

GRANDPARENTS RAISING GRANDCHILDREN: PROBLEMS AND POLICY FROM AN ILLINOIS PERSPECTIVE

Mary C. Rudasill

In this very important article, Professor Mary C. Rudasill examines the growing phenomenon of grandparents raising grandchildren. As she notes at the outset, the number of grandparents raising their grandchildren has multiplied over the past two decades, and the size of this group continues to grow. Professor Rudasill begins her analysis with a discussion of the legal problems encountered by grandparents who seek to acquire the legal authority to care for and make decisions for their grandchildren. Next, she outlines the various options available to grandparents in Illinois, including custody proceedings, guardianship proceedings, juvenile court proceedings, and adoption and habeas corpus actions. Finally, Professor Rudasill examines the various state and federal benefit programs available to grandparents who care for their grandchildren with the hopes of offering suggestions and guidance to grandparents and their attorneys. Although Professor Rudasill's article focuses on Illinois law, her analysis and recommendations will be useful to attorneys nationwide as they assist their elderly clients in gaining legal authority to protect and nurture the grandchildren left in their care.

I. Introduction

The number of grandparents raising their grandchildren has multiplied over the past two decades and the size of this group continues to grow. The growth of these grandparent-headed households has drawn national attention to the problems that confront these older "parents" and the policy considerations that affect them. The realization that the problems encountered by this group

Mary C. Rudasill is Director of Clinical Programs and Associate Professor of Law, Southern Illinois University School of Law, Carbondale, Illinois. She would like to acknowledge the assistance of her Research Assistant, Rhonda Jenkins.

will become more pressing as their numbers increase has spurred national legislation, extensive study, and revisions in state policy.

On the national level, Congress demonstrated its awareness of the increasing incidence of grandparents parenting grandchildren with the enactment of Public Act 103-368 which declared 1995 the "Year of the Grandparent."¹ This joint congressional resolution recognized that "grandparents are a strong and important voice in support of the happiness and well-being of children" and that "grandparents often serve as the primary caregivers of their grandchildren."² The resolution called for the President to "issue a proclamation calling on the people of the United States to observe the year 1995 with appropriate programs, ceremonies, and activities."³

A recent publication by the American Association of Retired Persons (AARP)⁴ brings this phenomenon into focus. In the last twenty-five years, the number of children living in households headed by grandparents has increased by over fifty percent.⁵ In approximately one-third of these grandparent households, neither parent of the grandchild is present.⁶ In other words, nearly 551,000 mid-life (aged forty-five to sixty-four) and older adults (aged sixty-five and older) in 353,000 households are caring for their grandchildren with neither parent present. If other nontraditional types of households are included (roommate, unmarried partners, etc.) the number of households is closer to 634,000.⁷

1. S. Con. Res. 198, 103d Cong., 2d Sess., 108 Stat. 3475 (1994).

2. *Id.*

3. *Id.*

4. DEBORAH CHALFIE, *GOING IT ALONE, A CLOSER LOOK AT GRANDPARENTS PARENTING GRANDCHILDREN* (AARP Women's Initiative, 1994) [hereinafter *AARP WOMEN'S INITIATIVE*].

5. *Id.* at 1 n.1.

6. *Id.* at 1. The statistical estimates provided in the AARP Women's Initiative report are derived from the March 1992 Current Population Survey (CPS), an annual survey of approximately 150,000 persons in nearly 60,000 households. See *id.* at 2 & n.6.

7. *Id.* at 3. The AARP Report provides the following demographic information: The median age for these mid-life and older grandparent care givers is age 57 and nearly 23% of these care givers are 65 or older. *Id.* Sixty percent of the grandparent care givers are grandmothers while 40% are grandfathers. *Id.* However, 96% of the grandfather care givers are married and thus presumably have a spouse to share the parenting duties. *Id.* at 4. Only 63% of the grandmother care givers share this responsibility with a spouse. *Id.* This means that 93% of all single grandparent care givers are women. *Id.* Proportionally, nearly twice as many grandparent care givers are black (approximately 9% overall). *Id.* Ten percent are of Hispanic origin. *Id.* Fifty-eight percent of all grandparent care givers did not graduate from high school. *Id.* Grandparent care givers are among the poorest of the nontraditional households studied. *Id.* Twenty-seven percent live at or below

As acknowledged by Congress and illustrated by the AARP report, these half-million grandparent "parents" face problems not often confronted by more traditional single-parent or nuclear family households. Because most of these household arrangements are not legally formalized, grandparents caring for grandchildren live in a state of legal limbo with regard to decision making and obtaining financial assistance for the children in their care.

This article explores the difficulties encountered by grandparents who shoulder the responsibility of raising their children's children and analyzes the legal aspects of the grandparent household. This article addresses the options available to grandparents in Illinois for acquiring the legal authority to care for and to make decisions for the children in their care. These options include custody proceedings, guardianship proceedings, juvenile court proceedings, adoption and habeas corpus actions. This article also discusses various state and federal benefits and suggests possible avenues of financial assistance to the grandparent-headed family. The goal of this article is to offer suggestions and guidance to grandparents and their attorneys with regard to the protection and care of grandchildren entrusted to them by fate or a family member.

II. Pursuing Legal Parenting Authority

A. The Problem

Many of the problems experienced by grandparents raising grandchildren arise from the lack of official or legal authority to make day-to-day decisions for the child. In theory, written consent from one of the child's parents is all that is needed to give the grandparent the required authority to make personal, medical, educational, and other decisions on behalf of the child. In reality, parents almost never give this kind of written consent when they leave their children with a relative or unrelated third party. Even when written consent is given, it rarely covers every situation which may arise when a child is in the

the poverty level and another 14% are near-poor (100-149% of poverty). *Id.* This means that 56% of grandparent care givers have household incomes of less than \$20,000 per year. *Id.* Only six percent of these households report having received child support payments. *Id.* Fifty-seven percent of these households are concentrated in the South. *Id.* The remaining households are evenly divided between the Northeast, Midwest, and West. *Id.* at 4-5. Interestingly, 40% of these grandparent care-giver households are located in nonmetropolitan areas having populations of less than 100,000. *Id.* at 3-5.

full-time care of a third party.⁸ Grandparents must usually decide between doing the best they can for the child while remaining a "de facto" parent or taking some form of legal action to obtain "de jure" parenting status.⁹ This decision sometimes depends on how long the grandparents believe that they will be caring for the child. Many grandparents lack the financial resources to institute action to legalize their role of primary care giver and, therefore, will not seek legal formalization of the relationship unless they are forced to do so in order to obtain medical care for the child or to qualify for financial assistance. Others do not act to formalize the relationship until it becomes apparent that the parent intends to leave the child for a long period of time or permanently in their care or when it becomes obvious that the parent is no longer fit or able to properly care for the child.¹⁰

Even after court proceedings, the grandparent remains in a precarious legal position. In all but adoption actions, the children's parents may initiate legal proceedings and seek the return of their children to their custody regardless of the legal authority obtained by the grandparent.¹¹ The success of these actions by parents to regain custody and control over their children depends upon the circumstances under which the parents lost or relinquished custody, the length of time the child has been living with the grandparent, and any change in circumstances alleged by the parent at the time the application for return of custody is made.¹²

Despite these potential challenges, the grandparent raising grandchildren in a long-term or permanent situation should take legal

8. The Illinois legislature recently enacted 755 ILL. COMP. STAT. § 5/11-5.4 (West 1993 & Supp. 1995), a short-term guardianship act under the Probate Act, allowing a parent to designate a nonparent as a short-term guardian of a child for up to 60 days but does not permit interference with the rights of the child's other parent who may be able and willing to care for the child. The statute includes a suggested form to use. (Short-term guardianship and standby guardianship are discussed in more detail *infra* part II.D.1.e).

9. AARP WOMEN'S INITIATIVE, *supra* note 11, at 5. The report explains that de jure (by law) relationships are legally recognized and confer parent-like powers and impose parent-like obligations on the grandparent care giver. *Id.* Adoption, permanent or temporary custody (called guardianship in some jurisdictions), certification as a foster parent, and powers of attorney are methods of establishing a de jure relationship. *Id.* In contrast, de facto (in fact) relationships are informal arrangements, usually initiated when the situation is expected to be temporary or the parent refuses to surrender legal authority over the child. *Id.* These relationships are not officially recognized by law and do not endow the grandparent care giver with any rights or duties with respect to the child. *Id.*

10. *Id.*

11. *Id.* at 5.

12. These factors will be discussed in more detail throughout this article.

action to acquire the authority necessary to care for a child and meet the child's financial, medical, and educational needs. Once this authority is obtained, if the parent attempts to regain custody of the child, the grandparent may seek a court ruling.¹³ This judicial oversight lessens the chance of disruption in the grandparent-headed household.

In Illinois, there are five ways to secure the legal right to care for a child when both parents are absent, unable, or unwilling to raise a child. A grandparent may initiate a custody proceeding under the Illinois Marriage and Dissolution Act,¹⁴ a guardianship proceeding under the Illinois Probate Act,¹⁵ a juvenile court proceeding under the Juvenile Court Act to obtain custody or guardianship,¹⁶ a habeas proceeding under the Habeas Corpus Act¹⁷ and finally, adoption of the child under the Adoption Act.¹⁸ These legal actions each have their own distinct advantages and disadvantages and each are discussed separately. Before reaching these issues, however, it is necessary to examine the threshold questions of jurisdiction.

B. Jurisdiction

1. SUBJECT MATTER JURISDICTION

To initiate legal action, the grandparent or the grandparent's attorney must first ascertain which court may hear the custody matter. Jurisdictional requirements are included in each statute concerned with the care and custody of a child.¹⁹ In years past, when society was less mobile, the determination of which court could hear and decide custody issues was a fairly simple matter. The custody actions were brought either where the petitioning party resided, where the child resided, or in the court where a party to the action had substantial

13. Should a parent remove a child from the grandparent's control and custody in violation of a court order, the grandparent will at least have the opportunity to bring an action in court in light of the previous court order.

14. 750 ILL. COMP. STAT. § 5/601(b)(2) (West 1993 & Supp. 1995).

15. 755 ILL. COMP. STAT. § 5/11-1 to 11-18 (West 1993 & Supp. 1995).

16. Juvenile Court Act, 705 ILL. COMP. STAT. § 405/2-1 to 2-31 (West 1993 & Supp. 1995).

17. 735 ILL. COMP. STAT. § 5/10-101 to 10-137 (West 1993 & Supp. 1995).

18. 750 ILL. COMP. STAT. § 50/1 (West 1993 & Supp. 1995).

19. Illinois Marriage and Dissolution of Marriage Act, 750 ILL. COMP. STAT. § 5/601 (West 1993 & Supp. 1995); Illinois Adoption Act, *id.* § 50/4; Illinois Juvenile Court Act, 705 ILL. COMP. STAT. § 405/2-1 and 2-2 (West 1993 & Supp. 1995); Illinois Probate Act, 755 ILL. COMP. STAT. § 5/11-1, 11-5, 11-7 (West 1993 & Supp. 1995); Illinois Habeas Act, 735 ILL. COMP. STAT. § 5/10-102 (West 1993 & Supp. 1995).

connections or contacts.²⁰ Once a court made the initial custody determination, it maintained continuing jurisdiction over future modifications of that decision.²¹

As society became more mobile, increasing numbers of people seeking custody orders engaged in forum shopping, moving from one state to another in pursuit of a favorable custody decision.²² This practice led to child snatching by parents unhappy with one court's custody determination and often resulted in children being moved from state to state and hidden from the other parent and family members to avoid a change of custody.²³ State courts, seemingly eager to ignore custody determinations from other jurisdictions, actually aided and abetted these schemes.²⁴ Each state had its own particular laws governing subject matter jurisdiction, and there was little consistency amongst the states.²⁵ In 1968, the National Conference of Commissioners on Uniform State Laws and the American Bar Association, recognizing the need for uniform legislation, approved the Uniform Child Custody Jurisdiction Act (UCCJA).²⁶

The UCCJA drafters explained:

Underlying the entire Act is the idea that to avoid the jurisdictional conflicts and confusions which have done serious harm to innumerable children, a court in one state must assume major responsibility to determine who is to have custody of a particular child; that this court must reach out for the help of courts in other states in order to arrive at a fully informed judgement which transcends state lines and considers all claimants, residents and non-residents, on an equal basis and from the standpoint of the welfare of the child.²⁷

The UCCJA has now been adopted in all fifty states as well as the District of Columbia and the Virgin Islands.²⁸ States that have enacted the UCCJA have incorporated their own individual amendments and nuances, but, in general, the UCCJA limits custody jurisdiction to the state where the child has his home or with which the child and the family have other significant contacts.²⁹ Also, the

20. *Siegel v. Siegel*, 417 N.E.2d 1312, 1314 (Ill. 1981).

21. *Id.*

22. UNIF. CHILD CUSTODY JURISDICTION ACT, 9 U.L.A. 116-18 note (1968) (Prefatory Note).

23. *Id.*

24. *Id.* at 116-17.

25. *Id.*

26. UNIF. CHILD CUSTODY JURISDICTION ACT §§ 1-28 (1968).

27. 9 U.L.A. at 118.

28. 9 U.L.A. Table of Jurisdictions (Supp. 1994).

29. UNIF. CHILD CUSTODY JURISDICTION ACT § 3.

UCCJA provides for the recognition and enforcement of out-of-state custody decrees.³⁰

Jurisdictional preference is given to the prior court in modification of custody matters under certain conditions.³¹ Access to the court may be denied to persons who have engaged in child snatching or similar misconduct.³² The UCCJA also provides for procedural due process rights such as notice for all persons, including nonresidents, who claim a right to custody.³³ Courts with pending custody cases are encouraged to contact one another and exchange information to determine which court should proceed to decide the custody matter.³⁴

The UCCJA has been adopted by Illinois.³⁵ The Illinois version of the uniform act is very similar to the UCCJA and embodies the overall intent of the UCCJA to limit forum shopping in custody matters and to provide guidelines for state courts to use to determine when they should not exercise jurisdiction over a particular case.³⁶ As courts have noted, the term "jurisdiction" as used in the UCCJA is not used in its traditional sense to confer subject-matter jurisdiction on certain courts, as courts have always presumably possessed continuing jurisdiction over child custody matters originated in their state. Rather, it limits state courts in their exercise of existing jurisdiction over custody proceedings.³⁷ The UCCJA is intended to apply to all custody proceedings. The term "proceedings" has been broadly defined in the UCCJA and construed by the case law to include most cases where the custody of a child is at issue.³⁸ The UCCJA is applicable to initial custody proceedings;³⁹ modification of custody proceedings;⁴⁰ adoption proceedings;⁴¹ abuse, neglect, and dependency

30. *Id.* §§ 13, 15.

31. *Id.* § 14.

32. *Id.* § 8.

33. *Id.* § 11.

34. *Id.* §§ 17-22.

35. 750 ILL. COMP. STAT. § 35/1 to 35/26 (West 1994).

36. See *Siegel v. Siegel*, 417 N.E.2d 1312, 1316 (Ill. 1981); *Noga v. Noga*, 443 N.E.2d 1142, 1143-44 (Ill. App. Ct. 1982); *In re Levy*, 434 N.E.2d 400, 403 (Ill. App. Ct. 1982).

37. *Siegel*, 417 N.E.2d at 1316; *Levy*, 434 N.E.2d at 403.

38. 750 ILL. COMP. STAT. §§ 35/3, 35/3.02, 35/3.03; see also Danny R. Veilleux, Annotation, *What Types of Proceedings or Determinations are Governed by the Uniform Child Custody Jurisdiction Act (UCCJA) or the Parental Kidnapping Prevention Act (PKPA)*, 78 A.L.R. 4TH 1028 (1994).

39. See, e.g., *In re Breyley v. Breyley*, 617 N.E.2d 423 (Ill. App. Ct. 1993); *In re Elblkasy*, 610 N.E.2d 139 (Ill. App. Ct. 1993); *In re Bozarth*, 538 N.E.2d 785 (Ill. App. Ct. 1989).

