Oklahoma GrandParental Visitation In Y2K & Beyond

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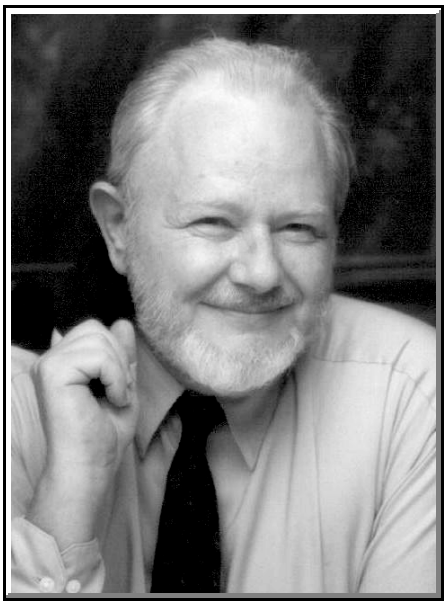

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It's been a bad six years for proponents of grandparent custody and/or visitation rights in Oklahoma, if not around the country. Although this paper focuses on grandparental visitation, it is worth noting that not only have the tides of visitation diminished, so have grandparental custody termination issues. In fact, the custody change came first, the visitation shift came second. A brief review is helpful to understand the overall context of where we're at now that 2001 has arrived.

1984-1985 may be perceived as the zenith of grandparental visitation and custody rights. As to visitation, in *In re Bomgardner*, 1985 OK 59, 711 P.2d 92, after a 14 year-long volley between the Oklahoma Legislature and Oklahoma Supreme Court, the ball being 10 O.S. §5, Oklahoma's grandparental visitation statute, Justice Opala delivered the Supreme Court's "concession speech":

> ¶9 As expressed by the First Circuit Court of Appeals, "it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before". The manifest objective of the series of amendments was to make alienation from grandparents remediable in all the described circumstances. The primary goal of this court in construing statutory enactments is to carry into effect the intent of the legislature.

Concerning grandparental custody modification, *Johnson v. Johnson*, 1984 OK 19, 681 P.2d 78, adopted *Gibbons v. Gibbons*, infra, as the legal test a parent must meet before regaining custody:

> ¶9 In *Gibbons v. Gibbons*, Okl., 442 P.2d 482, (485) (1968), we gave recognition to and followed the following basic rules where a parent seeks a court decreed custody change: the burden of proof is upon the person seeking a change in the court decreed child custody to make it appear: "(a) that, since the making of the order sought to be modified, there has been a permanent, substantial and material change of conditions which directly affect the best interests of the minor child, and (b) that, as a result of such change in conditions, the minor child would be substantially better off, with respect to its temporal and its mental and moral welfare, if the requested change in custody be ordered."
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> ¶10 In *Carpenter v. Carpenter*, Okl., 645 P.2d 476 (480) (1982), we said: "While an appellate court may and will examine and weigh the evidence, the findings and decree of the trial court cannot be disturbed unless found to be against the clear weight of the evidence."
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> ¶11 In the case before us, the mother was destitute, unemployed and living with a brother with no financial or home resources with which to care for her children at the time of the divorce decree. During the approximately four years intervening between the granting of the divorce and the filing of the motion to modify, she has remarried to a man who is gainfully employed; she is also gainfully employed; she and her husband have established a suitable home; and she and her husband have maintained a relationship with the children under her visitation rights established by the divorce decree. Thus she had demonstrated a change in her condition since the entry of the previous custody order, i.e., her fitness to be a custodial parent.
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> ¶12 *Under the record before us, the mother has wholly failed to meet her additional burden, that the change in conditions directly affect the best interests of the children, and that as a result of such change in conditions, the children would be substantially better off with respect to their temporal, mental and moral welfare if the requested change in custody be ordered.* [Emphasis supplied]

So, in *Johnson*, grandparental custody, once obtained, could only be divested by the same test applied to parental custody modification – no easy task. In *Bomgardner*, the Supreme Court's previous strict construction of 10 O.S. §5 was considerably relaxed. Such case law would remain intact until 1994.

