**GRANDPARENT ALIENATION: HOW DO WE ADDRESS IT?**

**TALKING POINTS FOR WEBINAR PRESENTATION, 16 JULY 2020**

**By Gene C. Colman**

**First Slides #1 to #8 [introductions]**

**Slide 9 PART 1: INTRODUCTION –**

1. OUTLINE OF TOPICS TO BE COVERED
2. TWO TYPES, THREE APPROACHES
3. THE STATUTORY FRAMEWORK
4. WHAT DO THE CASES TELL US?
5. COLMAN’S RANT AGAINST THE LAW AS IT EXISTS
6. COLMAN’S SUGGESTED GUIDING PRINCIPLES
7. SOCIAL SCIENCE LITERATURE
8. NON-JUDICIAL REMEDIES
9. SOME PARTING THOUGHTS, A STORY AND A SUMMING UP
10. SO WHAT HAVE WE LEARNED? LET’S SUM UP.
11. COMMENTS AND QUESTIONS

**Slides 10 and 11**

**Slide 12 PART 2: TWO TYPES, THREE APPROACHES**

**TWO TYPES OF ALIENATED GRANDPARENTS**

**Type #1:** The grandparent is him/herself alienated from the parent and/or the parent’s spouse, and the parent prevents the grandparent from having contact with the grandchild.

**Type #2:** The child is alienated from Parent “A” and as part of that process the grandchild refuses to spend time with Parent “B”. Parent B’s parents – the formerly beloved grandparents – are regrettably collateral damage. Slide 13

Beiner et al, *Grandparent Rights: Psychological and Legal Perspectives*, The American Journal of Family Therapy, 42:114-116, 2014: “…**alienated children regard as enemies not only the alienated and hated parent but also everyone associated with that parent, including grandparents** and other relatives.”

Slide 14 The focus of our talk this evening is the first type of “alienation”. It’s not really classical “alienation” in the classical sense of the term, although the grandchild might exhibit aspects of Type #2 due to the parents’ badmouthing of the grandparents.

**Slide 15 THREE APPROACHES**

There are three approaches or theories when we address grandparents claims for access to their grandchildren: 1. Parental Autonomy; 2. Pro-contact; 3. Hybrid

1. **PARENTAL AUTONOMY:** It is generally in the child's best interests to respect parental decision making.
2. **PRO-CONTACT:** Contact with grandparents is generally in the child's best interests.
3. **HYBRID**

**Slide 16 Approach #1: Parental Autonomy**

This theory is underscored by three assumptions:

1. The parent is a fit parent.
2. The parent acts in the best interest of the child.
3. The court should not intervene.

The Nova Scotia Law Commission 2007 summed it up like this: “…In the absence of a finding of parental unfitness, or harm flowing from the lack of access, the state has no right to interfere with parent’s proper decision-making authority.”

“While parents might not always make the right decision, it is not always the court’s job to second guess and usurp the parent’s role.” – Justice Koturbash in *D. (D.) v. C. (A.)* (2017), 88 R.F.L. (7th) 492 at para 17 (B.C. Prov. Ct)

**Slide 17 Approach #2: Pro Contact**

* Contact with grandparents is generally in the child's best interests. Slides 18 to 21

**Slide 22 Approach #3: Hybrid**

* Madam Justice McSorley said it best in [*McLaughlin v Huehn*, 2004 ONCJ 426](http://canlii.ca/t/1l6p5): “It is always important to defer to the decisions of parents regarding their children. But deference is only accorded when those decisions are reasonable. When the decision to end all contact between a child who has a positive relationship with grandparents, aunts, uncles, cousins and great aunts and grandmothers is made entirely because of hurt feelings from 3 to 5 years ago, then the decision is not reasonable and is no longer entitled to deference.”

**Slides 23 and 24**

**Slide 25 PART 3: THE STATUTORY FRAMEWORK**

***Children’s Law Reform Act*** (Ont.) allows anyone to apply for access. In 2017 the Act was amended to include the word “grandparent”. A number of cases say that including “grandparent” did not change the law one iota. The amendment does not give grandparents special standing.

The federal ***Divorce Act*** applies where parents are divorcing. Under section 16 “any other person” can also apply for custody or access but under s. 16(3) that “other person” first requires special permission from the court.

