

**“GRANDMA, GRANDPA, WHERE ARE
YOU?”—PUTTING THE FOCUS OF
GRANDPARENT VISITATION
STATUTES ON THE BEST
INTERESTS OF THE CHILD**

Christine Davik-Galbraith

In her note, author Christine Davik-Galbraith argues that familial problems such as divorce should not end the grandparent-grandchild relationship and that it is the right of both parties to visit with one another. Currently, the United States addresses the issue of grandparent visitation rights through the court system. Because the Supreme Court has yet to address third-party visitation rights, rulings concerning visitation issues among the lower courts have been inconsistent. Ms. Davik-Galbraith recommends that states adopt legislation that specifically handles grandparent visitation rights and balances the interests of the grandparent, parent, and child, with the best interests of the child being the determining factor in granting visitation rights.

I. Introduction

Nobody can do for children what grandparents can. Grandparents sprinkle stardust on the lives of children. Without contact with grandparents, a child loses a vital and natural way to see and understand that he is part of a continuum, that he has roots, that he is the future and the hope of all those who preceded him.¹

Alex Haley (1992)

Grandparents play a special role in the life of a child. If a grandparent is physically, mentally, and morally fit, then a grandchild almost always will benefit from contact with the grandparent.² Grandparents and grandchildren often form a very special bond,

1. CHAIRMAN OF SUBCOMM. ON HUMAN SERVICES, HOUSE SELECT COMM. ON AGING, 102D CONG., 2D SESS., GRANDPARENTS RIGHTS: A RESOURCE MANUAL (Comm. Print 1992) [hereinafter RESOURCE MANUAL].

2. King v. King, 828 S.W.2d 630, 632 (Ky. 1992).

each benefiting from contact with the other.³ From their grandparents, children learn respect, gain a sense of responsibility, and feel genuine love.⁴ Similarly, grandparents are invigorated by the exposure to youth, gain an insight into today's changing society, and avoid the loneliness which is often a part of an aging parent's life.⁵

The benefit a child receives from a relationship with a grandparent has even been documented in psychological studies on the subject. One such study specifically examined the tie between grandparents and grandchildren, finding that children who had a close relationship with their grandparents were more comfortable with the elderly and often more emotionally secure than other children.⁶ In addition, these children are less likely to be abused by their parents or to become drug users or victims of suicide because grandparents form the first line of support when children are experiencing problems with their parents.⁷

Because the relationship between grandparent and grandchild is so important, all fifty states now have statutes addressing grandparent visitation rights.⁸ These statutes, however, are far from uniform

3. *Id.*

4. *Id.*

5. *Id.*

6. Rebecca Brown, *Grandparent Visitation and the Intact Family*, 16 S. ILL. U. L.J. 133 (1991); see also JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* (1979).

7. Brown, *supra* note 6, at 137; see also *Grandparents' Visitation Rights: Hearing on S. Con. Res. 40 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. 35-36 (1983) (statements of Dr. Arthur Kornhaber, founder and president of the Foundation for Grandparenting) [hereinafter *Senate Resolution*].

8. ALA. CODE § 26-10A-30 (Michie 1992), § 30-3-4 (Michie 1989 & Supp. 1994); ALASKA STAT. § 25.24.150 (Michie 1991); ARIZ. REV. STAT. ANN. § 25-337.01 (West 1991 & Supp. 1994); ARK. CODE ANN. § 9-13-103 (Michie 1993); CAL. FAM. CODE §§ 3100, 3102-3104 (West 1994); COLO. REV. STAT. § 19-1-117 (West 1990); CONN. GEN. STAT. § 46b-59 (West 1986); DEL. CODE ANN. tit. 10, § 1031 (Michie 1993 & Supp. 1994); FLA. STAT. ANN. ch. 752.01 (West Supp. 1995); GA. CODE ANN. § 19-7-3 (Michie Supp. 1994); HAW. REV. STAT. ANN. § 571-46.3 (Michie Supp. 1994); IDAHO CODE § 32-719 (Michie Supp. 1994); 750 ILL. COMP. STAT. § 5/607 (Michie Supp. 1994); IND. CODE ANN. § 31-1-11.7-2 (Michie Supp. 1994); IOWA CODE ANN. § 598.35 (West Supp. 1994); KAN. STAT. ANN. § 38-129 (1993); KY. REV. STAT. ANN. § 405.021 (Michie Supp. 1994); LA. REV. STAT. ANN. § 9:344 (West Supp. 1995); ME. REV. STAT. ANN. tit. 19, §§ 1001-1005 (West Supp. 1994); MD. FAM. LAW CODE ANN. § 9-102 (Michie Supp. 1994); MASS. GEN. LAWS ANN. ch. 119, § 39D (Law. Co-op. 1994); MICH. COMP. LAWS ANN. § 722.27b (West 1993); MINN. STAT. ANN. § 259.622 (West 1992); MISS. CODE ANN. § 93-16-3 (Law. Co-op. 1994); MO. ANN. STAT. § 452.402 (West Supp. 1994); MONT. CODE ANN. § 40-9-102 (1993); NEB. REV. STAT. § 43-1802 (1993); NEV. REV. STAT. ANN. § 125A.330 (Michie 1993); N.H. REV. STAT. ANN. § 458:17-d (Butterworth 1992); N.J. REV. STAT. ANN. § 9:2-7.1 (West Supp. 1994); N.M. STAT. ANN. § 40-9-2 (Michie 1994); N.Y. DOM. REL. LAW § 72 (West

and many of them are poorly drafted. They often require a particular event to occur before grandparents are allowed to even file a petition for visitation rights.

