St. John's Law Review

Volume 56
Number 3 *Volume 56, Spring 1982, Number 3*

Article 9

July 2012

Visitation of Adopted Child By Natural Grandparents Properly May be Sought Under DRL § 72

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verdict aids subsequent review by presenting an explicit adjudication of each issue to an appellate court reviewing the merits[24] or another trial court considering the collateral estoppel effect of the judgment.[25] Finally, such verdicts appear to satisfy automatically the statutory requirements that elements of damages be itemized in medical malpractice awards[26] and that fault be apportioned among multiple tortfeasors in other negligence actions.[27]

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DOMESTIC RELATIONS LAW

Visitation of adopted child by natural grandparents properly may be sought under DRL § 72

Section 72 of the Domestic Relations Law accords grandparents a procedure to secure visitation with a minor grandchild when "either or both of the parents of a minor child . . . is or are deceased."[28] Once a child is adopted, however, the legal relationship

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spect to the law only to the degree reasonably necessary to answer the questions presented. *See* note 2 *supra*. In such cases, the jury is less able to predict the legal effect of its factual conclusions. Skidmore v. Baltimore & O.R. Co., 167 F.2d 54, 66 (2d Cir.), *cert. denied*, 335 U.S. 816 (1948).

[24] *See, e.g.*, Quigley v. County of Suffolk, 75 App. Div. 2d 888, 889, 428 N.Y.S. 2d 46, 47 (2d Dep't 1980); notes 18 & 19 and accompanying text *supra*. The factual determinations rendered incident to special verdicts are readily available to appellate courts since the clerk of the court must "make an entry in his minutes specifying . . . the general verdict and any answers to written interrogatories, or the questions and answers or other written findings constituting the special verdict." CPLR 4112 (1963).

[25] *See generally* CPLR 4111(d), commentary at 95-96 (McKinney Supp. 1981-1982).

[26] *See* CPLR 4111(d) (McKinney Supp. 1981-1982). Subsection (d) requires that a verdict in a medical malpractice action "specify the applicable elements of special and general damages upon which the award is based and the amount assigned to each element." *Id.*

[27] *See, e.g.*, Noga v. Monroe Medi-Trans, 78 App. Div. 2d 988, 988, 433 N.Y.S.2d 927, 928 (4th Dep't 1980); SIEGEL § 399, at 522; 4 WK&M ¶ 4111.05, at 41-195 to 41-196. *See generally* CPLR 1401-04, 1411 (McKinney Supp. 1981-1982).

[28] DRL § 72 (1977) (original version at ch. 631, § 1 [1966] N.Y. Laws 1391, *amended by* ch. 431, § 1 [1975] N.Y. Laws 620 (McKinney)); *see* Lo Presti v. Lo Presti, 40 N.Y.2d 522, 526-27, 355 N.E.2d 372, 375, 387 N.Y.S.2d 412, 414-15, *aff'd on remand*, 54 App. Div. 2d 582, 387 N.Y.S.2d 153 (2d Dep't 1976). Section 72 of the Domestic Relations Law provides:

> Where either or both of the parents of a minor child, residing within this state, is or are deceased, or where circumstances show that conditions exist which equity would see fit to intervene, a grandparent or the grandparents of such child may apply to the supreme court for a writ of habeas corpus to have such child brought before such court; and on the return thereof, the court, by order, after due notice to the parent or any other person or party having the care, custody,

between the natural parent and the adopted child is terminated.[29]

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and control of such child, to be given in such manner as the court shall prescribe, may make such directions as the best interest of the child may require, for visitation rights for such grandparent or grandparents in respect to such child.

