

## MUSING ABOUT COMMUNITY, OR WHY IS IT BETTER TO BE AN AMERICAN GRANDPARENT THAN A CUBAN FATHER?

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Most states provide that grandparents can, with relative ease, use the courts to seek visitation with their grandchildren. The decision of the Supreme Court in *Troxel v. Granville*<sup>1</sup> will slow this down, but it won't stop it. One of the many reasons that grandparents are so favored in family law is that they are expected to provide their grandchildren with a connection to a larger world beyond the nuclear family, to a community that will be important for the grandchildren to discover. That community might be the child's extended family (usually paternal). It may be the cultural, professional or business groups within which the grandparents operate. It may be the intellectual environment of the grandparent and their associates. The grandparents' community is assumed to be – and often is – a “good” community, a community that is beneficial for the grandchild to experience. It is, at the very least, a larger community than the community of the grandchild's nuclear family. The assumption of beneficence is one of the several reasons why courts make it easy for grandparents to win an order of visitation. In *Troxel*, for example, the trial court never articulated why visitation would be in the best interests of the children; it just was.

In sharp contrast with the favored treatment the grandparents got from the trial court is the experience of Juan Miguel Gonzalez, Elian's father, when he attempted to bring his child home to Cuba. Most natural or legal fathers have no trouble getting an order of visitation with their child and have an equal shot with mom for getting an order of custody and guardianship. Juan Miguel Gonzalez, as Elian's sole surviving parent, should have had no problem getting custody and guardianship of his son away from the great-uncle who was the temporary guardian. While he eventually prevailed in persuading the Department of Justice to recognize his parental rights, it was not until he was put through something of a ringer. First, the Immigration and Naturalization Service required him to prove that he was Elian's legal father. While the demand would not be not atypical for a father who had not been married to the child's mother, Juan Miguel Gonzalez had in fact been married to Elian's mother at the time of Elian's birth. Next, unlike other legal parents, his claim for custody was not approved until he could satisfy the Department that he had a serious relationship with Elian, not just a formal relationship. He demonstrated that he had been to Elian's school and knew his teachers and schoolmates. He produced pictures in which both he and Elian appeared. He talked about the games he and Elian had played. Probably, he was asked my favorite custody question: what size shoes does Elian wear?

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<sup>1</sup> 530 U.S. 57 (2000).

The question we ought to be asking ourselves is why the Department of Justice subjected Elian's dad to such an unusual level of scrutiny, while the trial court subjected the Troxels to almost no scrutiny at all. An obvious answer is politics with a "big p." That is, many voters in the key state of Florida don't like the Cuban government. If Elian goes back to his father, he goes back to Cuba. This foreign policy/electoral "big p" politics is not the stuff of which family law is usually made. It is not uncommon, however, for family law to respond to "small p" political stuff. I think some of the "small p" stuff is also at work here, and it is the "small p" stuff that connects the Troxels and their grandchildren with Elian and his dad.

While both the *Troxel* case and the Gonzalez case ended with a reaffirmation of parental rights, both cases were fought, in part, over the same "small p" claim. The common "small p" claim is the idea that a nuclear family is not a big enough community for a child. While every child is dependent on his or her parents and other members of the immediate household, every child also needs a bigger world: the world of the extended family, the neighborhood, the school, the community, the country, the world. The question is, who should pick the larger world for the child? Should it be the parents, or should it be people outside the child's immediate household? And if it is the parents, can courts second-guess their judgment? And, if not, does that mean that the parents "own" the child in such a way that they can exclude beneficial influences from outside their nuclear family?

As it plays out in Elian's situation, the "small p" claim is that Elian shouldn't go back to Cuba because his country is toxic. Elian's well-being is connected not just to the relationship of the child and his father, but also to his relationship to his community. Because his community fails, the father's rights to have his child live with him must also fail.

At bottom, what was being said about Elian is that children are not raised by their parents alone. Children live in communities bigger than their households. So the question becomes, to what degree do we test the individual family based on what we think that family does or does not do to connect (or disconnect, in the case of Elian) the child from his or her community. In other words, we can't trust Elian's father to disconnect him from Cuba, so we're not willing to give Elian back to his father. The trial court in *Troxel* came to a similar conclusion. It concluded that the children's mother, Tommie Granville, would not allow her children to connect enough with their grandparents and the rest of the Troxel extended family. Her rights as a parent, therefore, had to give way.

Notice that I'm conflating extended family and community. I'm doing that because I think that is exactly what judges do in grandparent visitation cases. The assertion is not without foundation. Some grandparents do many special things for their grandchildren. One of the very special things they sometimes do is connect grandchildren to extended families. Particularly in the *Troxel* case, that's very appealing because the children's father had died. He could not carry out a parent's usual role of connecting the children to his family of origin. Indeed, in the history of grandparent visitation caselaw, grandparents whose child had died rarely lost. In my view, courts understand the connection to the father's extended family to be important emotionally to the grandchild. Beyond the extended family, many grand-

parents also help the child enter into the extended family's networks, which may include cultural, religious, social and economic contacts.

So, under what circumstances should we defer to parents to decide whom the child will spend time with and when should we defer to a challenger who is asserting that he or she can connect the child to a good community beyond the child's nuclear family? And when should we limit a parent's ability to decide for a child because the community to which the parent wants to attach the child is a "bad" community?