Mr. Loudenback limits his practice to divorce, child custody and related issues. He is a past Chair of the Oklahoma Bar Association Family Law Section, received its Outstanding Family Law Attorney award in 1991, and, in 1998, a Chair's Award For Outstanding and Continuing Service to the Family Law Section. He received the Earl Sneed CLE Award from the OBA in 1999 and is Editor of *The Oklahoma Family Law Journal*, 1998-2001. This paper was originally presented in November 2000 at an Oklahoma County Bar Association program and again in January 2001 to the OBA Family Law Section. However, the article has been considerably revised in its last parts due to *Scott v. Scott*, 2001 OK 9. He maintains a website containing resources for Oklahoma Family Law at http://www.dougloudenback.com.

With her dicta in *McDonald v. Wrigley*, 1994 OK 25, 870 P.2d 777, Justice Kauger began to recast the stage:

> ¶12 To obtain custody in a divorce proceeding, even on a temporary basis as is sought here, over the objection of a parent, a grandparent must show the parents' unfitness by evidence that is clear and conclusive, and makes the necessity for doing so appear imperative. *Gibson v. Dorris*, 386 P.2d at 188. The unfitness may not be demonstrated by a mere comparison between what is offered by the competing parties, *Haralson*, supra, *Marshall*, 555 P.2d at 599, but only by a showing that the parents cannot reasonably be expected to provide for the child's ordinary comfort or intellectual and moral development. *Gibson v. Dorris*, supra at 188; Marshall, supra at 600. Such order must be the product of a hearing of which the parent had noticed with the opportunity to be heard. The order must include the conditions found by the trial court to constitute the parental unfitness. This is so that the parent knows what, if corrected, would amount to a change of condition in the eyes of the court.
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> ¶13 All grandparental custody, absent a final termination order under Title 10, may properly be considered temporary. In *Phillips v. Phillips*, 267 P.2d 597 (Okla. 1954) we said:
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> > "Court did not abuse its discretion by placing child of divorced parents in custody of its maternal grandparents, but upon application for change of custody, court could then consider whether either of child's parents were fit custodians for the child." (Quoted with approval in *State v. Lohah*, 434 P.2d at 931).
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> ¶14 During the child's minority the doors of the courthouse will remain open to the parent who would show that the conditions underlying the declaration of unfitness have been corrected. To the extent that *Logan v. Smith* disallows the adjudication of grandparental custody in a divorce proceeding it is disapproved.

The only *McDonald* issue on appeal was whether a grandparent might intervene in a grandchild's parent's divorce action, the *McDonald* court deciding, "Yes", and it disapproved *Logan v. Smith*, 1979 OK 148, 602 P.2d 647, to the extent it was inconsistent with that holding. The gratuitous comments by Justice Kauger were not in any way involved in any issue presented in the appeal.

But, in *Guardianship of M.R.S.*, 1998 OK 38, 960 P.2d 357, in a guardianship setting, Justice Kauger's dicta became the law when Justice Hargrave, speaking for the Court, wrote:

