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GRANDPARENT VISITATION RIGHTS:
SOCIAL POLICIES AND LEGAL RIGHTS

ELAINE D. INGULLI*

I. INTRODUCTION

Ten years ago, the notion that grandparents might have legally enforceable rights to visit their grandchildren was a radical one. Few courts,1 and fewer legislatures,2 had been willing to create such rights. Today, there are statutorily created visitation rights in all but two states.3 Grandparents’ rights have been the subject of much legal debate,4 and after hearings, the House Select Committee on

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2 Idaho (1972); Ohio (1972); Kansas, New Jersey and Tennessee (1971); California (1967); and New York (1966). Nineteen of the present statutes were added between 1980-84.


Aging and the Senate Subcommittee on Separation of Powers have recommended that the National Conference of Commissioners on Uniform State Laws consider drafting a uniform law.5

Grandparents are not the only adults to claim a right to have access to children not their own. In the past few decades, stepparents,6 foster parents,7 psychological parents,8 putative fathers,9 relatives,10 and babysitters11 have all used the courts to seek such access. Why, then, discuss the rights of grandparents as distinct from the rights of other persons who may play a significant role in the lives of children?

To begin with, grandparents have already achieved a special status in the eyes of the law. The overwhelming majority of states have determined that grandparents are different from other persons by passing legislation that is specifically directed


7 See, e.g., In re Cobin, 320 N.W.2d 539 (Iowa 1982) (foster parents allowed to intervene in divorce proceedings on the issue of custody); In re Tremayne Quame Idress, 286 Pa. Super. 480, 429 A.2d 40 (1981) (custody awarded to foster mother). On the issue of foster parents' liberty interest in maintaining their relationship with their foster children, see Kyees v. County Dep't of Pub. Welfare of Tippecanoe County, 600 F.2d 693 (7th Cir. 1979); Drummond v. Fulton County Div. Family & Childrens Servs., 563 F.2d 1200 (5th Cir. 1977), cert. denied, 437 U.S. 910 (1978); Berhow v. Crow, 423 So.2d 371 (Fla. Dist. Ct. App. 1982).

8 See, e.g., Bennett v. Jeffreys, 40 N.Y.2d 543, 356 N.E.2d 277, 387 N.Y.S.2d 821 (1976) (custody awarded to "psychological parent" where court found compelling reasons why it was in the best interests of the child to award custody to a third party, rather than a parent).


10 See, e.g., Reflow v. Reflow, 24 Or. App. 365, 545 P.2d 894 (Or. Ct. App. 1976) (permanent custody awarded to paternal aunt and uncle, with visitation rights to mother); Mathis v. Johnson, 258 S.C. 321, 188 S.E.2d 466 (1972) (permanent custody awarded to great-aunt and great-uncle, with visitation awarded to maternal grandmother); Gotz v. Gotz, 274 Wis. 472, 80 N.W.2d 359 (1957) (maternal aunt granted visitation rights).

at grandparents.\textsuperscript{12} Courts have reasoned that differential treatment is justified by biology, kinship, heredity, and the uniqueness of the relationship.\textsuperscript{13} Additionally, some psychologists and psychiatrists believe that special treatment of grandparents is appropriate because of a unique bond existing between grandparent and grandchild, which is stronger than any other, except that between parent and child.\textsuperscript{14}

Finally, demographic changes have strengthened the political clout of older Americans. It has been estimated that approximately seventy percent of older people in the United States have grandchildren.\textsuperscript{15} As a group, these grandchildren are healthier, more affluent, and better educated than ever before.\textsuperscript{16} Many belong to the group labeled the “young-old,” aged fifty-five to seventy, which many consider to be the most politically powerful new age group.\textsuperscript{17} Based on current life expectancies, many will be grandparents for twenty to thirty years.\textsuperscript{18} Thus grandparents have been able to lobby for special legal treatment based on their status as grandparents.\textsuperscript{19} Indeed, the political clout of grandparents is the best explanation for the nationwide rush to pass grandparents statutes.

It is a fact grandparents now have a statutory right of access to their grandchildren in almost every state. Existing legislation is generally inadequate, however, because it fails to confront a number of issues that recur in litigation involving grandparents. There is general agreement that in addition to the usual costs of time

\textsuperscript{12} Cf. statutes in California, Connecticut, Hawaii, Ohio and Washington which are not aimed directly at grandparents, but allow “any person” to petition for visitation rights. CAL. CIV. CODE § 4601; CONN. GEN. STAT. § 46b-59; HAWAI REV. STAT. § 571-46; OHIO REV. CODE ANN. § 3109.05 (any person having an interest in the welfare of the child); WASH. REV. CODE § 26.09.240.

In Alaska and Virginia, grandparents are specifically named, although other persons can also be granted visitation. ALASKA STAT. § 25.24.150 (in cases of divorce, separation or placement of a child whose parents have died, the court may grant visitation to a grandfather or other person); VA. CODE §§ 20-107.2 (Supp. 1984) (grandparents, stepparent or other family members).

\textsuperscript{13} See, e.g., Mimkon v. Ford, 66 N.J. 426, 332 A.2d 199 (1975) in which the New Jersey Supreme Court permitted grandparents to visit with their grandchild, even after adoption, because of the unique relationship between grandparents and grandchild, made even stronger in that case by the fact that the child had lived with his mother and maternal grandparents after his parents were divorced.

\textsuperscript{14} A. KORNHABER & K. WOODWARD, GRANDPARENTS AND GRANDCHILDREN 55 (1981).

\textsuperscript{15} Hearings, supra note 5, at 1.

\textsuperscript{16} A. KORNHABER & K. WOODWARD, supra note 14, at xxii.

\textsuperscript{17} A. KORNHABER & K. WOODWARD, supra note 14, at 162.

\textsuperscript{18} Hearings, supra note 5, at 1-2. The estimate is based on findings that most women become grandmothers at approximately 50 years of age, and men become grandfathers around age 52.

\textsuperscript{19} Among the witnesses at 1983 Congressional Hearings supra note 5, were Mr. and Mrs. Max Chasens, founders of “Equal Rights for Grandparents,” Baltimore, Maryland; Mr. and Mrs. Lee Sumpter, founders of “Grandparents/Children’s Rights, Inc.” in Haslett, Michigan; and Dr. Arther Kornhaber, founder and president of “Foundation for Grandparents” in Mt. Kisco, New York.

and effort involved in litigation, such litigation involving children is particularly undesirable because of its negative effects on the children. Thus, it makes sense for states to reevaluate and amend legislation to avoid litigation.

The need to reevaluate existing legislation, however, is not a reason to support uniform legislation. Instead, this Author takes the position that diversity is appropriate given the relative newness of the rights involved and the absence of any generally accepted social science findings justifying a uniform law.

The first part of this Article is an overview of research findings in the social sciences which are relevant to grandparents. The second part addresses the major issues that have arisen concerning grandparent visitation which should be considered by state legislatures in redrafting visitation statutes.

II. SOCIAL SCIENCE RESEARCH FINDINGS

Social science findings can and should play a role in the formulation of social policy through lawmaker. Indeed, this belief has been used to justify federal spending for social science research through such institutions as the National Science Foundation and the National Institute of Mental Health. It has also played a role in increasing the attention that research psychologists have paid to legal and policy issues.20 Before a uniform act affecting a right that is less than two decades old is drafted, we need to ask how much we know about the relationship between grandparents and grandchildren, and what effect that relationship has on children, grandparents, and families.

Generally, empirical and clinical research on children has blossomed and become more sophisticated in the past few decades. In 1969, a committee studying the feasibility of adopting Uniform Marriage and Divorce Legislation reported that the psychological literature on various custody arrangements and their effects on the development of children was sparse and inadequate.21 Since that time, our knowledge of the effects of divorce on children has been greatly enhanced by two highly respected longitudinal studies, one, a clinical study by Wallerstein and Kelly,22 and, the other, a study by psychologists Heatherington, Cox, and Cox.23 There

22 Heatherington, Effects of Paternal Absence on Personality Development in Adolescent Daughters, 7 DEV. PSYCH, 313 (1972); Children and Divorce, in PARENT-CHILD INTERACTION THEORY, RESEARCH AND PRACTICE, (1981); Heatherington, Custody and Visitation, in The Aftermath of Divorce, in MOTHER-CHILD, 4
is also a growing body of literature on the importance of the father-child relationship in families\(^\text{24}\) and on the effects of alternative parental lifestyles on children.\(^\text{25}\)

Unfortunately, there are no equivalent comprehensive studies on the importance of the grandparent-grandchild relationship.\(^\text{26}\) Researchers are just beginning to look closely at the influence of grandparents on the well-being of children. In one study, reported in a book that has been widely touted by grandparents lobbyists, the authors stated that children who have close relationships with at least one grandparent are different from other children; they are emotionally secure, are not ageist, and do not fear old age. These authors also reported the existence of a special bond between grandparents and grandchildren which is stronger than any other except that between parent and child.\(^\text{27}\) These sweeping conclusions, however, were based on a study that had several methodological weaknesses,\(^\text{28}\) and other researchers have not yet been able to replicate their results.\(^\text{29}\) Moreover, the authors based their findings regarding the bonds formed between children and grandparents on an attachment behavior theory propounded by John Bowlby in the late 1960s. According to Bowlby, children have a tendency to attach themselves to one figure (a phenomena he labelled "monotropism") and this attachment is different from other attachments children form.\(^\text{30}\) More recent studies, however, have cast doubt on the validity of some of Bowlby's theories.

\(^\text{24}\) See generally FATHERHOOD AND FAMILY POLICY (M. Lamb & A. Sagi eds. 1983) for recent studies concerning fathers and children.

\(^\text{25}\) See NONTRADITIONAL FAMILIES (M. Lamb ed. 1982) for recent research findings by various social scientists concerning children in a variety of family environments.

\(^\text{26}\) There are, however, several studies on adolescents. See, e.g., Hartshorne & Manaster, RELATIONSHIPS WITH GRANDPARENTS: CONTACT, IMPORTANCE, ROLE CONCEPTION, 15 J. AGRIC & HUM. DEV. 233 (1983). The authors concluded from a study of college students that most considered their grandparents to be important to their lives, and would like more contact with them than they in fact had.

Developmental psychologists do not consider adolescents to be "children." As a result, there is a separate discipline known as adolescent psychology which is distinct from child psychology.

\(^\text{27}\) A. KORNAHREF & K. WOODWARD, supra note 14, at 55.

\(^\text{28}\) The authors' method is described in A. KORNAHREF & K. WOODWARD, supra note 14, at 6-7. The study involved interviews with 300 children and adolescents aged 5-18 years old, and projective drawings by the children. The authors did not control for demographic characteristics, making it difficult to draw any conclusions about causation, and failed to distinguish the children by age, despite the differences in cognitive and emotional development of 5 and 18 year olds, as well as their ability to draw. Moreover, the pictures were not evaluated on the basis of any preestablished objective criteria.

\(^\text{29}\) One measure of how good a study is, is whether the results can be replicated. So, for example, the research on the effects of divorce by Wallerstein and Kelly, supra note 2, and by Heatherington, Cox, and Cox, supra note 23, have been widely acclaimed for the reason that the two studies, using different methodologies, reached consistent findings. See infra, notes 38-39 and accompanying text for failure to replicate results of the Kornhaber-Woodward study.

\(^\text{30}\) See J. BOWLBY, ATTACHMENT AND LOSS (1980).
As a result of this later work, many psychologists now believe that children can and do form bonds of varying strengths with different adults and that the strongest bonds are not necessarily those between mother and child, as Bowlby argued. Kornhaber and Woodward’s findings of a bond between grandparents and grandchildren, however, cannot be considered definitive because of weaknesses in both the research design and the theoretical foundations of their study.