Most statutes allow grandparents to petition for visitation rights when the child's parents divorce,⁹ or separate,¹⁰ or when one of the

1993); N.C. GEN. STAT. §§ 50-13.2 to -13.2A (1987); N.D. CENT. CODE § 14-09.05.1 (Michie 1993); OHIO REV. CODE ANN. §§ 3109.051, 3109.11-.12 (Anderson Supp. 1994); OKLA. STAT. ANN. tit. 10, § 5 (West Supp. 1995); OR. REV. STAT. § 109.121 (1993); 23 PA. CONS. STAT. ANN. §§ 5311-5313 (West 1991); R.I. GEN. LAWS §§ 15-5-24.2 to -24.3 (Michie Supp. 1994); S.C. CODE ANN. § 20-7-420 (Law. Co-op. Supp. 1993); S.D. CODIFIED LAWS ANN. § 25-4-52 (1993); TENN. CODE ANN. § 36-6-301 (Michie 1991); TEX. FAM. CODE ANN. § 14.03 (West 1986 & Supp. 1995); UTAH CODE ANN. § 30-3-5 (Michie Supp. 1994); VT. STAT. ANN. tit. 15, §§ 1011-1012 (Butterworth 1989); VA. CODE ANN. § 20-107.2 (Michie Supp. 1994); WASH. REV. CODE ANN. § 26.09.240 (West Supp. 1995); W. VA. CODE §§ 48-2B-2, -4, -6 (Michie Supp. 1994); WIS. STAT. ANN. §§ 767.245, 880.155 (West 1991); WYO. STAT. § 20-7-101 (Michie 1994).

9. ALA. CODE § 26-10A-30 (Michie 1992), § 30-3-4 (Michie 1989 & Supp. 1994); ALASKA STAT. § 25.24.150 (Michie 1991); ARIZ. REV. STAT. ANN. § 25-337.01 (West 1991 & Supp. 1994); ARK. CODE ANN. § 9-13-103 (Michie 1993); CAL. FAM. CODE § 3100 (West 1994); COLO. REV. STAT. § 19-1-117 (West 1990); DEL. CODE ANN. tit. 10, § 1031 (Michie Supp. 1994); FLA. STAT. ANN. ch. 752.01 (West Supp. 1995); GA. CODE ANN. § 19-7-3 (Michie Supp. 1994); HAW. REV. STAT. ANN. § 571-46.3 (Michie Supp. 1994); 750 ILL. COMP. STAT. § 5/607 (Michie Supp. 1994); IND. CODE ANN. 31-1-11.7-2 (Michie Supp. 1994); IOWA CODE ANN. § 598.35 (West Supp. 1994); LA. REV. STAT. ANN. § 9:344 (West Supp. 1995); ME. REV. STAT. ANN. tit. 19, §§ 1001-1005 (West Supp. 1994); MASS. GEN. LAWS ANN. ch. 119, § 39D (Law. Co-op. 1994); MICH. COMP. LAWS ANN. § 722.27b (West 1993); MISS. CODE ANN. § 93-16-3 (Law. Co-op. 1994); MO. ANN. STAT. § 452.402 (West Supp. 1994); NEB. REV. STAT. § 43-1802 (1993); NEV. REV. STAT. ANN. § 125A.330 (Michie 1993); N.H. REV. STAT. ANN. § 458:17-d (Butterworth 1992); N.J. REV. STAT. ANN. § 9:2-7.1 (West Supp. 1994); N.M. STAT. ANN. § 40-9-2 (Michie 1994); N.C. GEN. STAT. §§ 50-13.2 to -13.2A (1994); OHIO REV. CODE ANN. § 3109.051 (Anderson Supp. 1994); 23 PA. CONS. STAT. ANN. §§ 5312-5313 (West 1991); R.I. GEN. LAWS §§ 15-5-24.2 to -24.3 (Michie Supp. 1994); S.D. CODIFIED LAWS ANN. § 25-4-54 (1993); TEX. FAM. CODE ANN. § 14.03 (West 1986 & Supp. 1995); UTAH CODE ANN. § 30-3-5 (Michie Supp. 1994); VT. STAT. ANN. tit. 15, § 1011 (Butterworth 1989); VA. CODE ANN. § 20-107.2 (Michie Supp. 1994); W. VA. CODE § 48-2B-2 (Michie Supp. 1994); WIS. STAT. ANN. § 767.245 (West 1991); WYO. STAT. § 20-7-101 (Michie 1994).

10. ALASKA STAT. § 25.24.150 (Michie 1991); ARK. CODE ANN. § 9-13-103 (Michie 1993); CAL. FAM. CODE § 3104 (West 1994); COLO. REV. STAT. § 19-1-117 (West 1990); DEL. CODE ANN. tit. 10, § 1031 (Michie Supp. 1994); GA. CODE ANN. § 19-7-3 (Michie Supp. 1994); HAW. REV. STAT. ANN. § 571-46.3 (Michie Supp. 1994); 750 ILL. COMP. STAT. § 5/607 (Michie Supp. 1994); LA. REV. STAT. ANN. § 9:344 (West Supp. 1995); MASS. GEN. LAWS ANN. ch. 119, § 39D (Law. Co-op. 1994); MICH. COMP. LAWS ANN. § 722.27b (West 1993); MISS. CODE ANN. § 93-16-3 (Law. Co-op. 1994); NEV. REV. STAT. ANN. § 125A.330 (Michie 1993); N.H. REV. STAT. ANN. § 458:17-d (Butterworth 1992); N.J. REV. STAT. ANN. § 9:2-7.1 (West Supp. 1994); N.M. STAT. ANN. § 40-9-2 (Michie 1994); OHIO REV. CODE ANN. § 3109.051 (Anderson Supp. 1994); 23 PA. CONS. STAT. ANN. § 5312 (West 1991); S.D. CODIFIED LAWS ANN. 24-5-52 (1993); TEX. FAM. CODE ANN. § 14.03 (West 1986 & Supp. 1995); W. VA. CODE § 48-2B-2 (Michie Supp. 1994).

parents dies.¹¹ Some statutes also grant grandparents standing if the child is adopted by a family member (for example, a stepparent)¹² or if the paternity of a child born out of wedlock is established.¹³ Very few statutes allow grandparents to petition for visitation rights solely on the ground that it is in the child's best interests.¹⁴ As a result, children living in intact families—those where both parents are married and living together—are often denied the protection and benefit of grandparent visitation rights legislation, even if visitation would be in their best interests.

