Louisiana Law: Child Custody issues facing Grandparents raising Grandchildren

Part A.

I. Informal vs. Formal Caregivers. In 1997, 6% of U.S. children under 18 i.e. 3.9 million children lived in grandparent-headed households. (U.S. Census 1997). Of these, 1.3 million children did not have parents present in the household. One child in 10 in the United States lives with a grandparent, according to a new Pew Research Center analysis of U.S. Census Bureau 2010 data.

(a). Informal Caregivers: Caregivers who out of a sense of moral obligation, duty, religion, family or culture take it upon themselves to care for their grandchildren.

(b). Formal Caregivers: Are those that are entrusted either through the State (foster parents), or as provided by law.

II. Legal Custody:

Most States continue to struggle with the problem of balancing the rights of grandparents to have access (custody and/or visitation), with their grandchildren and the constitutionally protected rights of parents to make decisions concerning the care, custody, and management of their children. In June of 2000, the United States Supreme Court, in the case of Troxel v. Granville, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000), held that the State of Washington’s visitation statute was too “breathtakingly broad” and as applied, it violated the Due Process Clause of the U.S. Constitution in that it violated the fundamental rights of “fit parent’s ability to make the best decisions regarding their children.” The presumption that allowing grandparent visitation is in the best interest of the child is not the correct standard of proof to be applied. In fact there is a presumption that fit parents act in their child’s best interest.

Our existing statutes are as follows:

(a). Civil Code Art. 133: If awarding of custody to a parent would result in substantial harm to the child, a non-parent can get custody if the child has been living with the non-parent in a “wholesome and stable environment.” An award of custody can include a parent who is a joint custodian with the grandparent as the domiciliary parent. In some cases, it could be sole custody with some degree of visitation allowed to the parent. The right to handle the economic interests or tutorship is usually vested in the “parent” who has sole custody.

(b). Ch. Code. Art. 1514: Allows it if the parent, natural tutor, or legal custodian seeks to voluntarily transfer custody of the child to a third party and if doing so would be in the best interests of the child.
III. **Provisional Custody by Mandate:** *La. R.S. 9:§951 et seq.*

Allows a parent, legal custodian, or natural tutor to appoint an Agent to provide for the health care, schooling, and general welfare of the child. The mandate is executed before a notary and two witnesses. For some school districts, the mandate may not be sufficient. The person who granted it can revoke the mandate - like any other Power of Attorney - at any time. Thus, there is no Notarial transfer for the custody of a minor child that is legally enforceable in Louisiana. Louisiana also has a special Military Powers of Attorney illustrative form. See *R.S. 9:§3861 et seq.* This form, while acceptable to third parties, may not be acceptable to the military dept. as far as the parent’s obligations with the department are concerned.

IV. **Visitation:**

(a). *Civil Code Art. 136 (B).* Under “extraordinary circumstances,” a relative not granted custody may be granted reasonable visitation in accordance with the best interest of the child based on the following factors:

1. The length and quality of the prior relationship;
2. Whether the child is in need of guidance and enlightenment, which can best be provided by the relative; e.g. religious upbringing, etc.
3. The preference of the child if of sufficient maturity;
4. The willingness of the relative to encourage a close relationship between the child and his parents;
5. The mental and physical health of the child and the relative.

Our courts in determining whether court ordered visitation is warranted, closely looks at the above five factors - especially the first one.

(b). *Louisiana Revised Statute 9:§344.*

1. If the parent (married or not), die, is interdicted, or is incarcerated then the grandparents may have reasonable visitation rights depending upon the best interests of the child;
2. If married parents are legally separated or have split up for a period of six months or more, then grandparents may have reasonable visitation rights. Note, that if parents are not married and have split up, there are no provisions under this statute but *La. C.C. Art. 136(B)* may apply.

(c). *Children’s Code Art. 1264*

Post-Adoptive visitation rights of grandparents are available if the parent has died or if the parent forfeited their parental rights due to non-support or failure to maintain a relationship with the child.
V. Miscellany:

1. **De Facto Custody**: Not used in Louisiana. Defined as a primary caregiver and financial supporter of a child who has resided with the person for a period of six months if the child is younger than three (3) years of age and for a period of one (1) year if the child is three (3) years of age or older. Once identified as such, that person has the same standing in custody litigation as a parent.

2. **De Facto Parent**: Not used in Louisiana. Defined as a person who has a special interest or contribution to make to the well being of the child. This person is entitled to all notices of any hearing involving the child.