> ¶12 The trial court in the case at bar used the post-decree change of custody standard of proof set forth in *Gibbons v. Gibbons*, 442 P.2d 482 (Okla. 1968), as the proper standard to be applied in this guardianship termination proceeding. Gibbons involved a mother's motion to modify a divorce decree to change custody from the father to herself. The mother sought to modify the decree by showing a change in her condition. We placed the burden of proof on the party seeking the change of custody to show: 1) material and substantial change in circumstances, and 2) that modifying the court's previous order would be in the best interests of the child. Gibbons was a contest between the natural parents for custody of their children.**
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> ¶13 The natural father in the case at bar argues and we agree, that the *Gibbons* test applies to contests between the natural parents for custody of their children. Our review of the record in the case at bar indicates that the burden of proof placed on the natural father, who had not been found to be unfit at any time, was that he must show, by clear and convincing evidence, 1) that he could provide for M. more than the guardians were currently providing her, 2) that a material and substantial change of condition had occurred, and 3) that it would be in M.'s best interests to terminate the guardianship. The trial judge found that the father had not met his burden of proof to show a change of condition "sufficient to change custody of M." Although recognizing that the father was not unfit, the trial judge found that "by clear and convincing evidence there is no evidence of material or substantial change since the entry of this Court's Order in 1993." The trial judge believed that the best interest of the child outweighed any "rights" of the natural parent to her custody and control, and he found that there was "overwhelming evidence that M.'s moral, temporal and physical welfare are provided by the Guardians and that it is in the best interests of the minor child that she remain with the Guardians." This was error.
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> ¶26 It is clear, both by statue and by case law, that the guardianship may be terminated when the reasons for which the guardianship was established no longer exist. The guardianship will deemed "no longer necessary" when the impediment to the natural parent's custody has been removed, unless to do so would be inimical to the welfare of the child. *In re Guardianship of Hatfield*, 492 P.2d 819 (Okla. 1972); *Grose v. Romero*, 193 P.2d 1014, 1015 (Okla. 1948). The burden of proof for termination of a guardianship as "no longer necessary" is on the person seeking termination to show by clear and convincing evidence that the conditions that led to creation of the guardianship have been corrected. If that person is a parent who has been found unfit, then fitness must be established. If the parent has not been found unfit, then the parent must show that the conditions which resulted in the guardianship being established have changed and that the parent is now able to take care of his children. The parent in the case at bar has proved by clear and convincing evidence that he has had a change of circumstances which render the guardianship no longer necessary. The child's best interests are presumed to be with the natural parent and there is no evidence in this case that terminating the guardianship would be inimical to the child's welfare. It was error for the trial judge to refuse to terminate the guardianship.

Neither *McDonald v. Wrigley* nor *Guardianship of M.R.S.* mentioned the Court's inconsistent holding in *Johnson v. Johnson*, supra, or other cases similarly holding, which omission causes some uncertainty. But, the attitudinal change of the Court as to grandparental custody was unmistakable. So it would become with regard to grandparental visitation.

GRANDPARENTAL VISITATION, HERBST AND AFTER

The issue of whether grandparental visitation statutes were constitutional in "intact" families (i.e., no divorce between married parents) had been smoldering around the country and *In re Herbst*, 1998 OK 100, 971 P.2d 395, Oklahoma came face to face with that issue. Among other things, *Herbst* held that, absent harm or threat of harm to the child in the intact family, to the extent that 10 O.S. §5 would permit a grandparental visitation claim in an intact family situation, 10 O.S. §5 was unconstitutional.

Some of the important statements in *Herbst* are these:

> ¶0 * * * The statute does not provide for a threshold showing of harm to the child before bringing the best interests within the purview of the court. To the extent the statute purports to remove from parents their fundamental rights to the companionship, care, custody and management of their child, it is unconstitutional.
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> ¶13 The state's interest in a child is "implicated upon a finding of harm to the child . . . or of the custodial parent's unfitness." [citations omitted] It is the state's responsibility to exercise its police power to protect a child's welfare when the decisions of parents would result in harm. [citations omitted] Without the requisite harm or unfitness, the state's interest does not rise to a level so compelling as to warrant intrusion upon the fundamental rights of parents. [citations omitted]
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> ¶16 However, a vague generalization about the positive influence many grandparents have upon their grandchildren falls far short of the necessary showing of harm which would warrant the state's interference with this parental decision regarding who may see a child. With respect to our constitutional evaluation, whether a court ordered grandparent relationship might be thought of as better or more desirable for a child is not relevant. [cit om] If operating over the objection of fit parents, grandparental visitation may be imposed only upon a showing that the child would suffer harm without it. [citations omitted]
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> ¶18 * * *To reach the issue of a child's best interests, there must be a requisite showing of harm, or threat of harm, to bring the issue before the court or some instance of death or divorce which brings the child's domestic situation within the province of the court. Absent a showing of harm, (or threat thereof) it is not for the state to choose which associations a family must maintain and which the family is permitted to abandon. This case does not meet the threshold test to put the child's best interests at issue. [citations omitted]

Published decisions between 1998's *Herbst* and 2000's *Neal v. Lee*, 2000 OK 90, 14 P.3d 547(decided November 7, 2000) wrangled over exactly what *Herbst* meant.