More recently, two researchers have headed a longitudinal study of all children born on Martha’s Vineyard between 1974 and 1975. As part of their study, they looked at children living in extended family systems which the authors defined as a multigenerational family with at least one grandparent living in close proximity to the family, or having frequent interaction with the family. They expected to find that the extended family benefitted children. Instead, based on their preliminary findings, the authors suggest there is a relationship between the presence of an extended family and overall poorer behavioral and psychological adjustment of children at age three. The authors consider their findings preliminary and have declined to draw broader generalizations about the specific role that grandparents play in child development, but the findings do raise questions about the effects on children.

The literature on the significance of the grandparent-grandchild relationship is similarly devoid of conclusive findings. Kornhaber and Woodward argue that grandparenting is a natural instinct, rooted in our biological makeup, manifested by thoughts, feelings, and behavior; and that being a grandparent is a critically important role for the grandparents. Again, however, one finds few empirical studies that focus on the importance of the grandparent-grandchild relationship, but the existing literature does not support the Kornhaber-Woodward thesis.

The general body of literature suggests that there is ambiguity regarding the...

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31 See generally, M. RUTTER, MATERNAL DEPRIVATION REASSESSED (2d. ed. 1981) for a review of the research findings on attachment, bonding and the effects of separation on children. Dr. Michael Rutter is Professor of Child Psychiatry at The Institute of Psychiatry, University of London, and the highly respected author of numerous studies, books and articles on children.

32 Garrison & Earls, Preschool Behavior Problems and the Multigenerational Family: An Island Community Study, 2 INT’L J. FAM. PSYCH. 125 (1983). The study is part of the Martha’s Vineyard Child Health Survey, being directed by Dr. Earls.

33 Id. at 127.


35 A. KORNBACHER & K. WOODWARD, supra note 14, at 55.

36 But see L. GEORGE, ROLE TRANSITIONS IN LATER LIFE, 89 (1980) (“Grandparenthood does not appear to be a high-impact life event.”); Wood & Robertson, The Significance of Grandparenthood, in Time, Roles and Self in Old Age (J. Gubrium, ed. 1976) (the authors found that the role of a grandparent was not significantly associated with life satisfaction, and that when in need, one good friend is more important to maintaining morale than a dozen grandchildren).
grandparent role, and that the experience is largely "idosyncratic, an acquired and achieved status rather than one that is based solely on the ascriptive blood tie." Kornhaber and Woodward based their conclusions, in part, on a finding that grandparents mentally prepared themselves for the role when they first learned they were to become grandparents. A recent study, however, found the opposite to be true; that grandmothers had not mentally prepared for the role prior to the birth of the grandchild.

There is evidence to support the conclusion that the grandparent role is not of great importance to grandparents. Although family involvement is considered important to the elderly, several researchers have found that relationships with peers are of much greater significance to grandparents than relationships with grandchildren. The role of grandparent may be more important to those who have experienced social losses, a finding which may have significance for policies governing visitation in case of death of a grandchild's parent.

Given the embryonic stage of our knowledge of the significance of the grandparent-grandchild relationship, and the likelihood that reliable, sophisticated research programs can be designed and implemented, a uniform act, at this time, is premature. States already have conflicting ideas of which competing social policy should govern, and that diversity of policy is appropriate and desirable, given the current status of our knowledge.

The danger of a model, or proposed uniform statute, is that diversity will give way to the "bandwagon effect" before we have a clear idea of the successes and failures of the diverse statutes, and their effects on people. The recent history of joint custody laws provides a case in point. Until recently, courts had awarded custody of a child to only one divorced parent, usually subject to visitation or temporary custody rights of the noncustodial parent. In 1980, only five states had legislation permitting joint custody as an alternative to traditional custody arrangements, even if both parties wanted joint custody. Between 1980 and 1983, twenty-eight states enacted joint custody laws, and a bill was introduced in Congress to cut Aid to Families of Dependent Children funds to states that did not favor joint custody.

Kivnick, Grandparenthood: An Overview of Meaning and Mental Health, supra note 34, at 60. See also Wilson & DeShane chapter on grandparents in Families In Later Life, 108 (1979); and Kahana & Kahana, supra note 34.

Johnson, supra note 34, at 549.


Johnson, supra note 34, at 557.

Z. Blau, Old Age In A Changing Society (1973); Wood & Robertson, supra note 36.

Kivnick, supra note 34, at 62-63.


Freed, supra note 43.

Of course, the joint custody legislation has been accompanied by continued lip service to the "best interests of the child" standard for determining how custody awards should be made.46 One would therefore expect the literature on joint custody to demonstrate that it is, in fact, in the best interest of the child. Instead, the authors of a recent article reviewing the social science research findings relevant to joint custody have concluded that available studies on the advantages and disadvantages of joint custody are "egregiously inadequate, and for the most part the debates have been nourished solely by opposing ideologues."47 There is reason to believe that available research findings regarding joint custody are largely overlooked by courts and legislatures.48

In the absence of a generally accepted body of research conclusively demonstrating the importance of the grandparent-grandchild relationship, and the impact of this relationship on families, it is not advisable to adopt a uniform visitation law. Further research is needed to discover which policies and laws will best promote the interests of children, parents, and grandparents. This does not mean, however, that existing legislation ought to remain unexamined. On the contrary, in the rush to pass legislation to satisfy various pressure groups and to erase the unhappy results of particular cases,49 statutes have been passed which do not adequately anticipate and address certain recurring issues. The following section examines a variety of issues surrounding the newly created rights of grandparents in light of current social science research findings.

III. STATUTORY VISITATION RIGHTS FOR GRANDPARENTS

A. Who Should Have Visitation Rights: Grandparents or Any Adult?

The first issue usually addressed in visitation legislation is whether to recognize visitation rights belonging only to specific categories of persons (for example, grandparents), or whether to grant visitation rights to any third person adult depending

46 Despite criticism by some authorities, most notably, Goldstein, Freud, and Solnit, infra note 58, the doctrine that custody and visitation matters should be determined by the "best interests of the child" continues to dominate both statutory and judicial language. See generally Mnookin, Child-custody Adjudication: Judicial Functions in the Face of Indeterminacy, 39 L. & CONTEMP. PROB. 226 (1975); Wald, Thinking About Public Policy Towards Abuse and Neglect of Children: A Review of Before the Best Interests of the Child, 78 Mich. L. Rev. 645 (1980); and Note, State Intrusion into Family Affairs: Justifications and Limitations, 26 STAN. L. REV. 1353, 1390-91 (1974).

47 Clingempeel & Reppucci, Joint Custody After Divorce: Major Issues and Goals for Research, 91 PSYCHOLOGY BULL. 102, 124 (1982).

48 Clingempeel and Reppucci suggest that joint custody awards may be inadvisable in some cases, because the increased contact between the parents might exacerbate conflict. Since it is generally agreed that conflict has negative effects on children, the increased conflict between the joint custodians would mediate the otherwise positive effects on children of continuing the relationship with both parents. Clingempeel & Reppucci, supra note 47, at 110. One can assume a relatively high level of conflict where the parents cannot even agree to joint custody of their children. Yet, there are courts that would make joint awards in such circumstances, and few states have statutes that require the agreement of both parents to awards of joint custody. See Freed, supra note 43, at 4025.

See supra notes 47-49 and accompanying text.
on the specific relationship that has developed between the child and the adult seeking such rights. The category approach can, and is likely to be, narrowly interpreted by the courts to exclude all persons outside the category.50

The vast majority of the states have thus far chosen the category route.51 These statutes should define grandparent to avoid otherwise inevitable problems of statutory interpretation: Does grandparent include the natural parent of a putative father?52 If so, under what circumstances? Does grandparent include the natural parent of a stepparent or the stepparent of a natural parent?53 And why stop at grandparents? With the graying of the population, more and more people will be great-grandparents. Should they not have the same rights as grandparents? Some states have already accorded great-grandparents these rights.54 Then one might ask, why stop at grandparents and great-grandparents? Why not grant visitation rights to siblings55 and other relatives?56

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50 Despite generally broad discretion in the courts to determine custody and visitation issues in "the best interests of the child," the common law rule was that court-ordered visitation over the objection of a parent should not be awarded, except to noncustodial parents. See generally Foster & Freed, supra note 4; Note, Grandparent Visitation, supra note 1.

Following the general rule of construction that statutes in derogation of the common law are to be narrowly construed, most cases interpreting a statute creating grandparent rights have interpreted such statutes narrowly. See, e.g., infra notes 120-27.

51 See supra note 12 for a list of the states that have taken the "category" approach to visitation.


53 If the justification for extending rights to grandparents is related to notions of kinship, bloodlines, and biological urges, as the New Jersey Supreme Court suggested in Minikin, 66 N.J. 426, 332 A.2d 199, then there may be reason for treating step-grandparents differently from biological grandparents. The issue is clarified by statute in Oregon, where "grandparents" does not include step-grandparents. Or. Rev. Stat. 109.121 (1981).


56 Courts are also reluctant to award visitation to other relatives without specific authority to do so. See generally Ingulli: Grandparent Visitation Rights: Social Policies and Legal Rights, supra.
Another approach, taken by only a handful of states, focuses on the particular relationship existing between the child and the person seeking visitation rights, and gives legal recognition to such rights depending on the strength of that relationship, and not on its title. This approach is analogous to that taken by courts which have recognized the rights of psychological parents in addition to the rights of biological parents. This would allow a myriad of significant adults in a child’s life—aunt, stepmother, stepparents, relatives, psychological parents—to enforce visitation rights.

Prior to the recent onslaught of grandparents statutes, most courts allowing court-ordered visitation by grandparents did so because of the strength of the particular relationship which had developed between grandparent and grandchild, not because grandparents as such were entitled to see their grandchildren. Thus, grandparents who had been in loco parentis to the child, or who had developed strong psychological bonds, might be granted visitation rights. By the same reasoning, other nonparent adults have also been granted visitation rights.

Another option is to combine the category and significant relationship approaches as has been done in Idaho. This hybrid statute would grant visitation rights to those grandparents who have established a substantial relationship with the child.

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See supra note 12.

5 In a widely-acclaimed book first published in 1973, Drs. Goldstein, Freud, and Solnit introduced the notion of a “psychological parent” to describe an adult to whom a child is primarily attached, who is not that child’s biological parent. J. Goldstein, A. Freud, & A. Solnit, Beyond the Best Interests of the Child (1979) [hereinafter cited as G.F.S.-I]. The authors are highly influential and controversial authorities on children. Joseph Goldstein, a lawyer and psychoanalyst, is a professor of law at Yale University Law School and a professor at Yale’s Child Study Center. The late Anna Freud was director of the Hampstead Child Therapy Clinic in England. Albert J. Solnit is a professor of pediatrics and psychiatry at Yale University School of Medicine, director of the Yale University Child Study Center, and on the faculty of the Yale Law School. Together they wrote a second widely-read book, Before the Best Interests of the Child (1979) [hereinafter cited as G.F.S.-II]. Their concept of “psychological parent” who has assumed the parenting role towards a child has crept into the language of courts. See, e.g., James v. McLinden, 341 F. Supp. 1233 (D. Conn. 1969); Bennett v. Jeffreys, 40 N.Y.2d 543, 356 N.E.2d 277, 387 N.Y.S. 821 (1976); New Jersey Div. of Youth & Family Services v. Torres, 185 N.J. Super. 234, 447 A.2d 1372 (N.J. Juv. & Dom. Rel. 1980), aff’d, 185 N.J. Super. 182, 447 A.2d 1343 (1982).


