

A UNIFORM SYSTEM OF GRANDPARENTS' RIGHTS: A CALL FOR ALL STATES TO ADOPT A UNIFORM PERMISSIVE LAW

Courtney Koenig

Grandparents should have the right to visitation with their grandchildren. Unfortunately, grandparent-grandchildren relationships often get strained from factors tangential to the relationship such as divorce of the grandchildren's parents or financial strain between the grandparents and the grandchildren's parents. Through no fault of their own, many grandparents are legally barred from ever seeing their grandchildren again in these circumstances. Laws governing family matters such as grandparents' rights are dictated on a state-by-state basis. Because of this, the legal standards to show that grandparents should be allowed visitation are confusing for even experienced family law attorneys. This Note explores the issues that arise due to this patchwork of state laws. It highlights the practical implication of restrictive laws, which typically only allow for grandparents to seek visitation rights if the child's parents divorce or if one of the child's parents has died, in contrast to permissive laws, which allow for grandparents to seek visitation even if the parents are still married and/or are still alive. This Note recommends that states should adopt a uniform permissive statute on grandparents' rights. Doing so will avoid many issues such as increased cost of litigation due to confusing laws, and, most importantly, help maintain critical relationships between grandparents and grandchildren.

Courtney Sue Koenig, Executive Administrative Editor 2021–2022, Member 2020–2021, *The Elder Law Journal*; J.D. 2022 University of Illinois, Urbana-Champaign; B.S. 2019 Political Science, Southern Illinois University Edwardsville.

I. Introduction

Like many older parents, Mike and Barbara Fisher were extremely excited to become grandparents.¹ Their son, daughter-in-law, and two children lived only two miles away, which allowed them to be extremely involved in their grandchildren's lives.² Mike and Barbara even helped care for the children by watching them multiple times a week while the parents worked.³ This all changed, however, when their son and daughter-in-law went through a bitter divorce.⁴ After the divorce, Mike and Barbara were informed by their daughter-in-law that they could no longer see the children and that the daughter-in-law's friend would be the one helping her take care of the children.⁵ Mike and Barbara did not see their grandchildren for over a year and a half.⁶ This came as a complete shock to them because they made certain to not pick sides during the divorce.⁷ Mike and Barbara abruptly went from having an active role in their grandchildren's lives to having no role whatsoever.⁸ Through no fault of their own, they were unable to continue seeing their grandchildren.⁹

Mike and Barbara's story is one that is unfortunately common. When a child is born, they often develop an important bond with their grandparents.¹⁰ Sadly, this bond may be severed, for instance, because of an unhealthy relationship between the child's parents and grandparents.¹¹ In the 1960s, and as a result of these types of severances, states adopted statutes to address the rights of grandparents.¹² "Grandparents' rights" are defined as the rights of grandparents who are seeking

1. Natasha Courtenay-Smith, *We're banned from seeing our grandchildren—and the pain is tearing us apart*, DAILYMAIL (Oct. 29, 2009, 4:00 AM), <https://www.dailymail.co.uk/femail/article-1223652/Were-banned-seeing-grandchildren---pain-tearing-apart.html>.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Do I Have a Legal Right To See My Grandchild?*, PAC. NWFAM. L. (Jan. 1, 2020), <https://pnwfamilylaw.com/do-i-have-a-legal-right-to-see-my-grandchild>.

11. *Id.*

12. Susan Adcox, *An Introduction to Grandparents' Visitation Rights*, LIVEABOUT (May 23, 2019) [hereinafter *Introduction to Grandparents' Visitation Rights*], <https://www.liveabout.com/grandparents-visitation-rights-1695771>.

visitation with their grandchildren.¹³ The purpose of grandparents' rights is "to encourage a relationship between the children and their immediate family members."¹⁴ The essential idea is that in order for children to grow up to be healthy adults, grandchildren need grandparents and other family members to have an active role throughout their lives.¹⁵

Since family law issues are left to the states' legislatures to decide, the current system that exists in the United States is confusing and tends to make an already stressful and unwanted situation even worse for grandparents who merely want to maintain their relationship with their grandchildren.¹⁶ All fifty states have their own individual statutes that require showings and findings.¹⁷ Two sets of grandparents in similar situations will obtain completely different results when seeking visitation solely because they live in different states.¹⁸ As more and more grandparents are having an established relationship with their grandchildren, the process for obtaining visitation should not be as varied and complex as it is.¹⁹ A uniform permissive statute would eliminate this unnecessary complexity and would make it easier for grandparents who have a connection with their grandchildren to obtain visitation without ignoring the rights and wishes of the children's parents.

This Note argues for states to adopt a uniform permissive statute on grandparents' visitation rights. Part II will address why grandparents' rights were established, the two main types of grandparents' visitation rights statutes, and the considerations surrounding these rights. Part III will discuss the Supreme Court case *Troxel v. Granville*, its implications, and the pros and cons of permissive and restrictive statutes. Part IV provides a recommendation for how to create this uniform statute and the reasons for why a uniform statute should be permissive.

13. *Grandparents' Rights*, LEGAL DICTIONARY (Mar. 11, 2015) [hereinafter *Grandparents' Rights*], <https://legaldictionary.net/grandparents-rights>.

14. *Id.*

15. *Grandparents' Visitation and Custody: Background*, FINDLAW (Feb. 2, 2018) [hereinafter *Background*], <https://family.findlaw.com/child-custody/grandparents-visitation-and-custody-background.html>.

16. See generally *Introduction to Grandparents' Visitation Rights*, *supra* note 12.

17. *Id.*

18. *Id.*

19. Michael K. Goldberg, *A Survey of the Fifty States' Grandparent Visitation Statutes*, 10 MARQ. ELDER'S ADVISOR 245, 245 (2009).

II. Background

This Section of this Note will discuss how the changing role of grandparents in recent decades has caused states to adopt grandparents' visitation rights statutes. It will explain the different types of statutes and the "best interests of the child" standard that courts apply when granting visitation. This Section will highlight the impact of federal laws and adoption on grandparents' visitation rights. It also will address the creation of grandparents' rights organizations.

A. History of Grandparents' Rights Laws

Laws regarding grandparents' rights are relatively new.²⁰ The first law addressing grandparents' rights was not passed until the 1960s, but every state has since enacted some sort of law providing a means for grandparents to seek recourse in visiting their grandchildren.²¹ It is important to establish that there is a distinct difference between visitation and custodial rights.²² Visitation allows a party to visit with the child periodically and the court has discretion as to how often the visits will take place, where they will take place, and whether they will be supervised.²³ Unlike custody, visitation does not grant any power to make major decisions about the child's well-being.²⁴ A parent with custody will live long-term with their children while parties with visitation rights will only see the children at specified times.²⁵ This Note specifically focuses on grandparents' visitation rights.

States began adopting these statutes, in part, as a response to the changing composition of the typical American family.²⁶ Many families no longer resemble the traditional "nuclear" family.²⁷ A traditional nuclear family includes a married heterosexual couple and their biological

20. *Introduction to Grandparents' Visitation Rights*, *supra* note 12.

21. *Id.*

22. *What is the difference between custody and visitation?*, WOMEN'SLAW.ORG (Nov. 30, 2021), <https://www.womenslaw.org/laws/ma/custody/basic-info-and-definitions/what-difference-between-custody-and-visitacion>.

23. *Id.*

24. *Id.*

25. *Id.*

26. Sara Elizabeth Culley, *Troxel v. Granville and its Effect on the Future of Grandparent Visitation Statutes; Legislative Reform*, 27 J. LEGIS. 237, 239 (2015).

27. *Id.*

children living in the same household.²⁸ Many nuclear families are often impacted by divorce, which affects visitation between grandchildren and grandparents.²⁹ In the mid-1960s, the divorce rate in America was approximately twenty-five percent.³⁰ The 1970s saw a significant increase and by 1978, the divorce rate was fifty percent—double the rate in 1967.³¹ The divorce rate has declined slightly since the 1980s, but it is still higher today than it was in the 1960s when grandparents' rights were initially being codified.³²

In the United States, the number of children who are being raised by single parents has increased over time.³³ In 1970, there were approximately eight million children living in a single-parent home.³⁴ A single-parent home is a household with children under the age of majority (eighteen years old) being raised by a parent that is widowed, divorced, or not married.³⁵ The number of single-family homes rose steadily until 2005 and has remained relatively steady ever since.³⁶ In 2019, there were around nineteen million children living in single-parent homes.³⁷ This can be explained by divorce, children being born out of wedlock, or children losing a parent.³⁸ Children are also more frequently born outside of wedlock today.³⁹ In 1964, around seven percent of children were

28. Gabrielle Applebury, *Definition of a Nuclear Family: Understanding the Characteristics*, LOVETOKNOW (Aug. 20, 2021), <https://family.loveto-know.com/definition-nuclear-family>.

29. Culley, *supra* note 26.

30. Jennifer L. Betts, *Historical Divorce Rate Statistics*, LOVETOKNOW, https://divorce.loveto-know.com/Historical_Divorce_Rate_Statistics (last visited Jan. 14, 2022).

