guardianship of a person other than a natural or adoptive parent, or if the child is illegitimate. In the case of an illegitimate child, a paternal grandparent may request visitation only if

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paternity has been established in court. Grandparents may not seek visitation in Arkansas if the parents of the grandchild in question are still married, or if the parents' rights have been terminated in court. Arkansas specifically grants great-grandparents the same rights as grandparents. Mediation and counseling are suggested as possible solutions in the Arkansas law, but only if the services are available, if both sides consent and if one or both sides agree to pay for the services. It is also stipulated that if mediation or counseling takes place, the records of these processes may not be used in court.

Mental Health Professional – In Arkansas a Mental Health Professional is defined as a Psychiatrist, Psychologist, Licensed Psychological Examiner, Licensed Professional Counselor, Licensed Clinical Mental Health Counselor, Licensed Marriage and Family Therapist, Licensed Clinical Social Worker, and Psychiatric Nurse.

NBFE (National Board of Forensic Evaluators) – Simply holding a license in one of the Mental Health professions is not sufficient to have the expertise required to evaluate and counsel parties regarding custody and visitation. Specialized training in forensic mental health is required. One nationally recognized group for training multidisciplinary mental health professionals other than psychiatrists and psychologists is the National Board of Forensic Evaluators. There are over two-hundred thousand, licensed, (non-psychiatrists or psychologists) mental health professionals in the United States. Many of whom seek specialized training and certification to provide forensic mental health evaluations, and expert court testimony. Therefore, it became necessary to develop a credible and professionally recognized training/certification process for licensed mental health professionals.

NBFE was initially established in 2003 to enhance skills of licensed mental health professionals and forensic counselors, otherwise not effectively trained, or recognized by the public or private sector, as well as by the legal or mental health field. Eligible candidates are professionally trained and nationally credentialed with NBFE certification. (<http://www.nbfe.net>)

Restrictive State - Arkansas is considered a restrictive state with regard to grandparents' rights. This is primarily because Arkansas law requires a showing of harm to the child (as opposed to the best interest of the child) if visitation is denied.

Mental Injury - Emotional/Mental Injury as well as physical injury can occur to the child resulting in harm. It is this counselor's opinion that DHS policy regarding whom may report mental injury is lacking in that it does not include Licensed Professional Counselors as mental health professionals that may report Mental Injury. Inconsistently, Medicaid does recognize LPC's as mental health professionals eligible for reimbursement for their services. This Counselor's testimony at an appeal hearing regarding his report of a mental injury, found to be true by the investigator, was overturned because the administrative law judge cited DHS Policy PUB-357(R.8/2013) P.29,III.A. He found the

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testimony to not be credible because LPC's are not specifically listed with the plethora of other professionals, many of whom do not fit the definition of a Mental Health Professional.

Best Interest of the Child – The best interests doctrine is an aspect of parens patriae, and in the United States it has replaced the Tender Years Doctrine. “Best interests” determinations are generally made by considering a number of factors related to the child's circumstances and the parent or caregiver's circumstances and capacity to parent, with the child's ultimate safety and well-being the primary concern. In Arkansas, in order to show that grandparent visitation is in the child's best interest, he/she must demonstrate all three of the following: an ability to give the child "love, affection and guidance"; harm to the child that would result if visitation is denied; and a willingness to cooperate with the parent or other person having custody.

Fit Parents - A presumption that fit parents act in the best interests of their children. (Note: it might be extrapolated that fit grandparents would also act in the best interest of the child; however, this apparently was not a consideration in *Troxel v. Granville*).

Special Weight - *Troxel* requires courts to give "special weight" to parents' decisions concerning whether, when and how grandparents will associate with their children.

Parens patriae - Refers to the public policy power of the state to intervene against an abusive or negligent parent, legal guardian or informal caretaker, and to act as the parent of any child or individual who is in need of protection.

Parental Alienation – When one party turns the child against the other, aligning with child through systematic undermining, disparaging or interfering with access to the child by the other parent. Most commonly, the primary cause is a parent wishing to exclude another parent from the life of their child. This can occur when a parent discusses information (true or false) that diminishes the child's respect and trust in said parent. Many Mental Health Professionals consider this child abuse as it interferes with the loving bond between a parent and their child. The alienating parent is usually resistant to counseling. When courts determine that this is happening they often award custody to the alienated parent. In custody hearings, the parent most willing to give the other access to the child is often awarded custody. Parental alienation often happens in the context of high conflict divorces. The parent who is alienated can also contribute to this phenomenon by his/her own behaviors.

High Conflict Divorce – When one or both parents are determined to continue the battle beyond divorce court with a spirit of non-cooperation resulting in numerous motions, accusation and court

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hearings. This results in expenses to both parents and sometimes the party with the “deepest pockets” wins out.

Co-Parenting – The art of two mature and logical parents working together beyond their divorce in the best interest of the child. They respect the rights of each other and realize the child needs both loving parents in his/her life. They communicate well and keep each other informed on matters concerning the child such as activity schedules, school events, grades and health care.

Reports of Child Abuse to DHS in the context of high conflict divorces – Should be viewed with circumspect. A party will sometimes accuse the other of physical or sexual abuse feeling it will help them win their case. Small children can be convinced this has happened when it has not through repeated suggestive interviewing by professionals or convincing/brain washing by the parent. It is tragic when a child lives their life believing a parent has abused them when it has not happened. This likely will result in mental health problems into the future. Although we should err on the side of caution regarding child abuse, when it comes to child custody and visitation, we should also be aware of this issue.