See, e.g., Looper, 581 P.2d 487 (a steppmother who had developed a close relationship with her stepchild was granted visitation rights to contribute to the child’s emotional well-being).
In deciding whether to choose the category approach or the significant relationship approach to visitation rights, certain important factors should be taken into account. There are few research findings to support the presumption in grandparent statutes that the grandparent relationship is uniquely significant to either grandchildren or grandparents. There are, however, the oft-cited findings of various judges stating that the relationship is unique, important, and worth preserving. For example, in an early case permitting grandparent visitation after the grandchild had been adopted, the New Jersey Supreme Court stated:

Grandparents ordinarily play a different role in the child's life; they are not authority figures, and do not possessively assert exclusive rights to make parental decisions. At best, they are generous sources of unconditional love and acceptance.

It is a biological fact that grandparents are bound to grandchildren by the unbreakable links of heredity. It is common human experience that the concern and interest grandparents take in the welfare of their grandchildren far exceeds anything explicable in purely biological terms. Visits with a grandparent are often a precious part of a child's experience and there are benefits which devolve upon the grandchild from the relationship with his grandparents which he cannot derive from any other relationship.

The extension of visitation rights specifically to grandparents has also been justified by courts as a way of recognizing the value of kinship and the need to understand one's roots. These purposes would not be served by extending visitation rights to persons not biologically related to the child.

The category approach serves the additional purpose of limiting the number of people able to use the courts to seek legal access to children. It is an essentially conservative approach, altering the common law in increments instead of turning it on its head. At common law, visitation rights were viewed as an encroachment

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62 See supra notes 20-40 and accompanying text.
63 Minkon, 66 N.J. at 437, 332 A.2d at 204.
64 Tremayne Quame Idress, 286 Pa. Super. at 487, 429 A.2d at 44 (Kinship ties are still very important in our society. A sense of closeness to relatives can be critical to a child's wholesome and happy development.).
66 The author assumes that grandparents are unlikely to lose the rights they have so recently gained. For that reason, there is little discussion on the wisdom of allowing anyone, even grandparents, to enforce access to children over the objection of the child's parent. For a discussion written prior to most of the new statutes, see Gault, supra note 4, and Gault, Grandparent-Grandchild Visitation, 37 Tex. B.J. 433 (1974) for a discussion of the problems raised by narrow, grandparent visitation rights. Gault suggests that multiple sets of divorced parents and their possibly divorced parents (grandparents) can lead to a large number of persons seeking access to the same child. Gault, supra note 4, at 484-85. At least one court has made that same criticism in a case ending grandparent visitation after a step-parent adoption. Adoption of Child by M., 140 N.J. Super. 91, 93, 355 A.2d 211, 213 (N.J. Super. 1979).
on the custodial rights of parents. Only in exceptional cases did the court award such rights to someone other than a noncustodial parent, reasoning that to do otherwise would create conflicts and infringe on the authority of the custodial parent.  

This view is not completely without support in the psychoanalytical community. One commentator has cautioned that some people do not sufficiently appreciate the significance and destructive potential to the child of loyalty conflicts that might be generated in a court battle between parents and grandparents.  Thus, there are reasons for adopting the category approach.

A number of commentators, however, have taken the alternative position that the law ought to support and nourish all significant relationships which children have with other adults, not only with grandparents. Forcibly breaking a strong affectionate relationship with any adult will harm a child by depriving him or her of an important source of support. It may also cause the child to unnecessarily experience a deep sense of loss and undermine his or her sense of security and stability.

Another reason for expanding the categories of persons who have regular access to children, even over the objections of their parents, is to help prevent child abuse. Child abuse is well recognized as a national problem, with dramatic increases in the number of child abuse cases reported: 8,000 cases in 1968; 416,000 in 1976; 700,000 in 1978; and 851,000 cases in 1981. It is not clear whether this increase has been in actual cases or in the number of cases reported; either way, the extent of the problem is clear.

Increasing access to children can be helpful in two ways. First, one factor con-

67 For fuller discussions of the common law rights of grandparents see Foster & Freed, Grandparent Visitation, 5 J. DIVORCE 79 (1982); Note, Statutory Visitation Rights of Grandparents: One Step Closer to the Best Interests of the Child, supra note 4; Note, Visitation Rights of a Grandparent Over the Objections of a Parent, supra note 4.

68 Hearings, supra note 5, at 70-71 (statement of Dr. Andre Derdyne). Dr. Derdyne's cautious were based on the psychoanalytical theories propounded by Goldstein, Freud & Solnit in G.F.S.-1, in which the authors proposed that the law go even further in protecting the authority of a custodial parent. Arguing from the assumption that children need to be in the continuous care and custody of an autonomous parent, Goldstein, Freud, and Solnit suggest that even a noncustodial parent should not be able to use the courts to force visitation over the objections of the custodial parent. G.F.S.-1 supra note 58, at 116-17. That particular proposal has been widely criticized. See Dembitz, Book Review, 83 YALE L.J. 1304 (1974); Foster, Book Review, 12 WILLAMETTE L.J. 545 (1976); Strauss & Strauss, Book Review, 74 COLUMBIA L. REV. 996 (1974); Wald, Book Review, 78 MICH. L. REV. 645 (1979); Zaharoff, supra note 4, at 182-85. However, much of the criticism has pointed to the studies by Wallerstein & Kelly, supra note 22, and Heatherington, Cox & Cox, supra note 23, which found that children benefit from continued contact with both parents after divorce. There are no similar empirical studies on the benefits of court-ordered visitation with nonparents.

69 See Foster & Freed, supra note 4; Zaharoff, supra note 4, at 191.

70 Statistics compiled by the American Humane Society, reported in vol. 1 of the WASHINGTON REPORT (May 1984) published by the Society for Research in Child Development.
sistently identified as a contributing cause of child abuse has been the isolation of the parent-child relationship.\textsuperscript{71} Some authorities have theorized that without privacy and isolation, a pattern of maltreatment cannot be established and maintained.\textsuperscript{72} In one of the first empirical studies on the subject, the findings demonstrated that abusing mothers were more likely than non-abusing mothers to have visits with friends and relatives infrequently and to want to have such visits more frequently.\textsuperscript{73} Thus, social isolation allows abuse to occur in the first place. Because increasing access to children reduces the social isolation of the family, it could be a factor in limiting abuse.

Second, authorities believe that children who have been maltreated will fare better afterwards if they have someone in their social network who provides compensatory acceptance, nurturance, and a positive model for social experience.\textsuperscript{74} The importance of parental autonomy would thus appear to be outweighed by the value of assuring that children have contact with adults who can ensure a variety of role models.

\section*{B. When To Allow Court-Enforced Visitation}

Once it is decided who is entitled to petition for visitation rights, the issue of when to permit such rights arises. Only a minority of states have open-ended statutes permitting grandparents to petition for visitation rights under any circumstances, regardless of the child’s custodial status.\textsuperscript{75} All states focus on the interests of the child rather than the grandparents, and allow visitation only when it is determined to be in the best interest of the child and not when it is determined to be detrimental to the child.

There are, however, different considerations which come into play, depending on the child’s custody arrangements. This section examines the appropriateness of legally enforceable visitation rights when the child is living in his intact, natural family, when he is living with only one of his natural parents, and when the child is living with neither of his natural parents.


\textsuperscript{72} J. Garbarino & G. Gilliam, supra note 71, at 44.

\textsuperscript{73} Starr, supra note 71, at 98. Starr’s study compared abusive families with a demographically-matched control group, and tested for a variety of “causes” identified in the literature. He was unable to demonstrate empirically a connection between abusive families and most of the factors thought to place families at greater risk of abuse. His findings did, however, support the infrequency of visiting with friends and relatives and a desire for greater frequency as significant factors in abusive families.

\textsuperscript{74} J. Garbarino & G. Gilliam, supra note 71, at 44.

\textsuperscript{75} Connecticut, Delaware, Florida, Hawaii, Idaho, Montana, New York, and North Dakota. See supra note 3, for full citations to statutes.
1. Children In Intact Natural Families

The most controversial situation in which courts might order visitation rights for grandparents is when the child is living in the care and custody of his married, biological parents, the intact, natural family. There is a strong tradition in the law of not intruding into the intact, natural family. Those who favor this position label it the "family autonomy tradition," and emphasize court recognition of the value our society places on minimizing intrusions into family life, unless the welfare of the child is endangered.76 Those who oppose that tradition label it a "parental rights doctrine," and argue that it overlooks the interests of the child which should be foremost. Thus, the argument goes, grandparent visitation rights are disfavored because they are not in the parent's best interest, rather than because they are not in the child's best interest.77

In all but one of the recently reported cases in which grandparents sought visitation with children in the care and custody of an intact, natural family, the courts adhered to the family autonomy tradition, and denied the petitions.78 Judicial reluctance to interfere in the ongoing, intact family is consistent with the narrow interpretation usually given to statutorily created visitation rights.79

In Herron v. Seizak,80 the Pennsylvania Superior Court denied visitation rights to grandparents in a case involving an intact family, even though earlier Pennsylvania cases had hinted that the courts might be ready to recognize such rights.81 The court distinguished the earlier cases by pointing out that all had involved at least one deceased parent and that the concern had been to protect children from being completely cut off from their family. As neither of these considerations were

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76 On the concept that there exists a private realm of family life which the state cannot enter, see generally Wisconsin v. Yoder, 406 U.S. 205 (1972); Stanley v. Illinois, 405 U.S. 645 (1972); Prince v. Massachusetts, 321 U.S. 158 (1944); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).
77 See Foster & Freed, supra note 4; Zaharoff, supra note 4.
79 See supra note 50, at 120-27.
80 Herron, 468 A.2d 803.
81 In Commonwealth ex rel. Williams v. Miller, 254 Pa. Super. 227, 385 A.2d 992 (1978), the Pennsylvania court awarded visitation rights to a maternal grandmother, after her divorcel daughter died. The language of the decision was broad enough to suggest that any person might seek visitation, just as any person has standing to seek custody of a child in Pennsylvania. (emphasis added).
factors in *Herron*, the court would not interfere with the parents' traditional authority to determine who will have access to their children.\textsuperscript{82}

In a recent case, however, a family court judge in New York broke with the family autonomy tradition and agreed to hear a visitation petition filed by grandparents against the natural parents. He did so despite a finding that the parents had a close, positive, intact nuclear family. Furthermore, the grandparents did not have a strong, ongoing relationship with their grandchildren; their petition was to see a newborn grandchild, and two grandchildren, aged six and ten, whom they had not seen in almost six years.\textsuperscript{83} The New York statute permitting the petition allows grandparents to apply for visitation rights when conditions exist into which "equity would see fit to intervene."\textsuperscript{84}

There are few other recent or reported cases in which grandparents sought visitation rights with a child in the care and custody of his or her natural parents. Yet, there are now statutes in five states other than New York which appear to permit such actions. Legislative histories are largely unavailable, and it is unclear whether legislatures intended such a serious break with the family autonomy tradition.\textsuperscript{85}

The parental autonomy tradition is not without support in the psychological literature. Its proponents include the authors of the most widely publicized, acclaimed, and criticized books on the custody of children: Goldstein, Freud, and Solnit.\textsuperscript{86} Consequently there is evidence supporting the view of one of the experts, who testified before the House Committee hearings, recommending that Congress proceed slowly with the adoption of a proposed grandparent statute.\textsuperscript{87}

2. Children in the Care and Custody of One Natural Parent

Large numbers of children do not live with both of their natural parents. One survey showed that in 1978, approximately twenty percent of all American children under eighteen years of age lived with only one, instead of both of their parents.\textsuperscript{88} Single parent custody, whether it results from separation, divorce, or the death

\textsuperscript{82} *Herron*, 468 A.2d at 805.
\textsuperscript{83} *In re La Russo*, 9 Fam. L. Rep. (BNA) 2647.
\textsuperscript{84} N.Y. Dom. Rel. Law § 72.
\textsuperscript{85} Conn. Gen. Stat. § 46b-59 ("any person" can petition for reasonable visitation rights in the best interest of the child); Del. Code Ann. tit. 10, § 950(7) (grants visitation rights "regardless of the material status of parents or relationship of the grandparent to the person having custody"); Idaho Code § 32-1008 (allows any grandparent who has a "substantial relationship" with a grandchild to petition for visitation rights); Mont. Code Ann. § 40-9-102 ("grandparent may be granted rights after a finding by the court that visitation rights are in the best interest of the child"); N.D. Cent. Code § 14-09-05.1 (grandparents or great-grandparents can be awarded reasonable visitation rights under a finding that such rights are "in the best interest of the child and would not interfere with the parent-child relationship").
\textsuperscript{86} See G.F.S.-I and G.F.S.-II, supra note 58, see also notes 68 & 69 and accompanying text.
\textsuperscript{87} *Hearings*, supra note 5, at 72 (testimony of Dr. Andre Derydyne).
\textsuperscript{88} Glick, *Children of Divorced Parents in Demographic Perspective*, 35 J. Soc. Iss. 112 (1979).
of a parent, raises concerns that are not present when a child is living in his or her intact natural family. Divorce and death disrupt the normal functioning of families and cause different amounts of stress to each family member. These unfortunate circumstances add additional factors to consider in relation to grandparent statutes.