40. See, e.g., *Siegel*, 417 N.E.2d at 1316; *Levy*, 434 N.E.2d at 403.

proceedings;⁴² guardianship proceedings brought by nonparents;⁴³ and habeas attacks on prior custody determinations.⁴⁴

2. PERSONAL JURISDICTION OVER THE PARENTS

Once subject-matter jurisdiction is established, personal jurisdiction over all interested parties becomes a crucial consideration. Failure to obtain personal jurisdiction over the child's parents can mean that, at any time, a parent can institute legal action seeking the return of custody of the child.⁴⁵

Although it is true that a parent whose parental rights have not been terminated may seek custody of his child at any time from the court, appropriate legal action by the grandparent offers some protection in preserving the grandparent's custodial position. If the grandparent has obtained custody through a legitimate court proceeding and the parent received proper notice of the proceeding, the burden is on the parent to show that, due to a change in the circumstances that led to the relinquishment of the child, it is now in the child's best interest to be returned to the custody of the parent.⁴⁶ If the parent was not given proper notice or made a party to the initial custody proceeding brought by the grandparent, the burden on the parent is less onerous. Rather than requiring a showing of changed circumstances, the court will probably base the determination on the superior right of the parent to raise his or her child balanced with the best interest of the child under the facts and circumstances of the case. Thus, the grandparent may seriously disadvantage himself or herself in the proceedings by failing to give proper notice to the parent.

Jurisdictional issues are an integral part of every custody action. The jurisdictional factors may affect the balancing of burdens of proof and the weight of presumptions. Therefore, jurisdiction should be the threshold concern addressed by a grandparent or the grandparent's attorney in initiating a custody action.

41. See, e.g., *Noga v. Noga*, 443 N.E.2d 1142, 1143 (Ill. App. Ct. 1982).

42. Annotation, *Child Custody: When Does State That Issued Previous Custody Determination Have Continuing Jurisdiction Under Uniform Child Custody Jurisdiction Act (UCCJA) or Parental Kidnapping Prevention Act (PKPA)*, 28 USCS § 1738A, 83 A.L.R. 4TH 742 (1991) [hereinafter Annotation].

43. *In re Donaldson*, 223 Cal. Rptr. 707 (Cal. Ct. App. 1986).

44. *McGuane v. McGuane*, 645 N.E.2d 575, 578 (Ill. App. Ct. 1995); see also Annotation, *supra* note 42.

45. *In re Doe*, 638 N.E.2d 181, 182 (Ill. 1994), cert. denied, 115 S. Ct. 499 (1994).

46. *Nye v. Nye*, 105 N.E.2d 300, 304 (Ill. 1952); *Marcus v. Marcus*, 248 N.E.2d 800, 804-05 (Ill. App. Ct. 1969).

C. Custody Under the Illinois Marriage and Dissolution of Marriage Act

A grandparent seeking custody of a minor grandchild in an Illinois court will usually proceed under the custody provisions of the Illinois Marriage and Dissolution Act (IMDMA).⁴⁷ One need not be seeking a dissolution of marriage or legal separation to seek a custody determination under the IMDMA.⁴⁸ Instead, a grandparent may seek an original order of custody in the situation where the matter has not been before the court previously, or the grandparent may seek a modification of an order of custody made by the court in another proceeding such as a dissolution of marriage or legal separation.⁴⁹

One who is appointed a minor's custodian under the IMDMA "may determine the child's upbringing, including but not limited to, his education, health care and religious training," unless otherwise limited by the court order at the time of the custody determination.⁵⁰ A child's custodian has plenary authority over all decisions concerning the child and becomes, as the Illinois Supreme Court has stated, "in effect, the general guardian of the child . . . 'who has the general care and control of the person and estate of the ward.'"⁵¹

The court retains jurisdiction over a custody matter once a determination is made, and the IMDMA provides procedures for challenging a custody order.⁵² The Uniform Child Custody Jurisdiction Act operates concurrently with the custody provisions of the IMDMA to determine which court will hear a custody matter.⁵³ If all parties reside in Illinois and custody has not been previously adjudicated in another state, the Illinois court will have jurisdiction over the custody matter.⁵⁴ Venue is determined by the IMDMA.⁵⁵ In general, an original custody matter is filed in the county where either the plaintiff or the defendant resides.⁵⁶ If a third party such as a grandparent files for custody, the case must be filed in the county where the child is a permanent resident or is found.⁵⁷ If a parent or a third party is seeking modification of an original custody determination, the petition must

47. 750 ILL. COMP. STAT. §§ 5/601 to 5/611 (West 1993 & Supp. 1995).

48. *Id.* § 5/601(b).

49. *Id.* §§ 5/601, 5/610.

50. *Id.* § 5/608(a).

51. *Stevenson v. Hawthorne Elementary Sch.*, 579 N.E.2d 852, 856 (Ill. 1991).

52. *Id.* at 855, *see also* 750 ILL. COMP. STAT. § 5/610.

53. 750 ILL. COMP. STAT. § 5/601; *id.* § 35/1.

54. *Id.* §§ 5/601, 35/1.

55. *Id.* § 5/601.

56. *Id.* § 5/104.

57. *Id.* § 5/601(b)(2).

be filed in the court which made the original determination unless some or all of the original parties no longer reside in the state.⁵⁸

1. PARENTAL SUPERIOR RIGHTS DOCTRINE

A third party is specifically allowed to file a petition for custody under the IMDMA.⁵⁹ However, the third party must show that at the time of filing, the child was "not in the physical custody of one of his parents."⁶⁰ This codifies the "parental superior rights doctrine," a doctrine historically recognized by Illinois courts to protect the right of the natural parent of a child to raise the child.⁶¹ Traditionally, the parent had the right to custody of the child as against all the world unless that right was forfeited or the welfare of the child demanded that the parent should be deprived of custody.⁶² Parents have a fundamental liberty interest in the care, custody, and management of their child.⁶³

As articulated in *In re Townsend*,⁶⁴ when the custody matter is brought against the child's natural parent, the superior rights doctrine is always recognized and the nonparent must show a "compelling reason" why the parent should not have the custody of the child. In *Townsend*, the mother and father of the child were not married, but the father had acknowledged paternity when the child was born.⁶⁵ When the child was about two years old, the child's mother shot and killed the father's wife and was subsequently convicted and sent to prison.⁶⁶

The child remained in the care and custody of her adult half-sister with whom the child and the child's mother had lived since the child was born.⁶⁷ Both the father and the half-sister sought custody of the child.⁶⁸ In examining the relative burdens of the two parties, the court noted that the nonparent and the natural parent did not start on equal footing because the father possessed a superior right to the cus-

58. *Id.* § 35/4(b).

59. *Id.* § 5/601(b)(2).

60. *Id.* § 5/601(b)(2).

61. See *Edwards v. Livingston*, 247 N.E.2d 417 (Ill. App. Ct. 1969); *In re Custody of Townsend*, 427 N.E.2d 1231 (Ill. App. Ct. 1981).

62. H. Joseph Gitlin, *Defining the Best Interest of Children: Parents v. Others in Custody Proceedings*, 79 ILL. B.J. 566 (1991) (citing *Stafford v. Stafford*, 217 Ill. App. 548 (1920)).

63. *Santosky v. Kramer*, 455 U.S. 745 (1982); *Stanley v. Illinois*, 405 U.S. 645, 651 (1971).

64. *In re Townsend*, 427 N.E.2d 1231 (Ill. App. Ct. 1981).

65. *Id.* at 1233.

66. *Id.* at 1234.

67. *Id.*

68. *Id.*

tody of the child.⁶⁹ The nonparent must establish "good cause or reason" to overcome the presumption that the parent has a superior right to the custody of the child.⁷⁰ In this case, the trial court, in granting custody to the half-sister, had failed to give proper weight and consideration to the father's superior right.⁷¹ The high court reversed and remanded for appropriate consideration.⁷²

In addition, in deference to the superior rights of the parent, under the IMDMA, a third party bringing a custody action must first establish standing by showing that the child "is not in the physical custody of one of his parents."⁷³ A finding that the natural parent has actually relinquished custody of the child confers standing on the grandparent to pursue custody under the IMDMA.⁷⁴

Generally, standing connotes whether a litigant has a justiciable interest in a controversy, and the standing of the litigants before the court is one of the components of the court's subject matter jurisdiction. The term "standing" . . . involves a threshold issue of whether a parent has custody of a child for purposes of satisfying the requirements of section 601(b)(2) [of the IMDMA].⁷⁵

Furthermore, the third party must show that his or her custody of the child is more than mere "physical possession . . . of the child at the moment of filing a petition for custody."⁷⁶ To find that a child is "not in the physical custody of one of his parents," the grandparent must show that there has been a voluntary relinquishment of the child by the parent.⁷⁷ The grandparent also must show that he or she has more than mere physical possession of the child.⁷⁸ "The determina-

69. *Id.* at 1234-35.

70. *Id.* at 1235.

71. *Id.* at 1238.

72. *Id.*

73. 750 ILL. COMP. STAT. § 5/601(b)(2).

74. See, e.g., *In re Custody of Barokas*, 440 N.E.2d 1036, 1042 (Ill. App. Ct. 1982) ("Overnight contact with third parties fails to fulfill the statutory provision that the child not be in the physical custody of one of her parents. A parent's 'actual possession and control of a child' . . . is not lost everytime the child visits or spends a vacation with a relative or friend. We do not accept petitioners' theory that physical custody may be relinquished by default if a parent performs the task of parenting in a less than adequate manner."); *In re Menconi*, 453 N.E.2d 835, 839 (Ill. App. Ct. 1983) (The grandparents had custody of the child for six and one-half years without interruption. The court found "the voluntary nature of the initial transfer of the child, coupled with the lengthy period of care by the grandparents and the corresponding integration of the child into the home of her grandparents sufficient to divest the father of physical custody of the child."). *Id.*

75. *Sechrest v. Sechrest*, 560 N.E.2d 1212, 1214 (Ill. App. Ct. 1990).

76. *In re Peterson*, 491 N.E.2d 1150, 1152 (Ill. 1986).

77. *Peterson*, 491 N.E.2d at 1152.

78. *Id.*

tion of whether a child is in a person's physical custody has included factors such as how the child came to be in the nonparent's physical possession and the duration of the possession."⁷⁹

If the grandparent fails to make the required showing, he or she lacks standing to bring the action and may not proceed under the IMDMA to attain legal custody of a child.⁸⁰ These procedural requirements are designed to protect the superior right of the natural parent in custody determinations; however, this right of natural parents to raise their children without interference from the state or other third persons is not absolute.⁸¹ The superior right of the natural parent must yield to the "best interest of the child."⁸²

2. BEST INTEREST OF THE CHILD

The presumption in favor of the natural parent in custody matters has been held to be only one factor which the court weighs in determining the best interest of the child.⁸³ The court need not find a natural parent unfit or find that the parent forfeited parental rights in order to award custody to a grandparent so long as the best interest of the child will be served.⁸⁴

Once a grandparent meets the standing requirement to bring a custody action before the court, the grandparent will be considered for legal custody of the child under the "best interest of the child"

79. *Sechrest*, 560 N.E.2d at 1215 (citing *In re Santa Cruz*, 527 N.E.2d 131, 136 (Ill. App. Ct. 1988)). Illinois case law illustrates the principle. For example, it was not sufficient to establish physical custody of the child by a grandparent when the grandparent took the child from an adult sister's home where the child went for an overnight visit. *In re Custody of Barokas*, 440 N.E.2d 1036, 1042 (Ill. App. Ct. 1982). Nor was it sufficient when the grandparents obtained custody of the child immediately following the death of the custodial mother, as it is presumed that a noncustodial parent gains physical custody of his child at the death of the custodial parent. See *Dile v. Lundak*, 618 N.E.2d 1165, 1167 (Ill. App. Ct. 1993) (citing *Peterson*, 491 N.E.2d at 1152). It was sufficient to establish standing when the child in question had been residing with the grandparent for nearly four years before the custody action arose. *Rose v. Potts*, 577 N.E.2d 811 (Ill. App. Ct. 1991). Standing to bring a custody action was also found where the custodial mother and child had lived with the maternal grandparents for six years before the mother's death and the child was residing with the grandparents at the time the child's father brought a modification proceeding. *Stephens v. Piccirilli*, 410 N.E.2d 1086 (Ill. App. Ct. 1980). A neighbor who cared for children whose father was incarcerated for murdering their mother had standing to seek custody. *Milenkovic v. Milenkovic*, 416 N.E.2d 1140 (Ill. App. Ct. 1981).

80. 750 ILL. COMP. STAT. § 5/602(b).

81. *In re Townsend*, 427 N.E.2d 1231, 1234 (Ill. 1981).

82. *Giacopelli v. Florence Crittenton Home*, 158 N.E.2d 613, 618 (Ill. 1959).

83. *Townsend*, 427 N.E.2d at 1234.

84. *Giacopelli*, 158 N.E.2d at 618.

standard.⁸⁵ Illinois courts have never hesitated to assert their power to decide matters concerning the rights and interests of minors. Traditionally, the courts have declared plenary jurisdiction over the persons and estates of infants and the right to "cause to be done whatever may be necessary to preserve their estates and protect their interest."⁸⁶ The "best interest of the child" standard is the "guiding star" for courts making custody determinations.⁸⁷ The standard is a "simple one designed to accommodate the often complex and unique circumstances of a particular case."⁸⁸ The premise has been described in this way: "Giving full consideration to the primary and superior right of the natural parents to the custody of their child, what does the best interest of the child demand?"⁸⁹

Although theoretically a simple principle, the standard is not easily applied.⁹⁰ All matters that have a bearing upon the welfare of the child must be considered.⁹¹ The particular facts and circumstances of each case are dispositive.⁹² Because the facts and circumstances presented to the trier of fact are crucial to this determination, the trial court's findings generally will not be disturbed unless the holding is against the manifest weight of the evidence.⁹³

In original custody proceedings, where the court has not previously rendered a custody decision involving the minor, section 602 of the IMDMA applies.⁹⁴ Section 602(a) sets out the factors which the court must consider along with all other relevant factors in attempting to arrive at the custody arrangement that serves the best interest of the child. These factors are:

- (1) the wishes of the child's parent or parents as to his custody;
- (2) the wishes of the child as to his custodian;
- (3) the interaction and interrelationship of the child with his parent or parents, his siblings and any other person who may significantly affect the child's best interest;
- (4) the child's adjustment to his home, school and community;
- (5) the mental and physical health of all individuals involved;

85. *In re Peterson*, 491 N.E.2d 1150, 1152 (Ill. 1986).

86. *Ames v. Ames*, 37 N.E. 890 (Ill. 1894).

87. *Nye v. Nye*, 105 N.E.2d 300, 304 (Ill. 1952).

88. *In re Townsend*, 427 N.E.2d 1231, 1234 (Ill. 1981).

89. *Giacopelli v. Florence Crittenton Home*, 158 N.E.2d 613, 618 (Ill. 1959).

90. *Edwards v. Livingston*, 247 N.E.2d 417, 421 (Ill. App. Ct. 1981).

91. *Giacopelli*, 158 N.E.2d at 618 (citing *Kuhn v. Weeks*, 228 Ill. App. 262 (1923)).

92. *Edwards*, 247 N.E.2d at 422.

93. *Becton v. Sanders*, 474 N.E.2d 1318, 1324 (Ill. App. Ct. 1985) (citing *Schulenburg v. Signatrol, Inc.* 226 N.E.2d 624 (Ill. 1967)).

94. 750 ILL. COMP. STAT. § 5/602.

- (6) the physical violence or threat of physical violence by the child's potential custodian, whether directed against the child or directed against another person;
- (7) the occurrence of ongoing abuse as defined in Section 103 of the Illinois Domestic Violence Act of 1986 . . . whether directed against the child or against another person; and
- (8) the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child.⁹⁵

The court need not recite these factors in its order, but the record should indicate that the court considered these factors as well as all other relevant circumstances in arriving at its decision.⁹⁶ Although the factors listed in the IMDMA are not the only considerations in custody determinations and other pertinent factors may be considered, grandparents seeking custody of a grandchild should address as many of the statutory factors as possible when presenting their case to the court.

Under the IMDMA, only conduct of the present or proposed custodian which affects the custodian's relationship with the child is to be considered.⁹⁷ Therefore, the grandparent attempting to show the misconduct of the parent as a factor must also show that the misconduct has some affect on the parent's relationship with the child. Otherwise, the parent's behavior will not be considered by the court.

The grandparent's chances of acquiring custody of the child are greatly enhanced if the grandparent establishes that the child has been living with the grandparent for a long period of time and is well adjusted and happy in that environment. This could provide the "compelling reason" sought by the court to award custody to the grandparent over the superior right of the natural parent. Also it is helpful to show that the parent of the child has not provided support for the child and continues to be unwilling or unable to do so.

In *Look v. Look*,⁹⁸ the maternal grandparents intervened in a court proceeding seeking to transfer custody of the child from the mother to the father. The grandparents cared for the child for five years after the child's mother had left the child with them.⁹⁹ The father paid child

95. *Id.* § 5/602(a). In addition, "[t]he court shall not consider conduct of a present or proposed custodian that does not affect his relationship to the child." *Id.* § 602(b).