Where there is a Children’s Aid Society case, in Ontario we are dealing with the ***Child, Youth and Family Services Act*.** Section 79 describes who the formal parties are and that definition does not include grandparents. But under s. 79(3) some other people might have the right to be present at the proceeding and make submissions and even have legal representation. But you have to have cared for the child continuously during the six months immediately before the hearing. Cases[[1]](#footnote-1) have nonetheless held that grandparents can be added as parties. But it’s a tough go.

Another way to have your voice heard and offer help to the grandchild is via the children’s aid. Come forth with a comprehensive plan and perhaps the children’s aid will support it.

The federal *Divorce Act* has been amended in **Bill C-78**. The new law is not coming into effect until March 2021. Section 16.5 provides for a “Contact Order”. Grandparents can be included but are not specifically mentioned in s. 16.5. The requirement to first secure special permission has been continued. Bill C-78 gives the court a very broad discretion re whether or not to make the order in the first place and if so, what terms can be attached. But what is indeed encouraging is that grandparents are specifically mentioned in s. 16(3)(b) where the statute is defining what “best interests of child” really means. The statute directs us to consider “the nature and strength of the child’s relationship with each spouse, each of the child’s siblings AND GRANDPARENTS and any other person who plays an important role in the child’s life”. This is encouraging.

It will be interesting to see if courts imply a greater importance to siblings and grandparents. However, I don’t believe that this amendment actually grants to grandparents any additional rights, In my view, the existing case law will still apply.

**Slide 26 PART 4: WHAT DO THE CASES TELL US?**

[***Chapman v. Chapman***, 2001 CarswellOnt 537 (Ont. C.A.):](http://canlii.ca/t/1fbp4) This case is the starting point of any analysis of grandparents’ access rights.

You have to examine what is in that particular child’s best interests. If the parents are “demonstrably attentive” to children’s needs, then the parents make the decisions re “extent and nature of the contact”. In other words, here we have due regard being paid the Parental Autonomy philosophy in the law.

On the other hand, the Ontario Court of Appeal also told us that where the parents act arbitrarily in the face of loving and nurturing relationships, then “the court may intervene to protect the continuation of the benefit of the family relationship.”

So we learn in this seminal case, that if the circumstances are right, then the court might protect existing relationships. In *Chapman*, there was no pre-existing relationship. In later cases where there was indeed a relationship, then the courts have protected the grandchild/grandparent relationship.

**Slide 27** Justice Nelson clarified the text well in [***Giansante v. Di Chiara***, 2005 CarswellOnt 3290](http://canlii.ca/t/1l84r) (Ont. S.C.J.). Yes, we listen to the parents UNLESS you can answer yes to the following three questions:

1. Does a positive grandparent-grandchild relationship **already exist**?
2. Has the parent’s decision imperilled the **positive grandparent-grandchild relationship**? and,
3. Has the parent acted **arbitrarily**?

**Slide 28** Justice Jarvis then told us in [***Capone v. Pirri***, 2018 ONSC 6541 (Ont. S.C.J.)](http://canlii.ca/t/hw3bc) that the *positive relationship* generally requires “time and depth”. Justice Jarvis refers to ***Sproule v. Sproule***, [2012] O.J. No. 6423 (Ont. C.J.) in which the court stated that:

. . . to be a positive relationship, there must exist ***something more than an occasional pleasant experience with the children***. The grandparent and grandchild relationship must consist of a ***close bond with strong emotional ties deserving of preservation in order to displace the principle of parental autonomy***. See para. 27.

In other words, Justice Jarvis essentially raised the bar. The relationship can’t just be “occasional”. The judge has to view the relationship as “deserving of preservation”. I say that all healthy relationships are deserving of preservation. Justice Jarvis is unduly restrictive in my view.

**Slide 29** Justice Marvin Kurz in [***Torabi v. Patterson***, 2016 ONCJ 210](http://canlii.ca/t/gphpv) considered what constitutes a positive relationship:

a. There must generally be a ***substantial pre-existing relationship, with strong, loving, and nurturing ties***;

b. The relationship must be ***constructive for the child in the sense that it is worth preserving***. ***If relations are too poisoned, a previously positive relationship may not be capable of preservation***;

c. The determination must include the ***age of the child and the time since the child last saw the relative***; and,

d. A fourth factor may apply in the ***exceptional circumstance*** of a young child who has ***lost a parent***. In that event, the existence of a strong pre-existing relationship may not be necessary when the relative(s) of the lost parent applies for access.