Prior to the advent of grandparent statutes, the courts were in general agreement about the treatment of grandparents seeking visitation with children in the custody of one natural parent. For the most part, courts stated they did not treat such families differently from intact families. That is, the parental autonomy rule prevailed, and grandparents were denied the right to visit children if the custodial parent objected.99

Two things are apparent, however, regarding these cases. First, the disrupted families generally reacted in predictable ways. Often, parents sought help with child care from kin and in-laws during periods of disruption.91 Second, some courts had been willing to justify an exception to the parental autonomy rule when these kinds of special circumstances existed. Thus, some grandparents had been able to obtain court-enforceable visitation rights even before the present grandparent statutes were adopted.92 In other cases, where courts were unwilling to be so bold, legislatures had stepped in to correct seeming injustices.93 Therefore, it is not surprising, that the vast majority of states have passed legislation specifically authorizing grandparent visitation when the family has been disrupted by the death of a parent or by divorce.

a. Death. Statutes authorizing visitation upon the death of the child’s parent fall into three categories: (1) Some states allow courts to order grandparent visitation rights under any circumstances, subject, of course, to the best interest of the child;94 (2) A minority of states permit any grandparent of a grandchild whose

99 See generally Heatherington, Cox & Cox, Effects of Divorce on Parents and Children, in Non-Traditional Families (1982), and studies cited supra notes 22 & 23.
90 Note, Grandparent Visitation, supra note 1.
92 See, e.g., Miller, 254 Pa. Super. 227, 385 A.2d 992, which involved prestatutory visitation rights. In that case, after the parents divorced, the mother went with her child to live with a maternal aunt. The mother remarried, leaving her child with the aunt, and then died. Upon the mother’s death, the father was awarded custody, and the maternal aunt visited the child. When the maternal aunt died, the court ordered the father to let the child visit with her last maternal relative, i.e., the maternal grandmother. Accord Brock v. Brock, 281 Ala. 525, 205 So.2d 903 (1967); Parks v. Crowley, 221 Ark. 340, 253 S.W.2d 561 (1952); Benner v. Benner, 113 Cal. App. 2d 531, 248 P.2d 425 (1952); Bookstein v. Bookstein, 7 Cal. App. 3d 219, 86 Cal. Rptr. 495 (1970); Warman v. Warman, 496 S.W.2d 286 (Mo. Ct. App. 1973); Commonwealth v. Perry, 7 Pa. D. 240, 20 Pa. C. 245 (1897); Goodman v. Dratch, 192 Pa. Super. 1, 159 A.2d 70 (1970); and Douglass v. Merriman, 163 S.C. 210, 161 S.E. 452 (1931).
93 See, e.g., infra notes 120-27 and accompanying text.
parent or parents are deceased to petition for visitation rights; 92 and (3) A plurality of states, almost half, permit only the parents of the deceased parent to petition for visitation with their grandchildren. 96 Some of these states extend the same privilege to great-grandparents, 97 siblings, 98 or other relatives. 99

If the reason for permitting court-ordered visitation on the death of a parent is to assure that the child is not cut off entirely from one side of its family, 100 then the plurality rule makes sense. The law protects that side of the family which is no longer represented by a living parent. Before the statutory era, some courts used the theory of derivative rights to allow a child's extended family to stand in the shoes of the deceased parent. 101 The surviving parent represents his or her side of the family, and there is no corresponding need for a legislature to guarantee connection to that bloodline, by mandating visitation rights for the relatives of the survivor. He or she is free to function as an autonomous parent who can exercise discretion in allowing his or her own relatives to interact with the child.

The psychological literature suggests there may be a more important reason to mandate visitation by relatives after the death of the parent. Few events are more immediately traumatizing to a child than the death of a parent. 102 In fact, there are a number of large scale population studies that link parental loss in childhood to later psychiatric disorders, especially depression. 103 Authorities have learned, however, that the way particular children react to loss depends on a variety of factors, including certain protective factors enabling some children to withstand

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94 See supra note 54.

95 See supra note 55.

96 See supra note 56.


101 See, e.g., Krystek v. Schumacher, 120 Ill. App. 3d 50, 53, 458 N.E.2d 94, 97-98 (1983), vacating a grandparent visitation order after the child was adopted. The court wrote: "However, as a grandparent's status as such is derived from the relationship between the child and the natural parent . . ., an adoption which terminates the rights of the natural parent, also removes the basis for the relationship of the grandparent and thereby ends the status on which the statutory right to visitation rests." (citations omitted). Accord In re Gardiner, 287 N.W.2d 555 (Iowa 1980); DeWeese v. Crawford, 520 S.W.2d 522 (Tex. Civ. App. 1975).

102 Garmezy, Stressors of Childhood, in STRESS, COPING AND DEVELOPMENT IN CHILDREN 59 (1983).

103 Id.
stress better than others. One protective factor that lessens the impact of losing a parent is the quality of care and support the bereaved child receives following a parent’s death.104 Thus, if the justification for court-ordered visitation following the death of a parent is to minimize the child’s loss and grief and to prevent the child from suffering additional losses from being cut off from other relatives, then the plurality rule seems misguided. The death of a parent followed by the loss of any grandparent, not just the blood-related relatives of the deceased parent, is likely to decrease the child’s ability to deal with the loss. There is, therefore, a reason for states to adopt statutes ensuring children continued access to all relatives after the death of a parent.

b. Divorce. Most states also permit grandparents to intervene in divorce or dissolution proceedings, or to file separate petitions for visitation, when there has been a legal separation, divorce, or dissolution of the parents’ marriage. As in the case of a parent’s death, states are divided between those allowing any grandparent to obtain court-ordered visitation after a breakup of the marriage,105 those that limit visitation rights to the parents of the noncustodial parent,106 and those allowing visitation by grandparents if the parent fails to exercise his or her visitation rights.107

Since the vast majority of states permit any grandparent to seek court-ordered visitation when the parents are divorced, the rationale in divorce cases, unlike death cases, is not dependent on the bloodline theory or on the need to continue contact with both sides of the family. Presumably, legislatures were persuaded that the detriment a child might suffer as a result of court intervention in a custody or visitation matter is not worsened by the presence of additional parties.

There is, however, some question about the wisdom of such assumptions. For one thing, it is not clear that a right to petition necessarily includes a right to intervene in the dissolution proceeding itself.108 If the statute is unclear on this point, there is a new issue to be litigated. More importantly, there is some concern regarding the impact of additional parties on a dissolution proceeding. Most divorces

104 Id. at 65.
108 See infra notes 172-79 and accompanying text for a discussion of intervention rights.
are, in fact, negotiated.\textsuperscript{109} This is significant because it means that while there is technically litigation pending, matters such as money, property, custody, and visitation are actually settled privately by the divorcing parties and counsel. Some authorities have argued that the issues of custody and money, including support, alimony, and property settlements, are inextricably connected.\textsuperscript{110} In light of these facts, there is something unsettling about encouraging, permitting, or requiring additional parties to the negotiation process. It is possible for there to be more than two sets of grandparents seeking to join the negotiations, if the grandparents themselves are divorced. Especially in view of the fact that grandparents have no legal obligation of support, and no interest in marital property, they would enter such negotiations with rights but no responsibilities.\textsuperscript{111}

Another factor to consider is the recent trend toward mediation as an alternative to the traditional litigation and negotiation model for settling domestic matters. Several states have adopted statutes permitting, encouraging, or requiring mediation in divorce and custody actions.\textsuperscript{112} These statutes raise a number of important questions: Are grandparents to be permitted, encouraged, or required to participate in such mediation? How will their participation tip the balance of power? Should all grandparents participate, even in states where only the relatives of the noncustodial parent have protected legal interests?

Clearly, the permissive or mandatory intervention of grandparents into the dissolution process requires clarification by legislatures. The relationship between mediation and intervention should be explored and clarified, and the resulting statutes should be consistent with the policies justifying such visitation rights in the first instance.

c. Informal or temporary separation. Children in the care and custody of only one parent due to marital discord and informal separation, or due to hospitalization, institutionalization, or incarceration of one parent, have been largely ignored in grandparent visitation statutes.\textsuperscript{113} The absence of any legal proceedings

\textsuperscript{110} Id. at 964.
\textsuperscript{111} See infra notes 187-92 and accompanying text on grandparents support obligations, which are largely nonexistent.
\textsuperscript{112} See, e.g., ALASKA STAT. § 25.24.060, (mediation at the court’s discretion); CAL. CIV. CODE § 4607 (mandatory mediation in custody and visitation cases); CONN. GEN. STAT. § 46b-53 (conciliation at the request of either spouse or attorney); KY. REV. STAT. § 403.170 (conciliation on request of either party).
\textsuperscript{113} Although a few states provide for grandparent visitation when there is a legal separation, only two specifically provide by statute for such visitation in the absence of any legal proceedings. N.J. STAT. ANN. § 9:2-7-1 and TEX. FAM. CODE ANN. § 14.03(a)(1). Vermont, however, has recently passed a statute that is unlike any other. VT. STAT. ANN. tit. 15, § 1012. In addition to the usual grounds for grandparent standing (i.e., divorce or death of a parent), Vermont now permits grandparents to petition for visitation when a parent is physically or mentally incapable of making a decision. It appears
d. Stepparent adoption. An important and recurring issue involves the power of courts to grant grandparents visitation rights to see a child in the legal custody of one of its natural parents, when that child has been adopted by his or her stepparent. Despite litigation in nineteen states,\textsuperscript{115} legislation in seventeen states,\textsuperscript{116} and much legal commentary,\textsuperscript{117} the issue has been left unresolved by the legislatures in most states.

Typically, the issue has been viewed as a clash between two creatures of statute: adoption and grandparents visitation rights. As a result, courts have determined the outcome of the clash primarily by relying on principles of statutory construction and by ascertaining legislative intention. The majority of courts have found that the intent of adoption statutes, to engrat a child onto a new family tree by severing all ties with relatives of the nonadopting natural parent, should override the policy of maintaining family ties, which underlies the grandparent statutes. Thus, the majority common law rule is that stepparent adoptions terminate visitation rights that the assumption is that an autonomous parent who is able to make a decision will permit grandparent visitation.

\textsuperscript{114} One problem, of course, is that some separations are not caused by marital discord or institutionalization, but are living arrangements necessitated by parental education or career demands. Such families should probably be considered intact natural families, despite geographical separation of the parents.


\textsuperscript{116} See infra note 119.

