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Statutory Grandchild Visitation.

Duncan Gault

STATUTORY GRANDCHILD VISITATION

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In normal family relations one of the great joys a grandchild experiences is visitation with his doting and proud grandparent, who bestows upon him all manner of love and affection. Unfortunately there are instances where normal family relations do not exist. There may be bitter and irreconcilable differences between a parent and a grandparent, with or without the fault of one or both parties, to the extent that the custodial parent refuses to permit the grandparent to visit his minor grandchild.

Courts in Texas and other jurisdictions of the United States have held that the obligation of the custodial parent to permit visitation of the grandchild by the grandparent is moral, not legal;[1] that the custodial parent does not have to account to anyone for his motives in denying visitation;[2] and that the courts will not enforce any so called "right" of visitation by the grandparent with the grandchild over the protests of the custodial parent.[3]

NEW PROVISIONS OF TEXAS FAMILY CODE

Title 2 of the Texas Family Code, effective on January 1, 1974, purports to make a radical change in the present Texas case law. The Family Code appears to create a right of visitation with the grandchild in favor of the grandparent, notwithstanding the protest of the custodial parent; granting to the court the power to issue necessary orders to enforce such right, and providing the grandparent the right of trial by jury on the grandchild visitation issue, with the court being bound by the jury verdict. The following sections of the new Family Code are those in which these changes are found:

Sec. 14.03. Possession of and Access to Child

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1. *E.g.*, Commonwealth *ex rel.* McDonald v. Smith, 85 A.2d 686, 688 (Pa. Super. Ct. 1952); Smith v. Painter, 408 S.W.2d 785, 786 (Tex. Civ. App.—Eastland 1966), *writ ref'd n.r.e.*, 412 S.W.2d 28 (Tex. Sup. 1967) (per curiam).

2. *E.g.*, Odell v. Lutz, 177 P.2d 628, 629 (Cal. Dist. Ct. App. 1947); Succession of Reiss, 15 So. 151, 152 (La. 1894).

3. *E.g.*, Odell v. Lutz, 177 P.2d 628, 629 (Cal. Dist. Ct. App. 1947); Succession of Reiss, 15 So. 151, 152 (La. 1894).

(d) The court may grant reasonable visitation rights to either the maternal or paternal grandparents of the child and issue any necessary orders to enforce said decree.

Sec. 11.13. Jury

(a) In a suit affecting the parent-child relationship, except a suit in which adoption is sought, any party may demand a jury trial.

(b) The verdict of the jury is binding on the court except with respect to the issues of managing conservatorship, possession, and support of and access to a child, on which the verdict is advisory only, provided, however, the court may not enter a decree that contravenes the verdict of the jury on the issues of managing conservatorship, possession of, or access to a child.

The State Bar of Texas sponsored the Family Code and other significant legislation adopted at the last session of the legislature. Great credit is due the various members of the State Bar who have given so generously of their time and efforts in this legislative reform program designed to better permit our Texas courts to cope with the myriad problems of a growing and dynamic state. The comments in this article are not intended in any way to detract from the favorable recognition owed to the drafters of the Family Code. Instead, this article is directed to the question of whether or not this purported change in the law of grandparent-grandchild visitation has merit.

PRESENT TEXAS CASE LAW

There seem to be only two Texas cases in point: *Smith v. Painter*[4] and *Green v. Green*.[5] The Eastland Court of Civil Appeals decided both of these recent cases, and in each case the application for writ of error to the Supreme Court of Texas was refused due to a finding of no reversible error.

Smith was a case of first impression in the State of Texas. The court of civil appeals held in that case that a natural father and adoptive mother were entitled as a matter of law to refuse to permit the maternal grandfather to communicate and visit with their 5-year-old son at reasonable times and places.[6]

The same principle of law was adhered to in *Green* wherein a surviving mother, vested with custody of her 6-year-old daughter, was allowed as a matter of law to refuse to permit her child to visit with

4. 408 S.W.2d 785 (Tex. Civ. App.—Eastland 1966), *writ ref'd n.r.e.*, 412 S.W.2d 28 (Tex. Sup. 1967) (per curiam).

