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Introduction

In 2002 in Wickham v. Byrne,1 the Illinois Supreme Court recognized that in "most cases, the relationship between a child and . . . grandparents is a nurturing, loving relationship that provides a vital connection to the family’s history and roots.” Yet, it also said that given the “fit parent’s constitutionally protected liberty interest to direct the care, custody, and control of his or her children . . . parents – not judges – should . . . decide . . . with whom their children will associate.” Thus, the “human conflict” between parents and grandparents was found to have “no place in the courtroom.” The court declared the grandparent visitation statute to be “facially unconstitutional.”

We argue that there needs to be some place in the courtroom, more than now allowed, for “human conflict” over grandparent childcare. Such childcare includes custody, visitation (traditional and virtual, as via FaceTime or Skype), and, yes, financial support. Notwithstanding a “fit parent’s constitutionally protected liberty interest,” the U.S. Supreme Court in a plurality opinion, in Troxel v. Granville in 2000, recognized,2 contrary to the Wickham declaration, that

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1 199 Ill. 2d 309, 321-2 (2002) [hereinafter Wickham].

the “presumption that parents act in their children’s best interests” does not totally prevent
courts “from second-guessing parents’ visitation decisions.” At the least, second-guessing is
permitted by the U.S. Supreme Court to prevent harm to grandchildren. Post-Wickham cases
in Illinois also hold, and should continue to hold, that second-guessing is permitted in some
instances where fit parents earlier agreed (as in consent decrees), but now object, to
grandparent childcare. Illinois legislators should expand grandparent childcare opportunities,
especially important today as the opioid, other drug-related, and non-drug crises disable many
parents from providing adequate childcare.

Past and Current Illinois Grandparent Childcare Laws

For some time grandparent childcare statutes have existed in Illinois. Before and after
Wickham laws have spoken explicitly to “reasonable visitation privileges” to a grandparent or
great-grandparent of any minor. From at least 1977, by statute a child custody or similar
proceeding (distinct from a visitation proceeding) could be commenced “by a person other than
a parent,” but only if the child is “not in the physical custody” of one of his or her parents.

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3 Wickham, 199 Ill. 2d at 321.

4 Troxel, 530 U.S. at 73 (for the plurality, Justice O’Connor says “we do not consider ... whether ... Due Process . . . requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation”).

5 Former 750 ILCS 5/607(b)(1) (“reasonable visitation privileges” to a grandparent or great-grandparent) and 750 ILCS 5/602.9 (c)(1) (“visitation and electronic communication” orders involving, inter alia, grandparents and great-grandparents).

The explicit statute on grandparent visitation struck down in Wickham had its origins in a 1981 amendment to the Illinois Marriage and Dissolution Act which recognized for the first time that a court “may grant reasonable visitation privileges” to a grandparent or great-grandparent upon petition as long as “the court determines that it is in the best interest and welfare of the child.” Similar provisions remained during statutory changes in 1982, 1985, 1989, and 1990. The statutory provisions were deemed inapplicable in 2000 to two parents who objected to a grandparent visitation petition because the provisions infringed on the parents’ fundamental liberty interests without serving compelling state interests. The same provisions on grandparent visitation orders were later deemed facially unconstitutional in Wickham in 2002.

After Wickham, grandparent visitation petitions were guided by modifications to the common law precedents on grandparent visitation that were decided before 1981. Those rulings permitted grandparent visitation orders under “special circumstances.” Such circumstances after Wickham would be guided, however, by the more limiting analyses in Wickham and Troxel.

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8 Lulay, 193 Ill. 2d at 465-6 (reviewing the changes).

9 Lulay, 193 Ill. 2d at 480.

10 See, e.g., In re M.M.D., 344 Ill. App. 3d 345, 348 (3d Dist. 2003), affirmed on other grounds, 213 Ill. 2d 105, 117 (2004) (visitation upheld by Appellate Court due to voluntary agreement between father, the sole parent, and the maternal grandparents) [hereinafter M.M.D.] and Felzak v. Hruby, 367 Ill. App. 3d 695, 707-708 (2d Dist. 2006), vacated on other grounds, 226 Ill. 2d 382 (2007) (mootness found in the high court) [hereinafter Felzak].