K.R. v. B.M.H., 1999 OK 40, 982 P.2d 521, affirmed paternal grandparents' visitation award which was coterminous with the father's visitation time. The absence of discussion on the "harm to child" issue certainly would not lead a reader to think that issue was important in this context – and, after all, the *Herbst* decision did contain the other limitations mentioned in its ¶18, above.

Fink v. Corlett, 1999 OK CIV APP 44, 980 P.2d 1128, presented an odd fact situation to *Division III*. Somehow (the decision does not say), the child's parents' rights were terminated. The father's parents, then married, were apparently caretakers of their grandchild. They divorced. The grandfather (Appellant) remarried. He and his new wife (Appellant) filed an adoption action. Grandfather's ex-wife (grandmother) requested visitation. Both requests were granted. Several months later, the adoptive parents filed a motion to vacate the visitation order, alleging the statute was unconstitutional ala *Herbst*, that a change of circumstances had occurred, and that the forced visitation was harmful to the child. The trial court treated the motion as a motion to modify and denied it. The Court of Appeals reversed on the basis of *Herbst*, since the adoptive appellants were an intact nuclear family.

Queen v. Henson, 1999 OK CIV APP 116, 993 P.2d 129, was a *Division II* case. The child's mother (Appellee) had custody of her child but the child's father was "unknown" and the child was apparently born out of wedlock. The mother later married and she and her husband cared for the child. The maternal grandmother requested visitation. The trial court's dismissal of the grandmother's motion was affirmed on appeal on the basis of *Herbst*. Division II (Boudreau, J), opined that *Herbst* was not limited to "intact nuclear family" contexts and said:

> ¶14 In conclusion, we view *Herbst* as controlling here. Absent any allegation of Mother's unfitness or threat of harm to Child, the district court properly dismissed Grandparents' application for visitation rights.

In *Hartness v. Hartness*, 1999 OK CIV APP 138, 994 P.2d 1196, *Division I* took a narrower view of *Herbst*. In the parents' divorce, the mother was granted custody and the father visitation. Later, the paternal grandparents filed a motion for visitation. The father filed a document indicating he had no objection to his parents' visitation when he was unable to do so. Although she filed an entry of appearance (which presumably waived her right to object to the sufficiency of the motion), she later filed a motion to dismiss, relying on *Herbst*. The trial court's decision granting the dismissal motion was reversed. The opinion reads:

> ¶4 The dispositive issue before us is whether the holding of *In re Herbst*, supra, precludes these grandparents from stating a right to grandparental rights under the facts presented. The mother argues that the Oklahoma Supreme Court has found 10 O.S. Supp. 1997 §5 to be unconstitutional unless there is a showing that the child would suffer harm. This is an erroneous interpretation. In *Herbst*, the Court found that before grandparental visitation rights will be granted there must be a showing of harm or some instance of death or divorce which brings the child's domestic situation within the province of the court. The parents in *Herbst* were not divorced so the children involved were not within the province of the court and no showing of harm was made. Further, in *K.R. v. B.M.H.*, 1999 OK 40, ¶21, 982 P.2d 521, 525, the Oklahoma Supreme Court reemphasized that *Herbst* was based upon both parents objecting to the grandparents' visitation and absent a compelling reason.