31. *Id.*

32. Ana Swanson, *144 years of marriage and divorce in the United States, in one chart*, WASH. POST (June 23, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/06/23/144-years-of-marriage-and-divorce-in-the-united-states-in-one-chart/>.

33. *Number of children living with a single mother or a single father in the U.S. from 1970 to 2019*, STATISTA RSCH. DEP'T [hereinafter *Number of children living with a single mother or a single father in the U.S. from 1970 to 2019*], <https://www.statista.com/statistics/252847/number-of-children-living-with-a-single-mother-or-single-father/> (Jan. 20, 2021).

34. *Id.*

35. *Single-parent families*, ENCYCLOPEDIA CHILDREN'S HEALTH, <http://www.healthofchildren.com/S/Single-Parent-Families.html> (last visited Jan. 24, 2022).

36. *Number of children living with a single mother or a single father in the U.S. from 1970 to 2019*, *supra* note 33.

37. *Id.*

38. *Id.*

39. Joseph Chamie, *Out-of-Wedlock Births Rise Worldwide*, YALEGLOBAL ONLINE (Mar. 16, 2017), <https://archive-yaleglobal.yale.edu/content/out-wedlock-births-rise-worldwide>.

born out of wedlock.⁴⁰ That number drastically increased to approximately forty percent in 2014.⁴¹ In addition, many children unfortunately lose a parent, resulting in them being raised in a single-parent home.⁴² It is estimated that nearly 1.5 million children (five percent of children in the United States) lose one or both parents by age fifteen.⁴³ With these continuously evolving family dynamics, grandparents are starting to have a more active role in raising their grandchildren.⁴⁴ Approximately sixty percent of grandparents who live within an hour of their grandchildren are either providing childcare or have in the past, making the topic of grandparents' rights all the more salient.⁴⁵

With these new family dynamics, grandparents are being separated from their grandchildren when the parent who gives them access to the child becomes separated from the child themselves.⁴⁶ This can happen when the child's parents are not married and one parent does not have secured parental rights or they have given up their rights.⁴⁷ Other situations that can lead to grandparents being separated from their grandchildren is when their child—the parent—is incarcerated or when their child is prohibited from seeing the grandchild due to substance abuse, sexual offenses, or domestic violence.⁴⁸ Parents with custody or the parent who supplies custody to the grandchild, can also move far away from the grandparent, putting an end to any grandparent visitation.⁴⁹

40. *Id.*

41. *Id.*

42. MARIAN OSTERWEIS, ET AL., BEREAVEMENT: REACTIONS, CONSEQUENCES, AND CARE 99 (1984).

43. *Id.*

44. Goldberg, *supra* note 19.

45. *Grandparents: A Critical Child Care Safety Net*, NAT'L ASSOC. OF CHILD CARE RES. & REFERRAL AGENCIES (Sept. 2008), available at https://www.childcareaware.org/wp-content/uploads/2015/10/2008_grandparents_report-finalrept.pdf.

46. Susan Adcox, *Conflicts That Can Lead to Grandparent Estrangement*, VERYWELL FAM. (Sept. 12, 2021) [hereinafter *Conflicts That Can Lead to Grandparent Estrangement*], <https://www.verywellfamily.com/family-disputes-may-lead-loss-of-contact-1695435>.

47. *Id.*

48. *Id.*

49. *Id.*

B. Restrictive Versus Permissive Statutes

Grandparents' visitation rights are considered a family law matter, which is left up to the states.⁵⁰ Thus, there is no uniform law governing these rights.⁵¹ As it pertains to these rights, states can be categorized into two different groups: restrictive and permissive.⁵² Due to a lack of uniformity, states frequently interpret similar statutes very differently within these broad groups.⁵³ Broadly speaking, however, restrictive laws typically only allow for grandparents to seek visitation rights if the child's parents divorce or if one of the child's parents has died.⁵⁴ Permissive laws, on the other hand, allow for grandparents to seek visitation even if the parents are still married and/or are still alive.⁵⁵ Regardless of the permissive/restrictive distinction, to obtain visitation, the grandparents must prove to the court that granting visitation would be in the best interest of the child.⁵⁶

For instance, Massachusetts is considered to be a restrictive state.⁵⁷ Grandparents are not allowed to petition for grandparents' rights if the family is intact.⁵⁸ This means grandparents can only seek visitation if the child's parents are divorced, the child was born out of wedlock, or one of the parents is deceased.⁵⁹ Additionally, Massachusetts is considered a restrictive state because there is a harm standard that must be met to obtain visitation.⁶⁰ This standard presents another high hurdle for the grandparents to overcome to obtain visitation.⁶¹ Grandparents must show that visitation is in the child's best interests and that the child would be harmed if visitation was denied.⁶²

50. *Introduction to Grandparents Visitation Rights*, *supra* note 12.

51. *Id.*

52. *Grandparent Visitation Rights*, FINDLAW [hereinafter *Grandparent Visitation Rights*], <https://family.findlaw.com/child-custody/grandparent-visitation-rights.html> (last updated Nov. 22, 2021).

53. *See generally id.*

54. *Id.*

55. *Id.*

56. *Grandparent Custody and Visitation*, JUSTIA [hereinafter *Grandparent Custody and Visitation*], <https://www.justia.com/family/child-custody-and-support/child-custody/grandparent-custody-and-visitation> (last updated Oct. 2021).

57. Susan Adcox, *Massachusetts Grandparents' Rights*, LIVEABOUTDOTCOM, <https://www.liveabout.com/massachusetts-grandparents-rights-1695961> (last updated May 23, 2019).

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

On the other hand, South Dakota is an example of a permissive state, and, accordingly, has a more lenient statute governing when grandparents can obtain visitation of their grandchildren.⁶³ There are no additional statutory restrictions set forth in South Dakota's statute that requires a child's parents to be separated in order for the grandparent to have standing.⁶⁴ Grandparents may be awarded visitation if it is in the best interest of the child and if one of the following two provisions are met: (1) If the visitation will not negatively impact the parent-child relationship or (2) If the parent has denied the grandparent reasonable opportunity to have visitation with the grandchild.⁶⁵

Grandparents seeking to establish their visitation rights must first figure out which court has jurisdiction to hear their complaint.⁶⁶ Typically, the state in which the child lives is the state that has appropriate jurisdiction.⁶⁷ A child's home state is considered to be where the child resides.⁶⁸ A child's home state is determined by two factors: if they have lived in that state within six months of the filing of the petition and if at least one of their parents still currently resides there.⁶⁹ Grandparents do not always live in the same state as their grandchildren. This means that a grandparent could potentially live in a state with permissive grandparents' rights, but will have to file suit in a state that is more restrictive or vice-versa.⁷⁰

C. Best Interest of the Child Standard

As discussed, the best interest of the child standard often is used by courts to analyze a grandparents' visitation petition. The best interest of the child standard ensures that any decisions relating to the child are to be made with the goal of promoting the child's happiness, safety, health, and emotional development.⁷¹ To make this determination,

63. S.D. Codified Laws § 25-4-52 (2021).

64. *Id.*

65. *Id.*

66. Susan Adcox, *Grandparent Visitation Rights by State*, VERYWELL FAM., <https://www.verywellfamily.com/grandparent-visitiation-rights-state-by-state-1695938> (last updated Sept. 17, 2019).

67. *Id.*

68. *Interstate Child Custody*, JUSTIA, <https://www.justia.com/family/child-custody-and-support/child-custody/interstate-child-custody> (last visited Jan. 24, 2022).

69. *Id.*

70. *See generally id.*

71. *Focusing on the "Best Interests" of the Child*, FINDLAW, <https://family.findlaw.com/child-custody/focusing-on-the-best-interests-of-the-child.html> (last updated Nov. 26, 2018).

courts look at a number of factors related to the circumstances of the child and of the party seeking visitation.⁷² Although a non-exhaustive list, some common factors courts consider are:

- The needs of the child, including considerations of physical and emotional health of the child, the safety of the child, and the welfare of the child;
- The capability of the parents and/or grandparents to meet the needs of the child;
- The wishes of the parent(s) and the grandparent(s);
- The wishes of the child, if the child is capable of making decisions for himself or herself;
- The strength of the relationship between the grandparent(s) and grandchild;
- The length of the relationship between the grandparent(s) and grandchild;
- Evidence of abuse or neglect by the parent(s) or grandparent(s);
- Evidence of substance abuse by the parent(s) or grandparent(s);
- The child's adjustment to the home, school, or community;
- The ability of the parent(s) or grandparent(s) to provide love, affection, and contact with the child; and
- The distance between the child and the parent(s) or grandparent(s).⁷³

Specific to grandparents' visitation rights cases, some courts have considered the stability of grandparents in terms of economics, psychology, and morals.⁷⁴ They will consider the suitability of the grandparents' home for the grandchildren.⁷⁵ Courts may also look at the quality of the relationship between the children's parents and grandparents.⁷⁶ This standard helps to protect against an overzealous grandparent.⁷⁷

72. *Grandparents' Rights*, ENCYCLOPEDIA.COM [hereinafter *Grandparents' Rights*, ENCYCLOPEDIA.COM], <https://www.encyclopedia.com/law/encyclopedias-almanacs-transcripts-and-maps/grandparents-rights> (last visited Jan. 24, 2022).

