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Catherine M. Gillman

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Note

One Big, Happy Family? In Search of a More Reasoned Approach to Grandparent Visitation in Minnesota

Catherine M. Gillman

In 1989, shortly after Wanda gave birth to her son Cody, she pled guilty to federal drug charges and served a sentence of three months in a halfway house.¹ Cody's grandmother, Geraldine, took custody of him during Wanda's sentence.² Geraldine returned Cody to Wanda's custody after her release, but continued to care for him while Wanda worked.³ Wanda and Cody moved into Geraldine's home for a short time in 1992 and then moved into a trailer owned by Geraldine.⁴ Soon thereafter, Wanda's relationship with her mother faltered, and since then she has denied Geraldine any opportunity to see Cody.⁵ Geraldine turned to the courts to secure the right to visit with her grandson.⁶

Sadly, almost one-third of all families⁷ no longer fit the notion of a traditional family consisting of two cohabiting married

1. Reed v. Glover, 889 S.W.2d 729, 729-30 (Ark. 1994).

2. 889 S.W.2d at 730.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. An increasing number of children live in households headed by one parent. Between 1970 and 1984, the number of families headed by one parent grew from 3.8 million (12.9% of all family groups) to more than 8.5 million (25.7% of all family groups). BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, POPULATION CHARACTERISTICS, SERIES P-20, NO. 398, HOUSEHOLD AND FAMILY CHARACTERISTICS: MARCH 1984, at 4, tbl. D (1985) [hereinafter 1984 REPORT]. By 1993 the number of one-parent family groups had grown to 10.9 million (30.2% of all family groups). BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, POPULATION CHARACTERISTICS, SERIES P-20, NO. 477, HOUSEHOLD AND FAMILY CHARACTERISTICS: MARCH 1993, at XVI, tbl. G (1994) [hereinafter 1993 REPORT]. African-American households witnessed an even more pronounced demise in the traditional family. Single-parent family groups grew from 35.7% of all African-American family groups in 1970 to 59.2% in 1984. 1984 REPORT, *supra*, at 4,

parents and their biological children (an intact family⁸). The increasing instances of family turmoil threaten the psychological health of the family's children.⁹ Under common law, courts rarely ordered visitation between grandparent and grandchild as a means of protecting the grandchild from family disruption.¹⁰ State legislatures, however, stepped in where courts feared to tread by giving grandparents greater rights of access to their grandchildren, originally in instances of family disruption and more recently over the wishes of parents in an intact family.¹¹ Minnesota, at the forefront of this national movement,¹² enacted its own grandparent visitation statute¹³ in 1976.¹⁴

tbl. D. By 1993, single parents headed 63% of all African-American families. 1993 REPORT, *supra*, at XVI, tbl. G.

Statistics explain the reasons for the growth of single-parent families. Between 1960 and 1982, the divorce rate in the U.S. more than tripled. Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 881 n.7 (1984) (citing BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, SPECIAL STUDY SERIES P-20, No. 380, MARITAL STATUS AND LIVING ARRANGEMENTS: MARCH 1982, at 4, tbl. D (1983)). In addition, as of 1992, 24% of all never-married women age 18 to 44 had borne a child, up from 15% in 1982. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, SPECIAL STUDY SERIES P-23, No. 187, HOW WE'RE CHANGING: DEMOGRAPHIC STATE OF THE NATION: 1994, at 1 (1994).

8. The term "intact family" refers to a nuclear family consisting of a husband, a wife, and their dependent children. Bartlett, *supra* note 7, at 879 n.1; Laurence C. Nolan, *Honor Thy Father and Thy Mother: But Court-Ordered Grandparent Visitation in the Intact Family?*, 8 B.Y.U. J. PUB. L. 51, 52 n.6 (1993).

9. JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 16 (new ed. 1979) ("The prolonged absence or death of one parent may place the child at risk."); Elaine D. Ingulli, *Grandparent Visitation Rights: Social Policies and Legal Rights*, 87 W. VA. L. REV. 295, 309-10 (1985). See also *infra* notes 125-126 and accompanying text (discussing a parent's death as a childhood stressor).

10. See *infra* notes 22-26 and accompanying text (discussing the common law's general denial of grandparent visitation rights).

11. See *infra* notes 32-52 and accompanying text (discussing statutory visitation rights for grandparents).

12. By 1977, only six states other than Minnesota had enacted grandparent visitation statutes. Phyllis C. Borzi, Note, *Statutory Visitation Rights of Grandparents: One Step Closer to the Best Interests of the Child*, 26 CATH. U. L. REV. 387, 392 (1976). By 1984, 49 states had adopted similar legislation. 2 JEFF ATKINSON, MODERN CHILD CUSTODY PRACTICE § 8.11 (1986 & Supp. 1994).

13. MINN. STAT. § 257.022 (1994).

14. Act of Apr. 8, 1976, ch. 198, § 1, 1976 Minn. Laws 670 (codified at MINN. STAT. § 257.022). The Statute has been in a state of flux since enactment. The legislature amended the Statute six times, the first time one year after its enactment. See *infra* notes 53-74 and accompanying text (discussing the historical development of the Statute). On January 12, 1995, four members of the Minnesota House of Representatives introduced a bill designed to expand

Far from ending the discussion, however, grandparent visitation legislation continues to spark heated debate in Minnesota¹⁵ and elsewhere¹⁶ about whether the law should recognize and enforce grandparent visitation rights against the wishes of the grandchild's parents.¹⁷ In Minnesota, the debate currently

greatly grandparent visitation rights. MINN. H.F. 53, 79th Leg. § 257.022 (1995). See *infra* notes 80-84 and accompanying text (discussing the proposed amendment).

The Minnesota Court of Appeals only recently has begun to interpret the Statute's provisions. In 1989, that court issued its first decision involving the Statute. *In re Welfare of R.A.N.*, 435 N.W.2d 71 (Minn. Ct. App. 1989). The frequency of litigation under the Statute, however, increased recently. Eleven cases since *R.A.N.* cite the Statute; the court issued five of those after 1993. See *infra* note 85 (citing these cases). On August 29, 1994, the Minnesota Supreme Court assented to issue its first construction of the Statute when it agreed to review the Minnesota Court of Appeals's decision in *Olson v. Olson*, 518 N.W.2d 65 (Minn. Ct. App. 1994), *review granted*, No. C7-93-2425 (Minn. Aug. 29, 1994), discussed *infra* notes 91-99 and accompanying text.

15. After 18 months of lobbying, Minnesota grandparents found a legislator to sponsor their proposal to broaden grandparent visitation rights in response to an adverse Minnesota Court of Appeals ruling in *Olson*. Kurt Chandler, *Bill Would Give Grandparents Right to Visitation*, STAR TRIB. (Minneapolis), Jan. 30, 1995, at 1B. State family law experts, however, question the wisdom of greatly-expanded rights. Rhonda Hillbery, *Grandparents' Rights: Case Could Affect Others Who Want to Visit Kids Against Parents' Wishes*, STAR TRIB. (Minneapolis), Oct. 24, 1994, at 1A, 5A.