Significant and viable relationship with the child - Such a relationship is presumed to have existed if the child resided with the grandparent for six or more months, the grandparent was the caregiver for six or more months or the grandparent had "frequent or regular" contact with the child for twelve or more months.

The harm standard - A demonstration that a child will suffer actual harm if visitation is denied.

BYU Study –Although the rest of the world was pretty much already aware of it, the presence of grandparents in a child's life has huge benefits according to a September 2011 study out of Brigham Young University. Research by Jeremy Yorgason and Laura Padilla-Walker of the BYU Department of Family Life, showed that grandparents have an effect on children's social behaviors. The research was published in the Journal of Research on Adolescence, using data collected from 408 families with children in the fifth grade. The study indicated that when grandparents are involved in their grandchildren's daily lives, the children are more social and more involved in school. They are also more likely to show care and compassion for people outside their immediate circle of friends and family. Grandparents, it is believed, take on a role that encourages positive development rather than disciplining negative behavior. This may be particularly important in early-adolescence when parent-child conflict increases.

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Use of Technology -Technology has made it easier for grandparents to have regular contact with their children. Examples of this are social media, Skype and Face Time on cell phones.

Scenarios

In this section, this counselor has included some examples of scenario's he has encountered in working with grandparents seeking custody or visitation with their grandchild.

1. The biological mother dies, the maternal grandparents are worried because the biological father has a history of drug abuse and is unemployed. He remarries and his new wife who becomes the stepmother pulls the children toward her parents/step grandparents. This is somewhat similar to situations when a divorced parent remarries and tries to make the new spouse mommy or daddy.
2. The biological grandfather was abusive to the mother when she was growing up in the home. The mother resents her mother (the children's grandmother) for not protecting her from his abuse. During adolescence the mother had acting out problems and the grandmother had to be strict with her. Due to her resentments, the biological mother prevented the grandmother from seeing the grandchildren through childhood and adolescence. Surprisingly, she allowed the grandfather to have visitation. Counseling was provided for many years to help the grandmother cope with her grief. Finally, years after counseling was discontinued, the grandmother sent this counselor a nice card stating "you were right". The card had a nice picture of her with her grandchildren. After they turned 18, they reached out and initiated a relationship with their grandmother.
3. The mother is assaulted by the father and develops neurological problems. The mother is hospitalized in intensive care and is later transferred to a facility that treats head injuries. She cannot communicate in complete sentences and is in a wheel chair. While mother is in the hospital, the children's paternal grandfather takes the oldest child to her home where the child breaks into and vandalizes the home as the paternal grandfather waits outside in his car. The biological father severely disparages the maternal grandmother resulting in severe alienation of the oldest child against his paternal grandmother. This causes difficulty during visits with the grandmother. The grandmother is taking care of her sick daughter (the children's mother), holding down a job and seeing her grandchildren as often as she can. The grandmother sought visitation which was granted by the court. The biological father maintains a hostile attitude toward the grandmother. He is uncooperative in counseling and terminated the counseling sessions.

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4. Mom and dad have divorced and remarried, in some cases, multiple times. Children, as half-siblings, have different grandparents. Additionally children often form strong bonds with some of the parent's divorcees and their families. Multiple biological grandparents, step-grandparents, former step-grandparents, half-siblings and step-siblings wanting involvement with the children can create situations that are confusing and difficult for everyone.
5. The biological parent has a good relationship with the biological grandparent, the grandparents see the children when the child is with the parent. Courts are now awarding Fit Parents true joint custody much of the time.
6. In some cases the grandparent is not Fit and should not be awarded unsupervised visitation. The grandparent may be impaired in some way and the parent doesn't trust him/her and fears for the child's safety. Examples would be a grandparent having propensity of physical, verbal, sexual abuse, serious mental illness or other criminal history. He/she may have an alcohol or other substance problem. They might talk to the children about religious view or social views that the parent does not agree with.
7. In some cases both parents are impaired or unavailable; however, Fit grandparents are available. Grandparents may obtain guardianship if they are financially able to pay the legal fees.
8. Cases of single parents. For example children having children. The grandparent steps in and raises the grandchild while the parent is finishing high school. For all intents and purposes, the grandparent becomes the parent. Arkansas has the fourth largest number of teenage births in the nation with 50 or more per 1000 births (Census Bureau 2010).

Recommendations

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1. In cases of the death or disability resulting in loss of custody by a biological parent, there should be a less difficult provision for the Fit biological grandparents to continue their relationship with the child.
2. In cases where the Fit grandparents and grandchildren are separated by long distances, visits such as a two week summer visit could be supplemented by use of technology as described above.
3. If the "Fitness" of a grandparent is questioned, then an evaluation of the grandparent(s) should be performed by a mental health professional specifically trained in forensic child custody evaluation. The assessment should include an on-site home study of the grandparent's home. The mental health professional should have specialized training and be accredited by the nationally accepted body of their profession. This counselor was trained and accredited by the National Board of Forensic Evaluators and found the training invaluable in being able to do this type of work.
4. DHS PUB-357 (R.8/2013) manual as stated above should be revised to specifically list Licensed Professional Counselors as one of the mental health professionals approved to report mental injury to a child.