73. *Id.*

74. *Grandparents' Rights, Grandparents Visitation Rights in the United States*, WEB SOLUTIONS LLC [hereinafter *Grandparents' Rights, Grandparents Visitation Rights in the United States*], <https://family.jrank.org/pages/733/Grandparents-Rights-Grandparent-Visitation-Rights-in-United-States.html> (last visited Jan. 24, 2022).

75. *Id.*

76. *Id.*

77. *See generally id.*

D. Federal Laws

With grandparents' rights being subject to varying state-level laws, it is important to understand how a state's visitation rights work across state lines.⁷⁸ In 1980, Congress passed the Parental Kidnapping Prevention Act ("PKPA") to prevent non-custodial parents from taking their children to a different state and attempting to obtain custody in that state.⁷⁹ The statute provides that a state's courts are not permitted to make a custody ruling on a particular case without giving "full faith and credit" to a decision made previously in a different state's court.⁸⁰ The Full Faith and Credit Clause is a constitutional provision requiring states to recognize other state's judicial proceedings.⁸¹

In 1998, the PKPA was amended to include visitation for grandparents.⁸² This addition means that if grandparents are granted visitation rights in one state, other states must recognize those rights.⁸³ An example of this can be seen in the Florida case of *Ledoux-Nottingham v. Downs*.⁸⁴ In this case, a Colorado married couple with two children divorced and, shortly thereafter, the father of the children passed away.⁸⁵ The mother subsequently moved to Florida with her two children.⁸⁶ The children's paternal grandparents sought and were granted visitation with their grandchildren by a Colorado court.⁸⁷ The mother then sought to have the Colorado visitation nullified in Florida.⁸⁸ The Florida Supreme Court stated,

The PKPA requires "every State [to] enforce according to its terms . . . any custody determination or visitation determination made consistently with the provisions of this section [1] by a court of another State." (T)he United States Supreme Court explained that "Congress' chief aim in enacting the PKPA was to extend the requirements of the Full Faith and Credit Clause to custody determinations" and that "the PKPA is a mandate directed to state courts to respect the custody decrees of sister States." Thus, there

78. *Grandparents' Rights*, ENCYCLOPEDIA.COM, *supra* note 72.

79. *Id.*

80. *Id.*

81. *full faith and credit*, DICTIONARY.COM, (2020), <https://www.dictionary.com/browse/full-faith-and-credit> (last visited Jan. 24, 2022).

82. *Grandparents' Rights*, ENCYCLOPEDIA.COM, *supra* note 72.

83. *Id.*

84. *See Ledoux-Nottingham v. Downs*, 210 So. 3d 1217, 1220-21 (Fla. 2017).

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

is no doubt that custody determinations of a sister state are entitled to full faith and credit.⁸⁹

If a parent attempts to move out of state to stop grandparents from seeing their grandchildren, this law is a formidable—and much needed—protective barrier.⁹⁰

E. Impacts of Adoption

Adoptions can significantly impact grandparents' visitation rights in certain states.⁹¹ Since 1999, there have been over 250,000 adoptions in the United States.⁹² Some states only allow visitation to continue with biological grandparents if the adoption decree specifically permits it.⁹³ An adoption decree is a court document issued upon finalization of an adoption, declaring that the adoptee is the legal child of the adoptive parents.⁹⁴ Some states—Arizona, for example—only allow grandparent visitation to continue if the child was adopted by a step-parent.⁹⁵ Other states like Delaware have more restrictive rules and establish that adoption cuts off all grandparents' visitation rights.⁹⁶ Kansas, for example, has a more detailed and complex law on adoption, which provides that grandparents' visitation rights are severed unless the grandparents are the parent of the grandchild's deceased parent and the surviving parent's spouse adopts the children.⁹⁷ Some states allow grandparents to maintain their pre-existing visitation only if the child is adopted by someone that is a blood relative.⁹⁸ Clearly, there is considerable variation in how states entertain grandparents' rights and this patchwork system can present serious issues for a grandparent trying to maintain visitation.

89. *Id.*

90. *See generally id.*

91. *See generally Grandparent rights: State by State*, CONSIDERABLE (Dec. 28, 2017) [hereinafter *Grandparent rights: State by State*], <https://www.considerable.com/life/family/grandparent-rights-united-states/>.

92. *Adoption Statistics*, TRAVEL.STATE.GOV, https://travel.state.gov/content/travel/en/Intercountry-Adoption/adopt_ref/adoption-statistics-esri.html?wcmmode=disabled (last visited Jan. 24, 2022).

93. *Grandparent rights: State by State*, *supra* note 91.

94. *Adoption Laws*, ADOPTION CTR., <http://www.adopt.org/adoption-laws> (last visited Jan. 24, 2022).

95. *Grandparent rights: State by State*, *supra* note 91.

96. *Id.*

97. *Id.*

98. *Id.*

F. Organizations

Nonprofit organizations have been formed to help grandparents receive visitation rights⁹⁹ One such organization is the Grandparents Rights Organization, which was formed:

to educate and support grandparents and grandchildren and to advocate their desire to continue a relationship that may be threatened with loss of contact or amputation, usually following: family acrimony; a child being born out of wedlock; the death of one of the child's parents or the divorce of the grandchild's parents.¹⁰⁰

The Grandparents Rights Organization strives to work with state legislatures to improve the laws regarding visitation to help reconnect grandparents with their grandchildren.¹⁰¹ When grandparents sign up to be members of this organization, they are provided a copy of the law in their state (or the state in which their grandchild lives or where the action is pending, if that differs from where the grandparents live) addressing their visitation rights.¹⁰² The organization additionally helps grandparents find attorneys who are specialized in grandparents' visitation practice.¹⁰³

Another successful organization is a group called: Advocates for Grandparent Grandchild Connection.¹⁰⁴ The organization started as a support group for grandparents who have been separated from their grandchildren.¹⁰⁵ Susan Hoffman, the director of the organization, sponsored a bill in California in 2007 that was passed with unanimous support.¹⁰⁶ The bill allowed for grandparents to petition a court for visitation following an adoption by a stepparent.¹⁰⁷ These organizations not only provide support and resources for grandparents that find themselves seeking visitation with their grandchildren, but as the above example shows, they also have the ability to help make changes at legislative levels that will help grandparents obtain better leverage.¹⁰⁸

99. *History and Purpose of GRO*, GRANDPARENTS RTS. ORG., <https://grandparentsrights.org> (last visited Jan. 24, 2022).

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *See generally* *Advocates for Grandparent-Grandchild Connection, About Us*, ADVOCS. FOR GRANDPARENT GRANDCHILD CONNECTION, <https://www.grandparentchildconnect.org/about-us> (last visited Jan. 24, 2022).

105. *Id.*

106. *Id.*

107. *Id.*

108. *See generally id.*

III. Analysis

Despite the fact that many grandparents are playing a more active role in their grandchildren's daily lives,¹⁰⁹ twenty states still maintain restrictive grandparents' rights statutes.¹¹⁰ This poses many problems for grandparents seeking visitation with their grandchildren, such as having to prove the additional harm standard and having difficulty obtaining standing to seek visitation.¹¹¹ The Supreme Court case *Troxel v. Granville* complicated matters by failing to address whether harm is required for grandparents to receive visitation for a state's respective statute to be constitutional.¹¹²

A. *Troxel v. Granville*

Although grandparents' rights are subject to state law, they have found their way into federal courts. In fact, the United States Supreme Court has analyzed the constitutionality of a Washington state visitation statute.¹¹³ In *Troxel v. Granville*, the Court determined that the statute violated the parents' due process rights to raise their children.¹¹⁴ In *Troxel*, the paternal grandparents of two girls sought to maintain visitation with their grandchildren after their son, the children's biological father, committed suicide.¹¹⁵ The parents of the children were never married, and Brad, the children's father, lived with his parents after he and the children's mother separated.¹¹⁶ While their son was still alive, the grandparents were able to see their grandchildren on a regular basis.¹¹⁷ Even after the father committed suicide, the children's mother allowed the paternal grandparents to still see the girls.¹¹⁸ After only a few months, however, the mother informed the grandparents that she wanted to limit their visitation.¹¹⁹

109. Goldberg, *supra* note 19 at 245.

110. Melissa Heinig, *Grandparent and Caretaker Visitation Rights*, NOLO, <https://www.nolo.com/legal-encyclopedia/grandparent-caretaker-visitation-rights-29548.html> (last visited Jan. 24, 2022).

111. Culley *supra* note 26, at 247.

112. See *Troxel v. Granville*, 530 U.S. 57, 73 (2000).

113. *Id.*

114. *Id.* at 57.

115. *Id.* at 60–61.

116. *Id.* at 60.

117. *Id.*

118. *Id.*

119. *Id.* at 61.