5. 485 S.W.2d 941 (Tex. Civ. App.—Eastland 1972, writ ref'd n.r.e.).

6. Smith v. Painter, 408 S.W.2d 785, 786 (Tex. Civ. App.—Eastland 1966), *writ ref'd n.r.e.*, 412 S.W.2d 28 (Tex. Sup. 1967).

the paternal grandparents, notwithstanding the fact that the jury found that such visitation with the paternal grandparents would be in the best interest and welfare of the child.[7]

Both opinions are relatively short. Wisely, and out of deference to the parties and the welfare of the minor child, the opinions do not state the various charges and countercharges made as between parent and grandparent. Nor do the opinions reflect the voluminous transcripts and records which were before the court in each instance. An inspection of the records in each case discloses the hostile atmosphere and irreconcilable differences existing between parent and grandparent.

Neither *Smith* nor *Green* was decided on a factual basis. Each case was decided on the legal issue presented; whether a grandparent has a legal right to visitation privileges with his minor grandchild over the objections of the parent or parents having custody.[8] *Smith* and *Green* both hold that no such right exists in favor of the grandparent.

SMITH V. PAINTER

In *Smith* the natural mother of the child had died, and the father had remarried. The maternal grandfather filed suit against the father and the adoptive mother seeking to obtain visitation privileges.

The father and adoptive mother filed their motion for summary judgment and an affidavit wherein they claimed that visitation by the grandfather with the minor child created grave disciplinary problems with the child. The grandfather countered with his controverting affidavit wherein he specifically denied under oath the allegations that he had caused any disciplinary problems with the child. The grandfather also filed an affidavit from an uncle, by marriage to the child's natural mother, stating that the best interest of the child required visitations with his grandfather.[9]

The grandfather appealed from the order of the trial court granting the father's and adoptive mother's motion for summary judgment. The court of civil appeals affirmed the judgment of the trial court and noted in its opinion that the court could not find any Texas cases in point

7. Green v. Green, 485 S.W.2d 941 (Tex. Civ. App.—Eastland 1972, writ ref'd n.r.e.).

8. Green v. Green, 485 S.W.2d 941 (Tex. Civ. App.—Eastland 1972, writ ref'd n.r.e.); Smith v. Painter, 408 S.W.2d 785, 786 (Tex. Civ. App.—Eastland 1966), *writ ref'd n.r.e.*, 412 S.W.2d 28 (Tex. Sup. 1967).

9. Record at 17-28, Smith v. Painter, 408 S.W.2d 785 (Tex. Civ. App.—Eastland 1966), *writ ref'd n.r.e.*, 412 S.W.2d 28 (Tex. Sup. 1972).

and that none were cited by counsel.[10] The court then cited an 1894 decision by the Supreme Court of Louisiana, *Succession of Reiss*,[11] stating that it considered the case to be sound in principle.[12]

Reiss is generally considered to be a case of first impression in American Jurisprudence.[13] It is a landmark case and frequently cited. A detailed analysis of this case is helpful in understanding the case law that developed in the area of grandparent visitation rights. In *Reiss* the maternal grandmother sued the father of two minor children, 6 and 8 years of age, to compel the father to send his children, whose mother had been dead about 6 years, to visit her at her residence on such days and at such hours as might be fixed by the court. The trial court entered its order requiring the father to send the children to visit with their grandmother and also ordered that the grandmother should visit with the children at their father's home. The father had not sent the children to the grandmother for more than 3 years, and the grandmother had not visited with the children in their father's home. On appeal the grandmother sought a revision of the orders of the trial court to delete any requirement that she visit with the children in their father's home and that the order, as modified, require only that the father send the children to visit with her.

The grandmother alleged that the father was arbitrarily, wantonly, maliciously, and cruelly denying her the privilege of seeing her grandchildren. The father denied that he had refused visitation privileges to the grandmother and admitted that there was a law of nature that children should visit their grandparents. The grandmother admitted that she had never visited the children at their father's home, saying simply that it was proper to send the children to her, that she did not think it was her place to see the children at their father's home, and that the children should come to see her. The father, the paternal grandfather, the children, and other members of the father's family all lived at the same residence. On the surface the sole difference between the grandmother and the father on the issue of grandchild visitation was the place of visitation; the grandmother demanding that the children be sent to visit her, rather than visit the children at their father's home.