96. *Shedbalkar v. Shedbalkar*, 419 N.E.2d 409, 410-11 (Ill. App. Ct. 1981).

97. 750 ILL. COMP. STAT. § 5/602(b).

98. 315 N.E.2d 623 (Ill. App. Ct. 1974).

99. *Id.* at 624.

support regularly and visited the child periodically.¹⁰⁰ The court held that custody should remain with the grandparents, noting that:

[w]hen the people having the actual custody of the child at the time a change is sought have properly provided and supervised its needs for a substantial period of time and the child has become attached to the environment and to the grandparents who have made possible the happiness, security and comfort of its early years, a court is not justified in transferring custody to another except for the most cogent reasons.¹⁰¹

The court observed that the father, who is presumed to have a superior right to the custody of his child, waited five years to assert his right and his failure to act constituted a forfeiture of his right to custody.¹⁰²

In another case, a two-month-old child was left with the paternal grandmother where she remained for four years until a custody proceeding was brought by the parents of the child. The court found that the length of time the child had been in the custody of the grandmother could be a determinative factor in a custody decision.¹⁰³

Conditions showing that the natural parent is unable to care for the minor are also effective in overcoming the presumption favoring the natural parent in custody actions. In *Montgomery v. Roudez*,¹⁰⁴ the fourteen-year-old mother gave the child to her great-aunt soon after his birth.¹⁰⁵ The mother then lived in various places including a series of foster homes.¹⁰⁶ The mother subsequently sought custody of the child from the great-aunt in a habeas proceeding allegedly to become eligible for public aid benefits.¹⁰⁷ She was found unfit to have custody of the child, and the great-aunt was awarded permanent custody.¹⁰⁸

In affirming, the reviewing court noted that the superior rights doctrine is just one of several factors the court must consider in finding the best interest of the child.¹⁰⁹ It is not necessary to find a parent unfit in order to award custody to a third party.¹¹⁰ The court cited factors in the record supporting the determination that the child's best

100. *Id.* at 624-25.

101. *Id.* at 625-26.

102. *Id.* at 626.

103. *Rose v. Potts*, 577 N.E.2d 811, 814 (Ill. App. Ct. 1991) (citing *In re Townsend*, 427 N.E.2d 1231, 1238 (Ill. 1981)).

104. *Montgomery v. Roudez*, 509 N.E.2d 499 (Ill. App. Ct. 1987).

105. *Id.* at 501.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 502.

110. *Id.* at 503.

interest would be met by awarding custody to the great-aunt.¹¹¹ The factors included: the fact that the mother originally sought custody in order to qualify for public aid benefits; at the time she filed, she was a ward of the state with no permanent home; she was just being released from a structured group home where she had been placed by the Department of Children and Family Services; she had no employment and no financial security; and her current situation failed to demonstrate any pattern of maturity or stability in her own life.¹¹²

Depending on the circumstances, the paramount concern of Illinois courts for the best interests of the child may provide an advantage or present an obstacle for a grandparent seeking custody of his or her grandchild. The grandparent seeking custody should be aware of the statutory factors and strive to use these factors to persuade the court that supplanting the superior parental right of the natural parent would be in the best interest of the child.

3. MODIFICATION OF AN ORIGINAL CUSTODY DETERMINATION

In order to promote the stability of custody determinations made by the court, the IMDMA makes it difficult to modify a custody arrangement ordered by the court. According to Section 610 of the IMDMA, no motion to modify a custody judgment may be brought earlier than two years after its date, unless the child's present environment seriously endangers the child's physical, mental, moral, or emotional health.¹¹³ Under Section 610(a), a party seeking modification of a custody order must establish three things: first, the child must be seriously endangered by his present environment; second, there must be changed circumstances warranting modification of the existing order of custody; and, finally, the proposed modification must be in the best interest of the child.¹¹⁴ These requirements are the legislative attempt to provide stability and continuity in the child's life by preventing the "ping-pong" nature of litigation involving custody disputes, yet provide a "safety valve" for the modification of custody in emergency situations.¹¹⁵

111. *Id.*

112. *Id.*

113. 750 ILL. COMP. STAT. § 5/610(a).

114. *Naylor v. Kindred*, 620 N.E.2d 520, 524 (Ill. App. Ct. 1993) (citing § 610(a)).

115. *Id.*

If the custodial parent dies or is rendered incapable of caring for the child before the two-year period has passed, it appears that serious endangerment need not be shown.¹¹⁶ Nonetheless, a party seeking modification still needs to show that the modification is in the best interest of the child.¹¹⁷

After this two-year waiting period has passed, a party seeking to modify a custody order must show by clear and convincing evidence based upon facts "that have arisen since the entry of the prior judgment or upon facts unknown to the court at the time of entry of the prior judgment, that a change has occurred in the circumstances of the child or his custodian . . . and that the modification is necessary to serve the best interest of the child."¹¹⁸

The showing, as required by the IMDMA of a change of circumstances prior to a custody modification codifies Illinois case law. As indicated by the Illinois Supreme Court in *Nye v. Nye*,¹¹⁹

After a divorce decree in this State the custody of the children is always subject to the order of the court which enters the decree and may be changed from time to time as the best interests of the children demand. The decree is *res judicata* as to the facts which existed at the time it was entered but not as to facts arising thereafter. . . . New conditions must have arisen to warrant the court changing its prior custody determination¹²⁰

The welfare of the child is the sole consideration in deciding if there should be a change in custody.¹²¹ Changed conditions alone do not warrant modification unless the changes affect the welfare of the child.¹²² Proof of the change of circumstances must be made by clear and convincing evidence.¹²³ In addition, as in other custody actions, the superior parental rights doctrine applies in actions seeking to modify a prior court custody determination.¹²⁴ This parental preference is demonstrated in the requirement that the court "state in its

116. *Id.* at 531.

117. *Id.* at 532.

118. 750 ILL. COMP. STAT. § 5/610(b).

119. 105 N.E.2d 300 (Ill. 1952).

120. *Id.* at 304 (internal citations omitted).

121. *Id.*

122. *Nolte v. Nolte*, 609 N.E.2d 381, 385 (Ill. App. Ct. 1993).

123. 750 ILL. COMP. STAT. § 5/610(b) (the clear and convincing evidence standard was added to the IMDMA in 1982). The clear and convincing standard requires a high level of certainty. The standard is higher than a preponderance of the evidence standard while not quite approaching the degree of proof necessary to convict a person of a criminal offense. *Nolte*, 609 N.E.2d at 385.

124. *In re Walters*, 529 N.E.2d 308 (Ill. App. Ct. 1988).

decision specific findings of fact in support of its modification . . . if either parent opposes the modification."¹²⁵

As a deterrent to seeking a modification without good cause, the court is allowed to assess attorney fees and costs against a party seeking modification if the court finds that the modification action is vexatious and constitutes harassment.¹²⁶

Grandparents may have a very difficult time attempting to modify a prior custody judgment of the minor child if the child is still living with the custodial parent. Absent very compelling circumstances which affect the child's welfare, it is unlikely that a grandparent will succeed. However, the grandparent's chances of success are greatly enhanced if the child has resided with the grandparent for a significant length of time.

In *Barclay v. Barclay*,¹²⁷ the paternal grandparents, as intervenors, sought to have a Connecticut judgment for divorce which awarded custody to the father, modified in Illinois to award the child's custody to them. The custodial father had placed the child with his parents soon after the divorce was final.¹²⁸ The child's mother visited the child at his grandparents periodically and filed a counterclaim in the Illinois action seeking custody.¹²⁹ The child had lived almost exclusively with his grandparents. The court found that the natural right of the parents for custody must yield to the best interest of the child under circumstances such as these where the child had actually resided with the grandparents for nearly six years.¹³⁰ The court concluded that this action was not actually a change of custody from the father to the grandparents but rather a modification of the original order to conform to the realities of the situation.¹³¹

In *In re Walters*,¹³² a grandmother had custody of her grandchild for more than ten years under a court order. The natural mother's motion seeking a modification and custody of the child failed.¹³³ Noting that the mother had shown little interest in the child over the years

125. 750 ILL. COMP. STAT. § 5/610(b).

126. *Id.* § 5/610(c).

127. *Barclay v. Barclay*, 384 N.E.2d 564 (Ill. App. Ct. 1978) (this case was decided prior to the statutory amendment requiring proof of a change in circumstances by clear and convincing evidence).

128. *Id.* at 565.

129. *Id.* at 566.

130. *Id.* at 568.

131. *Id.*

132. *In re Walters*, 529 N.E.2d 308 (Ill. App. Ct. 1988).

133. *Id.*

and that the mother was unemployed and engaged to marry a man with physical and mental impairments, the court held that the modification sought was not in the best interest of the child.¹³⁴

The case law demonstrates that a grandparent will have the greatest chance of success in a custody proceeding if he or she can show that the child has been in his or her physical custody for an extended period of time and that the child is happy, well adjusted, and fully integrated into the grandparent's household. The court also will consider all other pertinent factors in order to find the custody arrangement that serves the best interest of the child.

D. Legal Guardianship of a Minor in Illinois

A guardian is "one who legally has the care and management of the person or the estate, or both, of a child during its minority."¹³⁵ For most minors, there is no need for the court to appoint a guardian, as a child's parents are his legal guardians.¹³⁶ It is only when a minor's parents are unwilling or unable to act that a guardian may be needed.¹³⁷ In Illinois, both the Probate Act¹³⁸ and the Juvenile Court Act¹³⁹ allow for the appointment of a guardian for a minor. A guardianship, however, involves more than mere custody of a minor.¹⁴⁰ The guardian serves at all times under the supervision of the court.¹⁴¹ The guardian must follow the duties and responsibilities stipulated by the statute, unless a court order limits or expands statutory requirements.¹⁴²

A grandparent who is appointed the guardian of a grandchild must accept that the court is a participant in the parenting of the minor child. Although the court will not initiate intervention in the parenting process, any interested party, not necessarily a relative of the minor, may petition the court and bring the grandparents' actions regarding the minor to the court's attention.¹⁴³ The court retains the

134. *Id.* at 311.

135. BLACK'S LAW DICTIONARY 706 (6th ed. 1990).

136. ROBERT S. HUNTER, ESTATE PLANNING AND ADMINISTRATION IN ILLINOIS § 30.1 (2d ed. 1981).

137. *Id.*

138. 755 ILL. COMP. STAT. § 5/11-1 to 11-18.

139. 705 ILL. COMP. STAT. §§ 405/2-1 to 2-31.

140. *In re Schomer*, 411 N.E.2d 554, 558 (Ill. App. Ct. 1980).

141. *Id.*

142. See Illinois Probate Act, 755 ILL. COMP. STAT. § 5/11-13(a) and the Illinois Juvenile Court Act, 705 ILL. COMP. STAT. § 405/1-3(8) (West 1993 & Supp. 1995).

143. See Illinois Probate Act, 755 ILL. COMP. STAT. § 5/23-2; Illinois Juvenile Court Act, 705 ILL. COMP. STAT. § 405/2-28(4).

authority to modify or terminate any guardianship for acts committed by the guardian which are not in the minor's best interest.¹⁴⁴

The guardian must seek the court's approval if he or she takes certain actions relating to the minor's personal and real property.¹⁴⁵ Although such judicial oversight and possible intrusion by the court may be intimidating to a grandparent guardian, the court's retention of jurisdiction over the matter can be helpful as well. For example, this requirement allows the grandparent guardian to seek approval from the court for any potentially controversial action he may be required to take on behalf of the minor. The grandparent may file a petition with the court describing the action for which he desires court approval and give notice as required by the statute (which generally includes close relatives of the minor, including parents). After a hearing on the matter, the court will enter an order either allowing or disallowing the action requested. Thus, the court's continuing involvement with the guardian and the minor child is not necessarily a reason to avoid seeking appointment. Rather, the court's continuing involvement provides guidance and legal authorization with regard to actions taken by the grandparent on behalf of the minor.

1. GUARDIANSHIP UNDER THE PROBATE ACT

In Illinois, the Probate Act¹⁴⁶ sets out the statutory procedures for obtaining a guardianship over a minor child. The Probate Act establishes judicial authority for the protection of persons whose age renders them incapable, in the eyes of the law, of protecting themselves.¹⁴⁷ The Probate Act codifies the court's inherent broad and plenary jurisdiction over the persons and estates of minors.¹⁴⁸

a. Statutory Provisions The probate guardianship procedure may be the simplest way for grandparents to seek legal authority over a minor grandchild. A guardianship proceeding is initiated by filing a petition with the court.¹⁴⁹ The information required in the petition for

144. See Illinois Probate Act, 755 ILL. COMP. STAT. § 5/23-2; Illinois Juvenile Court Act, 705 ILL. COMP. STAT. § 405/2-28(4).

145. See 755 ILL. COMP. STAT. §§ 5/19-1 to 19-13, 5/20-1 to 20-24.

146. *Id.* §§ 5/1 to 5/30-3.

147. 2 HORNER PROBATE PRACTICE AND ESTATES § 883 (Lawyers Co-op. 4th ed. 1994). Although at common law, minority did not end until age 21, the Act specifies that guardianships for minors are limited to those under the age of 18 years of age. *Id.* § 884; see also 755 ILL. COMP. STAT. § 5/11-1.

148. *Smythe v. Smythe*, 213 N.E.2d 609, 613 (Ill. App. Ct. 1965).

149. 755 ILL. COMP. STAT. § 5/11-5(a).

guardianship is contained in the Probate Act.¹⁵⁰ Two kinds of guardians are allowed by the Probate Act, guardian of the person and guardian of the estate.¹⁵¹ The guardian of the person of the minor "shall have the custody, nurture and tuition and shall provide education of the ward" ¹⁵² The guardian of the estate of the minor "shall have the care, management and investment of the estate, shall manage the estate frugally and shall apply the income and principal of the estate so far as necessary for the comfort, suitable support and education of the ward" ¹⁵³ The same person may act as both the guardian of the person and estate; however, the guardian of the estate must be a resident of Illinois.¹⁵⁴ If the personal guardian is not an Illinois resident and an estate guardian is needed, a second person who is an Illinois resident must be named guardian of the minor's estate.¹⁵⁵ Under the statute, a guardian must be at least eighteen years old, a resident of the United States, must not be of unsound mind or adjudged a disabled person, and must not have been convicted of a felony.¹⁵⁶ The court will not appoint someone as guardian of the person of a minor "whom the court has determined had caused or substantially contributed to the minor becoming a neglected or abused minor as defined in the Juvenile Court Act of 1987"¹⁵⁷ unless 2 years have elapsed since the last proven incident of abuse or neglect and the court determines that the appointment of such person as guardian is in the best of the minor."¹⁵⁸

The petition initiating the action may be filed in the county where the minor resides if the minor is an Illinois resident, and in the county in which the minor's real or personal estate exists if the minor is not an Illinois resident.¹⁵⁹ Thus the residence of the minor at the time a guardianship is sought is important in determining where to bring the action. However, in *In re Smythe*,¹⁶⁰ a guardianship action for two minor children was filed in Illinois, even though neither minor

150. *Id.* § 5/11-8.

151. *Id.* § 5/11-5(a).

152. *Id.* § 5/11-13(a).

153. *Id.* § 5/11-13(b).

154. *Id.* § 5/11-3(a).

155. *Id.*

156. *Id.*

157. 705 ILL. COMP. STAT. § 405/2-3(1) and 2-3(2).

158. 755 ILL. COMP. STAT. § 5/11-5(d).

159. 755 ILL. COMP. STAT. § 5/11-6.

160. *In re Smythe*, 213 N.E.2d 609 (Ill. App. Ct. 1965).

resided in Illinois and neither had an estate in Illinois.¹⁶¹ The minors resided in Kentucky with their parents until the parents were killed in an automobile accident in Illinois.¹⁶² The maternal grandparents of the minors resided in Illinois and the paternal grandfather resided in Indiana.¹⁶³ There was a possibility of a lawsuit in Illinois arising out of the accident which killed the minors' parents.¹⁶⁴ The court held that its inherent power to act on behalf of minors, independent of any statute, allowed it to act in the matter, stating:

[t]he jurisdiction of a State to regulate the custody of infants found within its territory does not depend upon the domicile of the child. It arises out of the power that every sovereignty possesses as *parens patriae* to every child within its borders to determine its status and custody that will best meet its needs and wants.¹⁶⁵

b. Best Interest of the Child Prior to January 1, 1994, the Probate Act required the court to appoint a guardian for a minor if it appeared from the evidence that the appointment was "necessary and convenient."¹⁶⁶ Although the courts nearly always indicated the appointment was either "necessary" or "convenient," the standard actually applied by the courts was the best interest of the child standard.¹⁶⁷ In 1994, the best interest of the child standard formally replaced the necessary and convenient standard in the Probate Act.¹⁶⁸ As explained by the court in *Estate of Brown*,¹⁶⁹ "[t]he best interest standard considers both the present and the prospective welfare of the minor child. Such

161. *Id.* at 609-10.