16. Grandparent visitation generally presents a much-debated issue. See, e.g., Edward M. Burns, *Grandparent Visitation Rights: Is It Time for the Pendulum to Fall?*, 25 FAM. L.Q. 59 (1991) (discussing policy and legal issues inherent in Illinois's grandparent visitation statute); Patricia S. Fernández, *Grandparent Access: A Model Statute*, 6 YALE L. & POL'Y REV. 109 (1988) (proposing a model grandparent access statute); Ingulli, *supra* note 9, at 295-98 (advocating the reevaluation of differing state grandparent visitation statutes pending more conclusive analysis of the benefits of grandparent visitation); Patricia A. Hintz, Comment, *Grandparents' Visitation Rights Following Adoption: Expanding Traditional Boundaries in Wisconsin*, 1994 WIS. L. REV. 483 (praising recent Wisconsin legislative developments concerning the effect of adoption on grandparent visitation); Anne M. Jackson, Comment, *The Coming of Age of Grandparent Visitation Rights*, 43 AM. U. L. REV. 563 (1994) (analyzing national trends and proposing a model statute); Katrine Ames, *Grandma Goes to Court*, NEWSWEEK, Dec. 2, 1991, at 67 ("Visitation rights [are] one of the most emotional issues of the growing 'grandparents' movement.").

17. Several recent articles discuss grandparent visitation over parental objection, specifically in the context of an intact family. Nolan, *supra* note 8, at 64-72 (criticizing judicial intervention in intact families); Alicia C. Klyman, Comment, *Family Law—Hawk v. Hawk: Grandparent Visitation Rights—Court Protects Parental Privacy Rights Over "Child's Best Interests"*, 24 MEM. SR. U. L. REV. 413 (1994) (analyzing a judicial decision invalidating a statute that authorized grandparent visitation in intact families); Melissa L. Moore, Comment, *King v. King: The Best Interest of the Child: A Judicial Determination for Grandparent Visitation*, 20 N. KY. L. REV. 815 (1993) (criticizing a judicial decision upholding the constitutionality of visitation in intact families).

centers on visitation disputes between a grandparent and the related parent,¹⁸ as in the hypothetical presented above.¹⁹ Grandparents want the legislature and the courts to guarantee their right to play an expanded role in their grandchildren's lives.²⁰ Parents, in contrast, want to curb judicial interference in their families.²¹ The polarized debate leaves children in the

18. This Note will use "related parent" to refer to the parent who is the child of the petitioning grandparent. Visitation disputes between a grandparent and the related parent arise in four contexts: when the grandchild lives in an intact family, e.g., *Hawk v. Hawk*, 855 S.W.2d 573, 575-77 (Tenn. 1993), when the spouse of the related parent has died, e.g., *Ingulli*, *supra* note 9, at 309-12, when the biological parents divorce and the related parent retains custody, e.g., *Goff v. Goff*, 844 P.2d 1087, 1089 (Wyo. 1993), and when the related parent bears or fathers the grandchild out of wedlock, e.g., *Reed v. Glover*, 889 S.W.2d 729, 729-30 (Ark. 1994).

19. See *supra* notes 1-6 and accompanying text. The *Olson* case, the court decision providing the impetus for the current debate, involved a visitation dispute between a grandmother and her divorced daughter. *Olson v. Olson*, 518 N.W.2d 65 (Minn. Ct. App. 1994), *review granted*, No. C7-93-2425 (Minn. Aug. 29, 1994). See also *infra* notes 91-92 and accompanying text (discussing the facts of *Olson*).

20. Grandparents seek recognition from the courts and the legislature that the grandparent-grandchild relationship exists independently of any grandparent-parent relationship. Hillbery, *supra* note 15, at 5A. Minnesota grandparents found a strong ally in the legislature. The legislature has frequently enlarged statutory grandparent visitation rights in response to perceived inequities in particular situations. See *infra* note 102 (highlighting the impetus for various amendments). The voting records of legislators reflect overwhelming support for the gradual expansion of grandparent rights. See 1 1977 JOURNAL OF THE HOUSE OF REPRESENTATIVES: SEVENTIETH SESSION OF THE LEGISLATURE 579 (1977) [hereinafter 1977 JOURNAL OF THE HOUSE] (passing amendment 123-0); 2 1977 JOURNAL OF THE SENATE: SEVENTIETH SESSION OF THE LEGISLATURE 2246 (1977) [hereinafter 1977 JOURNAL OF THE SENATE] (passing amendment 46-6); 3 1976 JOURNAL OF THE HOUSE OF REPRESENTATIVES: SIXTY-NINTH SESSION OF THE LEGISLATURE 4158 (1976) (passing original Statute 122-0); 4 1976 JOURNAL OF THE SENATE: SIXTY-NINTH SESSION OF THE LEGISLATURE 4951 (1976) (passing original Statute 37-3).