DRL § 72 (1977). Prior to the enactment of section 72, grandparents, having no legal right to visitation with their grandchildren, were forced to accept a custodial parent's decision regarding any visitation. The common-law rule was expressed in Noll v. Noll, 277 App. Div. 286, 288-89, 98 N.Y.S.2d 938, 940-41 (4th Dep't 1950) wherein the court refused to order a right of visitation by the paternal grandparents over the objections of the child's mother. *See, e.g.*, People *ex rel.* Marks v. Grenier, 249 App. Div. 564, 565, 293 N.Y.S. 364, 365-66 (1st Dep't), *aff'd*, 274 N.Y. 613, 10 N.E.2d 577 (1937); People *ex rel.* Schacter v. Kahn, 241 App. Div. 686, 686, 269 N.Y.S. 173, 174 (2d Dep't 1934). Exceptions to the common-law rule were rare. In Benner v. Benner, 113 Cal. App. 2d 531, 248 P.2d 425 (Dist. Ct. App. 1952), visitation rights were granted to a grandmother in a divorce proceeding where the child lived with her grandmother for 3 years and separation would have caused the child emotional harm. *Id.* at 532, 248 P.2d at 426. Moreover, in Kay v. Kay, 112 N.E.2d 562 (Ohio Ct. Common Pleas 1953), the court held that court-ordered visitation could be granted to a grandparent who demonstrated that the custodial parent is unfit to determine visitation. *Id.* at 564. For an analysis of the common-law rule and its exceptions, see Foster & Freed, *Grandparent Visitation: Vagaries and Vicissitudes*, 23 ST. LOUIS U.L.J. 643, 645-53 (1979).

Due to the inequity of the common-law approach, legal recognition of a grandparent's right to visitation was secured by the enactment of DRL § 72. *See* Memorandum of Assemblyman Goldstein, *reprinted in* [1966] N.Y. LEGIS. ANN. 14-15. This section, however, was not intended to give grandparents an absolute right of visitation, but rather to provide them with an opportunity to present their interest to the court. Lo Presti v. Lo Presti, 40 N.Y.2d 522, 526, 355 N.E.2d 372, 375, 387 N.Y.S.2d 412, 415, *aff'd on remand*, 54 App. Div. 2d 582, 387 N.Y.S.2d 153 (2d Dep't 1976). The decision as to whether visitation will be granted rests solely in the discretion of the court after an evaluation of the child's best interest. 40 N.Y.2d at 527, 355 N.E.2d at 375, 387 N.Y.S.2d at 415.

[29] *See* DRL § 117 (1977). Section 117 of the Domestic Relations Law provides in part:

After the making of an order of adoption the natural parents of the adoptive child shall be relieved of all parental duties toward and of all responsibilities for and shall have no rights over such adoptive child or to his property by descent or succession, except as hereinafter stated.

The rights of an adoptive child to inheritance and succession from and through his natural parents shall terminate upon the making of the order of adoption except as hereinafter provided.

The adoptive parents or parent and the adoptive child shall sustain toward each other the legal relation of parent and child and shall have all the rights and be subject to all the duties of that relation including the rights of inheritance from and through each other and the natural and adopted kindred of the adoptive parents or parent.

DRL § 117(1) (1977); *see, e.g.*, Betz v. Horr, 276 N.Y. 83, 87, 11 N.E.2d 548, 550 (1937); Doe v. Roe, 37 App. Div. 2d 433, 436, 326 N.Y.S.2d 421, 425 (2d Dep't 1971). Section 117 succeeds in making the adopted child the "natural child" of the adoptive parents. *See* Carpenter v. Buffalo Gen. Elec. Co., 213 N.Y. 101, 108, 106 N.E. 1026, 1028 (1914); Charles v. James, 56 Misc. 2d 1056, 1058, 290 N.Y.S.2d 993, 995 (Family Ct. Kings County 1968); Anonymous v. Anonymous, 15 Misc. 2d 1048, 1050, 182 N.Y.S.2d 992, 995 (Child. Ct. Saratoga County 1959) (*Carpenter* and *Anonymous* deal with section 117's predecessor, DRL § 115). The statute divests the natural parents of any relation to the child and gives all the rights of parent and child to the adopted child and his adoptive parents. Betz v. Horr, 276

In light of such annulment of the parent-child relationship, it has been unsettled whether the natural grandparents of an adopted child are precluded from seeking visitation under section 72.[30] Recently, in *People ex rel. Sibley v. Sheppard*,[31] the Court of Appeals held that adoption will not operate to bar a grandparent access to the section 72 mechanism.[32]

In *Sibley*, a minor child had resided, since birth, with his mother and maternal grandmother.[33] The child's father was deceased.[34] Prior to the child's second birthday, his mother died and he was removed from his grandmother's home, placed in a children's home, and thereafter adopted by his paternal grandparents.[35] The maternal grandmother regularly visited the child until his adoption, at which time the adoptive parents obstructed her attempts to visit.[36] Consequently, she commenced this action pursuant to section 72.[37] The Supreme Court, New York County, upheld the grandparent's right to rely upon section 72, despite the adoption of the child, and awarded visitation rights.[38] The Appel-

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N.Y. at 87-88, 11 N.E.2d at 550; Charles v. James, 56 Misc. 2d at 1058, 290 N.Y.S.2d at 995.