Division I had another grandparent visitation case in *Sicking v. Sicking*, 2000 OK CIV APP 32, 996 P.2d 471, and, again, it saw *Herbst* as limited by its factual context. Three months after marriage, the wife filed a divorce action. Pregnant at divorce, issues concerning the child were reserved. After the child's birth, visitation was contentious. Paternal grandparents intervened, requesting visitation. Following a multi-day trial spread over three month's time, the trial court awarded custody to the mother, visitation to the father for two hours each Tuesday and Thursday and ever Saturday. It awarded the paternal grandparents visitation simultaneous with the father's and allowed them the same time if he could not visit. Certain restrictions were made concerning the grandmother. Among the appellate issues: grandparents appeal denial of fees against the mother; the mother appeals the grandparental visitation award. Both trial court decisions

were affirmed. The opinion reads:

> ¶12 According to Mother, *Herbst*, 1998 OK 100, ¶ 18, 971 P.2d at 398, prohibits court-imposed grandparental visitation in this case because "[a]bsent a showing of harm, (or threat thereof) it is not for the state to choose which associations a family must maintain and which the family is permitted to abandon." Mother's reliance dismisses language immediately preceding that quotation that requires a "showing of harm, or threat of harm, to bring the issue before the court *or some instance of death or divorce which brings the child's domestic situation within the province of the court*." (Emphasis added.) Mother says this is appropriate because the emphasized language "implies only the legal context in which the questions of harm or threat to the child's well being arises." According to Mother, even where the parents of the child are divorced, some threatened harm is necessary before the court may require a parent to allow a grandparent to visit with the child. We disagree.
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> ¶13 The language chosen by the Court makes it clear that its decision does not impact the application of § 5 in cases involving divorced or divorcing parents. * * *

Division I had a 3rd chance to "make it right" (in hindsight ala *Neal v. Lee*) in *Graham v. Woffard*, 2000 OK CIV APP 101, 12 P.3d 487, but this time in *Herbst's* intact family scenario. The child's parents were not divorced. In 1994, the maternal grandmother was granted visitation with the child from 1:00 p.m. to 5:00 p.m. on the 1st and 3rd Sundays of each month. After the *Herbst* decision, the mother moved to terminate the visitation. The trial court terminated the order on the basis of evidence presented concerning strife associated with the visitation. The Court of Appeals affirmed on a different basis, those contained in *Herbst*. It said:

> ¶8 We hold that when an order has been entered allowing grandparental visitation, even if entered before *Herbst*, then the objecting parents of an intact, nuclear family need only show the court two factors: (1) they object to grandparental visitation; and (2) they exist as a nuclear family. Upon such showing, the court should terminate any prior order of grandparental visitation based upon 10 O.S. Supp. 1996 §5.

Troxel v. Granville, 120 S.Ct. 2054 (2000) was decided June 5, 2000, before *Graham v. Woffard* (but not mentioned therein, quite likely since it was unnecessary to Division I's decision). *Troxel* will not be more fully developed here than to state the gist of the facts and decision – the Supreme Court's plurality decision is quite susceptible of numerous interpretations and you can read the full opinion and reach your own conclusions. Since the U.S. Supreme Court's decision avoided reaching a decision on the element of "harm", the Washington Supreme Court decision, *In re Smith*, 969 P.2d 21 (Wash. 1998) (the decision decided a number of consolidated cases, including *Troxel*) may be more helpful in ferreting out what "harm" might mean. Justice O'Connor, joined by Chief Justice Rehnquist and Justices Ginsburg and Breyer, wrote the Court's opinion. Justices Souter and Thomas each wrote separate concurring opinions. Justices Stevens, Scalia and Kennedy each wrote separate dissenting opinions. That said, the facts and some principal statements by the main opinion will be briefly stated.

An extraordinarily broad Washington statute permitted "[a]ny person" to petition for visitation rights at any time and authorized Washington trial courts to grant whatever visitation may serve a child's best interests. The "any person[s]" in *Troxel* were the children's paternal grandparents (the Troxels). The children's parents had not married before the father committed suicide. Although the children's mother (Granville) had voluntarily allowed visitation to the Troxels after their son's death, it was less frequent than the Troxels desired. The Troxels filed an action for visitation under the Washington statute, which request was granted by the Superior Court. The Washington Supreme Court reversed. The United States Supreme Court accepted the grandparents request for certiorari and affirmed. A few snippets from Justice O'Connor's opinion follow.