162. *Id.* at 610.

163. *Id.*

164. *Id.*

165. *Id.* at 615 (citations omitted) (citing *People ex rel. Noonan v. Wingate*, 33 N.E.2d 467, 470 (Ill. 1941)). It should be noted that this case was decided prior to the adoption of the Uniform Child Custody Jurisdiction Act. Application of the UCCJA may have influenced the court to decline jurisdiction over this matter if another state with closer connections to the minors had instituted similar proceedings. See the discussion of the UCCJA, *supra* notes 26-44 and accompanying text.

166. 755 ILL. COMP. STAT. § 5/11-5(a) (amended 1993).

167. *Estate of Whittington*, 483 N.E.2d 210, 215 (Ill. 1985); *In re Schomer*, 411 N.E.2d 554, 558 (Ill. App. Ct. 1980).

168. 755 ILL. COMP. STAT. § 5/11-5(a).

169. *Estate of Brown*, 565 N.E.2d 312 (Ill. App. Ct. 1990). The child's mother challenged the maternal grandparents' petition for guardianship of their grandchild. The court found that the appointment of the grandparents as guardians was supported by evidence of an existing integrated familial relationship between the child and the grandparents and the grandparents' ability to adequately meet the reasonable needs of the child, all of which created a stable home with a wholesome environment whereas the mother was barely self-supporting and her lifestyle was unstable. *Id.* at 317.

consideration is not the simplest of matters. It requires a deep appreciation of the emotional impact that both custodial and guardianship determinations have on any familial relationship between litigants."¹⁷⁰

The court in *Eaton v. Eaton*,¹⁷¹ a case in which the paternal grandparents sought guardianship over their grandchildren after the children's father died in an accident, discussed the best interest of the child standard. The children's mother filed a petition for writ of habeas corpus to have the children returned to her custody.¹⁷² The paternal grandparents filed for guardianship of the person and the estate of the children.¹⁷³ The trial court, considering evidence based upon the mother's lack of ability to care for the children at the time of the parent's divorce, appointed the grandparents guardians of the children. However, the appellate court noted that under the Illinois Probate Act, the grandparents had the burden of establishing that, due to the parent's unfitness, it would be in the best interest of the child to take custody from the natural parent.¹⁷⁴ Moreover, the court noted that the surviving parent's unfitness at the time of the divorce was irrelevant.¹⁷⁵ It is the parent's fitness at the time of the other parent's death which is determinative.¹⁷⁶ Because the grandparents failed to prove that the mother was unfit at the time of the father's death, the court awarded custody of the children to the mother and appointed the paternal grandfather the guardian of the children's Illinois estate.¹⁷⁷ Absent a showing of the mother's unfitness, the court determined that it was in the best interest of the children to be raised by their mother.¹⁷⁸

In many guardianship cases, the best interest of the child tends to override the superior parental rights doctrine. In *In re Estate of Becton*,¹⁷⁹ the putative father and the child's maternal grandmother each petitioned for guardianship of the person and estate of the child. The child's parents had never married but had lived together for six years with the child until the mother's illness, when the child was placed

170. *Id.* (citations omitted).

171. *Eaton v. Eaton*, 365 N.E.2d 647 (Ill. App. Ct. 1977).

172. *Id.* at 648.

173. *Id.*

174. *Id.* at 650-51.

175. *Id.* at 651.

176. *Id.*

177. *Id.* at 653.

178. *Id.*

179. *Estate of Becton*, 474 N.E.2d 1318 (Ill. App. Ct. 1985).

with the maternal grandparents.¹⁸⁰ The court acknowledged the presumption in favor of awarding custody to a natural parent and indicated that the third party seeking custody bears the burden of overcoming this presumption by a demonstration of good cause or reason for the nonparent to be given custody.¹⁸¹ The *Becton* court affirmed the trial court's appointment of the grandparents as guardians, noting several factors supporting the lower court's determination that naming the grandparents as guardian was in the child's best interest.¹⁸² These factors included the stable environment of the grandparent's home, the father's lack of a permanent home, and the father's failure to contribute to the support or medical care of the minor child while living with the mother and the child.¹⁸³

In *In re Schomer*,¹⁸⁴ both sets of grandparents sought custody of their grandchildren after both parents were killed. One set of grandparents filed a petition to adopt the children while the other grandparents filed a petition for guardianship.¹⁸⁵ The cases were consolidated. The lower court denied the adoption petition and granted the guardianship petition.¹⁸⁶ On appeal, the losing grandparents claimed the lower court failed to apply the "best interest of the child" factors listed in section 602(a) of the IMDMA and failed to specify the basis for its decision.¹⁸⁷

The appellate court in *Schomer* held that the Probate Act did not require consideration of the section 602(a) factors in guardianship determinations.¹⁸⁸ However, the court further explained that, even though not required, the preferred practice is to consider the relevant section 602(a) factors, "as these are important considerations in ensuring that the guardianship of a young child corresponds to the best interests of that child."¹⁸⁹ The court affirmed the lower court ruling, noting with approval that the lower court had considered the best interest of the child standards, which included the amount of time the children had previously spent with each set of grandparents, the stability of the two families, and the fact that the children were always

180. *Id.* at 1321.

181. *Id.* at 1323.

182. *Id.* at 1324.

183. *Id.*

184. *In re Schomer*, 411 N.E.2d 554 (Ill. App. Ct. 1980).

185. *Id.* at 556.

186. *Id.*

187. *Id.* at 556-57.

188. *Id.* at 558.

189. *Id.*

well cared for by the grandparent guardians when left with them. The court held that these factors were sufficient to support the lower court's finding.¹⁹⁰

c. Presumption Favoring Parents Specific requirements are enumerated in the Probate Act to recognize and protect the superior right of a natural parent to the custody of the child.¹⁹¹ The Probate Act makes several clear references to this parental preference. For example, the Probate Act codifies the right of a parent, if parental rights have not been terminated, to designate a testamentary guardian for his children in the parent's will or to nominate a standby guardian to act for the parent in the event of the parent's disability or death.¹⁹² In addition, the Act specifically states that the court will

not have jurisdiction to proceed on a petition for guardianship if the minor has a living parent, adoptive parent or adjudicated parent whose parental rights have not been terminated, whose whereabouts are known, and who is willing and able to make and carry out day-to-day child care decisions concerning the minor
...¹⁹³

unless that parent either consents to the guardianship appointment or fails to appear and object at the hearing on the petition after receiving proper notice. Further, the Probate Act includes a rebuttable presumption that a parent is willing and able to make decisions for the minor.¹⁹⁴

To overcome these statutory obstacles, a grandparent petitioning for guardianship must show that the whereabouts of the minor's parents are unknown. If the parents' whereabouts are known, the grandparent must show that the parents are not willing or able to care for the child, or have consented to the guardianship. The Probate Act also requires that close relatives of the minor receive notice of the hearing on the petition for guardianship.¹⁹⁵ If the parent appears at the hearing and objects to the guardianship, the grandparent must present evidence to rebut the presumption that the parent is willing and able to make decisions regarding the child.¹⁹⁶ The standard of

190. *Id.* at 560.

191. 755 ILL. COMP. STAT. § 5/11-1 to 11-18.

192. *Id.* § 5/11-5(a-1).

193. *Id.* § 5/11-5(b).

194. *Id.*

195. *Id.* § 5/11-10 (1)(a).

196. *Id.* § 5/11-5(b).

proof required to rebut this presumption is a preponderance of the evidence.¹⁹⁷

d. Standing to Bring the Action Another hurdle for the grandparent to clear before proceeding under the Probate Act is the standing requirement imposed by the Probate Act.¹⁹⁸ As mentioned, section 11-7 of the Probate Act clearly states that a parent has a superior right to custody of the minor child unless the parent is unfit or incompetent.¹⁹⁹ If one parent is dead, the other parent is similarly entitled. The parents have equal powers, rights, and duties concerning the minor.²⁰⁰ The Probate Act has been construed by the courts to require both a showing that the child was not in the physical custody of a parent at the time the petition was filed and a showing that there is a good reason for the custody change.²⁰¹ However, the court may, for good reason, award custody to a third party if the parents live apart.²⁰²

The court in *Newsome v. Newsome*²⁰³ first applied this standing requirement in a guardianship case. In *Newsome*, the children went to live with their maternal grandparents after the death of their mother.²⁰⁴ The maternal grandparents filed a petition for guardianship of the two children, and, at the same time, the putative father of one of the children filed for custody of his children under section 601 of the IMDMA.²⁰⁵ The grandparents also filed a petition seeking permanent custody under the IMDMA.²⁰⁶ The lower court, relying on *In re Peterson*,²⁰⁷ held that the grandparents lacked standing to bring a petition for custody under both section 601(b)(2) of the IMDMA and the Probate Act.²⁰⁸

197. *Id.*

198. *Id.* § 5/11-7.

199. *Id.*

200. *Id.*

201. *See, e.g.,* *Barnhart v. Barnhart*, 597 N.E.2d 1238 (Ill. App. Ct. 1992); *Brown v. Brown*, 565 N.E.2d 312 (Ill. App. Ct. 1990); *Newsome v. Newsome*, 527 N.E.2d 524 (Ill. App. Ct. 1988). Note that this is the same requirement codified at § 5/601(b)(2) of the Illinois Marriage and Dissolution of Marriage Act.

202. 755 ILL. COMP. STAT. § 5/11-7.

203. *Newsome*, 527 N.E.2d 524.

204. *Id.*

205. *Id.* at 525.

206. *Id.*

207. *In re Peterson*, 491 N.E.2d 1150, 1152 (Ill. 1986) (holding that "nonparents must first show that the child is 'not in the physical custody of one of his parents' " (quoting § 601(a)(2) of the IMDMA).

208. *Newsome*, 527 N.E.2d at 525.

Mere "physical possession of a minor" is not sufficient.²⁰⁹ In light of *Peterson*, the *Newsome* court determined that acquiring custody when one parent dies is not sufficient to give a grandparent standing.²¹⁰ The *Newsome* court reasoned that because the superior rights doctrine was incorporated into the Probate Act at section 11-7, the standing requirement of the IMDMA must also apply to the Probate Act.²¹¹

In *Brown v. Brown*, the minor's mother opposed the grandparents' appointment as guardian and challenged the standing of the grandparents to bring the petition.²¹² Noting that the petitioners must show that the child was not in the physical custody of the parent at the time the case was filed, the court determined that the standing test would be satisfied "when the petitioners depend on the voluntary, not fortuitous relinquishment of child custody . . . [T]he facts of obvious importance here concern the legal incidents of custody: (1) who has immediate physical possession of the minor child; (2) how that person took over control; and (3) the nature, manner, and duration of possession."²¹³

The presumed superior right of a parent and the standing requirement applied in probate guardianship proceedings present significant barriers for grandparents seeking guardianship of a minor when the minor is in the custody of a parent. Filing for guardianship under the Probate Act is the best choice when the minor child is not in the physical custody of a parent and the sole issue before the court is whether the guardianship is in the best interest of the minor based on the facts and circumstances presented to the court.

e. Standby and Short-term Guardianship Designations Two new sections of the Probate Act may be of some assistance to grandparents seeking legal authority over a grandchild. In January of 1994, the Probate Act was amended to add two new types of guardians for minors, a "standby" guardian and a "short-term" guardian.²¹⁴ Both of these new guardianships require the minor's parent to take affirmative steps to create the guardianships. Because the parent's involvement

209. *Peterson*, 491 N.E.2d at 1152-53.

210. *Newsome*, 527 N.E.2d at 526.

211. *Id.* at 525.

212. *Estate of Brown*, 565 N.E.2d 312 (Ill. App. Ct. 1990).

213. *Id.* at 316.

214. 1993 Ill. Laws 88-529.

and consent are required to institute these guardianships, they will be of limited use to a grandparent seeking legal authority over a minor without the parent's cooperation.

A "standby guardian" is "a guardian of the person or estate, or both, of a minor as appointed by the court under section 11-5.3, to become effective at a later date" ²¹⁵ A parent may make a written designation appointing someone to act as guardian of the person or estate of his child in the event of the parent's future disability or death. Previously, this designation was allowed only by will. ²¹⁶ A statutory designation form is included in the Act. ²¹⁷

The standby designation is accomplished by filing a petition with the court. The appointment is subject to the court's determination that the appointment is in the best interest of the child. ²¹⁸ "The rights of the minor's other parent are protected by denying jurisdiction to the court if the minor has a living natural or adoptive parent whose rights have not been terminated, whose whereabouts are known and who is willing and able to make and carry-out day-to-day child care decision concerning the minor" ²¹⁹ The standby guardianship statute creates a rebuttable presumption that the other parent is willing and able to care for the child. ²²⁰

This new provision for standby guardianship was added to the Probate Act to allow a parent with a serious illness to make advance plans for the care of a minor child. If the designation by the parent is witnessed and attested to in the same manner as a will, the designation will have *prima facie* validity, subject only to the rights of the other parent. ²²¹ If the court finds that the appointment of a guardian is in the minor's best interest and the parent has previously designated a standby guardian, "the court shall appoint the standby guardian as the guardian of the person or estate, or both, of the minor, unless the court finds, upon good cause shown that the appointment would no longer be in the best interest of the child." ²²²

Once appointed by the court, the standby guardian cannot act on the child's behalf until the guardian receives notice that the parent has

215. 755 ILL. COMP. STAT. § 5/1-2.23.

216. *Id.* § 5/11-5(a-1).

217. *Id.* § 5/11-5.3.

218. *Id.* § 5/11-5.3(b), 5/11-8.1.

219. *Id.* § 5/11-5.3(c).

220. *Id.*

221. *Id.* § 5/11-5.3(a).

222. *Id.* § 5/11-5(b).

died or is unable to care for the minor children, unless consent to act sooner is given by the parent.²²³ Once the guardian begins to act on behalf of the minor child, he may act for sixty days without the authority of the court.²²⁴ After sixty days he must file a petition with the court seeking appointment as permanent guardian under section 11-5 of the Probate Act.²²⁵

The Probate Act also provides for appointment of a short-term guardian.²²⁶ Under this statute, a minor's parent may appoint a person to act for sixty days as the guardian of the minor child without court approval.²²⁷ However, no short-term guardian is to be appointed if the minor has another living natural, adoptive or adjudicated parent, whose whereabouts are known and who is willing and able to act on behalf of the minor child.²²⁸ This appointment does not affect the rights of the other parent in the minor.²²⁹ A form is included in the Act.²³⁰

The short-term guardianship statute is intended for situations in which the parent knows that another person will be needed to care for the minor child temporarily. Grandparents asked to care for children by a parent temporarily should ask the parent to make this designation. Unless otherwise limited, the designation gives the grandparent the authority of the guardian of the person under section 13(a) of the Probate Act. The designation is effective for only sixty days, but the Act allows the execution of successive designations if needed.²³¹ A short-term guardian is not authorized to act as guardian of the minor's estate. If authority is needed for the grandparent to deal with the minor's estate, this designation will not suffice. This limitation probably was included because a short-term guardian serves without the authority or oversight of the court.

It is unlikely that these two new statutory sections will help most grandparents who are raising a grandchild because the parent of the child must cooperate by executing the written designation of guardian. However, designation as the standby or short-term guardian of a

223. *Id.* § 5/11-13.1(b).

224. *Id.*

225. *Id.* § 5/13.1(b), (c).

226. *Id.* § 5/11-5.4.

227. *Id.* § 5/11-5.4(c).

228. *Id.* § 5/11-5.4(b).

229. *Id.* § 5/11-5.4(e).

230. *Id.* § 5/11-5.4(f).

231. *Id.* § 5/11-5.4(c).

grandchild will provide evidence favoring a grandparent seeking more permanent authority over a child as it indicates that the parent clearly preferred the grandparent over others to care for the child.