VI. Suggestion:

If you are a grandparent, who seeks visitation, please consider the following before considering litigation. Litigation injects a degree of animosity and further contributes to an otherwise dysfunctional situation.

1. Involve mutually respected relatives, or friends to act as an intermediary;
2. Church minister or family counselors are other options;
3. Pursue mediation.

**Part B.**

I. Adoption:

The parental rights of the parents, if alive, need to be terminated. This is done either by consent or involuntarily. Consent can be given in open court or by an Authentic Act (Notary and two witnesses). It is also done involuntarily, usually by the state, in cases where the parent has committed a serious crime (murder, sexual abuse, etc.), abandonment of the child under circumstances demonstrating an intention to permanently avoid parental responsibility - includes factors such as whereabouts of the parent is unknown for up to four months; no child support for up to six months; no significant contact for up to six months and non-compliance with State unification plans.

There are three primary types of adoption of minor children in Louisiana:

a. Agency – Dept. of Social Services or a licensed agency.
b. Private - More elaborate surrender of parental rights required. Counseling etc. Most restrictive; and
c. Intrafamily: Includes great grand-parents and is the least restrictive. The child(ren) must have been residing with the adoptive parents for at least six months prior to the filing of the petition.
Different circumstances bring about the need to adopt grandchildren. Sometimes it may be necessary to adopt your grandchild in order that the child becomes an eligible dependent who is entitled to receive Social Security benefits. Acadiana Legal Service Corporation considers it a priority in addressing this type of Intrafamily Adoption.

The Federal Adoption and Safe Families Act of 1997, seeks to expedite not only the time it takes but also to streamline the process by which States pursue and complete the adoption process for children in their care. As a result, the Department of Children’s and Family Services (DCFS) is supposed to expedite such adoptions.

(Part C).

I. **School Enrollment and medical care:**

While the law is clear that all children are entitled to “free and appropriate education,” different School Districts have different policies in place. These policies have come about either as a result of the demand for space at the various schools or as a result of a court order (desegregation cases). In Lafayette, a non-parent who does not have legal custody of their grandchild will not be able to enroll the child in a parish school – especially if it is outside their residential district unless they have legal custody. A Voluntary Transfer of Custody from the parent usually suffices. The parent, who is seeking to transfer custody, has to petition the court.

Involving the parents in this transfer of custody can be problematic if their whereabouts are unknown. Most caretaking arrangements usually start off for a short duration and then may lead to a long period where legal custody is needed. Courts may require that the interest of the absentee parents is protected and this process may involve having a court appointed attorney represent the absentee parent(s) – which can be expensive.

Medical care providers (doctors, hospitals, etc.) may require (usually for major medical treatments) that you have the authority and legal status to consent to certain procedures or treatment of the child. If the child has a medical condition where such medical services are needed, establishing legal custody may be an urgent priority and should be addressed when you are providing care on a short-term basis. See Provisional Custody by Mandate as well.

(Part D).

I. **Kinship Care Subsidy Grant:**

Grandparents who have legal custody of their grandchildren are entitled to pursue child support against the parents. If they have Custody by Mandate, they are also entitled to pursue the Kinship Care Subsidy Program but that is usually for a period of one year. After that, legal custody is required. KCSP provides cash assistance of $222 per month for each eligible child who resides with a qualified relative other than a parent. By seeking the KCSP, you assign the right to collect child support, to the State. See [http://www.dss.state.la.us/index.cfm?md=pagebuilder&tmp=home&pid=138](http://www.dss.state.la.us/index.cfm?md=pagebuilder&tmp=home&pid=138)
1. **Legal Obligations of grandparents to provide for their grandchildren:**

*Civil Code Art. 229:* (rarely is raised).

Our Louisiana Civil Code does impose a reciprocal legal duty on grandparents and grandchildren for that matter as well, of “maintenance limited to life’s basic necessities of food, clothes, shelter, and healthcare.” In the context of grandparents, this duty of the grandparent would arise upon clear proof of the inability (both parents dead, totally disabled, etc.), of the grandchild to obtain these necessities by other means or sources. The basic “source or means” obviously is the primary responsibility of parents.

**[Questions and Answers?]](questions-answers):**

*Caveat:* Avoid actual fact pattern to minimize attorney-client relationship and the gathering of confidential information. Try to limit it to general themes and scenarios.

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