> The liberty interest at issue in this case–the interest of parents in the care, custody, and control of their children–is perhaps the oldest of the fundamental liberty interests recognized by this Court. More than 75 years ago, in *Meyer v. Nebraska*, 262 U.S. 390, 399, 401 (1923), we held that the "liberty" protected by the Due Process Clause includes the right of parents to "establish a home and bring up children" and "to control the education of their own." Two years later, in *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535 (1925), we again held that the "liberty of parents and guardians" includes the right "to direct the upbringing and education of children under their control." We explained in Pierce that "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." Id., at 535. We returned to the subject in *Prince v. Massachusetts*, 321 U.S. 158 (1944), and again confirmed that there is a constitutional dimension to the right of parents to direct the upbringing of their children. "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." Id., at 166.
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> In subsequent cases also, we have recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children. See, e.g., *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) ("It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements' " (citation omitted)); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition"); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected"); *Parham v. J. R.*, 442 U.S. 584, 602 (1979) ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course"); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (discussing "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child"); *Glucksberg*, supra, at 720 ("In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the righ[t] … to direct the education and upbringing of one's children" (citing *Meyer* and *Pierce*)). In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.
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> Section 26.10.160(3), as applied to Granville and her family in this case, unconstitutionally infringes on that fundamental parental right. The

Washington nonparental visitation statute is breathtakingly broad. According to the statute's text, "[a]ny person may petition the court for visitation rights at any time," and the court may grant such visitation rights whenever "visitation may serve the best interest of the child." §26.10.160(3) (emphases added). That language effectively permits any third party seeking visitation to subject any decision by a parent concerning visitation of the parent's children to state-court review. Once the visitation petition has been filed in court and the matter is placed before a judge, a parent's decision that visitation would not be in the child's best interest is accorded no deference. Section 26.10.160(3) contains no requirement that a court accord the parent's decision any presumption of validity or any weight whatsoever. Instead, the Washington statute places the best-interest determination solely in the hands of the judge. Should the judge disagree with the parent's estimation of the child's best interests, the judge's view necessarily prevails. Thus, in practical effect, in the State of Washington a court can disregard and overturn any decision by a fit custodial parent concerning visitation whenever a third party affected by the decision files a visitation petition, based solely on the judge's determination of the child's best interests. The Washington Supreme Court had the opportunity to give §26.10.160(3) a narrower reading, but it declined to do so. See, e.g., 137 Wash. 2d, at 5, 969 P.2d, at 23 ("[The statute] allow[s] any person, at any time, to petition for visitation without regard to relationship to the child, without regard to changed circumstances, and without regard to harm"); id., at 20, 969 P.2d, at 30 ("[The statute] allow[s] 'any person' to petition for forced visitation of a child at 'any time' with the only requirement being that the visitation serve the best interest of the child").

* * *

Because we rest our decision on the sweeping breadth of §26.10.160(3) and the application of that broad, unlimited power in this case, we do not consider the primary constitutional question passed on by the Washington Supreme Court – whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation. We do not, and need not, define today the precise scope of the parental due process right in the visitation context. In this respect, we agree with Justice Kennedy that the constitutionality of any standard for awarding visitation turns on the specific manner in which that standard is applied and that the constitutional protections in this area are best "elaborated with care." Post, at 9 (dissenting opinion). Because much state-court adjudication in this context occurs on a case-by-case basis, we would be hesitant to hold that specific nonparental visitation statutes violate the Due Process Clause as a per se matter. * * *

If not the first, Oklahoma is certainly among the first of the state supreme courts to interpret and apply *Troxel* in a grandparental visitation case, in *Neal v. Lee,* 2000 OK 90, 14 P.3d 547. *Neal* was decided November 7, four months after *Troxel* and six days after the 2000 Legislature's revision to 10 O.S. § 5 became effective.