2. GUARDIANSHIP OR CUSTODY UNDER THE JUVENILE COURT ACT

Juvenile practice in Illinois is governed by the Juvenile Court Act of 1987 (Juvenile Court Act).²³² The purpose and policy of the Juvenile Court Act is:

to secure for each minor . . . such care and guidance, preferably in his own home, as will serve the moral, emotional, mental, and physical welfare of the minor and the best interests of the community; to preserve and strengthen the minor's family ties whenever possible, removing him or her from custody of his or her parents only when his or her welfare or safety or the protection of the public cannot be adequately safeguarded without removal; and when the minor is removed from his or her own family, to secure for him or her custody, care and discipline as nearly as possible equivalent to that which should be given by his or her parents, and in case where it should and can properly be done to place the minor in a family home so that he or she may become a member of the family by legal adoption or otherwise.²³³

The Juvenile Court Act codifies the court's ancient equitable jurisdiction over infants under the doctrine of *parens patriae*,²³⁴ covering four different categories of minors: delinquent minors, minors in need of supervision, addicted minors, and minors who are abused, neglected, or dependent.²³⁵

Grandparents may have grandchildren who fit into any of these descriptions. However, the following discussion regarding guardianship or custody of a minor grandchild will focus on only Article II of the Act which addresses minors who are deemed to be abused,²³⁶ ne-

232. 705 ILL. COMP. STAT. § 405/1-1 to 1-16.

233. *Id.* § 405/1-2(1).

234. *Houghland v. Leonard*, 112 N.E.2d 697, 699 (Ill. 1953). "Historically, courts of chancery, representing the government, have exercised jurisdiction over the person and property of infants to insure that they were not abused, defrauded, or neglected." *Id.*

235. 705 ILL. COMP. STAT. §§ 405/1-1 to 1-16.

236. *Id.* § 405/2-3(2). An abused minor is one:

whose parent or immediate family member, or any person responsible for the minor's welfare, or any person who is in the same family or household as the minor, or any individual residing in the same home as the minor, or a paramour of the minor's parent: (i) inflicts, causes to be inflicted, or allows to be inflicted upon such a minor physical injury, by other than accidental means, which causes death, disfigurement, impairment of physical or emotional health, or loss or impairment of any bodily function; (ii) creates a substantial risk of physical injury to such a minor by other than accidental means which

glected,²³⁷ or dependent.²³⁸ Proceedings under the Juvenile Court Act are considered civil in nature, and the standard of proof is a preponderance of the evidence.²³⁹ The primary concern of the court throughout the entire process is the best interest of the minor, the minor's family, and the community.²⁴⁰

A general overview of how the juvenile court system and Article II of the Juvenile Court Act operate is useful in understanding how and when a grandparent may seek guardianship or custody of a grandchild. Generally, the Act allows the state to intervene in family situations on behalf of a minor child who is in need of some kind of protection or intervention.²⁴¹ Juvenile court petitions usually are filed and presented by the state's attorney in the county where the minor

would be likely to cause death, disfigurement, impairment of emotional health, or loss or impairment of any bodily functions; (iii) commits or allows to be committed any sex offense against such minor . . . ; (iv) commits or allows to be committed an act or acts of torture upon such minor; or (v) inflicts excessive corporal punishment.

Id.

237. *Id.* § 405/2-3(1)(a). Neglected minors are described as any minor under 18 years of age whose parent or other person responsible for the minor's welfare does not provide the proper or necessary support, education as required by law, or medical or other remedial care recognized under State law as necessary for a minor's well-being, or other care necessary for his or her well-being, including adequate food, clothing and shelter, or who is abandoned by his or her parents or other person responsible for the minor's welfare.

Id. Also characterized as neglected are minors "whose environment is injurious to his or her welfare" and newborn infants who are born with any amount of a controlled substance in their blood or urine. *Id.* § 405/2-3(1)(b), (c).

238. *Id.* § 405/2-4. A dependent minor includes a minor

- (a) who is without a parent, guardian, or legal custodian;
- (b) who is without proper care because of physical or mental disability of his parent, guardian or custodian; or
- (c) who is without proper medical or other remedial care recognized under State law or other care necessary for his or her well being through no fault, neglect or lack of concern by his parents, guardian or custodian, provided that no order may be made terminating parental rights, nor may a minor be removed from the custody of his or her parents for longer than 6 months, pursuant to an adjudication as a dependent minor under this subsection (c); or
- (d) who has a parent, guardian or legal custodian who with good cause wishes to be relieved of all residual parental rights and responsibilities, guardianship or custody, and who desires the appointment of a guardian of the person with power to consent to the adoption of the minor under Section 2-29.

Id.

239. *Id.* § 405/2-18(1).

240. *In re J.M.*, 613 N.E.2d 1346, 1355 (Ill. App. Ct. 1993).

241. 705 ILL. COMP. STAT. § 405/1-2.

resides or is located at the time of the intervention by authorities.²⁴² The state's attorney is authorized to represent the people in juvenile court proceedings and to determine how and when to proceed on a petition.²⁴³ The right to initiate proceedings, however, is not limited to the state's attorney. Any adult may bring a petition alleging that a minor is in need of the court's protection.²⁴⁴ Grandparents and others may file a petition under the provisions of the Juvenile Court Act and present evidence to support the allegations of the petition in the proceeding.²⁴⁵

In *In re J.M.*,²⁴⁶ the adoptive parents of J.M. wished to forego their parental rights to J.M. because the child was emotionally disturbed and required institutional care. They filed a petition alleging that J.M. was a dependent child.²⁴⁷ The state's attorney declined to prosecute the dependency petition and instead proceeded on a neglect petition. The state's attorney alleged that J.M.'s parents were refusing to provide support, medical care, or other remedial care necessary for the child's well-being.²⁴⁸ The issue on appeal was whether the trial court could order the state's attorney to prosecute the petition brought by the adoptive parents.²⁴⁹ The appellate court held that the trial court had the authority to order the state's attorney to prosecute the dependency petition brought by the adoptive parents.²⁵⁰ However, because the state's attorney had proceeded under the neglect petition first, he could not then be required to prosecute the parent's dependency petition calling for conflicting findings and results.²⁵¹ The parents' attorney was allowed to present evidence of dependency while the state's attorney proceeded on the neglect petition.²⁵² Ultimately, the appellate court upheld the trial court's determination that J.M. was neglected but not dependent.²⁵³

In general, "neglect" is considered to be the failure by a responsible adult to exercise the care that circumstances justly demand and encompasses both wilful and unintentional disregard of pa-

242. *Id.* § 405/2-2.

243. 705 ILL. COMP. STAT. §§ 405/2-1 to 2-6, 405/2-13.

244. *Id.* § 405/2-13(1).

245. *Id.* §§ 405/2-13(1), 405/2-22.

246. *In re J.M.*, 613 N.E.2d 1346 (Ill. App. Ct. 1993).

247. *Id.* at 1348-49.

248. *Id.* at 1348.

249. *Id.* at 1352.

250. *Id.* at 1353.

251. *Id.*

252. *Id.* at 1355.

253. *Id.*

rental duty. The term is not one of "fixed and measured meaning" and takes its content from the specific circumstances of each case. In dependency and neglect proceedings, both the State's Attorney and the court are charged with the duty of ensuring that at each step of the wardship adjudication process the best interests of the minor, the minor's family, and the community are served.²⁵⁴

The declaration of J.M.'s adoptive father that the parents did not intend to provide further food, shelter, clothing, education, medical or remedial care, or emotional support to J.M., along with other evidence, was sufficient to support the state's allegations that J.M. was neglected.²⁵⁵ The state met its burden of proving neglect by a preponderance of the evidence.²⁵⁶

a. Temporary Custody Proceedings under Article II of the Juvenile Court Act may be initiated either when a minor is taken into temporary custody²⁵⁷ or when a petition is filed alleging a minor is abused, neglected, or dependent.²⁵⁸ If the state or local authorities take a minor into protective custody and the designated authority (usually the state's attorney) determines that the minor should be retained in custody, a petition alleging the basis for retention must be filed.²⁵⁹ There must be a temporary custody hearing (sometimes called a shelter care hearing) within forty-eight hours.²⁶⁰ At this hearing, a judicial officer presides and will determine if the minor should be retained in custody.²⁶¹ The minor's parent, guardian, custodian, or responsible relative is to be given notice of the time and place of this hearing.²⁶² The minor, who has essentially the same due process rights as an adult who is being detained, must be provided with counsel before any hearing.²⁶³ When a petition is filed alleging that the minor is either abused or neglected, the court must appoint a guardian ad litem to represent the best interest of the minor and make recommendations to the court.²⁶⁴

254. *Id.* at 1354-55 (citations omitted).

255. *Id.* at 1355.

256. *Id.*

257. 705 ILL. COMP. STAT. § 405/2-9.

258. *Id.* § 405/2-1.

259. *Id.* § 405/2-9(2).

260. *Id.* § 405/2-9(1).

261. *Id.*

262. *Id.* § 405/2-9(2).

263. *Id.* § 405/1-5.

264. *Id.* § 405/2-17.

At the temporary custody hearing, which is generally more informal than many other civil hearings, the court will examine all witnesses with regard to the allegations of the petition.²⁶⁵ If the court finds that there is no probable cause to believe that the minor is abused, neglected, or dependent, the petition is dismissed and the minor is released.²⁶⁶ Each juvenile case is decided on the basis of its particular facts, although the court's primary concern remains the best interest and welfare of the child.²⁶⁷ To this end, the juvenile court is vested with wide discretion.²⁶⁸ The trial court's finding of neglect will not be disturbed on review unless the findings are contrary to the manifest weight of the evidence.²⁶⁹

If the court determines that probable cause exists that the child is abused, neglected, or dependent, the court will examine all persons able to give relevant evidence, including the parent, guardian, custodian, or responsible relative of the minor.²⁷⁰ After hearing this evidence the court will determine if the minor should be released to the custody of his parent or guardian, or if an "immediate and urgent necessity" requiring protection of the minor in a shelter care setting arranged by the court or through the Department of Children and Family Services.²⁷¹ Once the court determines that the protection of the minor requires placement away from the minor's home, the minor may not be returned to the custody of the parent or guardian until the court finds that the placement is no longer necessary for the protection of the minor.²⁷²

A grandparent who is the primary care giver of the minor, or who appears at the temporary custody hearing, may be allowed, at the court's discretion, to present evidence concerning the allegations of the juvenile petition, and may also, if not involved in the alleged misconduct, be able to persuade the court to place the minor in his care until the next court proceeding. Otherwise, the child will most likely be placed in a licensed foster care home until further court order.

265. *Id.* § 405/2-10.

266. *Id.* § 405/2-10(1).

267. *In re M.B.*, 609 N.E.2d 731, 737 (Ill. App. Ct. 1992).

268. *Id.*

269. *In re B.M.*, 618 N.E.2d 374, 376 (Ill. App. Ct. 1993).

270. 705 ILL. COMP. STAT. § 405/2-10(2).

271. *Id.*

272. 755 ILL. COMP. STAT. § 405/2-10(2).

At this early stage in the juvenile court process, the minor has an attorney, a guardian ad litem, or both, and sometimes a special advocate.²⁷³ The grandparent should contact these individuals and offer suggestions with regard to the best interests of the minor. If a grandparent can convince these individuals that her home is an appropriate placement for the minor and that she can provide adequate care and supervision for the minor, it is unlikely that a foster home will be considered an option in subsequent court proceedings. The grandparent should appear at all court proceedings, demonstrating support for the minor and displaying a willingness to assist the court in protecting the minor and alleviating the conditions which brought the matter to the court's attention.

b. Adjudicatory Hearing Once temporary placement of the minor is arranged or the minor is released to his parents, the matter will be set for an adjudicatory hearing.²⁷⁴ At this hearing, the court will hear the allegations of the petition and determine if the minor is abused, neglected, or dependent.²⁷⁵ There are strict time limits for holding this hearing, and continuances are not allowed except for "good cause."²⁷⁶ This is to insure that delays do not cause harm to the minor or the family or adversely effect the best interest of the minor.²⁷⁷ The adjudicatory hearing will be the first court appearance for minors who were not taken into temporary custody prior to the filing of the petition. All persons named as respondents in the petition must receive notice of the adjudicatory hearing in accordance with the Juvenile Court Act.²⁷⁸ All respondents have a right to representation, and the court must appoint counsel for each respondent if the respondent cannot afford to hire private counsel.²⁷⁹ If a grandparent is the relative responsible for the minor and has been caring for the minor prior to the court proceeding, the grandparent is a "respondent" and, accordingly, has the right to notice as required by the Act and to appointed counsel if he or she is indigent.²⁸⁰

273. 705 ILL. COMP. STAT. § 405/2-17.1.

274. *Id.* §§ 405/2-14, 405/1-3(1).

275. *Id.* § 405/2-18.

276. *Id.* § 405/2-14(c).

277. *Id.* § 405/2-14(a).

278. *Id.* § 405/2-15.

279. *Id.* § 405/1-5(1).

280. *In re Jennings*, 368 N.E.2d 864, 867 (Ill. 1977).

The court's first consideration at the adjudicatory hearing is whether the minor is abused, neglected, or dependent.²⁸¹ In many hearings, the parties will agree to admit to or stipulate to the allegations of the petition. When this happens, the court may continue the case under supervision without proceeding to make findings and adjudication.²⁸² The court will then enter an order which will include where the minor will reside and with whom, what services the minor and other family members will be provided, how long the supervision will continue, and any other conditions the court may wish to impose.²⁸³ If any of these conditions are violated, a petition may be filed bringing the violation to the court's attention, and further action, including proceeding to findings and adjudication, may be taken by the court.²⁸⁴

If the case is not continued under supervision, the court must hear the evidence and make findings and adjudications on the record.²⁸⁵ The minor is presumed to be competent to testify at the hearing either in open court or in chambers. The court determines the weight to be given to the minor's testimony.²⁸⁶ If the court finds the minor is not abused, neglected, or dependent, the petition will be dismissed.²⁸⁷ If a finding of abuse, neglect, or dependency is made, the court will set a date for the dispositional hearing and may order a predisposition investigation to develop information that may be helpful to the court.²⁸⁸ If an investigation is ordered, the grandparent should meet with the person conducting the investigation and inform the investigator of his or her interest in caring for the minor and of his or her ability to do so.

c. Dispositional Hearing At the dispositional hearing, the court must first determine whether it is in the best interests of the minor and the public that he or she become a ward of the court, and, if so, what disposition will best serve the interests of the minor and the public.²⁸⁹ The court may consider oral and written reports as well as other evi-

281. 705 ILL. COMP. STAT. § 405/2-18(1).

282. *Id.* § 405/2-20.

283. *Id.* § 405/2-20(4).

284. *Id.* §§ 405/2-20(4), 405/2-20(5).

285. *Id.* § 405/2-21.

286. *Id.* § 405/2-18(4)(d).

287. *Id.* § 405/2-21(1).

288. *Id.* § 405/2-21(2).

289. *Id.* § 405/2-22(1).

dence to determine the proper disposition.²⁹⁰ The child and the child's parents, guardian, legal custodian, or responsible relative have the right to be present at the hearing, to be heard, and to present evidence.²⁹¹ A grandparent may be heard at the dispositional hearing if he or she is classified as a "responsible relative" under the Juvenile Court Act.²⁹² He or she would be classified as a responsible relative only if he or she were the person having custody and control over the child, or is the child's nearest known relative, and he or she would have been made a respondent in the petition.²⁹³

After all evidence is heard, the court must issue a dispositional order. There are many kinds of disposition orders which may be entered.²⁹⁴ Under some circumstances, the court might order the minor to be returned to the custody of his or her parents and services ordered.²⁹⁵ However, the court may determine that it is in the minor's best interest that he or she not be returned to the custody of his or her parents. In that case, the court must enter a finding that the minor's parents are unfit or unable to care for the minor and that it is in the minor's best interest that he or she be placed elsewhere.²⁹⁶ "To deprive the parents of custodial rights requires a finding that the parents are unfit or unable, other than for financial reason alone, to properly care for the minor or unwilling to do so and that the custody change is in the minor's best interest."²⁹⁷ This is not the same unfitness determination which terminates parental rights and frees a child for adoption.²⁹⁸ The determination merely supports a change in the custody of the minor from his or her parents to another individual or agency.²⁹⁹ The court will then commit the minor to the care of an agency such as the Department of Children and Family Services for foster home placement, or to the custody of a suitable relative or other person as legal custodian or guardian.³⁰⁰ The suitable relative could be the minor's grandparent.

290. *Id.*

291. *In re Jennings*, 368 N.E.2d 864, 867 (Ill. 1977).

292. *Id.*

293. *Id.*

294. 705 ILL. COMP. STAT. § 405/2-23.

295. *Id.* § 405/2-23(a).

296. *Id.* § 405/2-27.

297. *In re Powers*, 418 N.E.2d 1145, 1147 (Ill. App. Ct. 1981).