\textsuperscript{117} Foster & Freed, Grandparent Visitation: Vagaries and Vicissitudes, supra note 67; Note, Grandparents' Statutory Visitation Rights and The Rights of Adoptive Parents, supra note 4; Note, Divesting Grandparents of Statutory Grandchild Visitation Rights by Stepparent Adoptions, supra note 4; Note, Adoption: Visitation Rights of Natural Grandparents, supra note 4.
of natural grandparents.118 Interestingly, legislatures do not agree. The majority of legislatures that have dealt expressly with the issue have mandated that visitation rights survive adoption by a stepparent.119 Although courts continue to cite them, many of the leading cases in this area have been overturned by such statues.120

The history of the Oklahoma law on the survival of grandparent visitation rights after adoption serves as a warning regarding the importance of careful statutory drafting. The Oklahoma legislature created visitation rights for the parents of a deceased parent.121 In a frequently cited case, Matter of Fox,122 involving an adoption by the paternal grandparents with the consent of the natural father, the Oklahoma court found that the adoption terminated the visitation rights of the maternal grandparents, even though the child’s mother was deceased. It did so in an opinion that claimed to rest on the statutory adoption scheme. The legislature responded by amending the law to permit continued visitation when a “consent to adopt” is executed to a blood relative.123 While the new statute would allow grandparents like those in Fox to retain their visitation rights (because the father in Fox had consented to adoption by his parents, who were blood relatives), it did not help grandparents who want to visit a child adopted by his stepfather. Because a stepparent is not a blood relative the amendment was held inapplicable to a stepparent adoption in another oft-cited case, Leake v. Grissom.124 Therefore, adoption by stepparents was held to cut off grandparents visitation rights.

The legislature was not happy with this result and amended the statute again, to provide for reasonable grandparent visitation rights when the parents are divorced or where one parent is deceased and the child is adopted by either a blood relative or the natural parent’s spouse. In such cases, the parents of the deceased or divorced natural parent are able to obtain visitation rights.125 This may have settled the prob-

118 See supra note 115.

But see statutes in four states which permit stepparent adoptions to terminate grandparent visitation rights: COLO. REV. STAT. § 19-1-116; IOWA CODE § 598.35; MISS. CODE ANN. § 93-6-7; and NEV. REV. STAT. § 123.123.


121 OKLA. STAT. tit. 10, § 60.16(3) (1971).
122 In re Fox, 567 P.2d 985.
123 OKLA. STAT. tit. 10, § 60.16(3) (Supp. 1978).
124 Leake, 614 P.2d 1107.
125 See infra note 115 (Supp. 1984).
lem. In two cases decided since the latest amendments, however, the Oklahoma courts have continued to construe the visitation statutes narrowly. For example, in Matter of K.S., T.W., and G.S.,126 children’s paternal grandparents were not permitted to petition for visitation rights after their daughter’s parental rights were terminated by the court. The court held the statute was limited to cases where the parents were divorced or where one parent was deceased, and had no applicability in situations where a parent was judicially determined to be unfit. Most recently, a similar result was reached where a stepfather adopted his wife’s children after her former husband’s parental rights were terminated for failure to pay support. The paternal grandparents were found to be without standing to petition for visitation rights because their rights were derived from their divorced son’s rights, and had, therefore, been terminated prior to the adoption, at the same time the father’s rights were terminated.127

3. Children Living With Neither of Their Natural Parents

A great many children live with neither of their natural parents for some or all of their lives. Included in this category are children in foster care (where arrangements can range from voluntary, informal agreements made by those who are temporarily unable to care for their children128 to involuntarily placed children adjudicated dependent, neglected, or abused);129 children in institutions, who have been adjudicated in need of supervision or delinquent, or who are awaiting trial;130 and children in permanent placements through adoption at birth or later. Grandparents and other relatives may seek access to any of these children.

a. In Loco Parentis. It is difficult, if not impossible, to estimate the number of children who are in the care and custody of friends or relatives at the request of parents who are unable or unwilling to care for them for a period of time. Legally,

128 Children may be “voluntarily” placed in foster care by parents who are unable or unwilling to care for them for some period of time, or may be adjudicated “neglected”, “deprived”, “in need of supervision” or “abused” and involuntarily removed until their parent(s) can be “rehabilitated.” In Smith v. Organization of Foster Families, 451 U.S. 816 (1977), the Supreme Court noted that it is the poor who most frequently resort to “foster care” on a voluntary basis. The middle and upper classes presumably rely on less formal arrangements for child care. Much has been written about foster care. See generally Areen, Intervention Between Parent and Child: A Reappraisal of the State’s Role in Child Neglect and Abuse Cases, 63 Geo. L.J 887 (1975); Foster & Freed, Child Custody, 39 N.Y.U.L. REV. 423 (1974); Mnookin, supra note 46; Mnookin, Foster Care-In Whose Best Interests? 43 Haw. Ed. REV. 599 (1973); Wald, State Intervention on Behalf of “Neglected” Children: A Search for Realistic Standards, 27 STAN. L. REV. 985 (1975); Wald, supra note 46; Wald, State Intervention on Behalf of Neglected Children: Standards For Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights, 28 STAN. L. REV. 623 (1976).
129 While the standards for involuntary removal of children from the custody of their parents vary from state to state, every state has a removal statute and procedure. For a survey of state laws on child abuse and neglect, see Katz, Howe & McGrath, Child Neglect Laws in America, 9 FAM. L.Q. (1975).
the parents remain guardians and custodians of their children, while someone else acts in loco parentis. The absence of any legal rights in the friends or relatives may have little to do with the effect of the separation on the child. These effects are more likely to depend on the reason for the separation, its length, and on the quality of care received in the interim. Nevertheless, as in the case of informally separated married couples, only two states have specifically provided for grandparent visitation when the child is informally and temporarily separated from both parents.  

A few states, however, have distinguished situations where the persons who act in loco parentis are the grandparents themselves. In these states, grandparents who live with and care for their grandchildren for a period of time may acquire enforceable rights to visit those grandchildren after they are returned to the care and custody of their parents.  

b. Foster Care. Children who have been formally placed in state-sanctioned foster care programs are in a different situation. Unless the parents surrender their rights to the child, the placement is considered temporary; thus, the mandate to the social service agency charged with overseeing foster care is to protect the family unit and work to reunite parent and child. Toward that end, parents are, in theory, encouraged to visit their child. In reality, the timing and conditions of such visitation are often inadequate for a variety of reasons, including overworked social workers and a lack of funds.  

Some states allow grandparents and other relatives to visit children who are in foster care, either by laws specifically referring to foster care or by statutes

130 Children who have been institutionalized for health or developmental reasons present a different problem. Ordinarily, the problem is not one of limiting visitation, but of encouraging parents and relations to maintain a relationship with the child. That problem is outside the scope of this Article. Neither does the Article address the specific issues related to children who are removed from their homes due to their own wrongdoing.

131 N.J. STAT. ANN. § 9:2-7.1; TEX. FAM. CODE ANN. § 14.03(e)(6).

132 See, e.g., MINN. STAT. ANN. § 257.022(2a); PA. STAT. ANN. tit. 23, § 1014 (grandparents can petition for visitation rights when child has lived with grandparent for more than twelve months); TEX. FAM. CODE ANN. § 14.03(e)(6) (grandparent who lives with child for 24 months can petition for access).

133 IDAHO CODE § 32-100 allows a grandparent who has a "substantial relationship" with a grandchild to petition for visitation rights. Presumably, that language would permit a grandparent who resided with a grandchild or acted in loco parentis to so petition.

134 The New York statute is typical. The legislative intent to protect the natural parents is set forth. [I]t is generally desirable for the child to remain with or be returned to the natural parent because the child's need for a normal family life will usually be best met in the natural home . . . ; The state's first obligation is to help the family with services . . . to reunite it if the child has already left home. . . .


135 One study, cited by the United States Supreme Court in Smith v. Organization of Foster Families, 431 U.S. 816, 836 n.39 (1976) (citing CHILD WELFARE INFORMATION SERVICES, PARENTAL VISITING INFORMATION, New York City Reports, Table No. 1 (Dec. 31, 1976)), found that 57.4% of all foster children in New York City had had no contact with their natural parents for the previous six months.

providing for grandparent petitions whenever there is any action affecting the custody of children. 136 Because formal foster care requires some sort of court approval or review in most states, it can be considered a proceeding affecting custody. Thus, grandparents seeking visitation rights during foster care proceedings may affect the outcome of the foster care decisions.

In California, as in most states, dependent children may be placed in foster care involuntarily, if a court finds that such disposition is in the child's best interest.137 Prior to placement, the law mandates a social study. The California legislature recently passed a statute which requires the social study in every dependent child proceeding to contain a discussion of whether the best interest of the child will be served by granting reasonable visitation rights to grandparents. 138 The California statute is the first of its kind.

There are certainly good reasons for permitting grandparents to visit children in foster care. Because foster care placement is considered temporary, there is no attempt to sever the child from his or her natural family and weld him or her to the foster family. Although legally considered a part of his or her natural family, the child undergoes the psychological effects of separation from it. Presumably, there is a strong interest in minimizing the negative effects of such separation. One way to do that is to permit and encourage grandparents to visit children in foster care. In an investigation of foster care, Fanshel and Shinn found that the intellectual, psychological, and physical development of children in long-term foster care was enhanced by visitation and contact, however minimal, with the biological family. 139

Encouraging relationships that are beneficial to children in foster care is made even more desirable by the gap between foster care's operation in theory and its operation in fact. As the Supreme Court has recognized in Smith v. Organization of Foster Families,140 the theory that foster care is temporary is far removed from its reality. For many children, foster care means "long term limbo." 141 Studies have shown that even when it is clear a foster child will not be returned to his or her natural parents, it is rare that he or she will achieve a stable home life through adoption into a permanent family. Instead, foster children frequently drift from one foster home to another.142 In these circumstances, visitation by the grandparents can provide continued ties to kin and some continuity of relationships over time.

136 See, e.g., COLO. REV. STAT. § 19-1-116; GA. CODE ANN. § 74-112; and MICH. COMP. LAWS ANN. § 722.27.
137 CAL. WELF. & INST. CODE § 362(a).
138 CAL. WELF. & INST. CODE § 358.1.
139 Fanshel & Shinn, Status Changes of Children in Foster Care: Final Results of the Columbia Longitudinal Study, 55 CHILD WELFARE 143, 145 (1976).
140 Smith, 431 U.S. 816.
141 Id. at 835-36.
c. Termination of Parental Rights. Some children are separated from both their natural parents permanently, by court termination of the parental rights, with or without a subsequent adoption. Generally, the purpose of termination proceedings is to free the child for adoption by another parent or parents. In reality, however, there are some children whose parents' rights have been terminated but who are never attached to a new family by adoption.\textsuperscript{143} Thus, there are times when it is in the child's interest not to terminate parental rights, even when a parent cannot adequately care for him or her, where the parent can still provide something of value to the child.\textsuperscript{144} Whether a state permits grandparent visitation to continue after termination of parental rights should be a factor in determining the best interests of the child. Where a termination of the parent's rights also divests grandparents of their rights, the value of the latter relationship to the child, and the impact of its loss, becomes a factor in determining whether it is in the child's best interest to terminate parental rights.

Because the issue has arisen in a number of cases already, and is likely to recur, legislatures should address the question of under what circumstances, if any, termination of parental rights should also divest the grandparents of visitation rights.\textsuperscript{145} Most courts which have decided the issue have held that the termination of parental rights also terminates the rights of grandparents.\textsuperscript{146} The courts' reasoning has been two-fold. First, courts have relied on the derivative rights doctrine of grandparents rights. Under this theory the grandparent's status is derived from the status of the child's parents. Because the grandparent can stand no higher than his or her own child, once the parent has lost his or her rights to the child, the grandparents also lose their rights.\textsuperscript{147} Second, courts have focused on the policy reasons for terminating parental rights: The termination of parental rights is intended to break old ties, to allow adoption, and to permit the child to begin anew. Thus, no purpose is served by continuing ties with the grandparents. Even when adoption is not imminent, courts have found that delay in severing ties between the child and his natural relatives only makes adoption and adjustment more difficult.\textsuperscript{148}

\textsuperscript{143} For a report on the data on children who are removed from their parents see Wald, supra note 128.