[30] *Compare* People *ex rel.* Herman v. Lebovits, 66 Misc. 2d 830, 832, 322 N.Y.S.2d 123, 125-26 (Sup. Ct. N.Y. County 1971) *and* People *ex rel.* Levine v. Rado, 54 Misc. 2d 843, 845, 283 N.Y.S.2d 483, 485-86 (Sup. Ct. Nassau County 1967) (visitation rights do not survive adoption) *with* Scranton v. Hutter, 40 App. Div. 2d 296, 299, 339 N.Y.S.2d 708, 711 (4th Dep't 1973) *and* People *ex rel.* Simmons v. Sheridan, 98 Misc. 2d 328, 333, 414 N.Y.S.2d 83, 86 (Sup. Ct. N.Y. County 1979) (adoption does not preclude a grandparent from applying for visitation rights). Discord also exists among other jurisdictions regarding grandparents' visitation rights subsequent to a child's adoption. Courts in California, New Jersey and Ohio have allowed such visitation. *See* Roquemore v. Roquemore, 275 Cal. App. 2d 912, 80 Cal. Rptr. 432, 435 (Ct. App. 1969); Mimkon v. Ford, 66 N.J. 426, 436, 332 A.2d 199, 204 (1975); Graziano v. Davis, 50 Ohio App. 2d 83, 361 N.E.2d 525, 530 (Ct. App. 1976). Courts in Florida and Texas have taken the opposite view. *See* Lee v. Kepler, 197 So. 2d 570, 573 (Fla. Dist. Ct. App. 1967); Deweese v. Crawford, 520 S.W.2d 522, 526 (Tex. Civ. App. 1975). For an in-depth analysis of grandparents' visitation rights in Texas, see Gault, *Grandparent-Grandchild Visitation*, 37 TEX. B.J. 433 (1974).

[31] 54 N.Y.2d 320, 429 N.E.2d 1049, 445 N.Y.S.2d 420 (1981), *aff'g* 79 App. Div. 2d 896 (1st Dep't 1980) (mem.).

[32] 54 N.Y.2d at 326, 429 N.E.2d at 1051-52, 445 N.Y.S.2d at 422-23.

[33] *Id.* at 322-23, 429 N.E.2d at 1050, 445 N.Y.S.2d at 421.

[34] *Id.* at 322, 429 N.E.2d at 1049, 445 N.Y.S.2d at 420.

[35] *Id.* at 323, 429 N.E.2d at 1050, 445 N.Y.S.2d at 421. While the child and his mother were living in the maternal grandmother's home, a neglect proceeding was brought against the child's mother resulting in the child's removal from the grandmother's home. *Id.* at 322-23, 429 N.E.2d at 1050, 445 N.Y.S.2d at 421. The grandmother was not involved in this proceeding. *Id.* at 323, 429 N.E.2d at 1050, 445 N.Y.S.2d at 421.

[36] *Id.*

[37] *Id.*

[38] *Id.*

late Division, First Department, affirmed without opinion.[39]

On appeal, the Court of Appeals affirmed.[40] Chief Judge Cooke, writing for a unanimous Court, noted that the visitation statute, on its face, contemplates the situation where the child has been adopted,[41] and that the adoption statute recognizes the interests of natural relatives in maintaining family ties.[42] Moreover, since the adoption statute was part of state law prior to the enactment of the visitation statute,[43] the Court concluded that the legislature would have expressly excluded adoption from the purview of section 72 had that been its intention.[44]

Finding that natural grandparents may use section 72 as a vehicle for asserting their visitation rights, the *Sibley* Court thereupon decided in favor of the section's constitutionality. In this regard, the Court, without distinguishing between natural and adoptive families, observed that parents have a constitutional right to raise their families "as they see fit."[45] Nevertheless, upon commenting that "parents are not totally free to act as they please,"

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[39] 79 App. Div. 2d 896 (1st Dep't 1980) (mem.).

[40] 54 N.Y.2d at 323, 429 N.E.2d at 1050, 445 N.Y.S.2d at 421.