298. *Id.*

299. *Id.*

300. 705 ILL. COMP. STAT. §§ 405/2-27(1)(a), 405/2-27(1)(d).

When a minor is placed with a relative or another unrelated person, the court is required to give that person the legal status of either legal custodian of the minor or guardian of the person of the minor.³⁰¹ These terms are defined in the Juvenile Court Act, which defined the duties and responsibilities of this position.³⁰² Custody or guardianship continues until the court otherwise directs but terminates once the minor reaches nineteen years of age.³⁰³

The court continues to supervise the minor by periodic review of the placement and may require reports to be filed.³⁰⁴ The Act requires permanency review hearings at various intervals after the placement.³⁰⁵ Even when the minor is not initially placed with the grandparent, any interested person, including the minor or a grandparent, may apply to the court for a change of custody of the minor and the appointment of a new legal custodian or guardian.³⁰⁶ Thus, a grandparent who learns of a minor grandchild's court-ordered placement in a foster home may petition the court to request that the grandparent be considered for custody of the minor. At the hearing on this peti-

301. *Id.* § 405/2-27(2).

302. *Id.* § 405/1-3 (8), (9). "Guardianship of the person" of a

(8) "Guardianship of the person" of a minor means the duty and authority, subject to residual parental rights and responsibilities, to make important decisions in matters having a permanent effect on the life and development of the minor and to be concerned with his or her general welfare. It includes but is not necessarily limited to:

(a) the authority to consent to marriage, to enlistment in the armed forces of the United States, or to a major medical, psychiatric, and surgical treatment; to represent the minor in legal actions; and to make other decisions of substantial legal significance concerning the minor;

(b) the authority and duty of reasonable visitation, except to the extent that these have been limited by court order;

(c) the rights and responsibilities of legal custody except where legal custody has been vested in another person or agency; and

(d) the power to consent to the adoption of the minor, but only if expressly conferred on the guardian in accordance with Section 2-29, 3-30, 4-27 or 5-31.

(9) "Legal custody" means the relationship created by an order of court which imposes on the custodian the responsibility of physical possession of a minor and the duty to protect, train and discipline him and to provide him with food, shelter, education and ordinary medical care, except as these are limited by residual parental rights and responsibilities and the rights and responsibilities of the guardian of the person, if any.

303. *Id.* § 405/2-27(5).

304. *Id.* § 405/2-28(1).

305. *Id.* § 405/2-28(2).

306. *Id.* § 405/2-28(4); see also *In re Jennings*, 368 N.E.2d 864, 866 (Ill. 1977).

tion, the grandparent must show that the change of custody is in best interest of the minor.

In *In re Robinson*,³⁰⁷ two minors were found neglected and made wards of the court.³⁰⁸ They were initially placed with an unrelated couple. The mother of the minors was residing at the same location. Two years later, the minors' father petitioned the court for a change of custody, claiming that the minors' mother no longer lived with the minors or had contact with them, and asked that custody be awarded to his mother, the paternal grandmother.³⁰⁹ The trial court granted the change of custody, and the mother appealed.³¹⁰ The appellate court upheld the lower court's decision, finding the change of custody to be in concert with the Juvenile Court Act's policy of preserving and strengthening family ties.³¹¹ The court further noted that no change in circumstances was required to be shown in cases where custody was awarded and subject to change at the court's discretion.³¹² All the petitioner needed to show was that the grandmother was a fit and proper person to have the custody of the minors and that she could properly maintain, rear, and educate them.³¹³

In a more recent case, a grandmother, who was caring for two of her daughter's children, intervened in a juvenile proceeding alleging that a third grandchild was neglected.³¹⁴ The trial court, after making the minor a ward of the court, awarded permanent custody and guardianship of the minor to a nonrelated person who had been caring for the minor at the mother's request.³¹⁵ The grandmother, who had intended to adopt all three of the minors, appealed the court's decision.³¹⁶ In reversing the decision, the reviewing court was critical of the expert psychiatric testimony relied upon by the lower court in its determination that changing custody from the primary care giver to the grandmother would be psychologically damaging to the child.³¹⁷ The court noted that the prime directive in custody or guardianship cases is to reach a disposition that serves the best interest of

307. 332 N.E.2d 14 (Ill. App. Ct. 1975).

308. *Id.* at 15.

309. *Id.*

310. *Id.*

311. *Id.* at 16.

312. *Id.*

313. *Id.*

314. *In re C.B.*, 618 N.E.2d 598 (Ill. App. Ct. 1993).

315. *Id.* at 603.

316. *Id.*

317. *Id.*

the child.³¹⁸ The court should not rely solely on the recommendations of experts but should consider all available information in determining the best interest of the minor.³¹⁹ Citing a "glaring lack of competent evidence" concerning the child's situation, the court remanded the case for further consideration of the best interest of the minor.³²⁰

d. Termination of Parental Rights At any time during the wardship, a petition may be filed with the court alleging that the minor's best interest would be served if the court appointed a guardian with the power to consent to the minor's adoption.³²¹ This step is usually not taken until the court has attempted to rectify the initial misconduct and reunite the minor with his or her family. This petition must comply with the requirements of the Adoption Act.³²² Unless the parents of the minor have consented to the adoption of the minor, the court must find the parents unfit as defined in the Adoption Act.³²³ The finding of unfitness must be made by clear and convincing evidence.³²⁴ The court does not consider the best interest of the child when determining if the parent is unfit.³²⁵ Once there is a finding of unfitness, the finding may operate as a termination of parental rights.³²⁶ The court will then determine whether it is in the child's best interest to allow adoption by the petitioners.³²⁷ The grandparent may attempt to intervene at this point in the juvenile proceeding to assert his or her right to custody of the minor.³²⁸

318. *Id.*

319. *Id.* at 603-04.

320. *Id.* at 604-06.

321. 705 ILL. COMP. STAT. § 405/2-29(2).

322. *Id.*; see also 750 ILL. COMP. STAT. §§ 50/.01 to 5/20.

323. 750 ILL. COMP. STAT. § 50/1(1)(D).

324. *In re Clarence T.B.*, 574 N.E.2d 878, 889 (Ill. App. Ct. 1991); see also 705 ILL. COMP. STAT. § 405/2-29(2).

325. *In re Clarence T.B.*, 574 N.E.2d at 889 (citing *In re Syck*, 562 N.E.2d 174 (Ill. 1990)).

326. *In re D.L.W. & J.W. III*, 589 N.E.2d 970, 973 (Ill. App. Ct. 1992). "A finding of unfitness may lead to the termination of parental rights and a court may take such action after finding it to be in the best interests of the minor." *Id.*

327. 705 ILL. COMP. STAT. § 405/2-29(2).

328. See *In re Jennings*, 368 N.E.2d 864 (Ill. 1977), in which a grandmother was allowed to intervene in the proceedings even though the minors' mother had consented to the appointment of a guardian with power to consent to the adoption of the children, who were found to be neglected and dependent. The grandmother alleged that she had raised the children since infancy and that the mother was mentally retarded and illiterate and therefore unable to give her consent to the adoption of the children. The case was remanded for an evidentiary hearing on the rights of the grandmother to be made a necessary party in the juvenile proceeding based on her allegations that she had raised the children since birth. *Id.*

As in a guardianship under the Probate Act, a grandparent acquiring custody or guardianship through proceedings under the Juvenile Court Act will retain custody at the discretion of the court and under the court's continuing supervision.³²⁹ The minor's parents may petition for a return of custody at any time, and the court will determine if the change in custody is in the minor's best interest.³³⁰ Nonetheless, intervention of the grandparent during the pendency of the juvenile matter and the subsequent appointment of guardianship by the court affords the grandparent legal authority over the child. This legal authority may not be disturbed unless the court later determines that a change of custody is warranted.

D. Adoption

The Illinois Adoption Act³³¹ is to be liberally construed and used in conjunction with the Juvenile Court Act.³³² Adoption of a minor terminates the parental right of the minor's parents, stripping them of all rights, duties, and responsibilities toward that minor.³³³ Adoption by a grandparent transfers these parental rights, duties, and responsibilities for the minor to the grandparent.

Parental rights may be terminated voluntarily by the consent of the parent to an adoption or by the parent's surrender of the child to an agency for future adoption.³³⁴ The consent or surrender by natural parents must be in a writing that complies with the requirements set out in the Adoption Act.³³⁵ Once a consent or surrender is given in accordance with the Adoption Act, it becomes irrevocable unless the parent can show that it was obtained by fraud or duress.³³⁶ A consent or surrender should be obtained from both of the minor's natural parents whenever possible. However, recent amendments to the Adoption Act allow some exceptions to the consent requirement with regard to putative fathers who have not asserted their parental rights over the minor.³³⁷

329. 705 ILL. COMP. STAT. § 405/2-28(1).

330. *Id.* § 405/2-28(4).

331. 750 ILL. COMP. STAT. §§ 50/1 to 24.

332. *Id.* §§ 50/2.1, 50/20.

333. *Id.* § 50/17.

334. *Id.* § 50/8.

335. *Id.* § 50/10.

336. *Id.* § 50/11.

337. *Id.* § 50/8(b)(1)(B).

If the minor's natural parents refuse to consent to his or her adoption by the grandparent, or do not surrender the minor to an agency to be placed for adoption, the parents' rights can only be terminated by a finding of unfitness. The Adoption Act defines eighteen grounds for finding a parent unfit.³³⁸ The grounds must be specified in the petition for adoption, and, because the termination of parental rights is an extraordinarily serious measure, the grounds must be proven by clear and convincing evidence.³³⁹ The burden of proving parental unfitness is on those seeking to adopt.³⁴⁰ Evidence of how the minor would benefit from the adoption is not appropriate until parental unfitness has been established.³⁴¹

An adoption action is instituted by filing a verified petition for adoption in compliance with the Adoption Act.³⁴² Statutory requirements for a related child adoption, such as the adoption of a grandchild, are less stringent than the requirements for the adoption of an unrelated child.³⁴³ A grandparent need not be a resident of Illinois in order to file a petition to adopt a minor grandchild; however, if the grandparent is married, the petition must be brought by both spouses.³⁴⁴ The action may be brought in any county where the petitioner resides if he or she is an Illinois resident, in the county where the minor child resides or was born, or in a county where one of the respondents resides.³⁴⁵ Unless parental rights have been terminated in a previous court proceeding or the parent has previously surrendered the child to an agency for adoption, the petition must contain the names and last known addresses of the parents, if known, and must also disclose if any parent is a minor or disabled.³⁴⁶ All persons named in the petition, except the petitioners and any person who has previously denied paternity or whose parental rights have been termi-

338. *Id.* § 50/1(D).

339. *Id.* § 50/8(a)(1); see also *In re Syck*, 562 N.E.2d 174 (Ill. 1990).

340. 750 ILL. COMP. STAT. § 50/8(a)(1); *In re Syck*, 562 N.E.2d at 183.

341. 750 ILL. COMP. STAT. § 50/8(a)(1).

342. *Id.* § 50/5.

343. *Id.* In particular, a related child adoption may be filed at any time, whereas an unrelated adoption must be filed within 30 days of the child becoming available for adoption unless otherwise allowed by the court. *Id.* § 50/5(A).

344. *Id.* § 50/2.

345. *Id.* § 50/4. The UCCJA applies to adoption matters so the court may decline jurisdiction under the UCCJA; although jurisdiction seems to be accorded under the Adoption Act.

346. *Id.* § 50/8.

nated, are made defendants to the action and must be served with process in accordance with the Adoption Act.³⁴⁷

Once a petition is on file and the parties have notice as required, a hearing will be held, during which the court will determine the validity of the parental consent, or surrender if applicable, along with the entry of appearance and waiver of summons.³⁴⁸ The court will also consider the proof of service on any minor and on any consenting parent who has not waived service. At this hearing the court will appoint a guardian ad litem for the child and a guardian ad litem for any minor or disabled party defendants, such as underage parents.³⁴⁹

If a nonconsenting parent is alleged to be unfit, that parent is entitled to counsel, and the court will appoint counsel for that parent if he or she is indigent.³⁵⁰ If the parent challenges the allegations of unfitness, the court will hear the evidence and determine whether or not the petitioner has met the burden of proof for parental unfitness by clear and convincing evidence.³⁵¹ If so, parental rights will be terminated.

Each case of parental unfitness is *sui generis*, and factual comparisons between cases must not be relied upon by anyone.³⁵² As noted earlier, in addition to naming all interested persons in the petition for adoption, if a parent will not consent to the adoption, the petition must set forth the specific grounds of the parent's alleged unfitness.³⁵³ Many of the grounds enumerated in section 50/1(D) have been defined in adoption case law. For example, "abandonment" is defined as conduct by the parent evidencing the desire to forego all parental responsibilities and duties; "desertion" is defined as evidence of conduct during the three months preceding the filing of the petition which demonstrates the parent's desire to relinquish permanent custody of the child; and "habitual drunkenness or addiction" means that the condition existed for at least one year prior to the filing of the petition.³⁵⁴

347. *Id.* § 50/7(A).

348. *Id.* § 50/13(A).

349. *Id.* § 50/13(B)(b).

350. *Id.* § 50/13(B)(c).

351. *Id.* § 50/8(a)(1); see also *In re Syck*, 562 N.E.2d 174 (Ill. 1990).

352. *In re S.J.*, 598 N.E.2d 456, 472 (Ill. App. Ct. 1992) (citing *Syck*, 562 N.E.2d 174).

353. 750 ILL. COMP. STAT. § 50/5.

354. ILLINOIS INST. FOR CONTINUING LEGAL EDUC., FAMILY LAW, ch. 13, §§ 13.20-13.27 (1992 & Supp. 1995).

If parental rights are terminated, the minor will become a ward of the court and will be placed in the custody of the petitioner.³⁵⁵ In the case of adoption by a relative, once parental rights are terminated, the court may enter a judgment of adoption immediately.³⁵⁶ Once the adoption is final, the Adoption Act provides for the issuance of a new birth certificate³⁵⁷ for the child and for the confidentiality of adoption files and records.³⁵⁸

Often an adoption proceeding will arise out of a Juvenile Court case where the minor was first determined to be abused, neglected, or dependent, and made a ward of the court. If the parent of the child has not made reasonable progress toward the return of the child to the family, grounds for unfitness may exist. Recent amendments require that the parent complete the service plan established to correct the conditions that were the basis for the removal of the child within twelve months after adjudication or risk being declared unfit and deprived of his or her parental rights.³⁵⁹ If a parent fails to comply with the terms of the service plan, the agency or person acting as the child's guardian, or any interested party, such as a grandparent, may petition the court for a guardian with the power to consent to adoption.³⁶⁰ In the alternative, a grandparent may file a petition to adopt the minor based on the parent's unfitness. The court first determines parental unfitness.³⁶¹ If parental unfitness is established by clear and convincing evidence, the court then considers whether the adoption requested is in the best interest of the minor.³⁶² Here the Juvenile Court Act and the Adoption Act operate together to address the best interest of the minor.

Aside from petitioning through the Juvenile Court, a grandparent with evidence of parental unfitness may simply institute an adoption proceeding. In *Adams v. Adams*,³⁶³ the maternal grandparents sought to adopt their two granddaughters. The mother had placed the two girls with her father and stepmother soon after their birth and

355. 750 ILL. COMP. STAT. § 50/13(B)(d).

356. *Id.* § 50/14(a). In an unrelated adoption, the petitioners and the agency involved must file expense affidavits and a six-month waiting period must pass before a judgment of adoption can be entered. *Id.* § 50/14(f).

357. 750 ILL. COMP. STAT. § 50/19.

358. *Id.* § 50/18.1.

359. *Id.* § 50/1(D)(m).

360. See Juvenile Court Act, 705 ILL. COMP. STAT. § 405/2-13.

361. 750 ILL. COMP. STAT. § 50/5.

362. *Id.* § 50/20a.