10. Smith v. Painter, 408 S.W.2d 785 (Tex. Civ. App.—Eastland 1966), *writ ref'd n.r.e.*, 412 S.W.2d 28 (Tex. 1972).

11. 15 So. 151 (La. 1894).

12. Smith v. Painter, 408 S.W.2d 785, 786 (Tex. Civ. App.—Eastland 1966), *writ ref'd n.r.e.*, 412 S.W.2d 28 (Tex. Sup. 1972).

13. Annot., 98 A.L.R.2d 325, 327 (1964).

The court noted, however, that the relations between the grandmother and the members of the father's family were not "of the most pleasant character" and further stated: "Ill feeling and bad blood separate the father and grandmother."[14]

The court noted that "[t]he question involved is res nova in this state" and sought commentaries and court decisions interpreting the articles of the Civil Code of France.[15] The court stated that the French authorities were divided on this issue and that there was "respectable authority" holding that the precept of Deuteronomy, "Honora patrem tuum et matrem," also included "the grandfather and the grandmother and that a court can intervene for its enforcement without regard to the will of the father or mother."[16] Other French authorities, however, had held "that under the law of nature the child is under the authority of the father or mother after the death of either."[17]

The Supreme Court of Louisiana reversed all orders of the trial court, refused to intervene for the grandmother, and dismissed the suit. The court quoted from *Laurent* as follows:

> We translate from 4 Laurent, p. 362, who propounds the question, can the ascendant demand that the authority of the father and mother be limited? In truth, the ascendants have certain rights that the law, in accord with nature, gives them; but only when the father and mother are dead, or are incapable of manifesting their will. During the existence of the father and mother, the law properly accords them no authority over the children. To permit them to intervene would occasion embarrassment and annoyance; even more, it would injuriously hinder proper paternal authority by dividing it. The authority sought is said to be in the interest of the children. Are the children interested in anything in the nature of a conflict of authority? Without doubt it is desirable that the ties of affection that nature creates between the ascendants and their granchildren be strengthened and unceasing, but, if there is a conflict, the father alone or the mother should be the judge. The law gives no right of action to the grandparents. The father may have good reasons to avoid all contact between his children and their grandparents—either that he fears that they may inculcate bad principles, or that they will unsettle the respect and affection due him. He owes no account to any one for his motives. They may be so intimate that the honor of the family requires that they shall remain a secret. Shall we say that the judge

14. Succession of Reiss, 15 So. 151, 152 (La. 1894).
15. *Id.* at 152.
16. *Id.* at 152.
17. *Id.* at 152.

> shall be the arbitrator between the grandparent and the father? The court of Bordeaux replies that the intervention of the tribunals would, as a consequence, render the dissensions of the family more pronounced by delivering them to the public.[18]

The court in *Reiss* went on to comment that:

> We refer approvingly to the French authorities only so far as they lay down the principles that there is not a vinculum juris; that the obligation ordinarily to visit grandparents is moral, and not legal. There may be cases of downright wrong and inhumanity demanding judicial intervention, even to the extent of dismissing the father and tutor from his trust. The case at bar does not disclose so grave an issue. Ill feeling and bad blood separate the father and grandmother.[19]

The Supreme Court of Texas in its opinion, refusing a writ of error in *Smith v. Painter*,[20] observed that the adoptive mother of the minor child had all the rights of a natural mother to refuse visitation of the minor child by the grandfather but did not then pass on the matter of whether or not *Reiss* accurately reflected the law of Texas.[21]

GREEN v. GREEN

In *Green*, the paternal grandparents sued the mother and the maternal grandparents for child custody and in the alternative for visitation with the minor grandchild who had been in the custody of her mother since the death of the child's father. In answer to special issues, the jury found that it would not be in the best interest and welfare of the child for her custody to be removed from her mother. The jury did find, however, that it would be in the best interest and welfare of the child for the paternal grandparents to have reasonable visitation privileges. Upon motion of the mother, the trial court disregarded the special issue on visitation privileges in favor of the paternal grandparents and the answer of the jury thereto, and granted judgment in favor of the mother as to custody, rendering judgment that the paternal grandparents take nothing. The grandparents limited their appeal to the denial of visitation privileges.