The grandparents requested two weekends of overnight visits per month, two weeks during the summer, and some holidays.¹²⁰ The children's mother did not fully deny visitation, but instead, requested that visitation be limited to one day a month.¹²¹ The Washington state superior court found a middle ground: the grandparents were granted one weekend per month, one week during the summer, and four hours on each grandparent's birthday.¹²² The mother appealed, but the court of appeals remanded the case before addressing the merits.¹²³ On remand, the superior court found that allowing the grandparents visitation was in the best interests of the children.¹²⁴

Around nine months after remand, the mother's new husband adopted the girls and the court of appeals reversed the visitation order and dismissed the grandparents' petition due to a lack of standing to seek visitation under the pertinent statute unless there was a custody action pending.¹²⁵ The Washington Supreme Court granted the grandparents' petition for review and disagreed with the court of appeals on the standing issue.¹²⁶ The Washington Supreme Court, however, still agreed with the ultimate conclusion because the statute unconstitutionally infringed on the parents' fundamental right to raise their children.¹²⁷ The U.S. Supreme Court granted certiorari and affirmed the Washington Supreme Court.¹²⁸

B. Supreme Court Opinions on *Troxel*

The plurality opinion, which included Chief Justice Rehnquist, Justices O'Connor, Breyer, and Ginsburg, highlighted the changing demographic in American families and how the enactment of nonparental visitation statutes, including grandparents' rights statutes, were a result of this change.¹²⁹ The statutes are further supported by the fact that grandparents, in some cases, may take the role of a parent and that relationship should be protected because of its beneficial nature.¹³⁰ The

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 62.

125. *Id.*

126. *Id.*

127. *Id.* at 63.

128. *Id.*

129. *Id.* at 64.

130. *Id.*

plurality found a problem with the language of the Washington statute, but not with the concept of grandparents' visitation rights.¹³¹ The Washington statute stated that: "*Any person* may petition the court for visitation rights at *any time* including, but not limited to, custody proceedings."¹³² "The court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances."¹³³ The plurality stated that the statute violated substantive due process rights of the mother because it gave no weight to the mother's determination of what would be in the best interest of her children.¹³⁴

The plurality came to their conclusion on the broadness of the Washington statute and did not answer the question of whether the due process clause requires all statutes regarding nonparental visitation to include a showing of harm or potential harm to the child as a condition for granting visitation.¹³⁵ The plurality failed to define the scope of the parental due process right in the context of visitation.¹³⁶

Justice Souter wrote a concurring opinion.¹³⁷ He had essentially the same argument as the plurality and stated that the statute was too broad and that its overbreadth was sufficient to invalidate it.¹³⁸ He found no reason to decide whether harm needed to be shown in order for a third party to be granted visitation.¹³⁹ Additionally, he strongly opposed the notion of judges being able to make a decision for children because they believed they "could make a better decision than the objecting parent had done."¹⁴⁰ Justice Thomas also wrote a concurrence.¹⁴¹ He agreed with the plurality's reasoning, but wrote separately to reaffirm that their prior substantive due process cases were not argued in this case and that the "due process clause precludes judicial enforcement of unenumerated rights under that constitutional provision."¹⁴² He did not address the merits of the case.¹⁴³

131. *Id.* at 67.

132. *Id.* at 61 (emphasis added).

133. *Id.*

134. *Id.* at 65.

135. *Id.* at 67.

136. *See generally id.*

137. *Id.* at 75.

138. *Id.* at 76–77.

139. *Id.* at 77.

140. *Id.* at 78.

141. *Id.* at 80.

142. *Id.*

143. *Id.*

Justices Stevens, Scalia, and Kennedy all wrote separate dissents.¹⁴⁴ Justice Stevens wrote that a state statute that permits any person to file for visitation rights does not “invariably run afoul of the Fourteenth Amendment.”¹⁴⁵ Justice Stevens stated that the Washington Supreme Court was wrong in determining that the Constitution requires a showing of harm to the child before visitation is granted because there is no basis for that within the Supreme Court’s case law.¹⁴⁶ He concurred that the constitution protects the parent-child relationship from arbitrary state infringement, but the court has “never held that the parent’s liberty interest in this relationship is so inflexible as to establish a rigid constitutional shield, protecting every arbitrary parental decision from any challenge absent a threshold finding of harm.”¹⁴⁷ Justice Stevens also wrote that this parental right is limited when it comes to preserving relationships that children have with family members that are in their best interests.¹⁴⁸

Justice Scalia’s dissent rested on the idea that the question was better suited for the legislature rather than the judicial branch.¹⁴⁹ In his own dissent, Justice Kennedy stated that whether harm to the child need be proven should be considered on a case-by-case basis.¹⁵⁰ Kennedy said that just because third parties historically had no right to petition for visitation, does not mean that a parent has a right to prevent visitation in all situations not involving harm and he focused on how family demographics have substantially changed over the last few decades.¹⁵¹ He wrote that parents do not always have an established relationship with their children and that there are cases in which third parties, such as grandparents, do have that established relationship.¹⁵² Because of this potential lack of an established relationship and change in family structure, he stated that the visitation standard should not be based on the traditional concepts of the nuclear family.¹⁵³

Troxel has caused significant confusion because “although the majority of the justices generally agreed, many had a different reason for

144. *Id.* at 80–102.

145. *Id.* at 85.

146. *Id.* at 85–86.

147. *Id.* at 86.

148. *Id.* at 88.

149. *Id.* at 91–92.

150. *Id.* at 95–96.

151. *Id.* at 98.

152. *See id.* at 99.

153. *Id.* at 98–99.

ruling with the majority, which resulted in six written opinions, making it hard for state courts to interpret the decision."¹⁵⁴ This confusion among the state courts has had serious consequences for grandparents' rights and has led to a lack of uniformity.¹⁵⁵

C. Aftermath of Troxel

After *Troxel*, state courts began to see an influx of lawsuits by parents challenging their respective grandparents' visitation statutes.¹⁵⁶ States have tended to rule in favor of the parents' rights, indicating that post-*Troxel*, it will be more difficult for grandparents seeking visitation to be successful.¹⁵⁷ This has led to permissive states adopting more restrictive statutes.¹⁵⁸ Some states, however, have maintained their permissive statutes, such as South Dakota.¹⁵⁹ Shortly after *Troxel* was decided, the South Dakota Supreme Court found that the best interests of the child standard alone was still a permissible guide based on *Troxel*.¹⁶⁰

Two cases that were decided after *Troxel* highlight the different conclusions that state courts have come to as a result of the confusion surrounding the case.¹⁶¹ In *Cabral v. Cabral*, the Missouri Court of Appeals distinguished their state's visitation statute—which permitted grandparents to petition for reasonable visitation rights—from the Washington statute based on several factors.¹⁶² It found that the Missouri statute afforded parental decisions more weight, provided more protections for parental rights by requiring the appointment of a guardian ad litem,¹⁶³ (a court-appointed guardian that watches over someone during a case),¹⁶⁴ and the amount of visitation only created a trivial intrusion into the parent's lives, unlike the visitation in *Troxel*.¹⁶⁵

154. *Grandparent Visitation Rights*, ELDERLAWANSWERS (May 18, 2020) [hereinafter *Grandparent Visitation Rights*, ELDERLAWANSWERS], <https://www.elderlawanswers.com/grandparent-visitacion-rights-12130>.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. Culley, *supra* note 26, at 245.

162. *Id.*

163. *Id.*

164. CORNELL L. SCH., *Guardian Ad Litem*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/guardian_ad_litem (last visited Jan. 24, 2022).

165. Culley, *supra* note 26.

The Court of Special Appeals of Maryland came to a different conclusion when they applied the *Troxel* ruling to their visitation statute and found it unconstitutional.¹⁶⁶ In *Brice v. Brice*, the court found Maryland's statute to be similar to the statute in *Troxel*.¹⁶⁷ Both statutes allow visitation rights granted to grandparents when it is proven solely to be in the best interests of the child.¹⁶⁸ The court highlighted how the facts in both cases were also very similar.¹⁶⁹ In *Brice*, the parent was deemed fit and wanted a small amount of grandparent visitation.¹⁷⁰ The Maryland statute also did not provide any guidelines for how a court should apply the best interests of the child standard.¹⁷¹

The Missouri and Maryland statutes were very similar. The Missouri statute stated in part,

The court shall determine if the visitation by the grandparent would be in the child's best interest or if it would endanger the child's physical health or impair the child's emotional development. Visitation may only be ordered when the court finds such visitation to be in the best interests of the child.¹⁷²

The Maryland statute stated, "an equity court may: (1) consider a petition for reasonable visitation of a grandchild by a grandparent; and (2) if the court finds it to be in the best interests of the child, grant visitation rights to the grandparent."¹⁷³ This is an example of the confusion that *Troxel* has led to. The Supreme Court did not provide any insights on a standard for how states should determine if their third-party visitation statutes pass constitutional muster.¹⁷⁴

D. Fundamental Right to Raise Children

States with restrictive statutes give more weight to what the parent believes to be in the best interest of the child.¹⁷⁵ This coincides with the Due Process Clause of the Fourteenth Amendment, which provides that parents have a fundamental right to raise their children.¹⁷⁶ A fundamental right can only be limited when the government's interest

166. *Id.* at 246.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. MO. REV. STAT. § 452.402.2 (1999).