11. ALA. CODE § 30-3-4 (Michie 1989 & Supp. 1994); ALASKA STAT. § 25.24.150 (Michie 1991); ARIZ. REV. STAT. ANN. § 25-337.01 (West Supp. 1994); ARK. CODE ANN. § 9-13-103 (Michie 1993); CAL. FAM. CODE § 3102 (West 1994); COLO. REV. STAT. § 19-1-117 (West 1990); DEL. CODE ANN. tit. 10, § 1031 (Michie Supp. 1994); FLA. STAT. ANN. § 752.01 (West Supp. 1995); GA. CODE ANN. § 19-7-3 (Michie Supp. 1994); HAW. REV. STAT. ANN. § 571-46.3 (Michie Supp. 1994); 750 ILL. COMP. STAT. § 5/607 (Michie Supp. 1994); IND. CODE ANN. § 31-1-11.7-2 (Michie Supp. 1994); IOWA CODE ANN. § 598.35 (West Supp. 1994); LA. REV. STAT. ANN. § 9:344 (West Supp. 1995); ME. REV. STAT. ANN. tit. 19, § 1003 (West Supp. 1994); MASS. GEN. LAWS ANN. ch. 119, § 39D (Law. Co-op. 1994); MICH. COMP. LAWS ANN. § 722.27b (West 1993); MINN. STAT. ANN. § 257.022 (West 1992); MISS. CODE ANN. § 93-16-3 (Law. Co-op. 1994); MO. ANN. STAT. § 452.402 (West Supp. 1994); NEB. REV. STAT. § 43-1802 (1993); NEV. REV. STAT. ANN. § 125A.330 (Michie 1993); N.H. REV. STAT. ANN. § 458:17-d (Butterworth 1992); N.J. REV. STAT. ANN. § 9:2-7.1 (West Supp. 1994); N.M. STAT. ANN. § 40-9-2 (Michie 1994); OHIO REV. CODE ANN. § 3109.051 (Anderson Supp. 1994); 23 PA. CONS. STAT. ANN. § 5311 (West 1991); R.I. GEN. LAWS § 15-5-24.1 (Michie Supp. 1994); S.D. CODIFIED LAWS ANN. 24-5-54 (1993); TEX. FAM. CODE ANN. § 14.03 (West 1986 & Supp. 1995); VT. STAT. ANN. tit. 15, § 1012 (Butterworth 1989); W. VA. CODE § 48-2B-4 (Michie Supp. 1994); WIS. STAT. ANN. § 880.155 (West 1991); WYO. STAT. § 20-7-101 (Michie 1994).

12. ALA. CODE § 26-10A-30 (Michie 1992) (adoption by a stepparent, grandfather, grandmother, brother, half brother, sister, half sister, aunt, uncle); GA. CODE ANN. § 19-7-3 (Michie Supp. 1994) (adoption by a family member); N.H. REV. STAT. ANN. § 458:17-d (Butterworth 1992) (stepparent); N.M. STAT. ANN. § 40-9-2 (Michie 1994) (adoption by a stepparent, relative, individual designated in deceased parent's will to care for child, individual who sponsored the child at a baptism or confirmation of an established religion); N.C. GEN. STAT. § 50-13.2A (1987) (stepparent, relative).

13. ARIZ. REV. STAT. ANN. § 25-337.01 (West Supp. 1994); CAL. FAM. CODE § 3103 (West 1994); IND. CODE ANN. § 31-1-11.7-2 (Michie Supp. 1994); IOWA CODE ANN. § 598.35 (West Supp. 1994); MASS. GEN. LAWS ANN. ch. 119, § 39D (West 1994); MICH. COMP. LAWS ANN. § 722.27b (West 1993); NEB. REV. STAT. § 43-1802 (1993); N.H. REV. STAT. ANN. § 458:17-d (Butterworth 1992); OHIO REV. CODE ANN. § 3109.12 (Anderson Supp. 1994); W. VA. CODE § 48-2B-6 (Michie Supp. 1994).

14. CONN. GEN. STAT. § 46b-59 (West 1986); FLA. STAT. ANN. ch. 752.01 (West Supp. 1995); IDAHO CODE § 32-719 (Michie Supp. 1994); KAN. STAT. ANN. § 38-129 (1993); KY. REV. STAT. ANN. § 405.021 (Michie Supp. 1994); MD. FAM. LAW CODE ANN. § 9-102 (Michie Supp. 1994); MO. ANN. STAT. § 452.402 (West Supp. 1994); MONT. CODE ANN. § 40-9-102 (1993); N.Y. DOM. REL. LAW § 72 (West 1993); N.D. CENT. CODE § 14-09.05.1 (Michie 1993); OKLA. STAT. ANN. tit. 10, § 5 (West Supp. 1995); OR. REV. STAT. § 109.121 (1993); TENN. CODE ANN. § 36-6-301 (Michie 1991); WASH. REV. CODE ANN. § 26.09.240 (West Supp. 1995); WIS. STAT. ANN. § 767.245 (West 1991).

If a grandparent is denied access to his or her grandchild due to problems in the grandparent-parent relationship, does any rational basis exist for distinguishing between different classes of grandparents based on the status of the child's parents' relationship? Is the grandparent-grandchild relationship less important or beneficial to the child when the parents are still married and living together than when the parents are divorced? Or are many of the state statutes ignoring the most important consideration—the best interests of the child?

This note examines whether the decision to grant grandparents standing to petition for visitation rights based on factors such as marital status of the parents or death of a parent makes sense. This note looks at various states' interpretations of statutes addressing intact families, particularly those statutes that appear to allow any grandparent to petition for visitation rights. In addition, this note argues that a uniform state law addressing grandparent visitation rights is necessary and that this law should focus on whether visitation is in the best interests of the child, not on the child's parents' relationship. Finally, this note proposes a model statute that allows all grandparents to petition for visitation, but still strikes a proper balance between the rights of all the parties involved: grandparent, parent, and child.