The court of civil appeals affirmed the judgment of the trial court and in a very brief opinion, denying any visitation privileges to the

18. *Id.* at 152.
19. *Id.* at 152.
20. 412 S.W.2d 28 (Tex. Sup. 1967).
21. *Id.*

paternal grandparents, announced its reliance upon the principles applied in *Smith*.[22]

CASE LAW OF OTHER JURISDICTIONS

The courts have been virtually unanimous in denying a grandparent visitation privileges with a grandchild when the custodial parent objects. This has been true not only in Texas, but in other jurisdictions as well: Arkansas,[23] California,[24] District of Columbia,[25] Louisiana,[26] New York,[27] Ohio,[28] and Pennsylvania.[29]

It is interesting to note that all of the decisions in the various jurisdictions have treated the issue as a question of law and not upon any factual determination, such as whether the grandparent is a fit person. Several decisions have even recognized the grandparent as a fit person and still decided the visitation issue as a matter of law, denying the grandparent visitation rights.[30] In most of the cases, the courts have noted that the hostile relations and irreconcilable differences existing between the parent and grandparent created an atmosphere that was deemed contrary to the best interests and welfare of the child.[31]

In reviewing the cases from the various jurisdictions, there appear to be five basic reasons relied upon for the denial of judicially enforced grandparent visitation rights, which may be summarized as follows:

(1) Ordinarily the parent's obligation to allow the grandparent to visit the child is moral, and not legal.[32]

(2) The judicial enforcement of grandparent visitation rights would divide proper parental authority thereby hindering it.[33]

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22. Green v. Green, 485 S.W.2d 941 (Tex. Civ. App.—Eastland 1972, writ ref'd n.r.e.).

23. Veazy v. Stewart, 472 S.W.2d 102 (Ark. 1971).

24. Odell v. Lutz, 177 P.2d 628 (Cal. Dist. Ct. App. 1947).

25. Jackson v. Fitzgerald, 185 A.2d 724 (D.C. Mun. Ct. App. 1962).

26. Succession of Reiss, 15 So. 151 (La. 1894).

27. People *ex rel.* Sisson v. Sisson, 2 N.E.2d 660 (N.Y. 1936); Noll v. Noll, 98 N.Y.S.2d 938 (Sup. Ct. 1950).

28. Kay v. Kay, 112 N.E.2d 562 (Ohio Ct. C.P. Cuyahoga Co., 1953).

29. Commonwealth *ex rel.* McDonald v. Smith, 85 A.2d 686 (Pa. Super. Ct. 1952); Commonwealth *ex rel.* Flannery v. Sharp, 30 A.2d 810 (Pa. Super. Ct. 1943).

30. *E.g.*, Odell v. Lutz, 177 P.2d 628 (Cal. Dist. Ct. App. 1947); Commonwealth *ex rel.* Flannery v. Sharp, 30 A.2d 810 (Pa. Super. Ct. 1943).

31. *E.g.*, Succession of Reiss, 15 So. 151, 152 (La. 1894); Commonwealth *ex rel.* McDonald v. Smith, 85 A.2d 686, 687 (Pa. Super. Ct. 1952).

32. *E.g.*, Succession of Reiss, 15 So. 151, 152 (La. 1894); Smith v. Painter, 408 S.W.2d 785, 786 (Tex. Civ. App.—Eastland 1966), *writ ref'd n.r.e.*, 412 S.W.2d 28 (Tex. Sup. 1967).

33. *E.g.*, Odell v. Lutz, 177 P.2d 628, 629 (Cal. Dist. Ct. App. 1947); Jackson v. Fitzgerald, 185 A.2d 724, 726 (D.C. Mun. Ct. App. 1962).