21. Hillbery, *supra* note 15, at 5A. In Minnesota, the courts, rather than the legislature, protect the perceived interests of parents. The courts recognize "the public policy reasons that support a denial of visitation to uphold the independence and decision-making integrity of the . . . family unit." *In re Welfare of R.A.N.*, 435 N.W.2d 71, 73 (Minn. Ct. App. 1989). Parental rights advocates receive support from constitutional scholars advocating adherence to the traditional concept of parental autonomy. See *infra* notes 29-30 (defining parental autonomy); *infra* notes 47-52 (discussing the constitutional requirements for state interference with parental autonomy). They also receive support from some psychologists who conclude that the most significant factor affecting the value of grandparent visitation to the grandchild is the relationship between the grandparents and parents. See, e.g., Nolan, *supra* note 8, at 66 n.89 (citing Ross A. Thompson et al., *Grandparents' Visitation Rights: Legalizing the Ties that Bind*, 44 AM. PSYCHOLOGIST 1217, 1219 (1989)). Other psychologists con-

middle, confused by conflicting loyalties, but still in need of stable relationships with the adults in their lives.

This Note focuses on grandparent visitation rights in Minnesota from the context of a dispute between a grandparent and the related parent. Part I describes the limited scope of grandparent visitation rights under common law and the statutory codification and enlargement of such rights. Part I also analyzes the evolution of Minnesota's grandparent visitation statute and its narrow judicial construction. Part II analyzes the Minnesota Statute and concludes that it fails to balance thoughtfully the competing interests of grandchildren, parents, and grandparents in the myriad of situations in which visitation disputes arise. Part III proposes that the Minnesota Legislature amend the Statute to define clearly the situations in which the state's determination of the best interests of the child should outweigh the decision of the child's parents concerning grandparent visitation.

I. THE DEVELOPMENT OF GRANDPARENT VISITATION RIGHTS

A. COMMON LAW DERIVATIVE RIGHTS THEORY

A derivative rights theory shapes the common law rule governing grandparent rights relative to grandchildren. Under this theory, a grandparent's legal status derives from and is secondary to the related parent's legal status.²² Grandparents thus may visit a grandchild only with the permission of the grandchild's parents.²³ In compelling circumstances, however, courts allow limited exceptions to the strict common law rule. These exceptions generally adhere to the derivative rights theory by reserving for grandparents legally enforceable visitation rights only when the related parent's access to the grandchild is

clude "family stress and conflict are emotionally damaging to children." *Id.* (citing various psychological studies).

22. Fernández, *supra* note 16, at 118 ("A right to association with the [grand]child resides primarily with the parents and only secondarily with the grandparents."). Under this theory, grandparents lose grandparental status when their child experiences a voluntary or involuntary termination of parental rights. *Id.* at 118-19. Grandparents whose child has died, however, retain their grandparental status because the deceased child retains parental status. *Id.*

23. Succession of Reiss, 15 So. 151 (La. 1894), stands as the seminal case establishing that grandparents do not possess a common law right to request visitation. Courts in other jurisdictions follow *Reiss*. See, e.g., *Mimkon v. Ford*, 332 A.2d 199, 200-01 (N.J. 1975) (citing various cases including *Reiss*).

impaired,²⁴ such as when the related parent dies²⁵ or cannot exercise parental visitation following divorce.²⁶