II. History of Grandparents' Rights

At common law, grandparents had no legal right to visitation. If a parent decided the grandparent would not be allowed to see his or her grandchild, then the parent's decision would stand, regardless of the effect this decision had on the child. This was due to the fact that at common law, "[t]he right to determine the third parties who are to share in the custody and influence of and participate in the visitation privileges with the children should vest primarily with the parent who is charged with the daily responsibility of rearing the children."¹⁵ The right of a grandparent to visit with a grandchild was therefore considered a moral right, rather than a legal right.¹⁶

Consequently, in the absence of a statute granting grandparents visitation rights, courts were reluctant to turn a moral right into a

15. Chodzko v. Chodzko, 360 N.E.2d 60, 63 (Ill. 1976).

16. Edward M. Burns, *Grandparent Visitation Rights: Is It Time for the Pendulum to Fall?*, 25 FAM. L.Q. 59 (1991); see also Bronstein v. Bronstein, 434 So. 2d 780 (Ala. 1983).

legal right, leaving that task up to the legislature. Some courts, however, recognized an equitable exception to the common-law rule when special circumstances existed and a close and meaningful relationship existed between the grandparent and the grandchild.¹⁷ The situations in which courts justified imposing grandparent visitation in the absence of statutory authority included: (1) a grandparent's daily contact with the child following the death of the child's parent;¹⁸ (2) the death of a father in World War II and a provision in the father's will that his parents act as trustees of a fund for the benefit of his child;¹⁹ (3) the inability of a father to exercise visitation because of his military assignment in a distant state;²⁰ and (4) the agreement of the maternal and paternal grandparents to allow the paternal grandparents visitation with their common orphaned grandchild prior to the paternal grandparents consenting to the adoption of the child by the maternal grandparents.²¹

In contrast to grandparents who have no common-law right, absent special circumstances, to visit a grandchild when a parent objects, a parent does have a constitutionally protected right to determine his or her child's companionship, care, custody, and management.²² The case that first explicitly recognized the fundamental right to parent is *Meyer v. Nebraska*.²³ In that case, the U.S. Supreme Court recognized that one of the fundamental rights the Constitution grants is the right to freedom, including the right to bring up a child without unreasonable interference by the government.²⁴

More than four decades after the *Meyer* case, state statutes began to recognize that grandparents do have some rights to visitation of their grandchildren. Part of this was due to the fact that older persons were becoming an increasingly vital political force.²⁵ Grandparents'

17. Burns, *supra* note 16, at 61.

18. Hawkins v. Hawkins, 430 N.E.2d 652 (Ill. App. Ct. 1981); *see also* Burns, *supra* note 16, at 61.

19. Lucchesi v. Lucchesi, 71 N.E.2d 920 (Ill. 1947); *see also* Burns, *supra* note 16, at 62.

20. Solomon v. Solomon, 49 N.E.2d 807 (Ill. 1943); *see also* Burns, *supra* note 16, at 62.

21. Loveless v. Michalak, 522 N.E.2d 873 (Ill. 1988); *see also* Burns, *supra* note 16, at 62.

22. Burns, *supra* note 16, at 61.

23. Meyer v. Nebraska, 262 U.S. 390 (1923).

24. Meyer, 262 U.S. at 399.

25. *Grandparents Rights: Preserving Generational Bonds: Hearing Before the Subcomm. on Human Services of the House Select Comm. on Aging*, 102d Cong., 1st Sess. 14 (1991) [hereinafter *Generational Bonds*].

rights groups began to organize and lobby state legislatures for more comprehensive grandparents' rights statutes. Today, approximately seventy-five percent of all older Americans are grandparents.²⁶ In terms of raw numbers, this translates into fifty-eight million grandparents in the United States, with that number expected to grow to ninety-eight million by the year 2002.²⁷

The earliest statutes addressing grandparents' rights usually dealt only with situations in which a parent had died and the living spouse denied the grandparents visitation. As the divorce rate began to rise in the 1960s and 1970s, more state legislatures formulated statutes that gave grandparents standing to petition for visitation if the child's parents were divorced or separated. However, not all states have reacted as quickly to expand grandparent visitation rights into other situations. Moreover, the statutes differ widely on how to analyze a grandparent's visitation petition if the statute does give the grandparent standing. The majority of the statutes look to whether visitation is "in the best interests of the child," but the statutes never articulate what criteria should be used in determining if it is. Currently, only six states²⁸ have specific guidelines to guide the court in determining whether visitation is in the child's best interests.²⁹ As a result, there is much room for judicial bias in determining whether visitation is appropriate in a given case, because an appropriate standard to determine whether visitation is in the best interests of the child usually is missing.

Even if grandparents are successful in their attempt to win visitation, they still face another major obstacle. Because grandparent visitation statutes vary from state to state, a grant of visitation in one state is not given full faith and credit in any other state. As a result, if a grandparent wins rights to visitation and the child's family moves across state borders, the grandparent's visitation rights will not be honored. Instead, the grandparent will have to try to establish standing to petition for visitation rights in the new state (which may be impossible, depending on the new state's statute and on the status of the child's family). If the grandparent is able to petition the court for

26. *Id.* at 1.

27. *Id.*

28. FLA. STAT. ANN. ch. 752.01 (West Supp. 1995); NEV. REV. STAT. ANN. § 125A.330 (Michie 1993); N.H. REV. STAT. ANN. § 458:17-d (Butterworth 1992); N.J. REV. STAT. § 9:2-7.1 (West Supp. 1994); N.M. STAT. ANN. § 40-9-2 (Michie 1994); OHIO REV. CODE ANN. §§ 3109.051, 3109.11-.12 (Anderson Supp. 1994).

29. *Generational Bonds*, *supra* note 25, at 15.

visitation rights, he or she then will have to attempt to convince another court that visitation is in the child's best interests, expending even more time and money in the process.

It is probably not surprising, then, that the volume of litigation on grandparent visitation is rapidly increasing. As many as 100 or more cases may have reached the state appellate court level since 1980, with many more filed at the trial court level.³⁰ Often these cases focus on whether the grandparent even has standing to petition for visitation rights, never getting to the most important issue: Whether it is in the child's best interests to form a relationship or continue an existing one with his or her grandparent.