[41] *Id.* at 323-24, 429 N.E.2d at 1050, 445 N.Y.S.2d at 421. The *Sibley* Court noted that the statute "permits a proceeding against *any* person who has custody" of the child, *id.* at 325, 429 N.E.2d at 1051, 445 N.Y.S.2d at 422, and stated that the statute does not exempt a person who obtains custody through adoption. *Id.*; *cf.* Scranton v. Hutter, 40 App. Div. 2d 296, 298, 339 N.Y.S.2d 708, 710 (4th Dep't 1973) (court observed that the requirement of notice to "any parent having custody of the grandchild" suggests that adoption was intended to be covered).

[42] 54 N.Y.2d at 323, 429 N.E.2d at 1050, 445 N.Y.S.2d at 421. Chief Judge Cooke reasoned that since section 117 deals with bequests to a child from its natural relatives, it contemplates the continuation of natural family ties after adoption. *Id.*; *see* DRL § 117(2) (1977) (section 117(2) severs rights of inheritance through descent, not distribution of property through a will). Thus, the Court found that natural relatives having a desire to "perpetuate [a] sense of family" may do so by "[b]equeathing property to the adopted child." 54 N.Y.2d at 325, 429 N.E.2d at 1051, 445 N.Y.S.2d at 422. *See generally* Presser, *The Historical Background of the American Law of Adoption*, 11 J. FAM. L. 443, 469-70, 501-14 (1972).

[43] 54 N.Y.2d at 325, 429 N.E.2d at 1051, 445 N.Y.S.2d at 422. Formerly section 115 of the DRL, ch. 606, § 1 [1938] N.Y. Laws 1610, 1615 (current version at DRL § 117 (1977)), the section was amended in 1966 to preserve an adopted child's interest under a will made by a member of his natural family. Ch. 14, § 2 [1966] N.Y. Laws 35-36. Since this was the same year that the grandparent visitation statute was enacted, the Court asserted that the legislature was "presumed to know what statutes are in effect when it enacts new laws." 54 N.Y.2d at 325, 429 N.E.2d at 1051, 445 N.Y.S.2d at 422. *See generally* Easley v. New York State Thruway Auth., 1 N.Y.2d 374, 379, 135 N.E.2d 572, 575, 153 N.Y.S.2d 28, 31 (1956).

[44] 54 N.Y.2d at 325, 429 N.E.2d at 1051, 445 N.Y.S.2d at 422; *cf. In re* Santacose, 271 App. Div. 11, 16, 61 N.Y.S.2d 1, 5 (4th Dep't 1946) (since adoption is created by statute, in derogation of the common law, it must be strictly construed).

[45] 54 N.Y.2d at 326, 429 N.E.2d at 1052, 445 N.Y.S.2d at 423.

the Court held that a section 72 intrusion should be tested under the standard of whether the state's interest in regulating the family relationship bears "a reasonable relation to any end within the competency of the State."[46] Noting that the state legitimately may act to protect the best interest of children, the Court found that section 72, which affords grandparents standing to show that their visitation would be beneficial to a child, is reasonably related to the furtherance of such child's best interest.[47] The Court observed, moreover, that since the adoptive relationship is statutory,[48] the right of visitation is consistent with the state's power to supervise in the child's best interest after the child's adoption.[49] In light of the beneficial effects of visitation in the instant case, the Court concluded that it was in the child's best interest to grant his maternal grandmother visitation.[50]

In clarifying the legal status of grandparents who can use the procedural mechanism of section 72 to claim visitation rights, it is submitted that the *Sibley* Court correctly interpreted the section to encompass legal and natural grandparents. Such an interpretation recognizes that court evaluation of what is in the best interest of a child is the proper procedure to promote the welfare of such child.[51] Indeed, by facilitating access to the court, section 72

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[46] *Id.* at 327, 429 N.E.2d at 1052, 445 N.Y.S.2d at 423 (quoting Meyer v. Nebraska, 262 U.S. 390, 403 (1923)); *see, e.g.*, Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 643 (1974); Pierce v. Society of the Sisters, 268 U.S. 510, 535 (1925). Relying on Prince v. Massachusetts, 321 U.S. 158 (1944), the *Sibley* Court found that the liberty interest of parents in raising their families was not absolute. 54 N.Y.2d at 327, 429 N.E.2d at 1052, 445 N.Y.S.2d at 423. In *Prince*, the Supreme Court, in upholding the state's child-labor laws, 321 U.S. at 168-69, found that "the family itself is not beyond regulation in the public interest." *Id.* at 166. *See generally* Note, *Delineating the Reasonable Progress Ground as a Basis for Termination of Parental Rights*—In re Austin, 28 DE PAUL L. REV. 819, 826-30 (1979).