173. MD. CODE ANN., FAM. LAW § 9-102 (West 1999).

174. Culley, *supra* note 26.

175. *Grandparent Visitation Rights*, ELDERLAWANSWERS, *supra* note 154.

176. *See generally* Meyer v. Nebraska, 262 U.S. 390, 401 (1923).

outweighs the individual's fundamental right, and even then, the limitation must be as narrow as possible to achieve that important governmental goal.¹⁷⁷ As the Supreme Court has stated, "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder . . ." ¹⁷⁸

Due to this fundamental right, states typically defer to parents on how to raise their children unless extreme circumstances exist.¹⁷⁹ There is a presumption that fit parents make decisions that are in the best interest of their child(ren).¹⁸⁰ A fit parent is one that is competent and able to provide a safe environment for a child.¹⁸¹ This is a low standard and is not difficult to prove.¹⁸² The definition of a fit parent varies from state to state, but for a parent to be unfit, there usually needs to be evidence of serious offenses such as child abuse, substance abuse, or neglect.¹⁸³ In a few state and appellate cases, courts have determined that grandparents' rights unfairly interfere with the parents' fundamental rights.¹⁸⁴ Restrictive statutes were formed and remain intact to protect the fundamental rights of parents and to give their wishes more weight.¹⁸⁵

This does not mean, however, that the parents' rights will always prevail.¹⁸⁶ Courts ultimately have to consider what is in the best interest of the child.¹⁸⁷ The states use their *parens patriae* powers to protect the interest of children.¹⁸⁸ *Parens patriae* is the idea that the state is the

177. Robert J. Frank, *The Constitutional Right to Parent*, THE LAW FIRM OF ROBERT J. FRANK & ASSOCS. LLC (2007), <https://www.rjflaw.com/articles/the-constitutional-right-to-parent/>.

178. *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 166 (1944).

179. Joanna L. Grossman, *Limits on Grandparent Visitation: The Continuing Ripples of Troxel v. Granville*, VERDICT (Sept. 27, 2016), <https://verdict.justia.com/2016/09/27/limits-grandparent-visitation-continuing-ripples-troxel-v-granville>.

180. *Id.*

181. *Id.*

182. *How can I prove that I'm now a fit parent and can have custody of my child?*, RONALD L. KOSSACK, <https://www.kossacklaw.com/custody-modification/can-prove-im-now-fit-parent-can-custody-child/> (last visited Jan. 24, 2022).

183. *Unfit Parent Law and Legal Definition*, USLEGAL, <https://definitions.uslegal.com/u/unfit-parent/> (last visited Jan. 24, 2022).

184. *Grandparents' Rights, Grandparents Visitation Rights in the United States*, *supra* note 74.

185. *See id.*

186. *Id.*

187. *Id.*

188. *Id.*

protector of its children because they cannot protect themselves.¹⁸⁹ The courts will look at the best interest of the child and try to promote the children's rights.¹⁹⁰ In some cases, this has included granting grandparents' visitation rights because children have a right to know their grandparents and to have a relationship with them.¹⁹¹ In other situations, however, courts have found that protecting the rights of parents is in the best interest of the children.¹⁹²

E. Restrictive Versus Permissive

While each state has different variations of visitation statutes, the following is generally true for statutes that fall into these two categories.¹⁹³ Restrictive statutes are more protective of the parents' fundamental rights, therefore, making it harder for grandparents to be granted visitation.¹⁹⁴ Unlike permissive statutes, restrictive statutes pose an additional hurdle that grandparents must overcome to be granted visitation.¹⁹⁵ Not only must the child's family not be intact (by divorce, separation, deceased parent(s), etc.), but the court must find that the visitation would be in the best interests of the child and that the visitation would not negatively impact the child's relationship with their parent(s).¹⁹⁶ Some restrictive statutes require grandparents to prove that denying visitation would harm the child.¹⁹⁷ Take the following language from a Tennessee statute for example,

In considering a petition for grandparent visitation, the court shall first determine the presence of a danger of substantial harm to the child. Such finding of substantial harm may be based upon cessation or severe reduction of the relationship between an unmarried minor child and the child's grandparent if the court determines, upon proper proof, that:

(A) The child had such a significant existing relationship with the grandparent that loss or severe reduction of the relationship is likely to occasion severe emotional harm to the child;

189. See *Parens patriae*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/legal/parens%20patriae> (last visited Jan. 24, 2022).

190. *Grandparents' Rights, Grandparents Visitation Rights in the United States*, *supra* note 74.

191. *Id.*

192. *Id.*

193. *Grandparent Custody and Visitation*, *supra* note 56.

194. *Id.*

195. *Id.*

196. *Id.*

197. See TENN. CODE ANN. § 36-6-306 (2018).

(B) The grandparent functioned as a primary caregiver such that cessation or severe reduction of the relationship could interrupt provision of the daily needs of the child and thus occasion physical or emotional harm; or

(C) The child had a significant existing relationship with the grandparent and loss or severe reduction of the relationship presents the danger of other direct and substantial harm to the child.¹⁹⁸

Other states have a similar harm requirement that is very difficult to overcome.¹⁹⁹ In the 2005 New Jersey case of *Mizrahi v. Cannon*, the grandparents listed eighteen potential harms that the child could suffer if visitation was denied (including “loss of ongoing companionship and the special relationship which often arises between the child and her Paternal Grandparents”), but the visitation was ultimately denied because the grandparents could not prove that the harm would actually happen.²⁰⁰ This shows how difficult proving harm can be for grandparents.²⁰¹ In some cases, the potential of harm is not enough and they have to prove that it will actually occur.²⁰²

Permissive statutes are more protective of the child’s rights and can make it slightly easier for grandparents to obtain visitation.²⁰³ With some permissive statutes, grandparents can obtain visitation when it is simply in the best interests of the child.²⁰⁴ Idaho is a great example of a permissive statute that makes it relatively easy for grandparents to seek and receive visitation.²⁰⁵ The full text of the statute reads: “The district court may grant reasonable visitation rights to grandparents or great-grandparents upon a proper showing that the visitation would be in the best interests of the child.”²⁰⁶ This statute does not have a harm requirement, nor does it only allow grandparents to seek visitation when the family is not intact.²⁰⁷

198. *Id.*

199. Susan Adcox, *Grandparents’ Rights in New Jersey*, LIVEABOUTDOTCOM (Mar. 19, 2018), <https://www.liveabout.com/grandparents-visitacion-rights-1695771>.

200. *Id.*

201. *Id.*

202. *Id.*

203. *Grandparent Custody and Visitation*, *supra* note 56.

204. *Id.*

205. IDAHO CODE § 32-719 (2021).

206. *Id.*

207. *Id.*

F. Arguments for Parents' Rights and Rebuttal

In battles between parents and grandparents, courts typically have sided with the parents in order to protect the parents' constitutional rights.²⁰⁸ Supporters of parents' rights believe the state should not interfere with the child-rearing decisions of fit parents and that that right should not be compromised.²⁰⁹ In addition, not all grandparents are loving and supportive of their child and grandchildren.²¹⁰ Grandparents can be abusive, untrustworthy, interfere with parental decisions, and/or create unnecessary conflict.²¹¹ Lastly, court involvement in conflict between a child's grandparents and parents can negatively impact the home environment of the child.²¹²

All of the arguments that are posed by supporters of parental rights, are addressed when courts look into the best interest of the child.²¹³ Courts look at a number of factors and rarely make a decision based on one of the factors alone.²¹⁴ All of the factors the court considers are not given equal weight.²¹⁵ In addition, courts are allowed to consider any factor that is relevant in determining the best interests of the child.²¹⁶ This means that while one party may have more factors in their favor, they may not necessarily win visitation or custody because their favorable factors might be given less weight than the opposing party's favorable factors.²¹⁷ Evidence of abuse, willingness to support a parent-child relationship, and minimizing conflict are given great weight in a court's determination.²¹⁸ Since permissive and restrictive statutes both consider a child's best interests when determining whether to grant grandparents visitation, both types of statutes are going to give

208. *Introduction to Grandparents Visitation Rights*, *supra* note 12.

209. *Id.*; see also *Visitation Rights for Grandparents*, NOLO [hereinafter *Visitation Rights for Grandparents*], <https://www.lawfirms.com/resources/family/child-custody/visitation-rights-grandparents.htm> (last visited Jan. 24, 2021).

210. *Introduction to Grandparents' Visitation Rights*, *supra* note 12.

211. *Id.*

212. *Id.*

213. *Grandparents' Rights*, ENCYCLOPEDIA.COM, *supra* note 72.

214. Angela Barker, *Best Interests of the Child*, LEGAL REFERRAL SERV. (Jan. 2015), <https://www.nycbar.org/get-legal-help/article/family-law/child-custody-and-parenting-plans/best-interests-of-the-child/>.