\textsuperscript{144} See, e.g., In re Michael G., 9 FAM. L. REP. (BNA) 2708 (Cal. Ct. App. 1983) in which an agency moved to terminate the rights of loving but retarded parents who were unable to adequately care for the developmentally retarded son. Finding that the child's chances of being adopted were "tenuous" and that he would benefit from a continued relationship with his parents, the court left the child in foster care, without terminating parental rights.

\textsuperscript{145} A few have done so. Nev. REV. STAT. § 123.123.3 (termination of parental rights also terminates grandparent rights); Tex. FAM. CODE ANN. § 1403(e) (grandparent whose child's parent-child relationship has been terminated can seek visitation rights).

\textsuperscript{146} In re Johnson, 210 Kan. 828, 504 P.2d 217 (1972); In re Ditter, 212 Neb. 855, 326 N.W.2d 675 (1982); In re Nicholas R., 457 A.2d 1359; Alexander, 10 FAM. L. REP (BNA) 1327; Krystek, 20 Ill. App. 3d 50, 458 N.E.2d 94; Id re K.S., T.W., and G.S., 654 P.2d 1050. But see Weichman v. Weichman, 50 Wis. 2d 731, 184 N.W.2d 882 (1971) (grandparent rights are not derivative).

\textsuperscript{147} In re Ditter, 212 Neb. at 856, 326 N.W.2d at 676; accord, In re Johnson, 210 Kan. 828, 504 P.2d 217; Krystek, 120 Ill. App. 3d 50, 458 N.E.2d 94.

\textsuperscript{148} In re Ditter, 212 Neb. 856, 326 N.W.2d 675.
An argument can be made that the relationship between the grandparent and child is not derivative, but has an importance of its own, which should not be terminated simply because the parental rights are terminated, particularly where immediate adoption is not pending nor likely.

d. *Termination of Parental Rights Followed by Adoption.* Permanent separation of the child from his natural parents presents an even stickier set of issues when it is followed by adoption: What should happen to the visitation rights of grandparents whose grandchild is adopted? Should it matter who adopts the child? Should it matter who the grandparent is?

The laws governing adoptions are statutory in every state. Most adoption laws were originally enacted in the 1940s. At that time the adoptees were usually infants, frequently illegitimate, whose parents had surrendered them for adoption by strangers, before the child had any real contact or relationship with its natural family. Adoption statutes reflected this social reality; they provided for closed records to prevent the child from suffering the stigma of illegitimacy, and to protect the family against intrusion. The intent of the laws was to sever the child from the old family and "engraft him on to a new family tree."

Although the social reality has changed, for the laws in most states have not. As a result, most courts faced with the need to decide whether grandparents may visit their natural grandchildren have reasoned that adoption and grandparent visitation rights are both creatures of statute, and therefore, the decision should be based on statutory interpretation. In the absence of specific authority to hold otherwise, most courts have found that adoption terminates the rights of natural grandparents. According to the courts, this permits the foundation of a relationship with the new parents that can ""bloom and grow faster" free of the threat of outside interference . . . posed by the appearance of a natural, well intended parent . . . [or grandparent]."" In other words, the societal interest in the establishment of a permanent and stable family unit requires the severence of all former family bonds and relationships.

The statutory exceptions are narrow. In most states, the exceptional circumstances warranting continued grandparent visitation are limited to stepparent

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For a discussion of the sociological changes involving adoptions, see *In re Adoption of Anthony*, 113 Misc. 2d 26, 27-32, 448 N.Y.S.2d 377, 378-80 (N.Y. Fam. Ct. 1984) and sources cited therein. The court noted that in 1975, 50% of all adoptions in New York involved foster children who were older, rather than illegitimate babies who had never known their biological parents.


In *re Nicholas*, 457 A.2d at 1360 (quoting *In re Christine*, 121 R.I. 203, 206, 397 A.2d 511, 513 (1979)).
adoptions,\textsuperscript{153} or adoption by grandparents,\textsuperscript{154} apparently on the theory that all grandparents should be treated equally. Only a few states have created a more general exception for adoptions by other relatives, or permit any adoption to be an "open adoption."\textsuperscript{155}

The majority position is consistent with the family autonomy tradition. Since an adopted child is once again attached to an intact family, that newly created family should be accorded the same respect, integrity, and freedom from court intervention that is accorded to an intact, biological family. A court which orders adoptive parents to allow visitation, but refuses to order biological parents to do so, is indeed guilty of treating the two differently. Furthermore, as several courts and commentators have noted, if grandparents' rights survive adoption, there is the spectre of multiple sets of grandparents and great-grandparents (and if they divorce, step-grandparents, etc.) vying for a child's time.\textsuperscript{156}

There may be, however, good reasons for allowing grandparent visitation to continue after the adoption of older children, and in all cases of adoption by relatives. It is one thing for adults to use the adoption process to reorganize legal relationships with children of deceased parents, or whose parents have married, or divorced and remarried. It is another thing to ignore the fact that the child may experience lingering emotional ties to the parents and family members he or she knew before the adoption.\textsuperscript{157} It seems particularly inappropriate to apply a doctrinal "severing of the child from one family tree and engrafting him or her onto another" when the other family tree is nothing more than another branch of the same tree, as is the case when adoption by a blood relative terminates visitation by others.\textsuperscript{158} Some courts, sensitive to the fact that children may benefit from those

\textsuperscript{153} See, e.g., ALA. Code § 30-3-4; ARK. STAT. ANN. § 56-215(b); GA. Code § 74-112; KAN. STAT. ANN. § 30-129; MASS. Ann. Laws ch. 119 § 39D; TENN. Code Ann. § 36-6-301; and TEX. Fam. Code Ann. § 14.03(c)(6).


\textsuperscript{155} OKLA. Stat. Ann. tit. 10, § 60.16(3) (visitation rights survive adoption by stepparent or blood relative); VT. Stat. Ann. tit. 15, § 1016.

Courts in California, New Jersey, New York, and North Dakota have created "open adoptions" without specific statutory authorization. See Reeves v. Bailey, 53 Cal. App. 3d. 1019, 1024-26, 126 Cal. Rptr. 51, 55-57 (1975) (paternal grandparent visitation allowed after adoption by maternal grandparents); In re Buccholz, 326 N.W.3d 203 (N.D. 1983) (parties could agree to visitation by paternal aunt, uncle, and grandparents as part of divorce decree), and cases cited infra notes 159-67 and accompanying text.

\textsuperscript{156} Bikos, 88 Mich. App. 157, 276 N.W.2d 541; In re M., 140 N.J. Super. at 95, 355 A.2d at 213; Gault, supra note 4.

\textsuperscript{157} The distinctions between family adoptions and stranger adoptions is described in Maidment, Access and Family Adoptions, 40 Mod. L. Rev. 293 (1977), which discusses the British experience with open adoptions.

\textsuperscript{158} See, e.g., In re Gardiner, 287 N.W.2d 555 in which the adoption by a paternal aunt and uncle of a child whose mother died, and whose father's paternal rights had been terminated, was found to terminate any rights of the maternal grandparents, Contr. Graziano, 50 Ohio App. 2d 83, 361 N.E.2d 525.
lingering ties to their biological families, especially after they have suffered the loss of one or both parents, have denied adoptions to prevent the unnecessary severing of such ties.\textsuperscript{159}

A few states have pioneered the concept of an “open adoption” in which the court approves an adoption decree allowing or mandating continued visitation with members of the child’s biological family. Under this approach, the New York courts have allowed visitation with parents\textsuperscript{160} and birth siblings\textsuperscript{161} after a child’s adoption by foster parents, and have permitted grandparent visitation after a child has been adopted by stepparents,\textsuperscript{162} grandparents,\textsuperscript{163} and foster parents.\textsuperscript{164} In so doing, New York courts have considered the humanitarian nature of visitation laws which permit equity to intervene and to award grandparent visitation:

When one or both of the parents have died, the child usually suffers great emotional stress. By enacting [N.Y. Domestic Relations Law] Section 72, the Legislature has recognized that, particularly where a relationship between the grandparents and grandchild has been established, the child should not undergo the added burden of being severed from his or her grandparents who may also provide the natural warmth, interest and support that will alleviate the child’s misery.\textsuperscript{165}

In recognizing open adoptions, the New York court implicitly considered several factors: (1) The changed social reality, and the fact that not only is secrecy no longer critical, but it is impossible where the adoptive child is old enough to know his birth parents; (2) The fact that adoptions by relatives do not involve adjustment to a new family; and (3) A growing awareness of the need for an adoptive child to know his roots for psychological and medical reasons.\textsuperscript{166}

Open adoptions have also been allowed in Maryland, New Jersey, and England.\textsuperscript{167} In a New Jersey case, the court appointed a guardian on whom the
adopted children could call to enforce their right to see their (divorced) natural father after they were adopted by their stepfather.\textsuperscript{168}

Allowing open adoptions, or other permanent placement of children while continuing some relationship with the child's biological parents, has been endorsed by experts who have worked with children and families. It has been suggested that such alternatives to either long-term foster care, or adoption that terminates parental rights, would benefit children who have been abused or neglected by their parents, yet retain memories of them and emotional ties to them.\textsuperscript{169} Presumably, the same argument can be made to justify continued visitation with the child's grandparents after adoption.

C. Procedural Rights

Once a decision has been made to create substantive legal rights to visit with grandchildren, the issue is raised concerning what procedural rights attach to them.

1. Notice

For example, the issue arises as to whether grandparents have a right to be notified of proceedings directly affecting grandchildren, such as custody, guardianship visitation, neglect, abuse, paternity, court-review of foster care placements, or adoption; or indirectly affecting them, as in divorce, separation, or the dissolution of a marriage. It is clear that other rights, for example, a right to intervene, or to petition in certain events, may be rendered meaningless unless there is notice of the proceeding. While the issue has arisen in a number of cases,\textsuperscript{170} only a few legislatures have thus far made the notice requirement statutory.\textsuperscript{171}

A number of other issues arise concerning notice. If notice is required, who must receive it, all grandparents or only those who have a right to intervene in the proceedings? Again, in the interest of minimizing litigation, notice issues could be addressed by legislation.

\textsuperscript{168} In re Adoption of Children by F., 170 N.J. Super. 419, 406 A.2d 986.

\textsuperscript{169} Derdyne, Rogoff & Williams, Alternatives to Absolute Termination of Parental Rights After Long-Term Foster Care, 31 Vand. L. Rev. 1165 (1978); see also Wald, supra note 128.

\textsuperscript{170} See, e.g., In re Adoption of Berman, 44 Cal. App. 3d 687, 118 Cal. Rptr. 804 (1975) holding that grandparents were not entitled to notice of stepparent adoption. In Muggenborg v. Kessler, 630 P.2d 1276 (Okla. 1981) (notice of adoption proceedings filed by the other grandparents was required to be sent to one set of grandparents). Although the issue involved custody, not visitation, the Muggenborg decision is noteworthy because the court found that the right of kin related to the same degree of consanguinity was constitutionally required. Id. at 1278.