It follows from the above summaries that parental autonomy, even within the so-called “hybrid” approach, is given a very special importance, a very special position in the law.

I maintain that this wrong. Slide 30

**PART 5: COLMAN’S RANT AGAINST THE LAW AS IT EXISTS**

As a society we interfere for the benefit of children all the time. If a certain disposition is deemed to be in the child’s best interest, we do not hesitate to override “parental autonomy” and we do it with a vengeance! For example:

* **Slide 31 The child protection system:** On the one hand the thrust of the legislation is supposed to be that no child should be subject to care that is below a certain legislated minimal standard. Parents under this system do not have to be perfect; they have to be adequate. The thrust of the legislation is that where a parent falls below the minimum standard by way of abuse or neglect, then the state steps in. We cancel parental decisions as that is in the child’s best interest. We don’t carry on about “parental autonomy”. If parents are making really harmful decisions about a child’s care, we intervene. Sure, we prohibit physical abuse – those are the easy cases. But we also prohibit various forms of mental abuse and mistreatment. We intervene when a children’s aid society simply disagrees with the correct plan of care for a special needs child. Judges simply rubber stamp such CAS actions in first instance. For the parent who chooses to fight, it’s a very expensive exercise.
* **The child custody/access parenting system:** Through our courts we make decisions all the time that seriously limits a parent’s contact with his/her child. Somehow, courts seem to believe that a separation of partners or sometimes the parents never lived together at all – that we need to allocate to one parent the vast majority of the time. What about the autonomy of the parent who is relegated to a very minor role for absolutely no good reason? Where is the respect for parental autonomy there? Well, of course we justify those decisions as being made in accordance with the “best interests of the child”. We make decisions in our courts every single day that ride roughshod over parental autonomy.

Therefore, I argue that given that we disregard parental autonomy each and every day, and given that we say we are doing that because we know what is in the best interests of the child much better than one or both parents knows, then it logically follows that there is ***no valid policy reason to emphasize parental autonomy*** to the extent that we do in our legal system when we are considering if we will allow grandchildren to have relationships with their grandparents.

I do not advocate for a wholesale disregard of the wishes of parents. Far from it! The wishes of the parents should be seriously considered by any court that is faced with a grandparent’s access application. But I am saying this – we must prioritize the child’s best interests in this area of the law just as we prioritize the child’s best interests ***in every single other area of family law***.

There are ***some other legal principles*** that are related to the black letter law that I discussed before I went on my rant and rave about parental autonomy:

**Slide 32 Anxiety and Stress:** Once the court has determined that there was indeed a pre-existing relationship, believe it or not there are some cases that say that we then have to consider whether allowing the access would cause anxiety and stress for the parent, which in turn could have a deleterious impact on the child.[[2]](#footnote-2) Again here, ***I strongly disagree with these legal principles.*** Of course, we do not want any anxiety or stress for anyone – not for a parent, not for a child, not for a grandparent. But in our courts where anyone is behaving in a non-child-focused manner, we make orders to address that behaviour. If you are the access grandparent and you cause upset to the child, we’ll deal with it. If you are making life miserable for the parent, then we will deal with it. We make these sorts of orders as between parents all the time. We bring such parents into line. Why? Because we recognize that even imperfect parents have what to give to their kids. And you know what, conflict is often (not always) a two-way street. So, we have to set out parameters or ground rules. I was quoted in a now unfortunately defunct service, *Advocates Daily*, that grandparents should be peacemakers, not troublemakers. As long as you adhere to that common sense maxim, then you should be allowed a relationship with your grandkids.

**Destabilize the family unit:** The leading grandparent access case tells us that an additional consideration “is whether an access order would destabilize the family unit.”[[3]](#footnote-3) The grandparent behaviour that was found in another case to nix access was that grandma imposed her unsolicited view on proper child-rearing and she made “a heavy handed attempt to change the parents’ decision regarding schooling”. The lesson to be learned here is this: Just be a grandparent. Don’t try to be the parent to the grandchild. And don’t try to impose your will on your kid and in-law. Just focus on your relationship with your grandchild.