(3) The best interests of the child are not furthered by forcing the child into the midst of a conflict of authority and ill feelings between the parent and grandparent.[34]

(4) Where there is a conflict as between grandparent and parent, the parent alone should be the judge, without having to account to anyone for the motives in denying the grandparent visitation.[35]

(5) The ties of nature are the only efficacious means of restoring normal family relations and not the coercive measures which follow judicial intervention.[36]

EXCEPTION TO THE GENERAL RULE

The general rule that a grandparent does not have any legal right to visitation privileges with the grandchild over the objection of the custodial parent is subject to an exception. Visitation privileges in favor of a grandparent may be upheld in the event of a subsequent attack when such privileges were awarded to the grandparent incident to a divorce proceeding wherein the parents consented or acquiesced to such rights. An additional element in this exception is a finding that ties of love and affection have developed between the child and the grandparent.[37] The same result may follow even in the absence of a prior award of visitation privileges to the grandparent when the custodial parent and the grandchild have resided with the grandparent, and the custodial parent then dies.[38]

By way of illustration of this exception to the general rule, in *Benner v. Benner*[39] the wife, who had been awarded custody of the minor child, resided with her mother. Subsequently, the wife disappeared and the father was awarded custody of the child at which time he stipulated that the maternal grandmother would have visitation privileges with the child. The father remarried and thereafter attacked the order granting visitation. The appellate court, in upholding the visitation order, noted that the father had consented to the order of visitation and that such visitations with the maternal grandmother were in the best interest of the child in that the child had lived with the grand-

34. *E.g.*, Noll v. Noll, 98 N.Y.S.2d 938, 940 (Sup. Ct. 1950); Commonwealth *ex rel.* Flannery v. Sharp, 30 A.2d 810, 812 (Pa. Super. Ct. 1943).

35. *E.g.*, Odell v. Lutz, 177 P.2d 628, 629 (Cal. Dist. Ct. App. 1947); Succession of Reiss, 15 So. 151, 152 (La. 1894).

36. *E.g.*, Succession of Reiss, 15 So. 151, 152 (La. 1894); Commonwealth *ex rel.* Flannery v. Sharp, 30 A.2d 810, 812 (Pa. Super. Ct. 1943).

37. *See* Annot., 98 A.L.R.2d 325, 328-29 (1964).

38. *Id.* at 328-29.

39. 248 P.2d 425 (Cal. Dist. Ct. App. 1952).

mother about 3 years.[40] In allowing the grandparent visitation rights the court was of the opinion that the child would sustain considerable nervous and emotional disturbance if she were completely removed from the familiar surroundings.[41]

It should be noted that a court order granting visitation to the grandparent, in accordance with the stipulation of the custodial parent, is not always an absolute bar to a subsequent modification of the order whereby further grandparent-grandchild visitations are denied. In *People ex rel. Marks v. Grenier*,[42] there was a stipulation for grandparent-grandchild visitation by the father, which was later successfully attacked by the father and vacated.[43] In *Commonwealth ex rel. McDonald v. Smith*[44] the father complied with a trial court order for grandparent-grandchild visitation during a period of approximately 16 months before filing a petition which successfully revoked the order granting visitation privileges to the grandparents.[45]

Woods v. Parkerson[46] was a 1967 case decided by the Supreme Court of Colorado in which there was a divorce action pending when the wife died. Upon motion of the parents of the deceased wife, they were substituted as parties defendant in the divorce action. On stipulation of the parties, the grandparents and natural father agreed that he was to have custody of the two minor children and that the grandparents were to have certain visitation rights, the court entering an order accordingly. Thereafter the father refused to permit the grandparents to visit with the children and was cited for contempt. The father countered by filing a motion wherein he asked that the grandparents' right of visitation be terminated. The Supreme Court of Colorado held that the trial court had acted without jurisdiction to enter any order as to the grandparents concerning custody or right of visitation and directed that the trial court vacate its previous orders.[47]

IMPLICATIONS OF THE NEW STATUTES

As the discussion thus far has shown, the sections of the Family

40. *Id.* at 426.
41. *Id.* at 426; *accord*, Kentura v. Kentura, 152 P.2d 238 (Cal. Dist. Ct. App. 1944).
42. 293 N.Y.S. 364 (Sup. Ct.), *aff'd*, 10 N.E.2d 577 (N.Y. 1937).
43. *Id.* at 365.
44. 85 A.2d 686 (Pa. Super. Ct. 1952).
45. *Id.* at 687-88.
46. 430 P.2d 467 (Colo. 1967).
47. *Id.* at 469.