12 M.M.D., 344 Ill. App. 3d at 348-349 and Felzak, 367 Ill. App. 3d at 707-708.
Under a new statute in 2016, on “visitation by certain non-parents,” a petition requesting child “visitation,” which may include “electronic communication,” can be brought, inter alia, by grandparents or great-grandparents of “a minor child who is one year old or older . . . if there is an unreasonable denial of visitation by a parent that causes undue mental, physical, or emotional harm to the child” and if at least one of certain conditions exist.\textsuperscript{13}

Possible conditions include “the child’s other parent is deceased or has been missing;” a parent is incompetent; a parent has been incarcerated for more than 3 months; the parents, once and perhaps still married, are not together and “at least one parent does not object,” though any visitation must not diminish the parenting time of the parent who is not related to the grandparent or great-grandparent; or, the unwed parents are “not living together.”\textsuperscript{14}

Currently, both custody and visitation orders on grandparent childcare are fairly difficult to secure under the Illinois statutes.\textsuperscript{15} As noted, custody (presumably including shared custody) is only available where at least one parent does not have physical custody. Such availability is further limited- and significantly so- even with a single custodial parent, by Wickham’s concern for parents’ unilateral decisionmaking regarding “with whom their children will associate.” And as noted, nonparent visitation cannot reach grandchildren less than a year old. Upon reaching a year, a visitation order is guided, however, “by the length and quality of the prior relationship

\textsuperscript{13} 750 ILCS 5/602.9(c)(1).

\textsuperscript{14} 750 ILCS 5/602.9(c)(1)(A)-(E). Incidentally, the need for a single parent to agree to grandparent childcare when the parents are not together should apply, if at all, comparably to wed, once wed, and unwed parents since marital and nonmarital parents deserve equal treatment.

\textsuperscript{15} As well, grandparent childcare orders are difficult to secure in guardianship proceedings. See, e.g., In re R.L.S., 218 Ill. 2d 428 (2006) (need to rebut presumption that a parent is fit to make day-to-day childcare decisions).
between the child and the grandparent." Further, grandparent visitation is not available over parental objection even where the lack of visitation would cause the child "undue mental, physical, or emotional harm" unless certain conditions exist, though all U.S. Supreme Court justices in Troxel agreed that state laws can sometimes override a "fit parent's constitutionally protected liberty interest" in order to prevent or stop such harm to a child.

New Illinois Grandparent Childcare Laws

Expanded statutes on grandparent childcare are needed in Illinois. Why should grandparents seeking an "allocation of parental responsibilities" (which is a form of custody) always have to prove that a grandchild is "not in the physical custody" of a parent? Such proof is needed even when the grandparent can show significant harm to the grandchild will arise without an allocation and even when the grandchild had long been under the exclusive care of the grandparent, prompting a parental-like relationship between grandparent and grandchild which was earlier sought and supported by the parent or parents?

Why should grandparent visitation opportunities be unavailable over parental objections where the grandchild will otherwise suffer undue harm because the grandchild is under one year of age or because the parents—whether or not married—are together? Of course, expanded childcare opportunities, even with harm proven, should not automatically lead to grandparent childcare orders.

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16 750 ILCS 5/602.9(b)(5)(D).

17 750 ILCS 5/602.9(c)(1). See also id. at 5/602.9(b)(4) (a rebuttable presumption that a fit parent's actions and decisions regarding nonparent childcare are not harmful to the child's mental, physical, or emotional health; no elaboration on what constitutes harm).

18 Troxel, 530 U.S. at 73.

19 On the physical custody requirement, see, e.g., In re Custody of Peterson, 112 Ill. 2d 48 (1986).
Expanded grandparent childcare opportunities will serve the often-stated policy goal of promoting the best interests of the children of Illinois, without unduly infringing upon important parental prerogatives, especially where there was earlier parental acquiescence in or encouragement of strong and enduring grandparent-grandchild bonds.

In crafting new statutes, Illinois legislators now have, as a guide, the 2018 Uniform Nonparent Custody and Visitation Act (2018 UNCCA) of the National Conference of Commissioners on Uniform State Laws (NCCUSL). Other NCCUSL models were employed in Illinois when the Marriage and Dissolution of Marriage Act and the Parentage Act were amended, effective as of January 1, 2016. Further action by the Illinois General Assembly is necessary as the Illinois courts are unlikely to initiate much needed reforms via common law rulings.\(^\text{20}\)

In contemplating new grandparent childcare laws, legislators must confront several important issues. Issues include whether special nonparent childcare laws are needed for grandparents, whether grandparents should be treated as other nonparents like stepparents and siblings, or whether there should be – as there is now with parental responsibility allocation and visitation – a combination of special and general laws. The 2018 UNCCA authorizes custody or visitation orders, upon a showing of a child’s best interest, for a nonparent who is either a consistent caretaker or has a substantial relationship with a child where a denial of a childcare request will result in harm to the child.\(^\text{21}\) The UNCCA has no

\(^{20}\) See, e.g., In re Scarlett Z.-O., 2015 IL 117904, ¶68 (while “not unsympathetic” to a functional parent’s plea for common law childcare parentage per de facto or equitable adoption theories, legal change “in this complex area” must be the product of a policy debate in the legislature).