215. Howard Van Den Heuvel, *Child Custody And The 12 Child Best Interest Factors*, LAWYERS.COM (Dec. 30, 2013), <https://blogs.lawyers.com/attorney/child-custody/child-custody-and-the-12-child-best-interest-factors-29321/>.

216. *Id.*

217. *Id.*

218. *Id.*

significant weight to the factors that supporters of parental rights are concerned about.²¹⁹

Grandparents who desire visitation rights are typically not trying to be the grandchild's parents, but instead, are attempting to maintain their previous relationship with their grandchild.²²⁰ The following quote from Modern Family Law highlights the limitations of grandparents' visitation and the lack of impact they have on parental rights.

It is crucial to understand that while grandparents' rights allow for visitation with minor children, it does not put grandparents on the same footing as parents. Grandparents' rights do not supersede those of fit parents. Grandparents' rights are generally limited to visitation and do not include decision-making authority or other rights regarding the children.²²¹

G. Arguments for Grandparents' Rights

Over the course of the last half-century, grandparents have been increasingly fighting for visitation rights.²²² Those who support grandparents' rights cite a variety of different reasons.²²³ Grandparents can provide a stabilizing role in their grandchildren's lives, which can be especially helpful after a family separates or if a parent dies.²²⁴ It can negatively impact a child when they have a strong relationship with their grandparents and then it suddenly ends.²²⁵ It is seen as unfair that a parent can unilaterally end an invaluable grandparent-grandchild relationship.²²⁶ Lastly, supporters of grandparents' rights highlight how modern society has changed and how there are various family configurations.²²⁷ This poses the idea that the best place for raising children is not always in the traditional nuclear family setting.²²⁸

Trying to balance a parent's right to raise their children and a grandparent's desire to maintain their established relationship with their grandchild is complicated. As demonstrated above, there are

219. See generally *id.*; see also *Grandparent Custody and Visitation*, *supra* note 56.

220. *Grandparents Rights in Dependency and Neglect*, MOD. FAM. L. (July 19, 2018), <https://www.modernfamilylaw.com/resources/grandparents-rights-dependency-neglect/>.

221. *Id.*

222. *Introduction to Grandparents' Visitation Rights*, *supra* note 12.

223. See *id.*; see also *Visitation Rights for Grandparents*, *supra* note 209.

224. *Visitation Rights for Grandparents*, *supra* note 209.

225. *Id.*

226. *Id.*

227. *Introduction to Grandparents Visitation Rights*, *supra* note 12.

228. *Id.*

many components involved in visitation that go beyond the type of statute that a state has. Grandparents' visitation needs to be restructured to help simplify the process for everyone involved.

IV. Recommendation

There is no easy solution to the highlighted problem and no single solution is going to please parents and grandparents equally. But the current system of having each state have their own unique statute causes an array of problems that can be lessened by a uniform statute.²²⁹ A permissive statute would protect grandparents like Mike and Barbara Fisher from abruptly losing contact with their grandchildren, while fully protecting the fundamental rights of parents. The proposed uniform permissive statute would have three main components: (1) there would be no harm requirement, (2) the best interests of the child standard would be implemented in each case, and (3) it would not prevent grandparents from seeking visitation if the child's parents are together.

A. Other Uniform Family Laws

This Note proposes a uniform rule for grandparents' visitation rights to be adopted by all fifty states. Family matters are typically left to the states free from federal involvement.²³⁰ This is because the Constitution limits Congress' authority to legislate on domestic matters.²³¹ This has led to substantial variation among the states on family law topics such as marriage, divorce, and custody.²³² To address this specific issue of grandparent's visitation rights, given Congress's limited authority, a state legislative approach should be taken to get states on the same page without running into issues of Congress going beyond their constitutional authority, as has been done before.

Over the years, there has been a push for uniformity among the states in family law matters.²³³ The Uniform Law Commission has been

229. *Id.*

230. *Is Family Laws Federal or State?*, LAWS (Dec. 23, 2019), <https://family.laws.com/family-court/family-courts>.

231. *Family Law: Congress's Authority to Legislate on Domestic Relations Questions*, EVERYCRSREPORT, <https://www.everycrsreport.com/reports/RL31201.html> (last visited Jan. 24, 2022).

232. *Id.*

233. *See, e.g.*, Linda J. Ravdin, *Update on Arbitration in Family Law Matters: the New Uniform Family Law Arbitration Act*, PASTERNAK & FIDIS (Nov. 15, 2016), <https://>

attempting to standardize state laws since 1892.²³⁴ The Uniform Law Commission can only propose legislation, however, so no proposal is effective until a state's legislature adopts it.²³⁵ That being said, the Commission is very powerful and is composed of practicing lawyers, judges, and legislators. Thus, many of the Commission's proposals are either adopted in individual states or carry significant weight as persuasive authority.²³⁶

One example is the Uniform Family Law Arbitration Act which was proposed in July 2016, with the hopes that it would be enacted by all fifty states.²³⁷ In 1997, the Uniform Law Commission adopted the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA").²³⁸ The UCCJEA replaced the Uniform Child Custody Jurisdiction Act ("UCCJA") and it clarified provisions in the UCCJA that received conflicting interpretations amongst the states.²³⁹ It also codified new practices that have helped decrease interstate conflict, conformed jurisdictional standards to be in compliance with the PKPA, and added safeguards for victims of domestic violence who move to a new state for protection.²⁴⁰ The UCCJEA does not create standards for visitation nor modifying visitation; it only determines which courts have jurisdiction to make those decisions.²⁴¹

Over the years, the UCCJEA has been adopted by every state except Massachusetts.²⁴² Additionally, the Uniform Marriage and Divorce Act ("UMDA") has been adopted by many states and, in part, standardizes the factors that courts will consider in determining child

www.pasternakfidis.com/update-arbitration-family-law-matters-new-uniform-family-law-arbitration-act/.

234. *About Us*, UNIF. L. COMM'N, <https://www.uniformlaws.org/aboutulc/overview> (last visited Jan. 24, 2022).

235. *Id.*

236. *Id.*

237. UNIF. FAM. L. ARB. ACT (UNIF. L. COMM'N 2021).

238. Patricia M. Hoff, *The Uniform Child-Custody Jurisdiction and Enforcement Act*, U.S. DEP'T OF JUST. (Dec. 2001), <https://www.ncjrs.gov/pdffiles1/ojdp/189181.pdf>.

239. *Id.* at 1.

240. *Id.*

241. *Id.*

242. WENDY O. HICKEY, ET AL., FAMILY LAW IN THE UNITED STATES: MASSACHUSETTS: OVERVIEW, BRICK, HONES, MCBRIEN & HICKEY LLP (Dec. 1, 2020), [https://1.next.westlaw.com/Document/Idf2c9a94045d11e598db8b09b4f043e0/View/FullText.html?contextData=\(sc.Default\)&transitionType=Default#:~:text=see%20Question%2016\).-,Children,and%20Enforcement%20Act%20\(UCCJEA\).](https://1.next.westlaw.com/Document/Idf2c9a94045d11e598db8b09b4f043e0/View/FullText.html?contextData=(sc.Default)&transitionType=Default#:~:text=see%20Question%2016).-,Children,and%20Enforcement%20Act%20(UCCJEA).)

custody.²⁴³ These are illustrative of the fact that states are willing to enact uniform laws pertaining to family matters.²⁴⁴

These examples provide a potential process for how family laws can become uniform and is a possible way a permissive law for grandparent's rights can become uniform.

B. Benefits of a Uniform Law

Uniform laws tend to simplify individuals' lives by providing consistency in regard to rules and procedures across the states.²⁴⁵ Uniformity is needed because even in states with similar statutes, a lack of direction from the Supreme Court has resulted in courts interpreting them differently, which leads to different results in factually similar cases.²⁴⁶ The need for uniform legislation and interpretation can be summed up by this quote:

Uniformity of legislation by our various states and uniformity of interpretation by judicial construction, go hand in hand and thus tend to relieve the busy lawyer, as well as the litigant, of the mass of conflicting decisions upon the same subject matter in different states.²⁴⁷

Some grandparents are dissuaded from pursuing litigation to obtain visitation rights because of the financial cost.²⁴⁸ Over fifteen million Americans over the age of sixty are living at or below the federal poverty level.²⁴⁹ Many older adults struggle to afford basic needs like housing, health care, and food.²⁵⁰ These grandparents cannot spare the money needed to pursue visitation rights.²⁵¹ Elderly women are in a

243. *Custody and Child Support*, WEB SOLS. LLC [hereinafter *Custody and Child Support*], <https://law.jrank.org/pages/12480/Custody-Child-Support.html>, (last visited Jan. 24, 2022).

244. *See generally id.*

245. *FAQs*, UNIF. L. COMM'N, <https://www.uniformlaws.org/aboutulc/faq#What%20A0benefits%20does%20the%20Uniform%20Law%20Commission%20provide?>, (last visited Jan. 24 2022).

246. *See Grandparents' Rights*, ENCYCLOPEDIA.COM, *supra* note 72.