Code quoted earlier contravene well settled case law by conferring upon a grandparent the right of visitation with his minor grandchild notwithstanding the protests of a fit custodial parent. Apparently the drafters of the sections under discussion consider the statutory grant of such visitation rights to a grandparent as constitutional and valid. There is a suggestion in *Odell v. Lutz*[48] that the granting of any such visitation rights to the grandparent under these conditions would be an interference with the natural liberty of a parent to control the rearing of his child, an encroachment on the personal liberty of the parent, and an act forbidden by the Constitution.[49] It will be interesting to see what action the courts take in response to a constitutional attack on the new statutory grant of visitation rights to a grandparent.

These new sections of the Family Code introduce several other new, related concepts. In addition to giving the courts the power to enter necessary orders to enforce visitation rights in favor of the grandparent, there have been enacted provisions which would give the grandparent the right of jury trial on the issue of visitation rights, and would make the verdict of the jury binding on the court.

Any right to a jury trial on the issue of grandchild visitation is indeed a new concept. Article 4639a[50] has in the past provided for jury trials in any hearing "concerning the *custody* of a child, whether pursuant to a divorce cause or not . . . ."[51] Article 4639a is silent, however, as to the question of visitation. This article, as amended in 1961, required that the judgment of the court conform to the jury verdict concerning the issue of custody, and thus made the jury verdict binding on the court, whereas previously the jury verdict was advisory. It has always been the custom and practice, however, for a trial court to fix *visitation* rights as between parents, without the intervention of a jury. There does not appear to be any Texas case law on the right of trial by jury on the child visitation issue. It is true that in *Green v. Green*[52] the trial court did submit the visitation issue to the jury over the objection of the mother.[53] *Green* was decided on another

48. 177 P.2d 628 (Cal. Dist. Ct. App. 1947).
49. *Id.* at 629.
50. Tex. Laws 1961, ch. 305, § 1, at 663.
51. Tex. Laws 1961, ch. 305, § 1, at 663-64 (emphasis added).
52. 485 S.W.2d 941 (Tex. Civ. App.—Eastland 1972, writ ref'd n.r.e.).
53. Record, Green v. Green, 485 S.W.2d 941 (Tex. Civ. App.—Eastland 1972, writ ref'd n.r.e.).

question of law, however, making it unnecessary for the court of civil appeals to write on this question.

The language of Section 11.13(b) of the Family Code, with respect to the jury verdict being binding on the court on the issue of access to a child, is somewhat ambiguous. Leaving out the words of "managing conservatorship, possession, and support of," and reading the statute solely from the point of view of access or visitation of a child, the language is as follows:

> The verdict of a jury is binding on the court except with respect to the issues of . . . access to a child, on which the verdict is advisory only, provided however, the court may not enter a decree that contravenes the verdict of a jury on the issues of . . . access to a child.[54]

The statute first provides for the jury verdict on access to be only advisory. The statute subsequently states that the court may not enter a decree that contravenes the verdict of the jury on the issue of access to a child. If the jury verdict is advisory only, the court is entitled as a matter of law to disregard the jury verdict and render judgment. If on the other hand, the court may not enter a decree which contravenes the jury verdict, then the jury verdict is not merely advisory but is in fact binding on the court. Obviously these clauses of the statute are in conflict with each other. Perhaps it could be argued that the statute is correctly interpreted to mean that the jury verdict is advisory only to the court on the issue of access to a child; however, until the courts have dealt with this issue, the answer will remain unsettled.

One further aspect of the operation of these new statutes deserves mention. This grant of grandchild visitation rights is not limited to a divorce proceeding and could conceivably apply when the father, mother and child live together as a family or when the surviving parent and child live together as a family.