[47] 54 N.Y.2d at 329, 429 N.E.2d at 1053, 445 N.Y.S.2d at 424.

[48] *Id.* at 327, 429 N.E.2d at 1052, 445 N.Y.S.2d at 423. The *Sibley* Court noted that adoption did not exist at common law. *Id.*; *see In re* Thorne, 155 N.Y. 140, 143-44, 49 N.E. 661, 662 (1898).

[49] 54 N.Y.2d at 327-28, 429 N.E.2d at 1052-53, 445 N.Y.S.2d at 423-24. Since the state has created the adoptive relationship, Chief Judge Cooke reasoned that the state could define its parameters. *Id.* at 327, 429 N.E.2d at 1052, 445 N.Y.S.2d at 423.

[50] *Id.* at 328-29, 429 N.E.2d at 1053, 445 N.Y.S.2d at 424. The factual circumstances which the Court considered in deciding to allow the child's grandmother the right to visitation included the close contact maintained between the child and his natural family, the agreement between the parties that continued visitation would be in the child's best interest, and the fact that maintaining the anonymity and privacy of the child's natural and adoptive parents was not a concern. *Id.*

[51] The strong policy consideration of promoting the best interest of the child supports the *Sibley* Court's result that section 72 withstands a subsequent adoption. *See* Scranton v.

merely supplants resort to traditional equitable[52] and legal[53] remedies pursuant to which adoption was not prohibitive of visitation, but rather, was a factor to be considered in assessing the best interest of a child.[54] Thus, since section 72 does not create any rights

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Hutter, 40 App. Div. 2d 296, 298-99, 339 N.Y.S.2d 708, 710-11 (4th Dep't 1973). In *Scranton*, the Supreme Court, Appellate Division, upon considering the legislative intent, concluded that adoption does not automatically preclude a grandparent's right to seek visitation with that child. *Id.* at 299, 339 N.Y.S.2d at 711. Notably, when section 72 was originally enacted, Assemblyman Noah Goldstein discussed the need to preserve established relationships after the death of one or both of the child's parents. Additionally, he noted that the visitation statute was designed to safeguard a beneficial grandparent-grandchild relationship. *See* Memorandum of Assemblyman Goldstein, *reprinted in* [1966] N.Y. LEGIS. ANN. 14. Subsequently, in 1975, section 72 was amended to allow grandparents to seek a court determination of visitation rights "where circumstances show that conditions exist which equity would see fit to intervene." DRL § 72 (1977). Noting the effect of expanding a court's jurisdiction to evaluate other situations where grandparents may seek visitation, Senator Leon Giuffreda observed that the courts would now have greater flexibility to promote the welfare of the child. *See* Memorandum of Senator Giuffreda, *reprinted in* [1975] N.Y. LEGIS. ANN. 51.

Moreover, it is submitted that an approach which does not make the child's interest paramount would work great injustice. For example, to allow adoption to bar judicial determination of grandparent-grandchild visitation would frustrate the remedial purpose of section 72. *See* Note, *Adoption: Visitation Rights of Natural Grandparents*, 32 OKLA. L. REV. 645, 648-49 & nn.25-30 (1979). *See also* Note, *Visitation Rights of a Grandparent Over the Objection of a Parent: The Best Interests of the Child*, 15 J. FAM. L. 51, 74 (1976-1977) (suggests that the court is "shirk[ing] its legitimate duty: to oversee the best interests of all minor children."). Additionally, distinguishing between relative-adoption and stranger-adoption to determine when an adoption will bar use of section 72 is too arbitrary. *But see* Mimkon v. Ford, 66 N.J. 426, 435-36, 332 A.2d 199, 204 (1975). Significantly, three states allow judicial discretion in granting visitation after a relative adoption. *See* Lee v. Kepler, 197 So. 2d 570, 573 (Fla. Dist. Ct. App. 1967); Smith v. Trosclair, 321 So. 2d 514, 515-16 (La. 1975); Deweese v. Crawford, 520 S.W.2d 522, 525-26 (Tex. Civ. App. 1975). Other states have enacted statutes which permit grandparent visitation after adoption. *See* CAL. CIV. CODE § 197.5 (Deering Supp. 1981); MINN. STAT. ANN. § 257.022(3) (West Supp. 1981); OKLA. STAT. ANN. tit. 10, § 60.16(3) (West Supp. 1980-1981).