\textsuperscript{171} Ark. Stat. Ann. § 56-212(g) (notification to parents of deceased parents of children if the parent-child relationship had not been eliminated at the time of death); contra Fla. Stat. § 61.13 ("standing to seek enforcement of visitation rights does not mean that grandparents must be made parties or be given notice of dissolution, or be contestants"); Tex. Fam. Code Ann. § 11.09(3) (persons having access to children under order of court are entitled to notice of suits affecting the parent-child relationship).
2. Intervention

A second procedural issue concerns the rights of grandparents to intervene in various proceedings affecting the custody and legal status of their grandchildren. Since intervention issues have been litigated frequently, it would behoove legislatures to address the issue directly. This is particularly true in proceedings that are not concerned solely with the child, such as divorce, separation, dissolution, and annulment proceedings. These proceedings involve a cluster of issues concerning the rights and obligations between the parents, including property divisions, alimony, and support. Because there is room for debate as to the desirability of permitting grandparent intervention in such proceedings, legislative clarification seems especially important here. Few states, however, have addressed the specific rights of grandparents to intervene in divorce proceedings by clear statutes.

There are policy reasons why states might want to prohibit grandparent intervention in marital actions which affect not only custody and visitation rights, but also important aspects of the parent's relationship. First, couples should be encouraged to do what they already do in most cases: settle the details of their separation by private negotiation and court approval. States agreeing that there are benefits to such private dispute settlements ought not to make them more difficult by allowing additional parties, like grandparents, to intervene. From the grandparents' point of view, no rights need be lost by exclusion from divorce proceedings. There are no states in which a divorce cuts off grandparents' rights. On the contrary, the filing of a divorce action is frequently one of the limited numbers of events that triggers such rights.

The argument in favor of mandating such intervention, of course, is that grand-

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123 Such intervention is allowed by statute in three states: GA. CODE ANN. § 74-112(b)(1); Mo. REV. STAT. § 452.400; N.C. GEN. STAT. § 50-13.2. But statutes in two states are explicit that the right to petition does not mean that grandparents have a right to intervene in dissolution proceedings: FLA. STAT. § 61.132(c); N.D. CENT. CODE § 14-09.

124 For sources of psychological studies indicating that children benefit when parents agree on custody arrangements see, Note, Lawyering for the Child: Principles of Representation in Custody and
parents in need of a court’s decree permitting them to visit their grandchildren should not be required to increase litigation costs, and waste time and energy by having to litigate a second time and in a separate judicial hearing. Generally, it is better to resolve all custody matters affecting the child in one proceeding.

A grandparent’s need for a right to intervene, or at least to be heard, in proceedings solely concerned with the custodial or legal status of their grandchildren, for example, in adoption, termination of parental rights, abuse, or neglect cases, may be more critical. In a number of states, adoption, or the termination of parental rights, serves to terminate the grandparents’ rights as well. Given this possibility, appellate courts in some jurisdictions have allowed grandparents to intervene in adoption or termination proceedings. Other courts have refused to overrule the trial court’s exercise of its discretion to control the evidence in the case, even though it means the grandparent loses a significant right, without being heard by the court.

Grandparents who are permitted to intervene in these proceedings have no right to affect dispositions by withholding their consent. No state requires the consent of a grandparent to the adoption of a grandchild, or to the termination of a parent’s rights, unless the grandparent is also the legal guardian of the child. This is clearly evidence that grandparents’ rights are not regarded as highly as parental rights; most states require the consent of a noncustodial parent, who has enforceable visitation rights, to the adoption of his or her children. Few states permit open adoption allowing a noncustodial parent to retain visitation rights after a stepparent adoption. Thus, the requirement that a noncustodial parent’s consent be obtained prior to a child’s adoption has prevented the custodial parent from using an adoption proceeding to arbitrarily cut off the child’s relationship with the noncustodial parent. One commentator recently has argued that a noncustodial parent has a constitutional right to visit with his or her children. Grandparents’ rights, only recently recognized, are not generally considered to rise to a similar level of importance.


See supra note 150.

Quarles, 272 Ark. 51, 611 s.w.2d 757; Mathis, 258 S.C. 321, 188 s.e.2d 466; Cook, 271 S.C. 136, 245 S.E.2d 612; In re J.R. & S.R., 315 N.W.2d 750 (grandparents had a right to intervene in juvenile court proceeding to terminate parental rights pursuant to Iowa R. Civ. P. 75 because “any person interested in the subject matter” can intervene); C.f. Roquemore, 275 Cal. App. 2d 912, 80 Cal. Rptr. 432, (denying grandparents intervention in adoption because visitation would not be affected by the outcome of the adoption proceeding).

Krieg, 419 N.E.2d 1015 (grandparents not entitled to be heard in adoption proceeding even though visitation rights would be terminated); In re Nicholas, 457 A.2d 1359 (R.I. 1983) (paternal grandfather of child born out of wedlock had no standing to be heard at stepparent adoption). See also In re Coverdell, 30 Wash. App. 677, 637 P.2d 911 (1981) (denying foster parents a right to intervene in a dependency proceeding brought against the child’s mother).

3. Standards for Awarding Visitation

Most legislatures have set forth the circumstances under which grandparents can petition for visitation rights. In most of these statutes, however, the decision to grant visitation rights in a particular case is left entirely to the judge’s discretion. Often, the only restriction on the exercise of that discretion is that the visitation further the best interests of the child.181 Only a few states provide any further guidance for the exercise of the judge’s discretion.182 In a handful, the courts are required to consider the existing relationship between the child and petitioner, and whether the visitation will interfere with the parent-child relationship.183 One state, New Mexico, has required that visitation rights not conflict with the child’s education or with prior established visitation privileges.184

A compelling argument can be made that statutes should articulate clear standards, so that a parent can know when visitation will be ordered, and can cooperate in negotiating such visits, instead of litigating them.185 This is the direction in which most states have moved regarding custody. Typically, custody statutes will list a variety of factors to be considered in awarding custody.186

Another aspect of the decision in each case involves the burden of proof. Again, there is a marked distinction between statutes involving parents and those involving grandparents and other nonparents. While states frequently mandate visitation with the noncustodial parent, except under narrowly prescribed circumstances,187 grandparents only benefit from a similar presumption, that visitation with them will be in the child’s interest, in a few jurisdictions.188 Given the lack of social

179 See supra notes 160-69 and accompanying text, on visitation rights after adoption.
181 The California statute is typical:
Reasonable visitation shall be awarded to a parent unless it is shown that visitation would be detrimental to the best interests of the child. In the discretion of the court, reasonable visitation rights may be granted to any other person having an interest in the welfare of the child.
CAL. CIV. CODE § 4601.
182 In a recently-passed statute, Vermont became the first state to spell out a list of factors to be taken into account in actions to award grandparent visitation rights. VT. STAT. ANN. tit. 15, § 1013.
183 IDAHO CODE § 32-1008; MINN. STAT. ANN. § 257.022; NEV. REV. STAT. § 123.123; N.D. CENT. CODE § 14-09-05.1; PA. STAT. ANN. tit. 23, §§ 1012-1014.
184 N.M. STAT. ANN. § 40-9-1.
185 The argument is made by Mnookin & Korhauser, supra note 109.
186 See, e.g., WIS. STAT. ANN. § 767.24.
187 See, e.g., WIS. STAT. ANN. § 767.245(1) ("A parent is entitled to reasonable visitation rights unless the court finds, after a hearing, that visitation would endanger the child's physical, mental, or emotional health.").
188 See, e.g., CAL. CIV. CODE § 4601. However, a few states provide that, in the discretion of the court, grandparents shall be awarded visitation unless it is shown that such rights are detrimental to the child’s welfare. HAWAI'I REV. STAT. § 571; ILL. ANN. STAT. ch. 110 1/2, § 11-7.1. Another state has phrased the question of whether visitation is in the child’s best interests. WASH. REV. CODE § 26.09.240 (1983). A similar presumption has been created by case law in New Jersey. See Globman v. Globman, 158 N.J. Super. 338, 386 A.2d 390, 394 (N.J. App. Ct. 1978). Cf. Browder v. Harmeyer, 453 N.E.2d
science research findings supporting the presumption that the grandparent-grandchild relationship is necessarily important to either, the majority rule appears appropriate.

4. Responsibilities of Grandparents with Visitation Rights

It can be argued that a person who claims legal rights to visit a child should also bear some legal responsibility for that child, including financial support. Generally, however, the law has separated the rights from the responsibilities.

In every state, parents are responsible for the support of their children. Sometimes those responsibilities survive the termination of parental rights and the adoption of the child.\(^{199}\) Although they are rarely invoked, some states have filial responsibility laws imposing special financial responsibilities on relatives, including grandparents, of the poor.\(^{190}\) These laws are generally designed to ensure the care and support of elderly and needy relatives, who either do not receive or do not qualify for welfare.\(^{191}\) An argument can be made that a similar responsibility should be imposed on grandparents who have obtained visitation rights. Where there is no statutory obligation, however, the courts have been reluctant to impose any support obligations on grandparents.\(^{192}\)

The relationship between a parent’s duty to support and his or her right to visit is an issue whenever the child is no longer in that parent’s custody. Generally, courts are reluctant to condition parental visitation rights on compliance with support orders. They have also been hesitant to terminate support obligations in cases where the custodial parent has frustrated attempts to visit the child.\(^{193}\)

There are few reported cases in which trial courts have imposed support obligations on grandparents seeking visitation rights, and this Author has found no case

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301 (1983) in which the court found that a grandparent’s due process rights were not violated when her grandchild was taken for placement in a foster home without a finding that the grandmother was unfit. The court noted that regardless of the grandmother’s relationship to the child, it can never and will never, absent adoption, approach the importance attached to the parent-child relationship.


\(^{190}\) For an analysis of such statutes see Garrett, Filial Responsibility Laws, 18 J. Fam. L. 793 (1980).

\(^{191}\) Id. at 793-794.

\(^{192}\) The issue has arisen in at least two cases involving minors who applied for public assistance for their out-of-wedlock children. In both cases, the courts held that they could not be denied such aid on the basis of their parent’s resources, as grandparents are not financially responsible for support of grandchildren. Haggard v. Idaho Dept of Health & Welfare, 98 Idaho 55, 558 P.2d 84 (1977); Boines v. Levine, 44 A.D.2d 765, 354 N.Y.S.2d 252 (N.Y. App. Div.), cert. denied, 419 U.S. 1040 (1974).

This Author does not take the position that the relatives (grandparents) of the poor should have any greater responsibility for their grandchildren than do the relatives of the middle and upper classes.

in which an appellate court has allowed such an order to stand.\textsuperscript{194} In a Utah case, an appellate court held that it would be appropriate to impose responsibilities on a stepparent who was seeking a hearing to determine his right to visit his stepchildren after his divorce.\textsuperscript{195} The court reasoned that a stepparent, who has no statutory duty of support in Utah, had assumed such a duty by placing himself \textit{in loco parentis}. Correspondingly, he would also be entitled to enforceable visitation rights. The same argument could be made for grandparents. Only Connecticut has specifically stated that a grant of grandparent visitation rights shall not be contingent upon any order of financial support.\textsuperscript{196}

There are several good reasons for making a duty to support and the grant of visitation rights dependent on one another. One is that in divorce cases there is evidence that the parties themselves choose this arrangement. One authority, having negotiated divorce settlements, has described the issues of support and custody as "inextricably bound."\textsuperscript{197} The law would acknowledge a reality that already exists. Knowing that grandparents were obligated to help out financially would likely make it easier for many parents to accept the fact that courts can order grandparent visitation and therefore lead to more negotiated arrangements and fewer lawsuits.

A second reason for imposing a support obligation on anyone asserting a legal right to visit a child is that support is one of the most critical factors affecting a child’s well-being. There is evidence that one of the most detrimental aspects of divorce is the downward economic mobility of the mother, who has traditionally been awarded sole custody of the children.\textsuperscript{198} Anything that increases the economic well-being of the single-mother head of household will inure to the benefit of the children. It has been suggested that the deleterious effects on children due to the father’s absence can be eliminated if economic stability is provided to the mother.\textsuperscript{199} If grandparents are to receive the benefit of this relatively new right of visitation it is logical to impose some responsibility to aid their grandchildren.