\(^{21}\) 2018 UNCCA, at § 4(a)(1)(A) and (B).
special provisions for grandparent childcare. Yet several U.S. states have special laws where there is recognized the importance of biological ties, the longstanding existence of established and strong familial bonds, and/or the earlier parental consent to significant grandparent childcare.\textsuperscript{22}

Another issue is whether a showing of harm to the grandchild is necessary to support a grandparent childcare order over current parental objections. Any requirement as to harm was left undetermined in Troxel.\textsuperscript{23} The 2018 UNCVA expressly requires such a showing in substantial relationship settings, but not in consistent caretaker settings “because severance of a bonded and dependent relationship between a child and a consistent caretaker is presumptively harmful to the child.”\textsuperscript{24}

Yet another issue is whether, and if so how, a parent or parents can be deemed to have waived the right to object to a petition for grandparent childcare due to an earlier acquiescence in such childcare. Under the 2018 UNCVA, an alleged consistent caretaker must show “a bonded and dependent relationship with the child with the express or implied consent of a parent.”\textsuperscript{25} Under current Illinois precedents, in certain circumstances parents cannot object to continuing grandparent or other nonparent (like stepparent) childcare due to their

\textsuperscript{22} Special state grandparent childcare laws are reviewed in Jeffrey A. Parness and Alex Yorko, “Nonparental Childcare and Child Contact Orders for Grandparents,” 120 West Virginia L. Rev. 95 (2017) [hereinafter Nonparental Childcare].

\textsuperscript{23} Troxel, 530 U.S. at 73 (plurality opinion).

\textsuperscript{24} 2018 UNCVA, at § 4(a)(1)(A) and (B) and the related Comment. The 2018 UNCVA defines harm as a “significant adverse effect on a child’s physical, emotional, or psychological well-being.” Id. at §2(5).

\textsuperscript{25} 2018 UNCVA, at § 4(b)(4) (without consent, need to show “no parent has been able or willing to perform parenting functions”).
acquiescence in earlier childcare decrees. Perhaps similar parental acquiescence leading to waiver can also arise from premarital or postmarital, nonseparation agreements wherein current and/or future grandparents are accorded childcare standing for children already born to the soon-to-marry couple, children who will be born to the couple, and/or stepchildren soon to enter a new marital family.

A final issue is whether grandparent childcare laws should extend to child support orders over grandparent objections, with or without accompanying grandparent childcare orders involving custody, visitation or allocation of parental responsibilities. Support obligations against grandparents could conceivably arise in some settings where there were no grandparent childcare requests or opportunities for visitation or the like, as when grandchild support promises were included in premarital or midmarriage agreements between parents; when grandchild support promises prompted earlier consent orders; or when equitable adoption principles are found applicable.

Conclusion

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26 Precedents predate and postdate the current Illinois statutes on nonparent custody and visitation. See, e.g., Boyles v. Boyles, 14 Ill. App. 3d 602 (3d Dist. 1973) and In re M.M.D., 213 Ill. 2d at 116. Earlier parental acquiescence to nonparent childcare found in an oral contract rather than in a court decree, for now, will not prompt nonparent childcare opportunities, at least outside of assisted reproduction settings. Scarlett Z.-D., at ¶¶ 64-69.


Varying reasons, including the recent opioid epidemic, left over 1.5 million grandchildren in 2016 living in some way with their grandparents.29 Even with sole parental residence, many other grandchildren have relationships with their grandparents that are, as Wickham noted, “nurturing” and “loving” while providing “a vital connection to the family’s history and roots.” When “human conflict” between parents and grandparents threaten such relationships, there should be more places within courtrooms to better secure the best interests of children caught in the crossfires.

29 2018 UNCVA, at Prefatory Note (citing U.S. Census Bureau).