[52] *See In re* McDevitt, 176 App. Div. 418, 423, 162 N.Y.S. 1032, 1035 (2d Dep't), *aff'd*, 221 N.Y. 598, 117 N.E. 1076 (1917). The *McDevitt* court, in dictum, stated that "[t]he Supreme Court has ample power at law and in equity to promote the welfare of the child, notwithstanding a legal adoption. The power to permit and to regulate visitation . . . is, of course, included." 176 App. Div. at 423, 162 N.Y.S. at 1035 (citations omitted). Current courts retain this equitable power to grant visitation rights, dictated by their concern for the welfare of the child. *See In re* Anonymous v. Anonymous, 50 Misc. 2d 43, 45, 269 N.Y.S.2d 500, 503 (Family Ct. Queens County 1966). *See also In re* Adoption of N., 78 Misc. 2d 105, 109-10, 355 N.Y.S.2d 956, 960-61 (Sur. Ct. N.Y. County 1974).

[53] At common law, grandparents had no legal right to petition the courts to secure visitation rights with their grandchildren. *See* Foster & Freed, *supra* note 28, at 645-53; Note, *Statutory Visitation Rights of Grandparents: One Step Closer to the Best Interests of the Child*, 26 CATH. U.L. REV. 387, 388-92 (1977). Certain exceptions existed, however. *See id.* Thus, although no independent legal remedy existed, grandparents were accorded a right to petition the courts when they fell within a recognized exception to the common-law rule.

[54] Where a jurisdiction excepted to the common-law rule and used a "best interests"

to visitation, but expressly affords only a procedure to facilitate a court determination of visitation rights,[55] there appears to be no reason to frustrate access to this mechanism when a child has been adopted.[56]

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approach to assess grandparents' petitions for visitation, adoption of the child became one important consideration for the court in determining whether to grant visitation. *See* Note, *Visitation Rights of a Grandparent, supra* note 51, at 59-73.

[55] DRL § 72 (1977); *see* Lo Presti v. Lo Presti, 40 N.Y.2d 522, 527, 355 N.E.2d 372, 375, 387 N.Y.S.2d 412, 415, *aff'd on remand,* 54 App. Div. 2d 582, 387 N.Y.S.2d 153 (2d Dep't 1976).

[56] Although the adoption statute protects the new family unit by assuring family integrity, *see generally* 1 M. SCHAPIRO, A STUDY OF ADOPTION PRACTICE (1956), a complete severance of all ties with the natural family is not mandated when such would work severe hardship on a child's welfare. *See* Foster & Freed, *supra* note 28, at 663-67. Of course, since the language of the adoption statute provides for termination of the legal relations between a child and his natural family, DRL § 117(1) (1977), an argument can be made that visitation rights of natural grandparents must also be severed. *See In re* Adoption of Gardiner, 287 N.W.2d 555, 558 (Iowa 1980). The court in *Gardiner* reasoned that since the grandparent's status and right to visitation arose by virtue of the child's relationship to the natural parents, termination of the natural parent's rights by adoption removed the basis for the grandparent's rights. *Id.* Such an interpretation, however, fails to harmonize the objective of maintaining adoptive family integrity with the overall scheme of promoting the child's welfare. *Cf.* Graziano v. Davis, 50 Ohio App. 2d 83, 361 N.E.2d 525, 530 (Ct. App. 1976) (interpreting analogous Ohio adoption laws). Furthermore, since the purpose of sections 72 and 117 is to promote the best interest of the child, the *Sibley* Court's conjunctive reading of the visitation and adoption statutes is consistent with the axiom of *pari materia.* 2A C. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 51.03 (4th ed. 1973). Moreover, because the visitation statute includes the situation in which either or both parents of the child are deceased, DRL § 72 (1977), it can be inferred that adoption of the child was contemplated, and thus would not interfere with the grandparent's rights under the statute. *Cf.* Mimkon v. Ford, 66 N.J. 426, 436 & n.4, 332 A.2d 199, 204 & n.4 (1975) (interpreting analogous New Jersey visitation laws).