**Siblings:** We have a number of cases where a grandparent was the link between grandchild and step siblings or half siblings. That helped the grandparent’s case. But still, the other legal hoops are not cancelled out.

**Slide 33 PART 6: COLMAN’S SUGGESTED GUIDING PRINCIPLES**

**Section A:** Based on my reading of the the caselaw, not all of which I have discussed this evening, I have come up with the ***following very basic principles that will hopefully maximize your chances of maintaining a relationship with your grandchildren if you find yourself in court***:

1. PRE-EXISTING RELATIONSHIP: Demonstrate that you have had a pre-existing loving relationship with your grandchildren.
2. **Slides 34 & 35** AVOID CONFLICT: Avoid conflict with your own children where at all possible. Be a peacemaker and not a troublemaker.
3. **Slide 36** FREQUENCY: Do not be over demanding or unreasonable in the frequency of your requests for contact.
4. BEHAVIOUR: Do not behave badly.
5. OUTSIDE INTERESTS: Do not engage in a morally questionable occupation or outside interest.

**Slide 37 Section B:** Based upon my life experience that includes almost 49 years of marriage, seven kids, and 14 grandchildren, here are my suggestions as to what it should mean to be a grandparent:

1. Grandparent must give unconditional love and affection to the grandchild.
2. Slide 38 Grandparent must have 100% respect for the parent’s decisions, even where he/she disagrees (unless, of course the grandchild is in danger).
3. As a grandparent, take whatever time the parents are prepared to give you, don’t complain, and be available.
4. **Slide 39** Never, ever say one bad word about the parents when the grandchild is within earshot. And it is not a great idea to lecture your adult children about how they should parent their kids, your grandchildren.
5. **Slide 40** Remember, you are not the parent, it is a different role that you now play.

I believe that if we internalize these principles, we will hopefully avoid our children cutting us off from our dear grandchildren and we will be able to have healthier relationships with our own adult children.

**Slide 41 PART 7: SOCIAL SCIENCE LITERATURE**

Here is what we can learn from the social science literature.

1. Grandparents are bastions of stability whose bonds with their grandchildren can be more influential than all others, save and except the parents themselves.
2. **Slide 42** Relationships with grandparents are nothing less than crucial for a grandchild’s psychological health.
3. **Slide 43** Love and affection is not the sole purview of parents. Others such as grandparents bestow this on grandchildren, to the those kids’ benefit.
4. **Slide 44** A parent who badmouths the grandparents in the presence of the children causes those children extreme emotional harm. It can amount to child abuse.
5. **Slide 45** There can be therapeutic solutions for parents in conflict with their own parents (ie. the grandparents). Courts should consider ordering therapy with specific goals and parameters in order to help preserve grandparent/grandchildren contact.

**Slide 46** S. Beiner et al: *Grandparents’ Rights: Psychological and Legal Perspectives*, p. 124: The authors conclude their article with the following:

Family dynamics are very complex. Family therapists and attorneys may be needed to intervene, especially when the grandparent becomes the victim and target of alienation and the child becomes the object of manipulation by the alienating parent.

Philip Epstein agrees, in commenting on the case *C. (A.) v T. (K.)*, 2017 CarswellNS 384 (N.S. S.C.) stated (14 Aug 2017), “This is a very…difficult issue that is coming before the courts on a regular basis. Generally speaking, adversarial litigation is not the best path to try and re-establish a relationship or continue a relationship between a grandparent and a child in the face of opposition by a parent. Sometimes, however, it is the only way and if these cases have to happen, one can only hope that they get…sensitive treatment.”

**Slide 47 PART 8: NON-JUDICIAL REMEDIES**

1. Advocate For an End To Parental Alienation.
2. **Slide 48** Avoid Litigation.
3. **Slide 49** Engage In Family Therapy/Counseling.

As suggested by Michael Kleinman: [Michael B. Klienman, *Grandparent Access Claims in Ontario* in The Six-Minute Family Law Lawyer 2015, LSUC] “Often, grandparent access claims expose family dynamics that are more painful, dysfunctional, etc. than those associated with common marriage breakdown cases. ***To the extent that litigation should be the last resort, better public education about alternative resources (family counselling, therapy) and dispute resolution processes is essential.***”

Philip Epstein comments re *Nichols v Herdman*, 2015 CarswellOnt 9262 (Ont. SCJ.) (July 6, 2015) that ***these cases belong in the hands of a skilled mediator or therapist***.