Courts deny grandparents an independent visitation right on several grounds. Courts assert that parents have only a moral, and not legal, obligation to permit grandparent visitation.²⁷ Courts also fear that judicial enforcement of grandparent visitation rights will irreparably divide and hinder proper parental authority.²⁸ Some courts hesitate to recognize grandparent visitation rights on the grounds that parental autonomy²⁹ is a fundamental constitutional right.³⁰ In addition, courts hesi-

24. As the cases cited *infra* notes 25-26 demonstrate, most common law exceptions award visitation only when the related parent is not the custodial parent. See also *Anonymous v. Anonymous*, 269 N.Y.S.2d 500, 501-04 (Fam. Ct. 1966) (granting visitation to mother of mentally incompetent father).

25. Several courts granted visitation rights to grandparents who maintained almost daily contact with their grandchild following the death of the related parent. *Hawkins v. Hawkins*, 430 N.E.2d 652, 653-54 (Ill. App. Ct. 1981); *Boyles v. Boyles*, 302 N.E.2d 199, 201 (Ill. App. Ct. 1973); *Lucchesi v. Lucchesi*, 71 N.E.2d 920, 920-22 (Ill. App. Ct. 1947) (upholding visitation award to parents of father killed in World War II who acted as trustees of a fund their son established for the benefit of his child).

26. *Solomon v. Solomon*, 49 N.E.2d 807, 807-08 (Ill. App. Ct. 1943) (awarding visitation to grandparents whose divorced son was unable to exercise visitation rights because of military assignment in distant state).

27. *Reiss*, 15 So. at 152. In addition, courts believe that coercive judicial measures result in less harmonious family relationships than "ties of nature." *Id.* See also *GOLDSTEIN ET AL.*, *supra* note 9, at 50 ("The law, then, ought to and generally does prefer the private ordering of interpersonal relationships over state intrusions on them.")

28. *E.g.*, *Jackson v. Fitzgerald*, 185 A.2d 724, 726 (D.C. 1962); *Odell v. Lutz*, 177 P.2d 628, 629 (Cal. Dist. Ct. App. 1947); *Reiss*, 15 So. at 152; Annotation, *Grandparents' Visitation Rights*, 90 A.L.R.3d 222, 225-28 (1979 & Supp. 1994).

29. Parental autonomy, a fundamental principle of family law, dictates that parents retain the exclusive right, within certain constraints, to raise their children without undue influence from either the state or other individuals. *Bartlett*, *supra* note 7, at 883-86. This legal presumption provides that parents "have the capacity, authority, and responsibility to determine and to do what is 'good' for one's children . . . [and] 'best' for the entire family." *JOSEPH GOLDSTEIN ET AL.*, *BEFORE THE BEST INTERESTS OF THE CHILD* 7 (1979). This legal presumption serves a twofold purpose: it gives parents the opportunity to meet the developmental needs of children, and it safeguards the continuing maintenance of family ties. *Id.* at 9-10. The presumption also recognizes that states have neither the resources nor the expertise to govern all aspects of child-rearing. *Id.* at 11-12.

30. *Theodore R. v. Loretta J.*, 476 N.Y.S.2d 720, 721 (Fam. Ct. 1984); *Hawk v. Hawk*, 855 S.W.2d 573, 578 (Tenn. 1993). *Contra Herndon v. Tuhey*, 857 S.W.2d 203, 208-09 (Mo. 1993). See also *Burns*, *supra* note 16, at 62-64 (discussing the constitutional requirements for state intervention); *Nolan*, *supra* note 8, at 54-55, 70-72 (discussing Supreme Court precedent); *Samuel V. Schoonmaker III et al.*, *Constitutional Issues Raised by Third-Party Access to*

tate to order visitation and thus subject a child to a conflict of authority that might result in animosity between the parent and grandparent.³¹

B. THE EMERGENCE OF STATUTORY RELIEF

Developments during the 1970s and 1980s caused state legislatures to reconsider the wisdom of the strict common law rule denying grandparents independent visitation rights. Mounting political pressure from powerful grandparent groups³² and changing family demographics³³ created strong public interest

Children, 25 FAM. L.Q. 95, 103-07 (1991) (discussing competing federal constitutional rights in parents and in the state).