PRACTICAL CONSIDERATIONS

Under the new statute, visitation rights with the grandchild could presumably be granted to both sets of grandparents. Assuming that in a divorce proceeding the custody of a child were awarded to the mother and that the father were given reasonable visitation rights, then this would then make a total of six people who would have access to the child: The mother with custody of the child, the father and

54. TEX. FAMILY CODE ANN. § 11.13(b) (Supp. 1974).

four grandparents, all of whom would have judicially enforceable visitation rights with the minor child.

This type of an arrangement might well deprive the father of the full visitation rights to which he is entitled by forcing him to share visitation with the grandparents. It can also be argued that the father and each of the four grandparents are entitled to have a jury pass on the issue of the extent of visitation to which each is entitled. In a contested hearing, the entry of a decree giving "reasonable visitation rights" would probably not be satisfactory to the parties and it would be necessary for the decree to state visitation rights with great particularity. Under the new statute the father and each of the four grandparents may also be entitled, as a matter of law, to have the jury specify, in answers to special issues, those particular visitation rights which are considered reasonable and supposedly in the best interest and welfare of the child. The effect of all of these required jury findings as to visitation rights would greatly complicate any action they were attendant to and court orders granting visitation rights could be quite detrimental to the mother's exercise of her authority over the child as the custodial parent.

The statute further authorizes the court to issue any necessary orders to enforce its decree. Presumably then, upon motion of a grandparent, the court could enter an order directing that the mother not change her residence or remove the child from the jurisdiction of the court. This question is not as frivolous as one might think. There have been instances in Texas where a court, incident to a divorce proceeding, has awarded custody of the children to one spouse and has enjoined such spouse from removing the child from a certain county.[55] Allowing visitation rights to four grandparents increases the possibility of similar orders in the future.

There will also be problems of jury submission. Counsel for the grandparent will probably want to submit a special issue in substance as follows:

> Do you find from a preponderance of the evidence that it would be in the best interests and welfare of the minor child for the grandparent to have reasonable visitation privileges with such child?

The gravamen of this type of jury submission, from the standpoint of

55. *E.g., Ex parte* Rhodes, 163 Tex. 31, 352 S.W.2d 249 (Tex. Sup. 1962); Wilkerson v. Wilkerson, 483 S.W.2d 690 (Tex. Civ. App.—Waco 1972, writ ref'd n.r.e.).

counsel for the custodial parent, is that the jury is not necessarily required to find that the best interest and welfare of the child *demands* such visitation with the grandparent. This jury submission does not necessarily require a showing of any *special need* for the child to visit with the grandparent.

The necessity of determining visitation rights in light of the above factors is best shown in a hypothetical fact situation. Assume that the child is 6 years old, and a normal, healthy, happy and well-provided for child, receiving proper parental guidance, love and affection from the mother, the father being deceased. Assume further that one of the grandparents has not seen such child for the past 5 years, that the child does not really know such grandparent. In this context add the factors that hostile and bitter relations exist as between this particular grandparent and the mother of the child, arising out of purely personal matters; that such grandparent is a fit person; that the mother is a fit person; and, that nevertheless irreconcilable differences and conflicts exist between such grandparent and the mother. How would the jury react when this particular grandparent appeared before the jury in tears, telling of his great love and affection for this grandchild that he has not been allowed to see, and if reasonable visitation privileges were granted to him, that he would not do anything to cause the child any emotional or physical harm? How would the jury then deal with the mother's testimony to the effect that she fears that such grandparent, if visitation is granted, will attempt to destroy the love and affection of the child for her, and attempt to convince the child that her mother is an unworthy person, and in any event will unsettle the respect which the child has for the mother? With further testimony from various witnesses as to such grandparent being a fine and reputable person, deeply concerned about the welfare of the grandchild, the jury may well be hard-pressed to believe the fears of the mother. The jury could even be convinced that the mother's denial of visitation privileges to such grandparent is harsh, in fact cruel. The probability would be great that the jury would find that the best interest and welfare of the minor child would be served for such grandparent to have reasonable visitation privileges.