247. Sumner Kenner, *The Function of Uniform State Laws*, 1 IND. L. J. 127, 127–34 (1926).

248. *See* Susan Adcox, *Before You Sue for Grandparent Visitation Rights*, VERYWELL FAM. (June 11, 2020) [hereinafter *Before You Sue for Grandparent Visitation Rights*], <https://www.verywellfamily.com/before-you-sue-for-visitation-rights-1695438>.

249. *Get the Facts on Economic Security for Seniors Facts*, NAT'L COUNCIL ON AGING (Mar. 1, 2021) [hereinafter *Economic Security for Seniors*], <https://www.ncoa.org/article/get-the-facts-on-economic-security-for-seniors>.

250. *Id.*

251. *See generally id.*

worse position than elderly men.²⁵² In 2014, women received approximately \$4,500 less annually in Social Security benefits than older men.²⁵³ Women of color saw an even larger disparity.²⁵⁴ This disparity makes it even harder for grandmothers, especially grandmothers of color, to be able to seek visitation due to financial inability.²⁵⁵ The cost of litigation for a visitation case can easily exceed thousands of dollars when a party has to front the pay for court fees, attorney fees, and potentially, the cost of a guardian ad litem.²⁵⁶ A uniform law potentially would lower the cost of litigation because it would take out the complexity of which type of statute applies, how the statute has previously been interpreted, and which state's laws govern when grandparents live in a different state than their grandchildren.²⁵⁷ It also would help lower these costs because lawyers would not have to spend time figuring out what the law is and how it is going to be applied.²⁵⁸

Every state has some variation on restrictive or permissive laws.²⁵⁹ Grandparents must look toward the state in which the child lives to see which law applies: meaning the grandparents could live in a permissive state while the grandchild lives in a restrictive state.²⁶⁰ This can lead to parents who wish to prevent their child's grandparents from receiving visitation to forum shop.²⁶¹ Forum shopping in a custody scenario is the relocation of a child to a state with more advantageous laws for the parent hoping to retain custody.²⁶² A uniform law would prevent this type of forum shopping because the statutes would be the same in

252. *Id.*

253. Alana Semuels, *This Is What Life Without Retirement Savings Looks Like*, THE ATLANTIC (Feb. 22, 2018), <https://www.theatlantic.com/business/archive/2018/02/pensions-safety-net-california/553970/>.

254. Juliette Cubanski et al., *How Many Seniors Live in Poverty?*, KAISER FAM. FOUND. (Nov. 19, 2018), <https://www.kff.org/report-section/how-many-seniors-live-in-poverty-issue-brief/>.

255. *See generally Economic Security for Seniors*, *supra* note 249.

256. *Before You Sue for Grandparent Visitation Rights*, *supra* note 248.

257. *See generally Grandparent rights: State by State*, *supra* note 91 (describing the differences between grandparent visitation rights in different states).

258. *See generally id.*

259. *Summaries of State Law: Grandparent Visitation and Custody*, FINDLAW (Nov. 14, 2018), <https://family.findlaw.com/child-custody/summaries-of-state-law-grandparent-visitacion-and-custody.html>.

260. *What You Should Know About Visitation Rights for Grandparents*, OUR FAM. WIZARD, <https://www.ourfamilywizard.com/blog/what-you-should-know-about-visitacion-rights-grandparents> (last visited Jan. 24, 2022).

261. *See Custody and Child Support*, *supra* note 243.

262. *See id.*

every state, therefore, there would be no judicial incentive to move the child to a different state.²⁶³

A uniform law would save the parties time and keep courts from having congested dockets.²⁶⁴ Domestic issues tend to be long and end up clogging the state court systems and draining tax court resources.²⁶⁵ Custody and visitation cases can last for years depending on the location of the case, who the judge is, who the lawyers are, and whether or not the case goes to trial.²⁶⁶ When one party is clearly unfit, it makes the judge's decision easier and thus, the case will end sooner.²⁶⁷ But, in cases where both parties are fit, the case can become complicated and take longer to resolve.²⁶⁸

C. Why Permissive and Not Restrictive

With restrictive statutes, the grandparents may have to prove that it would be detrimental to the grandchild if visitation is denied.²⁶⁹ Because of this reason, restrictive statutes can be particularly more expensive than permissive statutes.²⁷⁰ This burden can force parties to spend a significant amount of money to retain psychologists to testify about harm that will or will not occur.²⁷¹ Hiring an expert psychologist can cost between hundreds of dollars an hour to over one thousand dollars an hour depending on the expert's level of experience.²⁷² This is not only a financial burden for grandparents, but also, a timely one.²⁷³ This increases time because the grandparents have to undergo psychiatric

263. See generally *id.*

264. *Id.*

265. *Id.*

266. Elisha Morris, *How Long Do Most Custody Battles Last?*, ELISHA MORRIS, ESQ., <https://divorcelawyersrhodeisland.com/custody-battles-length/> (last visited Jan. 24, 2022).

267. *Id.*

268. *Id.*

269. *Introductory Guide to Grandparents' Visitation Rights (A 50-State Survey, plus Washington, D.C.)*, JUST. FOR MIL. FAMS. [hereinafter *Introductory Guide to Grandparents' Visitation Rights*], <https://www.msjudn.org/wp-content/uploads/2016/02/2016-GRANDPARENTS-VISITATION-RIGHTS-GUIDE.pdf> (last visited Jan. 24, 2022).

270. Richard S. Victor, *Editorial to USA Today in Support of Grandparents Visitation Laws*, USA TODAY (Sept. 19, 2006), <https://grandparentsrights.org/editorialusa.pdf>.

271. *Id.*

272. Beryl Vaughan, *Hiring a Forensic Psychiatrist or Psychologist Expert Witness: How Much Is It Going to Cost?*, HGEXPERTS.COM, <https://www.hgexperts.com/expert-witness-articles/hiring-a-forensic-psychiatrist-or-psychologist-expert-witness-how-much-is-it-going-to-cost-54409> (last visited Jan. 24, 2022).

273. See, e.g., *Introductory Guide to Grandparents' Visitation Rights*, *supra* note 269.

evaluation and have to litigate this issue in court.²⁷⁴ A permissive uniform statute, without the requirement to show harm, would lower the total cost of litigation that stems from hiring experts and other costs associated with a contentious legal battle.²⁷⁵

A permissive statute still protects the rights and wishes of parents and prevents grandparents who do not have an established relationship with their grandchildren from obtaining visitation.²⁷⁶ Permissive statutes still require a court to consider the best interests of the child when deciding visitation.²⁷⁷ One of the main factors that courts consider (included in the list above), is the wishes of the parents.²⁷⁸ Courts place significant weight on this factor because a fit parent is deemed to do what is in the best interests of their children.²⁷⁹ Giving this factor substantial weight helps protect the rights of parents because it is a difficult factor to overcome.²⁸⁰ The courts balance many factors when determining if visitation is in the best interests of the child, and if parental wishes are granted significant weight, then many other factors would have to be in favor of the grandparents before the court would consider granting the visitation.²⁸¹ Because this factor is given significant weight, the need for parents to be separated in order for grandparents to be able to seek visitation is not compelling. When the parents of the child are together and they both wish for the grandparents to not be granted visitation, a substantial number of factors in favor of granting the visitation would have to be present.²⁸² If all those other factors are in fact present, then it is probably in the best interest of the child to grant that visitation and thus, a requirement that prohibits the grandparents from seeking visitation would negatively impact the child.

274. *See id.*

275. *See id.*

276. *See Grandparent Visitation Rights, supra* note 52.

277. *Id.*

278. *Grandparents' Rights, ENCYCLOPEDIA.COM, supra* note 72.

279. *See Parental-Presumption Rule Law and Legal Definition, USLEGAL, <https://definitions.uslegal.com/p/parental-presumption-rule/> (last updated Sept. 26, 2018).*

280. *See generally id.*

281. *Focusing on the "Best Interests" of the Child, supra* note 71.

282. *See generally id.*

D. Justice Stevens's Approval

Based on his opinion in the *Troxel* case, it seems that Justice Stevens would approve of the proposed statute.²⁸³ He expressed approval of a broad statute allowing third parties to seek visitation because of the more expansive role that third parties have begun to have.²⁸⁴ He highlighted how many children can have “an intimate relation” with people who are not their parents.²⁸⁵ Justice Stevens said:

Far from guaranteeing that parents' interests will be trampled in the sweep of cases arising under the statute, the Washington law merely gives an individual—with whom a child may have an established relationship—the procedural right to ask the State to act as arbiter, through the entirely well-known best-interests standard, between the parent's protected interests and the child's.²⁸⁶

Because of those cases, visitation statutes should be broad in who can seek visitation.²⁸⁷ This not only protects the third parties such as grandparents, but also, the children involved. Stevens said:

While this Court has not yet had occasion to elucidate the nature of a child's liberty interests in preserving established familial or family-like bonds, it seems to me extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests, and so, too, must their interests be balanced in the equation.²⁸⁸

The permissive nature of the proposed statute that allows grandparents to seek visitation even if the family is intact is a broader scope that Stevens would have appreciated in a visitation statute.²⁸⁹

When discussing the harm standard that the Washington Supreme Court deemed was constitutionally required, Justice Stevens found this argument to be unsupported by case law.²⁹⁰ As mentioned above, Stevens argued that the fundamental right of parents is not absolute and is not so protected that only a finding of harm should overcome their wishes.²⁹¹ Stevens said, “[t]he presumption that parental decisions generally serve the best interests of their children is sound, and clearly in the normal case the parent's interest is paramount. But even

283. See *Troxel v. Granville*, 530 U.S. 57, 80–92 (2000).

284. *Id.* at 85.