I agree with Mr. Epstein. Counselling, mediation, therapy - where these modalities can be arranged, then they should be pursued vigorously. They are cheaper than court and I believe that they have a better chance of achieving results. Out of court therapeutic approaches are to be preferred. If you are in court, however, then still the use of therapeutic types of resources should not be discounted.

**Slide 50 PART 9: SOME PARTING THOUGHTS, A STORY AND A SUMMING UP**

Grandparents constitute a tangible link to a very personal past, a family past. Without grandparents, the grandchild is lacking family history, is lacking roots, is lacking a sense of identity with respect to where he fits in within this chaotic world. Only a grandparent can make the all-important connection between past generations going back over 100 years (ie. the grandparent tells his grandchild about the grandparents’ grandparents). The grandparent is that link for the grandchild. A grandparent’s love for his/her grandchildren is unconditional. Hey – we don’t have to discipline; we just need to spoil them (yes, within parameters that our adult children set of course).

**Slides 51 to 54 -** An Amazing Story (*extemporaneous*)

**Slide 55** Who I am today – while certainly I admit that I am a product of my two parents – has been determined by the relationships that I was privileged to enjoy with all four of my grandparents and especially with my mother’s father, my Zeda Coblens. I cannot imagine now having grown up without their love, their guidance, their stories that link me back to my people and ancestors in Russia and Poland and to the struggles that my grandparents faced as Jews both in the old country and as immigrants coming to this great country. I know that without my dear grandparents I would be much less of a human being, I would most certainly have much less of a social conscience, I would have much less of a sense of my responsibility as a Canadian, as a Jew, and yes, even as a family law lawyer.

* I have been most privileged and blessed to have been a grandchild who was loved unconditionally, who heard the old stories (over and over again), who was able to see his bubbie’s tears at his Bar Mitzvah (even though she was ostensibly a communist) and feel her warm embrace. And now in my final years, I have been most incredibly privileged to experience what it means to be a grandparent.
* [*Tie in punch line from the story now*.] Because my grandfather (my mom’s father, Charles Coblens) ***was able to jump over that wall, I am able to stand here tonight***. By virtue of that that quantum leap, that miraculous leap, that leap of faith and hope, my mother came to be born in 1921 in Belgium on their way from the former Soviet Union to Canada and I, that infant who was born in 1950 in Toronto and attended Yorkview Public School, Willowdale Junior High and Northview Secondary was able to grow up to be that grandchild who sat on his zeda’s knee and was ultimately able to soak in, to imbibe, to experience those stories including that amazing story of how G-d lifted my Zeda Coblens over the wall and helped him to escape the Cossacks who sought to murder him for one reason only – because he was a Jew. I became that grandchild who heard that amazing story and many others from my grandfather. And I, starting in 1980 and spanning the next 15 years, told those stories over and over again to my own seven children. And in turn, I became the grandfather who connected my own 14 grandchildren to that family history (which by the say is a microcosm of the experience of the Jewish people in exile) and I am still telling those old stories over and over again while creating new stories, new memories, new experiences for my own grandchildren that they hopefully will pass on to their own children and grandchildren long after my wife and I are gone. Slides 56 to 59
* Because I have been so privileged, I would like to think that I have a more profound and deeper sense of understanding for the pain endured by those grandparents who have had their previous relationships with their grandchildren so cruelly cut off.
* **Slide 60 A Call to Action:** I still cannot understand how a judge who himself/herself is a parent and grandparent, can deny to perfectly normal and loving parents and grandparents the opportunity to fulfill their sacred roles.
* We in the legal system have to make a full stop here. What are we doing? Are we helping? Or, are we hurting people? How is that we lawyers and judges appear to think nothing of severely limiting or cutting contact or allowing contact to be cut?
* ***I call upon the judiciary to engage in a bit of introspection***. Think about your own relationships with your children and grandchildren. Then, once you have thought long and hard, decide what you are going to do to enhance the relationships of other parents ***and grandparents*** with their children and grandchildren.