An analysis and review of the record in this assumed fact situation shows that the grandparent will have prevailed solely because of the sentiment attached to a grandparent-grandchild relationship and the basic proposition that generally it is good for a grandparent to have visitation privileges with the grandchild. *In this assumed situation there is no*

evidence showing that the welfare of the child requires visitation with such grandparent and there is no showing that there is any special need by the child to visit with the grandparent. In substance the jury has answered this special issue on the basis of their belief that this grandparent is fit and has not been proven to be unworthy by the mother. The jury may not realize that many of the mother's fears for her child, if visitation is permitted, are not susceptible of that type of proof required in a jury trial. The record in this hypothetical case and the findings thereon shows only that the *grandparent* is thought to have a need of visitation with the grandchild. The controlling factor should be the needs of the grandchild, not the needs of the grandparent. The jury has completely overlooked the fact that the child will probably be thrown into the hostile environment existing between the mother and grandparent as a result of this coerced visitation by the grandparent. Such circumstances may result in a substantial danger of emotional harm to the child.

If these new concepts are in fact to become the law in Texas, then perhaps a more objective jury submission would be made possible by the following special issue:

> Do you find from a preponderance of the evidence that the welfare, contentment, peace of mind and happiness of the child make it essential for the child to have visitations with the grandparent?

Perhaps this form of special issue would focus the attention of the jury more on the needs of the child as distinguished from the needs of the grandparent.

BEST INTEREST AND WELFARE OF THE CHILD

Both the Family Code and case law are vitally concerned with the best interest and welfare of the child as being the primary consideration.[56] The basic difference between the two however is in the method used in determining the best interest and welfare of the child.

In substance the Family Code dictates that whenever there is a conflict between a fit custodial parent and a grandparent over visitation with the grandchild, the conflict should be resolved by the court, with or without the intervention of a jury. In this way the Family Code purports to determine the best interest and welfare of the child. There

56. TEX. FAMILY CODE ANN. § 14.07 (Supp. 1974); Legate v. Legate, 87 Tex. 248, 28 S.W. 281 (1894); Johnson v. Campbell, 107 S.W.2d 1111, 1112 (Tex. Civ. App.—San Antonio 1937, no writ).

does not seem to be any case law, however, to support this theory of the Family Code as to the determination of grandparent visitation rights. There are any number of Texas cases which point to the controlling effect given to the best interest and welfare of the child, but these concern parent's visitation rights.[57] The case law of Texas and other jurisdictions of the United States has resolved that the court should not take the position of an arbitrator as between a fit custodial parent and a grandparent on the issue of grandchild visitation. The best interest and welfare of the child have been found to be served by entrusting such child to the fit custodial parent, and not infringing upon the right of such parent to direct the upbringing of his child by requiring grandparent-grandchild visitation over the protest of the parent.

CONCLUSION

It is *not* sound in principle or in practice for a grandparent to have visitation rights with a minor grandchild over the protest of a fit custodial parent. If a grandparent is to have these so-called "rights," what about an aunt or an uncle? A New York trial court, confronted with this situation, gave visitation rights to a maternal grandmother, a maternal aunt and uncle over the objection of a father having child custody, although on appeal the trial court was reversed as to all visitation orders.[58]

The case law of Texas and the case law throughout the United States, acting to preserve the best interests of the child, has upheld the right of a fit custodial parent to direct the upbringing of his child, without interference from a grandparent. Case law prohibits any court ordered visitations by the grandparent over the protest of the custodial parent. There is no sound basis in law or equity for the change provided in the Family Code of granting such visitation rights to a grandparent. Looking to the future, if present Texas case law is not followed, there will be no end of difficulties for children and the courts.

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57. Herrera v. Herrera, 409 S.W.2d 395, 396 (Tex. Sup. 1966); Taylor v. Meek, 154 Tex. 305, 276 S.W.2d 787 (1955); Johnson v. Campbell, 107 S.W.2d 1111, 1112 (Tex. Civ. App.—San Antonio 1937, no writ).

58. People *ex rel.* Marks v. Grenier, 293 N.Y.S. 364, 365 (Sup. Ct. 1937) where reference is made to an order of the trial court in People *ex rel.* Schacter v. Kahn, 269 N.Y.S. 173 (Sup. Ct. 1934).