In *Neal v. Lee*, the maternal grandmother (Karen Neal) requested visitation with her three grandchildren: Joshua, a child born to the mother (Kristina Lee) out of wedlock in July 1989 (this child's father died two years later and never married Kristina); and two other children later born of Kristina's marriage with Keehan Nesvold. In November 1997, Neal filed her petition for visitation. In April 1998, an agreed order allowed Neal supervised visitation and also provided for a therapist to develop a visitation plan to be filed with the court, which plan would be final 10 days after filing unless an objection was filed. The visitation plan was filed on March 11, 1999. On March 15, 1999, Kristina and Keehan filed their objection and on May 25, 1999, they filed a motion to terminate Neal's visitation. On May 18, 1999, Keehan filed a petition to adopt the oldest child, Joshua. The trial court entered an order granting grandparent visitation from which this appeal arises. The adoption action apparently pended during the appeal. The version of 10 O.S. §5.A.1.i which became effective on November 1, 2000, provides that the district court may grant reasonable visitation independent of either parent if the court deems it to be in the child's best interest. The Supreme Court retained the case for decision and reversed. Justice Hodges, speaking for an 8-1 Court (Justice Opala dissented without opinion), said:

> ¶9 In *In re Herbst*, 1998 OK 100, ¶18, 971 P.2d 395, 399, this Court found that, under the Oklahoma Constitution, "[i]f operating over the objection of fit parents, grandparental visitation may be imposed only upon a showing that the child would suffer harm [or potential harm] without it." *Id*. 1998 OK 100 at ¶16, 971 P.2d at 399. After *Troxel*, it is unclear whether a showing of harm is necessary under the United States Constitution. However, this Court's application of the Oklahoma Constitution in *Herbst* is unchanged by *Troxel*. Under *Herbst*, "[t]o reach the issue of a child's best interests, there must be a requisite showing of harm, or threat of harm. . . ." *Id*. 1998 OK 100 at ¶18, 971 P.2d at 399. Karen Sue Neal bore the burden of showing harm to the children. See id. The district court erred in reaching the issue of the children's best interest absent an allegation and finding of harm.
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> ¶11 Karen Neal would have this Court find that because Joshua's father is deceased, Kristina Nesvold's rights as Joshua's mother have been diminished making *Herbst* inapplicable here. In *Herbst*, the biological parents were married to each other, they were living together with the child, both parents opposed grandparent visitation, and parental rights were vested in both parents. The fact that in *Herbst*, the child was living in an intact nuclear family was not necessary to the holding. *Id*. 1998 OK 100 at ¶3, 971 P.2d at 396. Joshua's father's death does not affect Kristina Nesvold's fitness as a mother nor alter her constitutionally protected rights to rear her child without state interference. Thus, we find the holding in *Herbst* applicable to the present facts.
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> ¶12 The trial court erred in granting Karen Sue Neal grandparent visitation with Joshua, Whitney, and Hunter over the objection of their parents absent a showing of harm. Here the "vague generalization about the positive influence many grandparents have upon their grandchildren falls far short of the necessary showing of harm which would warrant the state's interference with this parental decision regarding who may see a child." *In re Herbst*, 1998 OK 100 at ¶16, 971 P.2d at 399.

At the end of 2000, and when this paper was originally written, my expectation was that all grandparental visitation orders inconsistent with *Herbst* and *Neal* would thereafter be susceptible to a motion to vacate, pretty much like a "slam-dunk", if a prior grandparent visitation order was not predicated on harm or potential harm to the child. *Graham v. Woffard*, vis a vis *Neal v. Lee*. Well, I guessed wrong *again*! On January 30, 2001, *Scott v. Scott*, 2001 OK 9, ___ P.2d ___, said differently. As this article is written, the decision has not yet been released for publication.