One way to answer these questions is to deny the importance of a larger community for a child. All the child needs, according to this answer, is to be an individual who is raised by individuals. These individuals may be related to other individuals or may be members of a community or a country, but it is the job of family law just to think about each person as a separate individual.

If one thinks about family law this way, it is easy to approve of the outcomes in *Troxel* and *Gonzalez*. But it is uncomfortable. It is uncomfortable because we know that some parents make poor decisions about whom their children should see and what communities their children should connect with. We recognize that nuclear families, one or two adults, one or two kids, and maybe a dog, is a very small world. It can be a nurturing, supportive, encouraging, and generous world, but it may also be the opposite. Even if nobody in the family is abusive, the adults may just not be enough. They may not know enough to teach kids how to live life to the fullest. That is why we have schools and scout troops. They may not have enough money. That's one reason for mortgage deductions, child exemptions and other publicly-funded family economic support systems. They may not have enough emotional resources for kids in crisis. That's why we offer family counseling. They may not have access to social resources that will connect a child to a summer job or a first job out of school. That's a good reason for mentoring programs. They may not have enough constancy or certainty about their moral positions, so we try to connect kids to moral and ethical leadership through religious organizations and youth groups. In short, kids need more than one or two adults in their world if they're going to get enough.

But some adults, adults such as Tommie Granville and Juan Miguel Gonzalez, don't want their children to participate in every opportunity offered them by the wider world. For the good of the children, is there an argument that courts should be empowered to make them change their minds?

I think the answer, in general, should be no. The instances when a court should be able to tell the parent (or other co-resident caretaker) what to do about a child should be few, and the threshold requirements for judicial intervention should be high. I'm comfortable with interventions by people who once were co-resident with the child and the current caretaker, for example. Within that category, I would exclude prior co-residents who fail to act respectfully toward the current caretaker. In my judgment, the Troxels should have had no right to bring Tommie Granville to court. They had never been co-resident with the children and they were, or so it appeared from the public accounts, incapable of respecting the decisions that Ms. Granville had to make about her large blended family. Similarly, Elian's Florida relatives would also fail. Although they were co-resident with Elian for a time, they

were aware that his father did not want him to continue to live in Florida and that he was eager for the boy to return to his home in Cuba. They derided his decision publicly and made the child—literally—a poster child for their position.

When I put it this way, my position seems extremely individualistic and anti-community. It certainly enhances parental autonomy in most cases involving pre-adolescent children. The reality is, however, that I mean to foster and promote community involvement with children. I think my position accomplishes that by increasing the parent's security. If judicial intervention is limited, Tommie Granville can let her children visit with the Troxels without fearing that they will use their strong relationship with the children as a ticket for litigation demanding more overnight visits. Juan Miguel Gonzalez can let Elian visit his relatives without fearing that some court would allow his great-uncle to keep the child in Florida. Providing the parents with secure connections to their children helps them to make sensible decisions about allowing the children to connect with other people and communities, rather than the other way around. It is the fear of losing one's children that is likely to lead to irrationality.

Courts scare parents in a variety of ways. In addition to the power to require parents to do things is the equally important threat that litigation will cost an arm and a leg. Even though they won (and even though the Supreme Court mandated an end to the proceedings in part because of the cost of litigation), the Granville household was left with fewer resources than it would have had. Fewer resources for the Granville household means fewer resources for each child within the household, including the children the Troxels are trying to connect with.

In my view, allowing the Troxels and Elian's Florida relatives access to courts is not pro-community. It is a way of allowing two households to get into a fight. It helps household members to identify as a Hatfield or a McCoy. It is not a way to teach children how a community of people with common interests work together, or for a community to encourage parents to do the best job they can do for their children, both within their households and in the larger community.

Parental liberty is not always beneficial to children, of course. Obviously, some parents abuse their autonomy to the detriment of their charges. But if we believe that most parents do a reasonable job, we need to build legal rules that help most parents do the best job they can. We then must trust that fit parents will put those legal rules to work for the benefit of the children.

A number of family researchers have made a strong case for the proposition that the child who does best in communities outside the home is a child who enjoys a strong and trusting connection at home with the adults he or she knows best. The child's trusting relationships at home allow the child to reach out for new experiences. Allowing people from outside the household to sue interrupts the family's security and may even impair the process of trust-building within the family. My advice to the Troxels, therefore, is to be patient. They need to support the Granville family, to see the children when allowed, and to offer to help whenever they can. Things usually work out, over time. Many grandparents have said that's in fact what occurs; few grandparents have used the legal rights they have to sue.

So, the "little p" politics of the Gonzalez and Troxel cases are revealing. I hope they will lead us to think more deeply about the nature of the connections

between children, the adults in their lives and their wider communities. Some communities are, no doubt, harder on kids than others. And some families face challenges that make life harder for kids than other families. I don't see those problems as reasons to diminish the opportunities for parents and adults who are caretakers to make choices for their kids. I prefer instead for us to be coming from the opposite direction. Let us try instead to make ourselves into communities that parents can trust, communities that offer resources that parents and children want, need, and enjoy.