285. *Id.*

286. *Id.* at 90–91.

287. *Id.* at 91.

288. *Id.* at 88.

289. See generally *id.* at 80–92.

290. *Id.* at 89–90.

291. *Id.* at 86.

a fit parent is capable of treating a child like a mere possession."²⁹² This is precisely the reason for the best interests of the child standard.²⁹³ It allows for the parent's wishes to be predominant, while protecting children from parents denying visitation due to arbitrary reasons.²⁹⁴ The following quote from Justice Stevens sums up this point:

The constitutional protection against arbitrary state interference with parental rights should not be extended to prevent the States from protecting children against the arbitrary exercise of parental authority that is not in fact motivated by an interest in the welfare of the child.²⁹⁵

E. Benefits of Grandparent-Grandchild Relationships

Grandparents and grandchildren both benefit from having a relationship with each other.²⁹⁶ Grandparents receive the benefit of having a connection with younger generations and are introduced to new and different ideas.²⁹⁷ Grandparents who are involved in their grandchildren's lives have been found to benefit cognitively.²⁹⁸ They performed better on cognitive tests and had "sharper minds."²⁹⁹ Active grandparents felt more connected with the world and reported feeling younger.³⁰⁰ Studies have found that grandparents who babysit or care for their grandchildren live longer than adults of the same age who do not.³⁰¹

Grandchildren can receive wisdom from their grandparents to help them go through life.³⁰² Grandchildren who spend more time with their grandparents have fewer emotional and behavioral problems and

292. *Id.*

293. *Focusing on the "Best Interests" of the Child*, *supra* note 71.

294. *Id.*

295. *Troxel*, 530 U.S. at 89.

296. *What Are the Benefits of Grandparent Visitation?* ATKINSON & KELSEY, P.A. [hereinafter *What Are the Benefits of Grandparent Visitation?*], <https://www.atkinson-kelsey.com/what-are-the-benefits-of-grandparent-visitation/> (last visited Jan. 24, 2022).

297. *Id.*

298. *The Benefits of the Grandparent-Grandchild Relationship*, BABYCHICK, <https://www.baby-chick.com/the-benefits-of-the-grandparent-grandchild-relationship/> (last updated Mar. 17, 2021).

299. *Id.*

300. *Id.*

301. *Why Kids Need to Spend Time with Grandparents (According to Studies)*, TINYBEANS (Sept. 10, 2021), <https://redtri.com/benefits-for-kids-to-spend-time-with-grandparents/slide/1>.

302. *What Are the Benefits of Grandparent Visitation?*, *supra* note 296.

tend to score higher on emotional intelligence tests.³⁰³ Children are also more likely to be empathetic and show compassion in social settings.³⁰⁴ Children are not only able to learn about the past, but they can learn more about their heritage.³⁰⁵ This is particularly important for second and third generation immigrants who may have a lesser connection to their cultural background.³⁰⁶ Additionally, in cases where there is a strong tie between grandparents and grandchildren, both groups had lower rates of depressive symptoms.³⁰⁷ Thus, a statute that makes it easier for grandparents to obtain visitation would benefit the grandparents and grandchildren.

F. Avoidable Conflicts

By having states adopt permissive statutes, the number of grandparents receiving visitation with their grandchildren may increase.³⁰⁸ Allowing grandparents to have visitation rights will prevent some common conflicts from arising that cause parents to stop allowing their children to visit their grandparents.³⁰⁹ Financial issues can be used as a ploy for parents and grandparents when it comes to visitation.³¹⁰ When grandparents contribute financially to their children, they can threaten to halt payments if future conditions are not met, such as visitation with the grandchildren.³¹¹ Parents can threaten to stop allowing visitation between their children and the financially supportive grandparents if they want more money or want to lessen pressure for paying back loans.³¹²

Other factors besides financial concerns can lead to conflicts between parents and grandparents inhibiting visitation.³¹³ As adults, people can choose their own religion and raise their children within that religious community. An adult could marry someone who practices a

303. *The Benefits of Spending Time With Grandparents*, HOME AIDE HOME CARE, INC. (Jan. 28, 2020), <https://www.homeaidehomecare.com/2020/01/the-benefits-of-spending-time-with-grandparents/>.

304. *Id.*

305. *Id.*

306. *Id.*

307. *What Are the Benefits of Grandparent Visitation?*, *supra* note 296.

308. *Introduction to Grandparents' Visitation Rights*, *supra* note 12.

309. *Conflicts That Can Lead to Grandparent Estrangement*, *supra* note 46.

310. *Id.*

311. *Id.*

312. *Id.*

313. *Id.*

different religion and thus, raise their child in a different religion. This causes concerns when a grandparent does not practice the same religion as their children and/or grandchild and they disagree with how the grandchildren are being raised.³¹⁴ Many times there are personality conflicts between a grandparent and a parent.³¹⁵ This generally takes the form of disagreements between mother-in-law and daughter-in-law.³¹⁶ Both religion and personal differences can cause a rift between grandparents and parents and impact pre-existing visitation between grandparents and grandchildren.³¹⁷ With permissive statutes, it will be easier for grandparents to set in stone their visitation with their grandchildren and not be concerned that disagreements can be used as a way to prevent them from seeing their grandchildren.

Enacting a uniform permissive statute would make grandparents' visitation matters less complicated while also benefiting grandparents and grandchildren without infringing on the rights of parents.

V. Conclusion

Mike and Barbara Fisher deserve to maintain their pre-existing relationship with their grandchildren regardless of whether their son and daughter-in-law are divorced. Barbara Fisher said, "[t]hose children are our flesh and blood, and our life is empty without them."³¹⁸ Whatever went wrong between Louise and our son isn't our fault—or the children's. Yet we're all being punished."³¹⁹ This statement perfectly depicts how grandparents and grandchildren are being negatively impacted when some circumstance causes their existing relationship to abruptly end.³²⁰ Restrictive statutes make it virtually impossible for grandparents to achieve visitation with their grandchildren.³²¹ Grandparents, like Mike and Barbara Fisher, are left with trying to make things better with the parent which prove to no avail.³²² Mike and Barbara tried pleading with

314. *Id.*

315. *Id.*

316. *Id.*

317. *Id.*

318. Courtenay-Smith, *supra* note 1.

319. *Id.*

320. *See generally id.*

321. *See generally Grandparent Custody and Visitation, supra* note 56.

322. Courtenay-Smith, *supra* note 1.

the grandchildren's mother, but she would not budge and allow them to see her children.³²³ She eventually stopped taking their calls.³²⁴

A uniform permissive statute would help grandparents like Mike and Barbara Fisher maintain their relationship with their grandchildren no matter which state they live in.³²⁵ Grandparents would no longer have to spend time and money trying to figure out what kind of statute their state has, which statute their grandchild's state has, and how those statutes are applied.³²⁶ Permissive statutes would make it easier for grandparents to obtain visitation and no longer be controlled by a parent who is using their child for financial gain or as punishment for conflicting personality characteristics.³²⁷

Many parents are scared of permissive statutes because they believe that their rights are being infringed.³²⁸ A permissive statute still takes a parent's choice into consideration and it is presumed that fit parents do what is in the best interests of the child(ren).³²⁹ The main difference is that permissive statutes do not require the grandparents to prove that the child will be harmed if visitation is not granted nor do the parents have to be separated.³³⁰ The procedural safeguards protecting parental rights are still intact in permissive statutes and parental considerations remain a central focus.³³¹

Enacting a uniform permissive statute is not going to give unfit grandparents the right to visit their grandchildren, nor is it going to give grandparents who have not been involved in their grandchildren's lives an opportunity to establish that relationship. The statute would be enacted to help grandparents like Mike and Barbara Fisher from finding themselves in situations where a family conflict that they have no control over ends their relationship with their grandchildren and they need help obtaining visitation after they have tried other alternatives. A uniform permissive statute is the most effective and efficient way to protect the grandchild-grandparent relationship without interfering with the fundamental right of parents.

323. *Id.*

324. *Id.*

325. See generally *Introduction to Grandparents' Visitation Rights*, *supra* note 12.

326. See *Introductory Guide to Grandparents' Visitation Rights*, *supra* note 269.

327. *Conflicts That Can Lead to Grandparent Estrangement*, *supra* note 46.

328. See generally *Introduction to Grandparents' Visitation Rights*, *supra* note 12.

329. *Grandparent Custody and Visitation*, *supra* note 56.

330. *Id.*

331. *Grandparent Visitation Rights*, *supra* note 52.