**Slide 61 PART 10: SO WHAT HAVE WE LEARNED? LET’S SUM UP.**

1. When we talk about alienated grandparents, we usually mean grandparents not being allowed contact with their grandchildren. But sometimes, we are referring to grandparents being collateral damage in the war between the parents where a parent is alienated from his/her kids.
2. There are three philosophies or theories when we discuss court solution models for resolving grandparent access claims: (1) Parental Autonomy; (2) Pro-Contact. These two approaches have merged into the hybrid model that is applied in Ontario.
3. We talked briefly about the statutory framework. It was my view that changes to the *Divorce Act* will not likely amount to any significant change in grandparent access claims analysis in the courts, although it is mildly encouraging that grandparents are at least specifically mentioned in Bill C-78.
4. The cases tell us a number of rather important principles. These principles unfortunately seem to exclude for the most part grandparent access claims where there was no pre-existing relationship. We learned that these are the basic principles laid out in the cases:
5. There must be a a strong and relatively long-lasting pre-existing relationship.
6. That relationship must be worth preserving in the judge’s eyes.
7. That relationship has to be positive for the grandchild.
8. Not too much time should have passed before you get to court.
9. Have the parents or acted arbitrarily? If not, you will have significant difficulties to succeed.
10. In some exceptional circumstances such as the death of a parent, the tests might be slightly relaxed.
11. I then shared with you my very strong objections to this law. I demonstrated how other aspects of our family law system don’t hesitate to impinge on parental autonomy. The grandparent/grandchild area of the law should be no different.
12. I then caught up with some additional legal principles about (1) anxiety and stress; (2) destabilization of the family law unit; and, (3) Siblings.
13. **Slide 62** I shared with you my guiding principles for advancing a good case and I talked about my own feelings concerning the role of grandparents. Those feelings should apply within and outside of litigation.
14. I gave a very cursory rundown of some of the social science literature. Surprise. Surprise. The social scientists have found that we grandparents are important for our grandchildren.
15. That lead us to the Non-Judicial Remedies. I urged you to advocate for an end to Parental Alienation. To avoid litigation. And to engage in family therapy/counseling.
16. Coming towards the end of my presentation, I shared with you some personal observations, reflections and an amazing real-life story. I pleaded with judges basically to step back and put themselves in the grandparents’ shoes. Let me modify that sentiment: Let the judges place themselves in the shoes of the grandchildren. What do you think they would want?
17. In final closing before question and comment period, I just want to thank you all for attending this evening and allowing me to share with you some of my legal knowledge, but more than that, I thank you for allowing me to commiserate with you about ***what it means to be a grandparent***. Those of you who have had that all-important relationship so tragically cut off, my heart goes out to you. ***I feel your pain***. I pray that you will find solace and that in the fullness of time you will be reunited with your beloved grandchildren.

**Slide 63 PART 11: COMMENTS AND QUESTIONS**

Amanda of Alienated Grandparents Anonymous will comment first

Rob McNeillie will consolidate and pose the questions to Amanda and to GCC.

(Go quickly through slides 64 to 67 and periodically show those sides during question period.}

1. [*Children’s Aid Society of London and Middlesex v. S.H.* [2002] O.J. No. 4491 (Ont. S.C.J.);](http://canlii.ca/t/1r1vg) [*Children’s Aid Society of London and Middlesex v. J.P*., [2000] O.J. No. 745, (Ont. Fam. Ct.):](http://canlii.ca/t/1qxln) [*Catholic Children’s Aid Society of Toronto v. H.(D.)*, 2009 ONCJ 2](http://canlii.ca/t/224d9); [*CAS Halton v. C.S., D.D. and M.G. J.* 2004 ONCJ 54](http://canlii.ca/t/1h4vp) [↑](#footnote-ref-1)
2. [*Barber v. Mangal*, , 2009 ONCJ 631](http://canlii.ca/t/286k9); [*MacDonald v. MacDonald* (2009), 68 RFL (6th) 363 (Ont. S.C.J.);](http://canlii.ca/t/231kv) [*Ninkovic v. Utjesinovic*, 2019 ONSC 558 (Ont. S.C.J.)](http://canlii.ca/t/hxfgj) [↑](#footnote-ref-2)
3. [*Ninkovic v. Utjesinovic*, 2019 ONSC 558 (Ont. S.C.J.)](http://canlii.ca/t/hxfgj) [↑](#footnote-ref-3)