III. Analysis

A. The Response of the Courts

The Supreme Court has yet to decide a case involving third-party access to children. The Court, however, has made numerous rulings that have interpreted the rights of a parent to raise his or her child free from state interference. As previously mentioned, the first case that explicitly recognized the fundamental right to parent is *Meyer v. Nebraska*.³¹ In *Meyer*, the Supreme Court found a statute prohibiting the instruction of any subject in any language other than English to be unconstitutional.³² In doing so, the Court examined what rights the Fourteenth Amendment grants to parents:³³

Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.³⁴

The Court went on to say that this liberty could not be interfered with under the guise of protecting the public interest by legislative action that is arbitrary or without reasonable relation to some purpose within the competency of the state to effect.³⁵ Thus, the Court created the right of parents to raise their children free from state interference.

30. *Id.* at 14.

31. *Meyer v. Nebraska*, 262 U.S. 390, 390 (1923).

32. *Id.* at 402.

33. *Id.* at 399.

34. *Id.*

35. *Id.* at 399-400.

This theory was revisited in *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, decided less than one year after *Meyer*.³⁶ In this case, the Court found that a statute requiring attendance at public schools was unconstitutional because it violated the Fourteenth Amendment. In reaching this decision, the Court stated that the legislation “unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control.”³⁷ The Court grounded its decision on the premise that rights guaranteed by the Constitution could not be abridged by legislation that had no reasonable relation to “some purpose within the competency of the state.”³⁸

Parents have thereby long enjoyed the protection of the Constitution in their freedom to raise their children without undue state interference. This right to parental autonomy is not absolute, however.³⁹ Under the common-law doctrine of *parens patriae*, the state may intervene in order to protect the welfare of minors and others who are deemed incapable of properly caring for themselves.⁴⁰ This doctrine has traditionally given the state the power to protect the interests of the child in a child custody determination, as well as the power to step in and take over parental control in extreme circumstances—for example, when a child has been subjected to abuse or neglect by his or her parents.⁴¹ *Parens patriae*, therefore, is the source of the state’s power to promulgate grandparent visitation legislation.

Grandparent visitation rights, however, have not been recognized by the U.S. Supreme Court. As a result, the states have been left to question whether they actually exist. In attempting to reach a decision, state courts have been far from unanimous. This is especially true in one particular area: granting grandparents visitation rights to grandchildren living in intact families. State courts have dealt with this situation in a variety of ways.

Many state courts refuse to even allow grandparents of grandchildren living in intact families to petition for visitation rights.

36. *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925).

37. *Id.* at 534-35.

38. *Id.* at 535.

39. Brown, *supra* note 6, at 140.

40. *Kujawinski v. Kujawinski*, 376 N.E.2d 1382 (Ill. 1978); *see also* Burns, *supra* note 16, at 61.

41. *See generally* *Thompson v. Oklahoma*, 487 U.S. 815, 825 (1988); *Milen Kovic v. Milen Kovic*, 416 N.E.2d 1140, 1146 (Ill. 1981).

Other courts grant them standing, but find that the circumstances (usually that the parents are still married) do not necessitate state-ordered grandparent visitation. Moreover, even fewer states have actually found that grandparent visitation rights should be granted when the grandchild's family is intact. In order to fully appreciate the disparity in state decisions, a brief survey of the approaches a few state courts have taken is appropriate.

In *Hawk v. Hawk*, the Tennessee Supreme Court ruled on a petition for visitation by paternal grandparents whose grandchild was in an intact family.⁴² Although the state's statute is worded so that any grandparent may be granted reasonable visitation if it is in the child's best interests,⁴³ the court decided that this should not be applied to intact families.⁴⁴ The court ruled that granting visitation to a grandchild whose parents were married and fit violated the state's constitutional right to privacy in parenting decisions.⁴⁵ Although the court did not directly address the issue, in a footnote the court declared that the "state has a stronger argument for court intervention to protect the extended family when the nuclear family has been dissolved."⁴⁶ The court did not state why this was so.

In *Emanuel S. v. Joseph E.*, the New York Court of Appeals examined the limits of the state's grandparent visitation rights statute.⁴⁷ In *Emanuel S.*, the grandparents petitioned for visitation rights with their grandson, whose parents were married and living together as an intact family.⁴⁸ The New York statute addressing grandparents' rights allowed petitions in two situations. First, if either parent of the grandchild had died, grandparents had an absolute right to standing.⁴⁹ Second, a court could grant standing if the court found that circumstances existed in which equity would see fit to intervene.⁵⁰ The question presented in this case was whether the grandparents had fulfilled the conditions of the second method of gaining standing to petition.⁵¹ The New York Court of Appeals held that grandparents were not precluded from seeking visitation with a grandchild merely

42. *Hawk v. Hawk*, 855 S.W.2d 573, 575 (Tenn. 1993).

43. TENN. CODE ANN. § 36-6-301 (Michie 1991).

44. *Hawk*, 855 S.W.2d at 577.

45. *Id.*

46. *Id.* at 580.

47. *Emanuel S. v. Joseph E.*, 577 N.E.2d 27 (N.Y. 1991).

48. *Id.*

49. *Id.*

50. *Id.* at 30.

51. *Id.*

because the nuclear family was intact and the parents were fit.⁵² The court did not grant visitation, however, because it concluded that the facts as presented were not adequate to find standing; the case was remanded to the lower court to make that determination. The case is important because it did not completely rule out the possibility that grandparents of grandchildren in intact families could be granted standing. Whether a grandparent actually will make it into a New York courtroom with standing in such a situation remains to be seen.

In *Lehrer v. Davis*, the plaintiffs sued for the right to visit their grandchildren, who were living in an intact family.⁵³ The Connecticut Supreme Court concluded that the custodial rights of an intact family did not automatically preclude the granting of visitation rights to the grandparents and decided that the validity of the state statute was "not ripe for adjudication on the present record."⁵⁴ Before setting the issue aside, however, the court commented on whether it was appropriate to base grandparent visitation orders on the status of the child's parents:⁵⁵

The fact that a family is intact does not guarantee the absence of child abuse. Even absent child abuse, there is no compelling constitutional requirement that the legislature must defer, in every instance, to the child-rearing preferences of the nuclear family. "To assert that, as a matter of law, a widowed, divorced, remarried, or unmarried parent is subject to greater [s]tate interference than a married parent would be to assert that the former is less fit than the latter to raise his or her own child." . . . [T]he legislature may choose to recognize a public interest in affording a child access to those outside the nuclear family who manifest a deep concern for his or her growth and development.