Concededly, court implementation of visitation rights must account for the unique circumstances of each case, and the judge must use his discretion in determining whether to award visitation. *See* Lo Presti v. Lo Presti, 40 N.Y.2d 522, 527, 355 N.E.2d 372, 375, 387 N.Y.S.2d 412, 415, *aff'd on remand,* 54 App. Div. 2d 582, 387 N.Y.S.2d 153 (2d Dep't 1976). In *Lo Presti,* the Court stated that "[t]he question of whether visitation should be granted lies solely in the discretion of the court and must . . . be determined in the light of what is required in the best interests of the child. . . ." *Id.* (citations omitted). This comports with declared legislative intentions. *See* Memorandum of Assemblyman Goldstein, *reprinted in* [1966] N.Y. LEGIS. ANN. 14. Assemblyman Noah Goldstein stated that "granting to grandparents the right to visit their grandchild would be solely in the discretion of the Court." *Id.*; *see In re* Ehrlich v. Ressner, 55 App. Div. 2d 953, 953, 391 N.Y.S.2d 152, 153 (2d Dep't 1977); Geri v. Fanto, 79 Misc. 2d 947, 949, 361 N.Y.S.2d 984, 987 (Family Ct. Kings County 1974). As a practical matter, of course, it is essential that, when a judicial determination must be made of a child's best interest, the practitioner present a great array of facts and sociological studies to the court to guide the judge's decision. Although courts may never be able to predict adequately the child's needs, it is important that they be able to make an informed decision. *See* J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 3-8 (1973). It has also been suggested that the ideal situation would be to have independent counsel representing children. Foster & Freed, *supra* note 28, at 650 & n.42.

Significantly, upon finding that natural grandparents may assert the section 72 visitation mechanism, the *Sibley* Court placed adoptive parents on the same legal footing as natural parents, albeit implicitly, with respect to their constitutional right of familial integrity.[57] It is submitted that such an approach was warranted. Concededly, the Supreme Court, to date, has not expressly accorded adoptive families all the rights to which natural families may lay claim.[58] Nonetheless, it appears that adoptive families, although creatures of statute,[59] should be subject to the penumbra of

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Although the judge will focus on the best interest of the child, it has been asserted that judicial intervention should be a last resort and that conciliation and counseling of the adoptive family members and concerned grandparents would be more beneficial to the child. *See* Foster & Freed, *supra* note 28, at 664. Notwithstanding the fact that judicial discretion may result in inconsistent holdings, such inconsistencies may be tempered by appellate review. For instance, custody and visitation determinations are subject to review or modification. *See* People *ex rel.* Levine v. Rado, 54 Misc. 2d 843, 844, 283 N.Y.S.2d 483, 485 (Sup. Ct. Nassau County 1967). A visitation judgment will be reversed when there has been an abuse of discretion. *See, e.g.*, Hood v. Connaughton, 75 App. Div. 2d 582, 583, 426 N.Y.S.2d 574, 575 (2d Dep't 1980) (overly extensive visitation rights will impede child's adjustment to new family); Lachow v. Barasch, 57 App. Div. 2d 896, 896, 394 N.Y.S.2d 284, 284 (2d Dep't 1977) (denial of visitation on grounds of acrimony is abuse of court's discretion).

[57] *See* 54 N.Y.2d at 327, 429 N.E.2d at 1052, 445 N.Y.S.2d at 423.

[58] Notably, the courts currently are faced with the difficult task of assessing the extent of constitutional protection to which various types of state-created families may lay claim. In this regard, although commentators have equated the "psychological family" relationship, created by the state between a foster parent and a child, with the natural family relationship, *see* J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 56 at 9-20, 22-26, the courts have been apprehensive. The Supreme Court in Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816 (1977), defined the family as inhering in the blood relationship, *id.* at 843, but recognized that psychological parenthood can also exist in the absence of blood-ties. *Id.* at 843-44. Yet, when the Court compared the liberty interest of the natural parent to that of the foster parent, the Court found only "the most limited constitutional 'liberty' in the foster family." *Id.* at 846. Reasoning that natural parents' liberty interest was greater because it was based on a basic human right, *id.*, the Court suggested that other things being equal, relations by blood will override a psychological interest. *Id.* at 846-47. The Court implied, however, that a different result would have been reached had there been an adoptive relationship. *Id.* at 824, 827 n.19, 844 n.51, 846. Similarly, in Drummond v. Fulton County Dept. of Family & Children's Servs., 563 F.2d 1200 (5th Cir. 1977), *cert. denied*, 437 U.S. 910 (1978), the court found no constitutionally protected familial right of privacy in the foster parents. 563 F.2d at 1206. Noting that the foster relationship is a temporary arrangement, the *Drummond* court stated that "[t]rue liberty rights do not flow from state laws, . . . they have a more stable source in our notions of intrinsic human rights." *Id.* at 1207. Additionally, the court found the liberty interest of the foster family limited by the state laws which created the relationship. *Id.* The court also made references to treating adoptive family integrity similar to the natural family's protected liberty interest. *Id.* To date, however, the Supreme Court has not placed the adoptive relationship on the same constitutional footing as the natural family relationship.