363. 430 N.E.2d 744 (Ill. App. Ct. 1982).

failed to support them or visit them for nearly five years.³⁶⁴ The grandparents alleged the mother's unfitness was evidenced by her failure to maintain a reasonable degree of interest, concern, or responsibility for the welfare of the children.³⁶⁵ In finding the mother unfit, the trial court noted that the mother voluntarily gave up her first child to the grandparents when the child was seven months old and did not see the child or maintain contact with her for the next five years.³⁶⁶ She then gave her second child voluntarily to the grandparents and did not see her for four years. During this entire time, she failed to provide adequate support for the two children, and her conduct as a whole exhibited an "unreasonable regard [sic] for the welfare of her daughters."³⁶⁷ On appeal, the reviewing court noted that, though the evidence was conflicting, it would not disturb the lower court's findings unless they are palpably against the manifest weight of the evidence.³⁶⁸ In looking at a parent's conduct toward her children, the court must look at the entirety of the parent's conduct over the entire period of time and not just a single isolated period of time.³⁶⁹ In this light, the court found that the lower court's determination of unfitness was not against the manifest weight of the evidence.³⁷⁰

Illinois policy appears to favor the adoption of children by relatives. In considering the attempt of grandparents to adopt their grandchild, the court in *Smith v. Smith*³⁷¹ maintained that

[t]he legislature, in the provision of the Adoption Act, while defining the child's best interests as the paramount concern recognized it to be an important interest of a child that his relationships to the persons, places and course of inheritance where Providence has placed him be preserved where possible, and that this interest should be subordinated only when, considering other important interests, a different placement is clearly indicated.³⁷²

The court further asserted that when the natural parents have given their consent to the adoption and the grandparents are fit to assume the role of adoptive parents, social service agencies should not intervene and attempt to force their own ideas regarding the best place-

364. *Id.* at 745.

365. *Id.* at 746.

366. *Id.* at 747-48.

367. *Id.* at 748.

368. *Id.*

369. *Id.*

370. *Id.*

371. 347 N.E.2d 292 (Ill. App. Ct. 1976).

372. *Id.* at 300-01.

ment of the child.³⁷³ The legislative purpose behind the Adoption Act is to "preserve and strengthen the child's natural family ties" whenever possible.³⁷⁴ The court also rejected the argument that the age of grandparents precludes adoption.³⁷⁵ The court observed that if age alone could prevent adoption, the legislature's intent, which specifically contemplated related adoptions, would be frustrated.³⁷⁶

Grandparents do not fare as well when attempting to intervene in a private adoption proceeding involving a grandchild. In two very similar cases, the grandparents had been living with and helping to care for a grandchild when the child's mother removed the child from their home and gave consent to the child's adoption by unrelated persons.³⁷⁷ In both cases, by the time the grandparents located their grandchildren, a private petition for adoption with consent of the parent had been filed.³⁷⁸ In both cases, the grandparents attempted to intervene in the adoption proceedings.³⁷⁹ In *In re Ruiz*, the grandparents filed their own petition to adopt the minor child.³⁸⁰ In both cases, the court found that there was no right of intervention for a grandparent in a private adoption proceeding under the Illinois Code of Civil Procedure.³⁸¹ Thus, intervention was at the discretion of the court.³⁸² The courts also noted that there is no preference given to grandparents in adoption proceedings that would infer the right to intervene in a private adoption.³⁸³ The *Ruiz* court did find, however, that a grandparent may file a petition to adopt a grandchild as a related adoption at any time, even when another adoption proceeding already has been initiated.³⁸⁴ In that case, there would be two petitions to adopt on file. The same judge would hear both petitions in two separate and distinct proceedings and then make a decision based on the best interest of the child.³⁸⁵

373. *Id.* at 301.

374. *Id.*

375. *Id.* at 302.

376. *Id.*

377. *In re Ruiz*, 518 N.E.2d 436 (Ill. App. Ct. 1987); *In re Benavidez*, 367 N.E.2d 971 (Ill. App. Ct. 1977).

378. *Ruiz*, 518 N.E.2d at 437; *Benavidez*, 367 N.E.2d at 972.

379. *Ruiz*, 518 N.E.2d at 437; *Benavidez*, 367 N.E.2d at 972-73.

380. *Ruiz*, 518 N.E.2d at 438.

381. *Id.* at 439; *Benavidez*, 367 N.E.2d at 974.

382. *Ruiz*, 518 N.E.2d at 439; *Benavidez*, 367 N.E.2d at 974.

383. *Ruiz*, 518 N.E.2d at 441; *Benavidez*, 367 N.E.2d at 974.

384. *Ruiz*, 518 N.E.2d at 442.

385. *Id.*

Choosing adoption as a means of obtaining custody of a grandchild is the most drastic option available to a grandparent. It is also the most final and permanent solution for the child and the grandparent family, because once accomplished, the grandparent is legally responsible for the child and the rights of the natural parents have been permanently severed. If the child's natural parent will not consent to the adoption, the process can be emotionally devastating for all involved. It may also be expensive and time-consuming. Whether adoption is the appropriate choice for a grandparent depends upon the facts and circumstances of the particular situation.

One final note of caution exists. The law regarding a putative father's rights in an adoption action is in a state of flux in Illinois. This is largely the result of one well-publicized case. *In re Doe*,³⁸⁶ commonly known as the "Baby Richard case," involved a newborn adoption by unrelated persons. However, the Baby Richard case resulted in changes to the Adoption Act which affect all adoptions. In the Baby Richard case, the mother consented to her son's adoption four days after his birth without informing the biological father.³⁸⁷ Because the mother told the biological father that the baby had died, the father did not find out about the baby until fifty-seven days after the baby's birth.³⁸⁸

The trial court found that the consent of the biological father was unnecessary because he failed to show sufficient interest in the child during the first thirty days of the child's life.³⁸⁹ The father appealed this ruling, and the appellate court affirmed with one justice dissenting.³⁹⁰ The Illinois Supreme Court reversed. In reversing, the court stated that the finding that the father had not shown a reasonable degree of interest in the child during the first days was not supported by the evidence, specifically noting that the father's various attempts to locate the child were frustrated or blocked by the actions of the mother.³⁹¹ The mother's actions were aided and abetted by the attorney for the adoptive parents who failed to make any effort to ascertain the name or address of the father, despite the fact that the mother

386. *In re Doe*, 638 N.E.2d 181 (Ill.), cert. denied, 115 S. Ct. 499 (1994).

387. *Id.* at 182.

388. *Id.*

389. *Id.* The court noted that the failure of the father to show a reasonable degree of interest within the first 30 days of his life constituted grounds for parental unfitness as defined by the Adoption Act, 750 ILL. COMP. STAT. § 50/1(D)(1).

390. *In re Doe*, 638 N.E.2d at 182.

391. *Id.*

indicated that she knew the identity of the father.³⁹² The court found that under these circumstances, the father had no opportunity to discharge his parental duties.³⁹³ Because the father's rights were not properly terminated, there was no reason to address the child's best interest in the adoption proceeding.³⁹⁴

The Illinois Supreme Court observed that it was unfortunate that a period of three years had elapsed since the child was born.³⁹⁵ The burden, however, lies with the adoptive parents to establish the relinquishment or the unfitness of the natural parent.³⁹⁶ The adoptive parents persisted in the adoption despite knowing that the natural father had not been told of the baby's existence.³⁹⁷ According to the court, the adoptive parents proceeded at their own risk.³⁹⁸

The "Baby Richard" decision has been immensely unpopular. Critics claim it is inhumane to order a child, who has known only the adoptive parents as his parents, to be returned to his natural father. Most notable among the critics, First Lady Hillary Rodham Clinton condemned the decision, declaring, "I think it's an outrage that the child was not considered with respect to his best interests. That child had bonded. That child was not just the child of the adopted parents; that child was the child of an entire extended family and neighborhood, and it was as though a bomb had gone off and he was the only survivor."³⁹⁹ The Governor of Illinois, Jim Edgar, denounced the decision as a "travesty"⁴⁰⁰ and characterized the court as "smug and arrogant" in refusing to consider the best interests of the child.⁴⁰¹ The Governor's wife, Brenda Edgar, publicly appealed to the biological father to drop his case.⁴⁰²

392. *Id.*

393. *Id.*

394. *Id.*

395. *Id.*

396. *Id.*

397. *Id.*

398. *Id.*

399. Nancy Ryan, *First Lady Upset by Baby Richard*, CHI. TRIB., May 17, 1995, ChicagoLand Sec., at 3. Ms. Clinton made these comments during an appearance on the "Oprah Winfrey Show" to discuss issues related to children. *Id.*

400. Edward Walsh, *Controversial Illinois Adoption Ruling Upheld Without Comment, Supreme Court Affirms Biological Father's Right to Baby Richard*, WASH. POST, Nov. 8, 1994, Final Ed., at A6.

401. *Illinois Father Granted Custody of Baby Richard*, WASH. POST, Jan. 26, 1995, Final Ed., at A4.

402. Edward Walsh, *Justices Refuse to Delay Transfer of Baby Richard, Adoptive Parents to Continue Legal Battle*, WASH. POST, Feb. 14, 1995, Final Ed., at A3.

Illinois House Bill 2424 became law on July 3, 1994, as a direct result of the Baby Richard decision.⁴⁰³ Several portions of the bill addressed the Baby Richard problems and have been tagged the "Baby Richard Laws."⁴⁰⁴ The "Baby Richard Laws" attempt to clarify the circumstances under which a putative father must be made an active participant in an adoption proceeding.⁴⁰⁵

A recent amendment to the Adoption Act defines putative father as "a man who may be a child's father, but who (1) is not married to the child's mother on or before the date that the child was or is born and (2) has not established paternity of the child in a court proceeding before the filing of a petition for the adoption of the child."⁴⁰⁶ Mothers who consent to a child's adoption or surrender the child to an agency, allowing the agency to place the child for adoption, must now sign an "Affidavit of Identification" concerning the father of the child, which is retained in the adoption file along with her consent or surrender.⁴⁰⁷ This affidavit is conclusive evidence of the biological mother's knowledge of the child's father.⁴⁰⁸ The affidavit creates a rebuttable presumption of truth as to the identity of the biological father.⁴⁰⁹ It prohibits a later attack on the adoption proceeding except when fraud and duress were used to obtain the mother's consent or surrender.⁴¹⁰

Putative fathers are required to take certain steps under the Adoption Act, as amended, to preserve their right to receive notice of a proceeding to adopt their child. Under the amended Act, the Department of Children and Family Services must create a "Putative Father Registry."⁴¹¹ The Registry must contain information about the putative father such as his name, address, social security number, and date of birth.⁴¹² It also will contain information acquired from him concerning the mother of the child and the child he believes may be his own.⁴¹³ The putative father must register with this Registry, which is free of charge, no later than thirty days after the birth of the child.⁴¹⁴

403. Shelley B. Bostick, *The Baby Richard Law: Changes to the Illinois Adoption Act*, 82 ILL. B.J. 654 (1994).

404. *Id.*

405. *Id.*

406. 750 ILL. COMP. STAT. § 50/1(R).

407. *Id.* § 50/11(b).

408. 755 ILL. COMP. STAT. § 50/11(b).

409. *Id.* § 50/11(b).

410. 750 ILL. COMP. STAT. § 50/11(b).

411. *Id.* § 50/12.1.

412. *Id.* § 50/12.1(a)(1), (2).

413. 755 ILL. COMP. STAT. § 50/12.1(a)(1), (2).

414. 750 ILL. COMP. STAT. § 50/12.1(B).

Interested parties, including persons intending to adopt a child or the agency with whom the child is placed, may inquire of the Registry to determine if a putative father is registered.⁴¹⁵ A certified copy of the registration form or, if there is none, a certified statement indicating no registration is found as to the child in question serves as proof that the search was conducted.⁴¹⁶ If a putative father fails to register, he is barred from bringing an action to assert an interest in the child unless he proves, by clear and convincing evidence, that it was impossible for him to register through no fault of his own and that he registered within ten days after it became possible for him to register.⁴¹⁷ His lack of knowledge of the pregnancy is not an acceptable reason for failure to register.⁴¹⁸ Unless he proves that he was unable to register through no fault of his own, the failure to register operates not only as a waiver and surrender to the adoption of the child without further consent, but also constitutes abandonment, a ground falling under the Adoption Act's definition of unfitness.⁴¹⁹

The burden on adoptive grandparents, thus modified, is the requirement that they have the consent of the child's parents, or prove by clear and convincing proof that: (1) the parent is unfit; or (2) the person is not the biological or adoptive parent of the child; or (3) there has been a waiver of his or her parental rights under section 12a or 12.1 of the Adoption Act.⁴²⁰ The notice provisions regarding a putative father, as amended, require that notice go to a person who has been adjudicated in Illinois to be the child's father, or was adjudicated the father in another state, and the court order is included in the Registry, was registered in the Registry as the putative father, is recorded on the child's birth certificate as the father, is openly living with the child or the child's mother at the time the proceeding is started and holds himself out to be the child's father, is identified as the father in the mother's Identification Affidavit, or is married to the child's mother at the child's birth or within thirty days after the birth.⁴²¹ Finally, the Adoption Act, as amended, includes language to expedite

415. *Id.* § 50/12.1(C).

416. *Id.* § 50/12.1(D).

417. *Id.* § 50/12.1(G).

418. 755 ILL. COMP. STAT. § 50/12.1(G).

419. 750 ILL. COMP. STAT. § 50/12.1(H).

420. *Id.* § 50/8(a)(1-3).

421. *Id.* § 50/12A(1.5)(a-g).

the appeal of adoption matters and to limit the time for challenging an adoption judgment to one year from the date of the judgment.⁴²²

The significance of these changes for grandparents seeking to adopt will not be as profound as in newborn adoptions. Nonetheless, if there is a putative father, the new steps must be taken to comply with the new sections of the Adoption Act. The new provisions of the Adoption Act strive to balance the rights of the natural parents, the rights of the adoptive parents, and the child's best interest. Only the passage of time will determine if the new "Baby Richard Laws" clarify this muddy area of adoption law.

E. Habeas Corpus

Grandparents may attempt to acquire legal custody of a grandchild by initiating an action seeking a writ of habeas corpus.⁴²³ The habeas corpus writ challenges the detention or custody of someone being held by another and commands the production of the detained person before the court for a determination of the legality of his or her detention.⁴²⁴ The Illinois Constitution protects this right to habeas corpus.⁴²⁵ Generally, however, habeas proceedings and practice are regulated by statute.⁴²⁶

Under the statute, the petitioner need not meet a standing requirement to petition for a writ of habeas corpus.⁴²⁷ However, the petitioner must show that the authority under which the other party claims the right to custody of the child is void and of no effect.⁴²⁸ If the petitioner cannot demonstrate that the court entering the challenged custody order was without jurisdiction, the petition for a writ will be denied.⁴²⁹

A habeas action can be brought in the circuit court or directly to the Illinois Supreme Court.⁴³⁰ However, the Supreme Court will not assume jurisdiction of an original petition for a writ of habeas corpus

422. *Id.* § 50/20, 20a, 20b.

423. *Edwards v. Livingston*, 247 N.E.2d 417, 421 (Ill. 1969).

424. 20 ILLINOIS LAW AND PRACTICE, HABEAS CORPUS § 1 (West 1992 & Supp. 1994).

425. ILL. CONST. art. I, § 9.

426. *See* 735 ILL. COMP. STAT. §§ 5/10-101 to 5/10-137.

427. *Id.*

428. 20 ILLINOIS LAW AND PRACTICE, HABEAS CORPUS § 32 (West 1992 & Supp. 1994).

429. *Id.*

430. 735 ILL. COMP. STAT. § 5/10-103.

if a question of fact is presented.⁴³¹ Application for a writ is made by a complaint signed by the person for whose relief it is intended, or by some other person in his or her behalf, and is verified by affidavit.⁴³² The complaint must state: (1) that the person on whose behalf the relief is sought is restrained at a described place by named individuals; and (2) that the detention is not by virtue of a valid process or judgment.⁴³³ If the detention is by any warrant or process, a copy of this should be attached to the complaint, or the reason it cannot be attached should be described.⁴³⁴ The basis of the complaint must be that the judgment, order, warrant, or process under which the person is held is illegal and void due to lack of jurisdiction by the issuing court.⁴³⁵ Unless it is clear from the complaint that the detention is lawful, the court must issue a writ of habeas corpus, commanding that the detained party be brought before the court to be dealt with according to the law.⁴³⁶

In habeas actions pertaining to the custody of a child, as in all other custody actions, the best interest of the child within the context of the superior parental rights doctrine is paramount. In custody disputes it is an accepted presumption that the right or interest of a natural parent in the care, custody, and control of a child is superior to the claim of a third person.⁴³⁷ However, the presumption is not absolute and serves as only one factor in the ultimately controlling question of where the best interests of the child lie.⁴³⁸ A third party does not stand on equal footing with the natural parent of a child in a custody determination and, therefore, must show a "compelling reason" or "convincing grounds" to support placement of the child with one other than his natural parent.⁴³⁹

Grandparents have succeeded in obtaining the custody of a grandchild through habeas corpus actions. In *Zook v. Spannaus*,⁴⁴⁰ the maternal grandmother brought a habeas action challenging the jurisdiction of a juvenile court dependency determination of her four

431. *People v. Rugen*, 117 N.E.2d 390 (Ill. 1954).