The Connecticut Supreme Court has not yet revisited the issue of whether grandparents may petition for visitation of a grandchild in an intact family.

The Kentucky Supreme Court, on the other hand, has made a conclusive determination on the issue. In *King v. King*, the plaintiff petitioned for visitation rights to his grandchild, whose parents were married and living together.⁵⁶ The Kentucky grandparent visitation statute provided that reasonable visitation rights could be granted to either the paternal or maternal grandparents of a child if it were in the

52. *Id.*

53. *Lehrer v. Davis*, 571 A.2d 691 (Conn. 1990).

54. *Id.* at 695.

55. *Id.* at 694-95.

56. *King v. King*, 828 S.W.2d 630, 630 (Ky. 1992).

best interests of the child to do so.⁵⁷ The court found that not only was the statute constitutional, but a grant of visitation was appropriate.⁵⁸ In ruling on the statute's constitutionality, the court stated that although the U.S. Constitution recognizes the right to rear children without undue governmental interference, that right is not inviolate.⁵⁹ The court went on to say that it is not unreasonable for the state to say that the development of a loving relationship between family members is desirable, and that the arbitrariness of the statute is obviated by the requirement that visitation be granted by a court only after finding that it is in the best interests of the child.⁶⁰

As the above discussion shows, the methods by which state courts decide grandparent visitation rights cases are far from uniform, and the U.S. Supreme Court has yet to decide a case involving third-party access to children.

B. Congressional Authority to Regulate Grandparent Visitation Rights Legislation

Congress has no direct authority to legislate on family questions. Article 1, Section 8 of the Constitution enumerates the various areas in which Congress is authorized to act, and grandparent visitation rights do not readily fall within any of these categories.⁶¹ Because of this section and the Tenth Amendment, legislation dealing with grandparent visitation rights is generally the responsibility of individual states.⁶² There are a number of indirect approaches, however, to possibly *persuade* states to enact uniform legislation.

1. NONBINDING RESOLUTIONS

Congress has in the past promulgated "sense of the Congress" resolutions on domestic relations topics.⁶³ Although these resolutions have no legally binding effect on the individual states, they are introduced with the hope that they will affect the states' view on the issue in question. The theory behind these resolutions is that if Congress

57. KY. REV. STAT. ANN. § 405.021 (Michie Supp. 1994).

58. *King*, 828 S.W.2d at 632-33.

59. *Id.* at 631.

60. *Id.* at 632.

61. RESOURCE MANUAL, *supra* note 1, at 83; *see also* U.S. CONST. art. I, § 8.

62. RESOURCE MANUAL, *supra* note 1, at 83.

63. *Id.*

goes on the record as favoring a particular policy, the individual state legislatures will adopt laws advancing that policy.⁶⁴

This has been done in the past with grandparent visitation legislation; however, the resolutions have not had the desired result. In 1985, the House of Representatives adopted a resolution that expressed the view that a model state act governing grandparents visitation rights needed to be formulated and then adopted by all of the states.⁶⁵ In 1986, the Senate passed an identical resolution.⁶⁶ Unfortunately, neither formulation of the model act nor adoption of it occurred. The National Conference of Commissioners on State Laws has not developed a uniform law, nor does it have any plans to do so. As discussed above, the states are far from uniform in their grandparent visitation rights legislation.

2. FEDERAL FUNDS

Another approach often used by Congress to achieve a desired result in state legislatures is to precondition the receipt of federal funds on state compliance with federally imposed requirements.⁶⁷ Forcing the states to adopt a model grandparent visitation act proposed by the National Conference of Commissioners on Uniform State Laws, Congress, or another entity, appears constitutionally impossible, however.⁶⁸ This is because a model act would not be federal law or a regulation, nor could a model act set mandatory conditions for the receipt of federal aid.⁶⁹ A model act, therefore, would be just that, merely a model for state legislation. As such, individual state legislatures could choose whether to enact all, part, or none into state law.⁷⁰ It appears that Congress does not have the power to regulate grandparent visitation rights legislation through the preconditioning of federal funds.

Although Congress apparently does not have the power to directly or indirectly promulgate legislation affecting grandparent visitation rights, because this is a matter that must be dealt with at the state level, members of Congress are not prohibited from engaging in related activities. These include working with grandparent rights

64. *Id.*

65. H. Con. Res. 67, 99th Cong., 2d Sess., 100 Stat. 4376 (1986).

66. *Id.*

67. RESOURCE MANUAL, *supra* note 1, at 85.

68. *Id.*

69. *Id.*

70. *Id.*

groups, holding hearings on grandparent visitation rights, and working with individual grandparents who are trying to secure visitation rights in their home states.

C. A Constitutional Amendment Affecting Grandparent Visitation Rights Legislation

Children's advocates across the country currently are pushing for a constitutional amendment to recognize the rights of the child. Members of the general public usually are surprised to learn that the Constitution does not really provide any protective rights for children.⁷¹ The Supreme Court, however, traditionally has viewed the child only in relation to his or her family, and not as an individual having separate constitutional rights.⁷² Therefore, the rights contained in the Constitution appear to be reserved solely for those over the age of majority.

The idea of constitutional protection for the rights of children is not novel. Unlike the United States, the constitutions of seventy-nine nations at least make references to children.⁷³ "These range from comprehensive and detailed provisions, such as those found in the Brazilian Constitution of 1988," to very brief provisions like the one included in the 1946 Constitution of Japan, "which provides that 'children shall not be exploited.'" ⁷⁴ To some degree, these differences may be attributable to "the age of the constitution (the more recent the constitution, the more detailed provisions), and the assumption that children are adequately covered by provisions applicable to all citizens." ⁷⁵

A model amendment to the U.S. Constitution was drafted in 1989 by the National Task Force for Children's Constitutional Rights.⁷⁶ It reads as follows:

Section 1

All citizens of the United States who are fifteen years of age or younger shall enjoy the right to live in a home that is safe and healthy; the right to adequate health care; the right to an adequate

71. Charles D. Gill, *Essay on the Status of the American Child, 2000 A.D.: Chattel or Constitutionally Protected Child-Citizen?*, 17 OHIO N.U. L. REV. 543, 547 (1991).