\textsuperscript{194} In Blalock v. Blalock, 559 S.W.2d 442 (Tex. Civ. App. 1977), a Texas appellate court reversed a support order entered against grandparents in a divorce action since neither grandparent intervention, nor the granting of access to children, served to create a general duty to support the child. A similar outcome was reached by the high court in Florida, in Engle v. Engle, 323 So. 2d 658 (Fla. 1975), where maternal grandparents, who were awarded custody in a divorce action, were ordered by the lower courts to contribute to the support and welfare of the children. The court reversed the order, reasoning that the duty to support belongs to the father, not to the grandparents, despite the custody award.\textsuperscript{195}

\textsuperscript{195} \textit{Gribble}, 583 P.2d 64.

\textsuperscript{196} \textit{CONN. GEN. STAT.} § 46b-59.

\textsuperscript{197} Mnookin & Korhauser, \textit{supra} note 109.


Persons with statutory visitation rights might also be held responsible for maintaining the relationship by continuing to visit the child once visitation rights have been awarded. In an otherwise thoughtful article on postdivorce visitation by a parent, one commentator dismissed the question of whether visitation should be forced on a noncustodial parent as being self-evident. It should not be forced, the argument goes, because forced visitation would become, at best, an empty ritual. The problem, of course, is the creation of a dual standard. Visitation is frequently forced on children who do not want to see the visitor for one reason or another, yet must engage in the meaningless ritual, because a court, not believing it meaningless, has ordered it. There are ways of creating a responsibility to continue the relationship without ordering a grandparent to visit, such as the proposal that damages be awarded against a parent or grandparent who disregards the scheduled visitation. There is also the possibility that visitation rights could terminate if not exercised, although few courts have been willing to invoke such a serious remedy against parents who fail to visit.

5. Termination and Frustration of Grandparent’s Visitation Rights

As with any rights, issues arise concerning under what circumstances they may be lost. Two sets of circumstances might lead to a court’s termination of a grandparent’s visitation rights: The occurrence of events or circumstances not directly related to the grandparent-child relationship, such as the termination of parental rights, or the adoption of the child; and circumstances or developments occurring in the relationship between the grandparent and grandchild.

Events like the termination of parental rights or the adoption of the grandchild are sometimes grounds for terminating or divesting grandparents rights. As suggested above, courts have wrestled with the issue of whether those events should terminate rights by trying to ascertain the legislative intent. Legislatures that have not already done so, should determine whether such events do or do not divest grandparents of their rights, and should pass appropriate legislation. Even if legislatures choose to leave this determination to the court’s discretion, legislation is appropriate to provide guidelines, as not all courts are willing to voluntarily assume such broad discretion. It makes little sense for trial courts to exercise enlightened discretion, only to learn from an appellate court that the legislature did not intend for it to have such discretion.

Visitation rights might also be terminated by a court for changes in the relationship between the grandparent and grandchild. Most statutes allow a court to

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200 Novinson, supra note 180, at 1972.
202 See infra notes 204-06 and accompanying text on termination of parents’ right to visit for failure to pay support.
203 See supra notes 145-69 and accompanying text for a discussion of grandparent rights after adoption or termination of parental rights.
award visitation rights when they are in the best interest of the child, with few guidelines limiting the court's discretion. Presumably, even in the absence of specific authority, courts can modify or terminate visitation that is no longer in the best interests of the child.

The court's discretion could be narrowed or guided by listing factors a court should consider, as is commonly done in custody statutes. Among the factors that might be considered are: (a) Threatened or actual physical abuse; (b) Neglect, or failure to properly care for the child during visits; (c) Failure to support, where the obligation was imposed; (d) Negative impact on the child's mental, emotional, or physical well-being; (e) Abandonment, or lapse of time between visits; and (f) Undermining parental authority, or continued animosity between the grandparents or parents.

Abuse or neglect of a child are generally grounds for terminating parental custody and, if not corrected, all parental rights, including visitation. Where the primary justification for grandparents rights is that they benefit the child, abuse, neglect, or a negative impact on the child's mental or physical health should all be grounds for terminating such visits.

Generally, the obligation to support a child has not been linked to the right to visit the child. As a result, it is rare that a parent's visitation rights will be terminated because the parent failed to meet his or her support obligations, although it has been suggested that cutting off visitation is an appropriate means of enforcing support, and a few courts have done so. If a grandparent were similarly responsible for some support, the failure to meet that responsibility might justify the termination of the grandparent's rights.

In the prestatutory era, animosity between the grandparents and parents was frequently cited as a reason for denying grandparent visitation rights. Such animosity is no longer generally recognized as sufficient reason for denying visitation. If, however, the animosity continues and increases, or if there is evidence

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206 Comment, supra note 193.

207 Klobnock v. Abbott, 303 N.W.2d 149 (Iowa 1981); See also Acker v. Acker, 365 So. 2d 180 (Fla. 1978) suggesting that in appropriate cases visitation could be terminated for nonpayment of support.

208 See supra note 1.

of actual, not simply threatened, attempts by the grandparents to undermine the authority of the parents, this may be reason to terminate grandparents rights.

Abandonment or lapse of time between visits is rarely a reason for terminating a parent’s right to visit his children.*** Neither should it be a ground for terminating grandparents rights, especially since many grandparents with emotionally close relationships to their grandchildren visit infrequently or irregularly, even where visitation is encouraged by the parent and there has been no court order. Where the issue has been raised by parents, the courts have so far found that abandonment should not be a ground for denying or terminating grandparents visitation rights.**

Custodial parents can frustrate the visitation rights of grandparents in a variety of ways that recall the actions which frustrate noncustodial parents rights, by non-cooperation in the timing and arrangements, or by relocating. In relocation cases involving visitation rights of noncustodial parents, a number of interests must be balanced: the custodial parent’s rights to both geographic mobility and to act as the autonomous custodian of the child; the noncustodial parent’s interest in a continued relationship with his child; and the ubiquitous best interest of the child. It is not uncommon for the courts to require court approval before relocation, or to approve stipulations that limit the parent’s mobility.***

Given possible constitutional dimensions to the right to travel,** and to the autonomy tradition,** and considering a good argument can be made that a custodial parent and child are a family, court involvement in relocation decisions results in a significant infringement on family life. States permitting court intervention to assure the best interests of the child, in cases where relocation will deprive a parent of visitation rights, may have to contend with grandparents seeking similar court

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*** See In re La Russo, 9 Fam. L. Rep. (BNA) 2647, a recent New York case in which the grandparents sought visitation with two grandchildren they had not seen in almost six years. The court allowed the action.

** See Note, The Judicial Role in Post-Divorce Child Relocation Controversies, supra note 198 for an excellent student piece in which the authors argue that the courts should not determine issues of relocation.


intervention. States that would prevent the intrusion of the courts into family life when such intrusion is unnecessary would do well to consider legislation specifically prohibiting courts from restricting a parent’s geographical mobility for the purpose of guaranteeing a grandparent’s visitation rights. A few have already done so.

A final issue involves the frequency with which grandparents can invoke the assistance of a court to enforce their rights. One commentator has recommended limiting actions to prevent harassment of the parent and to minimize the burden of defending against endless petitions. Some states have limited the number of petitions that can be brought for just that reason.

Vermont has gone even further, in providing that grandparents cannot appeal from decisions involving visitation rights. That position makes a good deal of sense because appeals could otherwise be taken be either party, not only on the major issue of whether or not visitation should be ordered, but on the amount or timing of such visitation. In the interest of avoiding endless litigation, and in recognition of the great amount of discretion usually allowed trial judges in cases involving custody, such a restriction may make some sense.

IV. Conclusion

Since 1966, statutorily created grandparent visitation rights have spread to forty-eight states. Legislative attention to certain recurring issues, such as the effect on visitation rights of changes in the parent-child relationship through termination of parental rights or through adoption, could aid in avoiding, or at least limiting, litigation. Procedural rights to notice, intervention in divorce, custody, and other proceedings affecting the legal status of children should be adequately addressed by legislatures. State legislatures should be encouraged to evaluate existing statutes to address the issues which have repeatedly encouraged litigation. This evaluation should begin by addressing the underlying social policies furthered by grandparent statutes.

With few exceptions, the recent legislation creating grandparent visitation rights does not extend the same right to other adults seeking to maintain a relationship with a child over the objections of the child’s parents. While there is little scientific literature to support the underlying presumption that the grandparent-grandchild

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215 There have been two reported cases in which grandparents with visitation rights sought to prevent custodial parents from moving. In both, the courts upheld the right of the parent to move. In re Marriage of Jenkins, 116 Cal. App. 3d 766, 172 Cal. Rptr. 331 (1981); Fisher v. Fisher, 390 So. 2d 142 (Fla. 1980).


217 Zaharoff, supra note 4, at 201.

218 Petitions can be brought only once in every two years in Colorado and Montana. Colo. Rev. Stat. § 19-1-116(3); Mont. Code Ann. 40-9-102(3).
relationship is uniquely beneficial and important to either grandparent or grandchild, the grandparent statutes nevertheless furthers a significant social policy. Narrowly drafted grandparent statutes can be viewed as a limited accommodation to political realities that do not drastically alter the traditional view that the family is, and should be, a unit that functions best with limited state interference. The narrow grandparent exception to the common law rule that no adult except a non-custodial parent should have access to a child over the custodial parent’s objections thus limits state interference. Where this policy is intended, it makes sense for legislatures to draft narrow statutes spelling out the limited circumstances in which grandparents can petition for the court’s help in maintaining visitation rights. From this view, it follows that changes in the parent’s status, due to the termination of parental rights or the adoption of the child, should serve to terminate grandparent’s rights as well. Unless the result is too politically unpopular to be ignored, as has been the case in stepparent or grandparent adoptions, the new, adoptive family should have as much autonomy as the biological family.

A different social policy is furthered by legislation that does not focus only on the rights of grandparents, but rather on the rights of children. The Author agrees with those who argue that the autonomous family policy is really a policy that furthers the rights of autonomous parents, and may conflict, at times, with the rights of children. From this point of view, grandparent statutes may indeed be too narrow to adequately protect children’s rights. There is good evidence that children benefit from continued relationships with adults other than their parents or grandparents in a variety of situations, particularly when they are separated from their parents, as in foster care placements or during the stressful periods following a parent’s or sibling’s death. A statute that grants visitation rights to only grandparents, or worse, only grandparents related to the deceased parent, does not adequately protect the needs of all children. A better statute would protect the child’s interest in maintaining his or her relationship with any adult. Any built-in presumptions that treats grandparents more favorably than other relatives or stepparents, for example, should not be acceptable unless and until studies demonstrate the grandparent-grandchild relationship is uniquely important.

A consistent policy of protecting those relationships that a child develops with adults would also resolve the recurring problem involving the effect of adoption on visitation rights. Once it is established that any adult with a significant relationship to a child can petition for visitation rights, there is little justification for terminating that right simply because the adult’s label has changed from aunt to non-aunt, or from grandfather to non-grandfather, by virtue of an adoption decree. Instead visitation rights would be granted or denied based on the strength of the child’s relationship with the adult.

Until social science findings can conclusively demonstrate which of the competing social policies underlying the various grandparent statutes are most important or in need of the greatest protection from the law, a uniform visitation law is to be avoided. Experimentation with different laws, designed to protect different
interests, is preferable at this stage to a uniform law, based on one social policy, to the exclusion of any others. The diversity of the currently existing statutes can provide us with invaluable sources for comparison, ultimately enabling us to make a more enlightened decision regarding the policies we choose to promote in our society.