432. 735 ILL. COMP. STAT. § 5/10-103.

433. *Id.* § 5/10-104.

434. *Id.*

435. 20 ILLINOIS LAW AND PRACTICE, HABEAS CORPUS § 32 (West 1992 & Supp. 1994).

436. 735 ILL. COMP. STAT. §§ 5/10-106, 5/10-107.

437. *In re Townsend*, 427 N.E.2d 1231, 1234 (Ill. 1981).

438. *Id.*

439. *Id.* at 1235.

440. 217 N.E.2d 789 (Ill. 1966).

grandchildren after their mother died.⁴⁴¹ Upon the petition of the Lutheran minister who had attended the mother at her deathbed, a dependency proceeding had been filed and heard on the same day as the mother's funeral.⁴⁴² No notice was given to the grandmother or the children's half-sisters; and although the relatives were told there would be such a hearing, they were not told the time of the hearing.⁴⁴³ The grandmother did not appear until after the hearing.⁴⁴⁴ The trial court found the children dependent and neglected and awarded temporary custody to a third party.⁴⁴⁵ At a later hearing, the grandmother and her attorney were present.⁴⁴⁶ The court reiterated the finding that the children were dependent and neglected and further ordered that their custody be awarded to the Lutheran Child Welfare Association of Chicago with a named guardian who could consent to the adoption of the children.⁴⁴⁷ The children were then split up and placed in prospective adoptive homes.⁴⁴⁸ The grandmother filed a petition for writ of habeas corpus challenging the orders of the juvenile court for lack of jurisdiction of the person or the subject matter.⁴⁴⁹ Because the original petition did not ask that a guardian with the authority to consent to the adoption of the minors be appointed and the lower court made no findings as to the best interests of the children, the Illinois Supreme Court found the judgment of the juvenile court to be void.⁴⁵⁰ Ultimately, the parties presented evidence as to the children's best interest, and the court awarded custody of the four children to the grandmother and her husband.⁴⁵¹

In *Edwards v. Livingston*,⁴⁵² a grandfather who had helped raise his grandson for eleven years successfully defended a habeas action brought by the boy's father after the boy's mother died. The grandfather alleged that the father was unfit due to abandonment of the child.⁴⁵³ The father left his wife and son shortly after the child was born, secured a divorce, and did not attempt to see the child or con-

441. *Id.* at 789-90.

442. *Id.* at 790.

443. *Id.*

444. *Id.*

445. *Id.*

446. *Id.*

447. *Id.*

448. *Id.*

449. *Id.*

450. *Id.* at 791.

451. *Id.*

452. *People ex rel. Edwards v. Livingston*, 247 N.E.2d 417 (Ill. 1969).

453. *Id.* at 418.

tribute to his support for the next eleven years.⁴⁵⁴ The mother and the child resided with the grandfather as a family.⁴⁵⁵ The lower court found that the father was not unfit and that it was in the child's best interest to reside with his natural father.⁴⁵⁶ The Illinois Supreme Court reversed,⁴⁵⁷ observing that a habeas corpus action had long been recognized as an appropriate proceeding to determine the custody of children.⁴⁵⁸ The court also recognized the superior right of a natural parent to have the custody of his child.⁴⁵⁹ However, the court further noted that a finding of parental unfitness is not necessary in order to find that the child's best interest would best be served by awarding custody of the child to a third party.⁴⁶⁰ The court concluded that it was not in the child's best interest to be removed from the stable and wholesome environment of his grandfather's home and sent to live with his father who was, for all practical purposes, a stranger.⁴⁶¹ Custody was awarded to the grandfather with visitation rights for the father to facilitate the development of a father/son relationship.⁴⁶²

Habeas corpus actions also have been used to challenge adoptions and custody modifications in divorce cases. A common thread running through habeas cases involving the custody of a child is the existence of a court order challenged for lack of subject matter or personal jurisdiction.⁴⁶³ However, even if the custody order is declared void by the court, the best interests of the child will be considered in determining custodial arrangements. A grandparent will not obtain custody of a grandchild in a habeas action unless the grandparent has some cognizable claim or right to custody. Generally, a habeas action will not be effective to challenge a parent's right to custody of a child, unless the grandparent has previously been awarded custody or guardianship over the child. Thus, a habeas action is more useful as a defensive weapon, to deflect or defeat a challenge to the grandpar-

454. *Id.*

455. *Id.*

456. *Id.*

457. *Id.*

458. *Id.*

459. *Id.* at 421.

460. *Id.*

461. *Id.* at 422.

462. *Id.* at 422-23.

463. See *Faris v. Faris*, 220 N.E.2d 210 (Ill. 1966); *Giacopelli v. Elorencia Crittenton Home*, 158 N.E.2d 613 (Ill. 1959); *In re Smilga*, 103 N.E.2d 378 (Ill. App. Ct. 1952).

ent's already established right to custody, than as an offensive weapon seeking to establish a right to custody, especially against a parent who has not been declared unfit in a previous proceeding.

III. Financial Assistance

Financial hardship plagues the majority of grandparent-headed households. The majority of grandparent care givers are women.⁴⁶⁴ Three-fourths of the nation's four million elderly poor are women.⁴⁶⁵ Most grandparents are retired and living on fixed incomes.⁴⁶⁶ The more fortunate grandparent care givers have income from social security coupled with private retirement funds or savings set aside for their old age.⁴⁶⁷ The less fortunate exist solely on social security benefits without other sources of income. These fixed incomes do not allow for the considerable expense of caring for grandchildren.⁴⁶⁸ According to the AARP study, the median income for all grandparent care giver households is \$18,000. This is approximately one-half as much as traditional households with children.⁴⁶⁹

Given these facts, it is difficult to understand why more grandparent care givers do not receive financial assistance from currently established programs. Only twenty percent of the grandparent care givers identified in the AARP study have ever asked for public benefits.⁴⁷⁰ Of this twenty percent, however, more than one-fourth indicated that they had eligibility problems when they did apply for financial assistance.⁴⁷¹

The two main sources of financial assistance available to grandparents raising grandchildren are Aid to Families with Dependent Children (AFDC) and foster care stipends.⁴⁷² Both of these programs are federally funded but administered by the state. AFDC was created by Title IV-A of the Social Security Act and is intended to provide cash assistance to households with dependent children. These

464. Amicus Curiae Brief of the American Association of Retired Persons in Support of Respondents, *Anderson v. Edwards*, 12 F.3d 154 (9th Cir. 1994), *rev'd and remanded*, 115 S. Ct. 1291 (1995) [hereinafter AARP Amicus Brief].

465. *Id.*

466. AARP WOMEN'S INITIATIVE, *supra* note 11, at 6.

467. See AARP Amicus Brief, *supra* note 464.

468. *Id.*

469. AARP WOMEN'S INITIATIVE, *supra* note 11, at 4.

470. *Id.* at 6-7.

471. *Id.* at 7.

472. *Id.* at 6.

children must be somehow deprived of parental support or care and living with a "caretaker relative."⁴⁷³ Grandparent caretakers are among the many relatives who fit the "caretaker relative" category. Residence is the only requirement and thus no formal parenting relationship must be established in order to receive benefits.⁴⁷⁴

The AARP study indicates that twenty-eight percent of mid-life and older grandparent care givers receive AFDC benefits for children in their care. Still, many grandparents who apply for these benefits are turned down by state officials who refuse to comply with federal regulations.⁴⁷⁵ Some state officials simply refuse these benefits to nonparents, while others require the grandparent to obtain legal custody over the children involved when the law does not require this.⁴⁷⁶ Still other states have devised eligibility requirements which penalize a grandparent care giver who is parenting two or more grandchildren from different nuclear families.⁴⁷⁷ These problems exist despite the fact that the AFDC program was specifically set up to encourage the care of needy and dependent children by parents or relatives, and to maintain and strengthen family life.⁴⁷⁸

Even if the family is eligible for AFDC, it is unlikely that the benefits will fulfill the family's financial need. Each state is allowed to establish a "standard of need" for program eligibility and benefit amount.⁴⁷⁹ No state's AFDC benefit amount reaches the federal poverty threshold established by the Census Bureau.⁴⁸⁰ In 1993, this federal policy level for a family of three persons was \$11,521 or \$960 per month. Illinois's AFDC benefit level for a one-parent family of three persons, stated as a percentage of the 1993 poverty level, was thirty-

473. 42 U.S.C. §§ 606(a), 607(a) (1988 & Supp. 1993).

474. *Id.* Problems may arise when a child's parent seeks AFDC benefits on behalf of the child and claims the child is residing with her, while in reality, the child is residing in the grandparent's household. Interview with Theresa Doerr, Local Office Administrator of Union and Jackson County Public Aid Offices, Illinois Department of Public Aid, in Murphysboro, Ill. (June 23, 1995).

475. AARP WOMEN'S INITIATIVE, *supra* note 11, at 6.

476. *Id.*

477. See, e.g., *Anderson v. Edwards*, 115 S. Ct. 1291 (1995). Here the Court upheld California's "consolidated filing unit rule" which penalizes households with nonsibling children. Under this rule, all nonsibling children living in the same household with one caretaker are combined into a single assistance unit. The AFDC payment is based on this single unit. Thus, the payment is much less than if the household were deemed to be two or more units.

478. AARP Amicus Brief, *supra* note 464 (citing 42 U.S.C. § 601 (1988)).

479. *Id.* (citing 42 U.S.C. § 602(a)(23)).

480. *Id.* (citing HOUSE COMM. ON WAYS AND MEANS, OVERVIEW OF ENTITLEMENT PROGRAMS: 1994 GREEN BOOK 366-67, tbls. 10-11 (1994)).

eight percent. This level is the median monthly AFDC benefit for the fifty states, Guam, Puerto Rico, and the Virgin Islands.⁴⁸¹

According to the AARP study, however, AFDC benefits are not the biggest problem grandparents face when seeking financial assistance to raise their grandchildren. The biggest complaint heard from grandparent care givers was the disparity between the financial help grandparents receive compared to the financial help foster parents receive.⁴⁸²

Foster care stipends are also federally subsidized and administered by the states.⁴⁸³ Under Title IV-E of the Social Security Act, foster care maintenance stipends and related costs for out-of-home placement of children in a foster family home are available. In order to be a "foster family home," however, a family must undergo a lengthy and thorough process of becoming licensed or certified by state and local officials.⁴⁸⁴ Each state controls these requirements, and few, if any, grandparents are certified or licensed as foster care homes. Indeed, even if they were so certified, foster care placement is controlled by the state, which can remove children and place them elsewhere over the objection of the foster parent.⁴⁸⁵

Once approved as a foster care provider, the care giver becomes eligible for financial assistance that is two or three times higher than AFDC benefits.⁴⁸⁶ The Supreme Court in *Miller v. Youkim*⁴⁸⁷ held that federally subsidized foster care payments cannot be administered by the states in such a way as to discriminate against related care givers as opposed to unrelated foster parents. If all other requirements are met, the payment amounts must be the same. When grandparents are providing essentially the same kind of care for their dependent grandchildren as foster parents provide for the children of others, this disparity between AFDC benefits and foster care payments makes little sense. It is no wonder that grandparents who learn of this disparity are upset and discouraged. Some states are trying to solve this problem and make it easier for grandparents to qualify for federal fos-

481. *Id.*

482. AARP WOMEN'S INITIATIVE, *supra* note 11, at 7 (citing Lawrence Kutner, *More and More, Grandparents Raise Grandchildren*, N.Y. TIMES, Apr. 7, 1994, at C12).

483. 42 U.S.C. § 672 (1988).

484. *Id.* § 672(c).

485. AARP WOMEN'S INITIATIVE, *supra* note 11, at 7.

486. *Id.* (citing Michele Norris, *Grandmothers Who Fill Void Carved by Drugs*, WASH. POST, Aug. 30, 1991, at A1, A4).

487. *Miller v. Youkim*, 440 U.S. 125 (1979).

ter care benefits. Illinois, New York, and California have recently changed their programs to allow grandparents and other related care givers to receive benefits on par with licensed foster care parents.⁴⁸⁸ Illinois's attempt to allow relative care givers to qualify for foster care stipends under lesser standards has resulted in over \$14 million in lost revenues to the state.⁴⁸⁹ This loss stems from the fact that many relative caretaker homes could not meet even the less stringent requirements, and federal funding was denied for these homes.⁴⁹⁰ Because of these losses, Illinois will now require that relative caretakers be licensed as foster homes before receiving the higher benefits.⁴⁹¹ This change will mean a drastic loss in monthly income to many grandparents caring for grandchildren.

According to the AARP study, some state providers simply fail to inform nonparent care givers of their eligibility for either AFDC or foster care benefits.⁴⁹² Other states suggest that the care givers legally adopt the children in their care, thereby making the grandparent legally responsible for the children and ineligible for either program benefits.⁴⁹³

Another serious problem facing grandparent care givers is providing health care for their grandchildren.⁴⁹⁴ Most grandparents are old enough to qualify for Medicare coverage and many have Medicare supplemental insurance through their former employment.⁴⁹⁵ Neither of these benefits, however, will inure to a dependent child or children in the same household. Some companies will cover the children if the care giver has obtained court-ordered custody but not all will do so.⁴⁹⁶

Medicaid is a federal program which provides health care benefits to needy persons and automatically to children who receive AFDC

488. Louise Kiernan, *New Rules May Break Backbone of Foster Care*, CHI. TRIB., May 25, 1995, Chicagoland Final, at C.

489. *Id.*

490. *Id.*

491. See 225 ILL. COMP. STAT. § 10/5.2. On June 30, the day before the licensing requirement was to take effect, a U.S. district judge issued an order prohibiting DCFS from reducing foster care reimbursement amounts to unlicensed relative care givers who are unable to meet the July 1 deadline. Aaron Elstein, *Foster Parents Reprieved—Judge Prohibits State from Cutting Benefits for Unlicensed Relatives*, ILL. TIMES, July 6, 1995.

492. AARP WOMEN'S INITIATIVE, *supra* note 11, at 8.

493. *Id.*

494. *Id.*

495. *Id.*

496. *Id.* (citing Patricia DeMichele, *Grandparents and Child Care*, ELDER LAW FORUM, Nov./Dec. 1992, at 7).

or Supplemental Social Security Benefits.⁴⁹⁷ Thirty-five percent of grandparent care giver households have some, but not all, household members on Medicaid.⁴⁹⁸ Each state administers its own Medicaid program and eligibility standards vary.⁴⁹⁹ In addition, grandparent care giver households may qualify for other federal or state benefits, such as food stamps or Women, Infants, and Children (WIC) program benefits.⁵⁰⁰

Although there is not an abundance of financial and other assistance for grandparents who assume the responsibility of caring for their grandchildren, some help is available. In Illinois, grandparents should ask about these programs at the local office of the Illinois Department of Public Aid or the Illinois Department of Public Health.

IV. Conclusion

Grandparent care givers face many problems and challenges when they accept the responsibility of caring for their grandchildren. They are likely to be frustrated in the day-to-day decision making required to raise children if they lack legal authority over the children. Without legal authority, the grandparent-headed household is subject to upheaval at the whim of the children's parent. Thus, neither the grandparent nor the children can claim any certainty or security in their relationship or their living arrangements. Further exacerbating the problems, grandparents, the population least able to afford the cost of child rearing, often find public financial assistance programs and services difficult to obtain.

The law does not offer a flawless solution to these grandparents. As indicated by this article, the law favors natural parents, and, except when parental rights have been judicially terminated, this favored status prevents grandparents from avoiding custody challenges. None-

497. 42 U.S.C. § 1396 (1988).

498. AARP WOMEN'S INITIATIVE, *supra* note 11, at 9.

499. *Id.*

500. Interview with Theresa Doerr, *supra* note 474. The WIC program is a supplemental nutrition program administered by the Department of Public Health for pregnant and postpartum women and children up to the age of five years. A care giver for a child may obtain coupons to obtain WIC-approved food items for that child if specific financial and nutritional needs criteria are met. The care giver must take the child to a local clinic or the health department every six months to certify the continuing need for the supplemental food benefits and to receive education regarding proper nutrition. Illinois Department of Public Health Information Telephone Line 1-800-545-2200 (July 6, 1995).

theless, the grandparent seeking the legal authority to raise a grandchild and governmental assistance to provide for that child may fortify his or her legal status as care giver through a custody, guardianship, or habeas proceeding. By understanding the applicable law and complying with the required procedures, the grandparent may claim a degree of security through legal recognition of his or her role. Without official acknowledgment and approval of the grandparent's status, however, the grandparent-headed household is precariously insecure and subject to repeated disruption at the whim of the natural parent.