72. *In re Gault*, 387 U.S. 1 (1967); Gill, *supra* note 71, at 566.

73. Gill, *supra* note 71, at 566.

74. *Id.* at 566 n.82 (quoting P. Alston, Professor and Director for the Center for Advanced Legal Studies at the Australian National University, Canberra, Australia).

75. *Id.*

76. Gill, *supra* note 71, at 566.

education and the right to the care of a loving family or a substitute thereof, which approximates as closely as possible such family.

Section 2

All citizens of the United States who are fifteen years of age or younger shall be allowed to testify in any legal proceeding without having to view any person accused of abusing said citizen, notwithstanding any other provision of this Constitution.

Section 3

All citizens of the United States who are fifteen years of age or younger shall enjoy the right in any legal proceeding to have the trier receive evidence as to such citizen's developmental level as it pertains to that citizen's credibility.

Section 4

All citizens of the United States who are fifteen years of age or younger shall enjoy the right to counsel in any legal proceeding that effects [sic] that citizen's interests.⁷⁷

If passed, this amendment would have a direct impact on the way grandparents' rights cases are handled in a court of law, because the child would have the right to have his or her interests independently represented by counsel. This would ensure that the child's voice would at least be heard in any proceeding dealing with grandparents' rights legislation.

In addition, if passed, this amendment could indirectly affect the way grandparent visitation legislation is formulated. The amendment would require courts to treat children as individuals, rather than merely the property of their parents. Therefore, grandparent visitation rights legislation would have to address more than the parents' constitutional rights to raise a child without state interference. Statutes would have to balance the children's constitutional rights with the rights of their parents. Children's needs would have to be taken into account when drafting legislation.

This amendment possibly could have an even more drastic effect on grandparent visitation rights legislation. Section 1 of the proposed amendment states that "*all* citizens of the United States who are fifteen years of age or younger shall enjoy . . . the *right* to the care of a loving family or a *substitute* thereof."⁷⁸ Does this right include access to grandparent visitation if it is in the child's best interests? If it does, then it could be argued that statutory restrictions on grandparents' standing to petition for visitation rights, based on the status of the

77. *Id.* at 566-67. These sections were proposed by the National Task Force for Constitutional Rights.

78. *Id.* at 566 (emphasis added).

parents, might be unconstitutional. Under this type of statute, children would be treated differently solely based on the relationship of their parents. Because all children have a right to the care of a loving family, it is conceivable that the way many state grandparent visitation rights statutes are drafted could be declared unconstitutional. Visitation statutes stipulating that grandparents of only those children whose parents are divorced, separated, etc. may petition for visitation rights would be denying a substantial group of children potential access to their grandparents. This denial of potential access would be based on a system of classification that only takes into account the parents' relationship, and therefore only the parents' constitutional rights. As a result, these statutes would be discriminating among children, without their best interests being taken into account.

Whether this model amendment is adopted and whether it has the results discussed above remains to be seen. The National Task Force for Children's Constitutional Rights is actively trying to get this amendment passed and hopes to see it ratified by all states by the year 2000.

D. United Nations Convention on the Rights of the Child

Grandparent rights legislation could be affected by international law in the near future. On November 20, 1989, the United Nations unanimously adopted the United Nations Convention on the Rights of the Child. This Convention actually became international law on September 2, 1990, when it was ratified by the twentieth nation.⁷⁹ Approximately seventy nations have now ratified the Convention, making them legally bound by its standards.⁸⁰ The United States, however, is not one of them. In fact, the most notable holdouts are Iran, Iraq, Libya, South Africa, and the United States.⁸¹

Although the Convention has been in effect in many countries for almost four years, the United States is still "considering" it. The United States State Department appointed five experts to serve on a committee to advise whether and under what conditions the United States should become a party to the Convention. The U.S. Ambassador to the United Nations signed the Convention on February 15, 1995. However, ratification by the Senate is required.

79. Cohen, *Relationships Between the Child, the Family, and the State, in PERSPECTIVES ON THE FAMILY* 293, 319-35 (Robert C. Moffat et al. eds., 1990).

80. Gill, *supra* note 71, at 578.

81. *Id.*

If adopted, the United Nations Convention on the Rights of the Child would not only affect the way in which grandparent visitation rights cases are procedurally handled in a court of law, but would also change the focus of the entire civil suit. The relevant portions of the convention are as follows:

Article 2

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration.

Article 4

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in this Convention. In regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international cooperation.

Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rule of national law.⁸²

Procedurally, this Convention would ensure that a child whose grandparent has petitioned for visitation rights would have the right to testify on his or her own behalf. In addition, the child's views and opinions would have to be given weight (in accordance with the age and maturity of the child) in making the final determination. Moreover, the Convention requires that in any legal action, the best interests of the child shall be a primary consideration. This would require that grandparent visitation rights legislation not just consider the best interests of the child among many factors in deciding whether to grant

82. Convention on the Rights of the Child, Nov. 20, 1989, art. 2-4, 12, 28 I.L.M. 1459, 1461 (entered into force Sept. 2, 1990).

visitation, but treat it as one of, if not the, most important factors. This would shift the focus from the parents' interest in freedom from state interference to where the focus more appropriately belongs: the best interests of the child.

IV. Resolution and Recommendation

As the above discussion illustrates, the need for a uniform approach to granting grandparent visitation rights is self-evident. Regardless of whether a U.S. Supreme Court case is decided, an international treaty ratified, or a constitutional amendment passed, the fact remains that formulating a comprehensive approach to grandparent visitation rights legislation is necessary. The paragraphs that follow outline a model statute. This model statute balances the rights of grandparent, parent, and child; however, the focus remains on the child. Consequently, in determining whether visitation is in the child's best interests, the statute enumerates specific criteria to examine, so the court's decision is not only informed, but also unbiased. It grants automatic standing to all grandparents, including those whose grandchild lives in an intact family. It allocates the burden of proof in a way that attempts to respect the rights of all, but pays special attention to the needs of the child.