[59] *See* DRL §§ 114, 117 (1977); note 48 and accompanying text *supra*.

rights which the fourteenth amendment has been held to afford.[60]

Emilia M. Naccarato

ESTATES, POWERS AND TRUSTS LAWS

EPTL § 3-4.3: Separation agreement containing general release of rights held insufficient to revoke specific will bequests to spouse

EPTL § 3-4.3 provides that any conveyance, settlement, or other

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[60] The principle establishing a liberty interest of familial integrity evolved from the fourteenth amendment due process clause of the United States Constitution. In the seminal case of Meyer v. Nebraska, 262 U.S. 390 (1923), the Supreme Court held unconstitutional a state law prohibiting the teaching of a foreign language to a child not yet in the eighth grade because it deprived parents of their due process liberty to "establish a home and bring up children." *Id.* at 399. Similarly, in Pierce v. Society of Sisters, 268 U.S. 510 (1925), the Supreme Court noted that parents have the right to direct their children's education free from unreasonable state interference. *Id.* at 518-19. Recently, the Court in Wisconsin v. Yoder, 406 U.S. 205 (1972), upon upholding the right of Amish parents to instill their own religious beliefs in their children, held that such parents were not required to comply with compulsory education laws. *Id.* at 213-14. This analysis has been extended to the right of a parent to custody where the family unit is of paramount concern. *See* Stanley v. Illinois, 405 U.S. 645, 651, 658 (1972). Similarly, the New York Court of Appeals has viewed the family as protected by the due process liberty interest and has upheld parent's rights to raise their families. *See* Roe v. Doe, 29 N.Y.2d 188, 193, 272 N.E.2d 567, 570, 324 N.Y.S.2d 71, 75 (1971); People *ex rel.* Kropp v. Shepsky, 305 N.Y. 465, 468, 113 N.E.2d 801, 803 (1953); People *ex rel.* Portnoy v. Strasser, 303 N.Y. 539, 542, 104 N.E.2d 895, 896 (1952); People *ex rel.* Sisson v. Sisson, 271 N.Y. 285, 287, 2 N.E.2d 660, 661 (1936) (per curiam).

Additionally, the Supreme Court has articulated a fundamental right to privacy implicit in the due process liberty clause. Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (right of privacy includes a married couple's use of contraception). Subsequently, the basis for many family protection decisions was the fundamental right of privacy. This right, however, was extended only to situations directly affecting the marital relationship. In Paul v. Davis, 424 U.S. 693, 713 (1976), the Supreme Court noted that the constitution protects individuals in "matters relating to marriage, procreation, contraception, family relationships, and child rearing and education." *Id.*; *e.g.*, Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (constitution protects sanctity of the family); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-40 (1974) (woman has a right to determine whether to bear a child); Roe v. Wade, 410 U.S. 113, 153 (1973) (woman has a right to decide whether to terminate her pregnancy); Loving v. Virginia, 388 U.S. 1, 12 (1967) (constitution guarantees the right to marry); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (fundamental right to marry and procreate). *See generally* Richards, *The Individual, the Family, and the Constitution: A Jurisprudential Perspective*, 55 N.Y.U. L. REV. 1, 31-62 (1980). Notwithstanding the fundamental right of privacy, the Court in Zablocki v. Redhail, 434 U.S. 374 (1978), stated that "reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed." *Id.* at 386. This holding recognizes that domestic relations is "an area that has long been regarded as a virtually exclusive province of the States." Sosna v. Iowa, 419 U.S. 393, 404 (1975).