In *Scott*, the child's custody was originally awarded to its mother in a divorce action. Later, the father's rights were terminated. The mother remarried and her new husband adopted the child. The natural father's parents were awarded visitation both during the adoption action's pendency and after

the adoption was final, over the mother's objection. Later, the mother filed a motion to terminate the visitation. The district court denied her request. In the mother's appeal, Justice Hodges said:

> ¶5 This Court has held that a party seeking to modify a visitation order has the burden of proof. Section 112 of title 43 of the Oklahoma Statutes provides that a court may "modify or change [a visitation order] whenever circumstances render the change proper." This court has construed this provision in a custody modification proceeding to require the moving party to show a change in circumstances which "adversely effect[s] the best interest of the child" such that "the temporal, moral and mental welfare of the child would be" improved by the change. A similar showing is appropriate for a modification or change of a grandparent visitation order. *Because the Mother is seeking to terminate existing court-ordered grandparent visitation, she has the burden of showing a change in circumstances such that modification or termination of an existing grandparent visitation is in the best interest of the child.* [Emphasis supplied]
>
> ¶6 Subsection [10 O.S. §] 5(A)(7) requires an evidentiary hearing before the termination of the grandparent visitation order after adoption proceedings10 at which time the court is to take testimony on whether termination of the visitation is in the best interest of the child.11 Although the district court held a hearing, no evidence was taken before the judge concerning the best interest of the Child as contemplated by section 5 of title 10. The hearing consisted only of oral argument on the law. Only after conducting the statutorily-mandated subsection 5(A)(7) hearing to determine the best interest of the child will the court have the facts necessary for an informed decision. Because the court did not hold a section 5(A)(7) hearing to determine whether the best interest of the Child would be served by terminating visitation, we remand the matter to the district court to conduct such an evidentiary hearing. [Edition supplied]

Since the district court had taken no testimony in the above regards, its decision was reversed and the case was remanded for an evidentiary hearing consistent with the above. Note that *Scott* doesn't talk about the "showing of harm" factor, so important in *Neal v. Lee*. Go figure. The opinion doesn't mention *Graham v. Woffard*, supra, in which case an evidentiary hearing had taken place. But, Division I's opinion, ¶8, quoted above, was plain, and was predicated upon the "showing of harm" issue. Although the fact patterns in the two cases were different, it does appear that some very very fine, maybe shifting, lines are being drawn in the sand here, and this author's not got the savvy to figure out exactly where they are going to go when the Supreme Court writes its next opinion.

CONCLUSION

As this is written, it would be difficult to see that *Herbst*, as refined by *Neal* and *Scott*, leave much doubt that the state of Oklahoma grandparental visitation is pretty much like this:

(1) What I've called Justice Opala's "concession speech" in *Bomgardner* has been rescinded, big time. We're back to a pre-*Bomgardner* strict construction approach to interpreting grandparent visitation entitlements.

(2) Oklahoma goes further than *Troxel*, in that "a showing of harm or potential harm is necessary" before *any* grandparental visitation request reaches the "best interests of the child". *Neal*, ¶9.

(3) Remarks in *Herbst* as to "nuclear intact family" are not limitations upon either *Herbst* or *Neal*. *Neal*, ¶11. None of the inconsistent midstream cases grandparent decisions (the Supreme Court's *K.R. v. B.M.H.*, Division I's *Hartness v. Hartness* and *Sicking v. Sicking*) would be decided post-*Neal* as they were at the time of each case's rendition. Using hindsight, only Division II's *Queen v. Henson* interpreted *Herbst* correctly in a non-intact family situation.

(4) However, all grandparental visitation orders inconsistent with *Herbst* and *Neal* are **not** susceptible to a motion to vacate *just as a matter of law*. The test set forth in *Scott v. Scott* must be first satisfied before a prior grandparent visitation order should be terminated. I guess.

(5) Grandparental visitation litigation will be measured by the statute in place at the time of decision. *Neal* interpreted, and arguably applied, the 2000 version of 10 O. S. §5 even though it only became effective six days prior to the Court's decision in *Neal*. As the Legislature comes to grips with additional changes to 10 O.S. §5, this point is worth remembering in your particular grandparental visitation litigation.

Have I reached incorrect or arguable conclusions? Maybe so. I might even change/develop my thoughts further in any particular case that you and I might come to have together! Still, these are my impressions today – but, as we've surely observed over the course of the past thirty years, things can, and do, change in unpredictable ways. Read the cases and argue as you will.