A. The Best Interests of the Child

As discussed previously, most grandparent visitation rights statutes are seriously deficient because they lack specific criteria for determining whether visitation is in the best interests of the child. Because the best interests of the child is the most important factor in deciding whether to grant visitation, it is crucial that specific inquiries be made by the court. The seven factors listed below are modified versions of a policy resolution statement on grandparent visitation promulgated by the American Bar Association's Commission on Legal Problems of the Elderly.⁸³ It is important to discuss each factor thoroughly, state why this information is crucial to making a proper visitation determination, why it is worded in the following way, and how it is an improvement over many existing statutes.

83. *Generational Bonds*, *supra* note 25, at 18-20.

1. THE NATURE AND QUALITY OF THE RELATIONSHIP BETWEEN THE GRANDPARENT AND THE CHILD

This factor is extremely important because whether visitation is in the child's best interests often depends on whether emotional bonds have been established and whether the grandparent has enhanced or interfered in the parent-child relationship. This is not to say, however, that a previous relationship is necessary before a grandparent is allowed visitation. This model statute intentionally avoids establishing such a prerequisite because many times a grandparent has been denied access to the grandchild since birth, making the establishment of a prior relationship impossible. Future grandparent visitation may still be in the child's best interests, even if the child had no previous contact with the grandparent.

2. WHETHER VISITATION WILL PROMOTE OR DISRUPT THE CHILD'S PSYCHOLOGICAL DEVELOPMENT

Exactly how court-ordered visitation will affect the child's emotional well-being and growth is extremely important in deciding whether visitation is in the best interests of the child. In order to correctly evaluate this factor, an interview with a court-appointed psychologist, psychiatrist, or social worker may be necessary. This factor is not designed to foster a court battle of psychiatric testimony on both sides. In fact, if possible, a situation in which the child is interviewed by numerous psychiatric professionals to obtain favorable testimony for either side should be avoided. A single interview with a competent and neutral court-appointed psychologist, psychiatrist, or social worker, should prove sufficient.

3. WHETHER VISITATION WILL CREATE FRICTION BETWEEN THE CHILD AND HIS OR HER PARENTS

This factor focuses on not only on how the child will react to the time spent visiting his or her grandparent, but also the child's situation between visits. It does not, however, mean that just because a parent is unhappy about visitation, it will be denied. If this were the case, then virtually every grandparent would be denied visitation; litigation over grandparent visitation rights would not occur if parents wanted the child to visit with his or her grandparent. Instead, this factor merely recognizes that an overly stressful parental relationship and home life directly due to the granting of grandparent visitation rights may be too high a price for a child to pay.

4. WHETHER VISITATION WILL PROVIDE SUPPORT AND STABILITY FOR THE CHILD

This factor really gets to the heart of why visitation rights should be granted. Grandparents often contribute to a child's sense of support and stability, which is crucial to the child's mental well-being. As a result, the benefits a particular grandparent-grandchild relationship can provide will often prove to be one of the most important factors in making a determination of whether visitation is in the child's best interests.

5. THE CAPACITY OF THE ADULTS INVOLVED FOR FUTURE COMPROMISE AND COOPERATION IN MATTERS INVOLVING THE CHILD

This factor is somewhat similar to factor three; however, the focus of the inquiry is slightly different. Instead of looking at the parent-child relationship, this factor forces an examination of the grandparent-parent relationship. In doing so, whether the child will constantly be put in the middle of the two parties will be considered. A child who feels like he or she is merely a pawn between two groups of adults may not benefit from visitation.

6. THE CHILD'S WISHES, IF THE CHILD IS ABLE TO FREELY FORM AND EXPRESS A PREFERENCE

If the child is old enough and mature enough to make such a decision concerning visitation, a court should consider very carefully and give great weight to the preferences of the child. Often, a child will know what is best for him or her, or what will make the child happiest. Moreover, if a child's opinion is given credence, the child may be able to better deal with and respect the decision which is made because he or she will have contributed to it in some way. Finally, being able to express his or her wishes may make the courtroom experience more positive for the child.

7. ANY OTHER FACTOR RELEVANT TO A FAIR AND JUST DETERMINATION REGARDING VISITATION

This factor leaves open the possibility that other considerations may be relevant in the particular case at hand when making a visitation determination. Courts should be careful to include only those additional factors that truly ascertain the child's best interests and do not create undue bias.

B. Procedural Aspects of the Model Statute

As discussed above, the proposed model statute grants standing to petition for grandparent visitation rights to all grandparents, regardless of the status of the child's parents. This will ensure that if a grandparent-grandchild relationship is in the child's best interests, the child will be able to take advantage of this opportunity, regardless of the status of the child's parents' relationship. Therefore, all children will be treated equally.

It is important to recognize that a parent will usually act in the child's best interests and not make decisions concerning who will see the child based on some ulterior motive. Therefore, there will be a rebuttable presumption that a parent is acting in the child's best interests. However, as sad as it may be, this is not always the case. As a result, the presumption can be overcome by clear and convincing evidence that visitation is in the child's best interests. This should strike a proper balance among all parties involved, with the end result being a decision concerning visitation which is the most just.

One final comment must be made about this statute and its aims. As discussed above, children in the United States do not currently have a constitutional right to legal representation in legal matters which directly affect their well-being. This model statute envisions that all children will be granted legal counsel, so that their best interests will be most adequately represented. Until then, it is hoped that courts deciding issues such as grandparent visitation rights will make a concerted effort to make determinations that further the best interests of the child.

V. Conclusion

As this note makes clear, current grandparent visitation rights legislation is seriously deficient. Not only do the statutes fail to allow all grandparents to petition for their rights, but they also fail to protect the most important interests involved—those of the child. Whether by U.S. Supreme Court decision, constitutional amendment, or international treaty, grandparent rights legislation needs to be reexamined and reformulated.