Parents do not have an unlimited constitutional right "to raise their children as they see fit, free from state interference." Schoonmaker et al., *supra*, at 103. States reserve a *parens patriae* power, stemming from their police power, to supervise the welfare of minor children and promote their best interests. That *parens patriae* power is a "legitimate interest[] which, in certain circumstances, may override parental rights." *Id.* at 104-05. State regulations infringing on the fundamental right of parental autonomy, however, must be narrowly tailored to further a compelling state interest. *Id.*

31. *E.g.*, Noll v. Noll, 98 N.Y.S.2d 938, 940 (App. Div. 1950); Commonwealth *ex rel.* Flannery v. Sharp, 30 A.2d 810, 812 (Pa. 1943); Annotation, *supra* note 28, at 225. A noted group of authors advanced the same reasoning in criticizing court-ordered visitation with a non-custodial parent: "Children have difficulty in relating positively to, profiting from, and maintaining the contact with two psychological parents who are not in positive contact with each other. Loyalty conflicts are common and normal under such conditions and may have devastating consequences by destroying the child's positive relationships to both parents." GOLDSTEIN ET AL., *supra* note 9, at 38. See also *id.* at 116-21 (arguing court-ordered visitation is detrimental to a child).

32. The proportion of older Americans rose steadily from 1950 to 1990. Catherine Bostock, Survey, *Does the Expansion of Grandparent Visitation Rights Promote the Best Interests of the Child?: A Survey of Grandparent Visitation Laws in the Fifty States*, 27 COLUM. J.L. & SOC. PROBS. 319, 325 (1994). At the same time, "the older population, of which an estimated 75 to 85 percent are grandparents, [began] retiring earlier [and] living longer." *Grandparents Rights: Preserving Generational Bonds: Hearing Before the Subcomm. on Human Services of the House Select Comm. on Aging*, 102d Cong., 1st Sess. 3 (1991) [hereinafter *Preserving Generational Bonds*] (statement of Rep. Snowe). The political power of the "senior lobby" rose in conjunction with its relative proportion among the population. Bostock, *supra*, at 325. Even Congress acknowledged that "seniors are the most active lobby in this country, and when it comes to grandparents there is no one group more united in their purpose." *Preserving Generational Bonds*, *supra*, at 2 (statement of Rep. Downey).

33. Family structure has changed tremendously since the 1960s. During the 1960s and 1970s, the divorce rate and the number of illegitimate births increased dramatically at the same time family size declined. Fernández, *supra* note 16, at 115-17; Bostock, *supra* note 32, at 322-25. The number of one-parent families almost tripled between 1970 and 1993. See *supra* note 7 (citing relevant statistics).

in the importance of a grandparent's role in a grandchild's life.³⁴ This public emphasis on the importance of grandparents spurred state legislatures to create statutory grandparent visitation rights.³⁵ Currently, all fifty states have enacted grandparent visitation legislation³⁶ generally designed to "protect relationships that are important for the welfare of children."³⁷ A minority of state statutes merely codified the existing exceptions to the common law rule.³⁸ In contrast, a larger number of states recently enacted changes that abolished the derivative

34. The demographic changes renewed public interest in grandparents as vital members of the extended family. Fernández, *supra* note 16, at 115-17; Bostock, *supra* note 32, at 322-25.

35. As evidence of the pressure for a legislative response, the U.S. House of Representatives held hearings in 1982 and 1991 to discuss grandparent visitation rights and to urge states to provide legislative relief from the restrictive common law. At the first hearing, Representative Biaggi commented that his office was besieged with phone calls and that he expected an "avalanche" of letters in support of the hearing. *Grandparents: The Other Victims of Divorce and Custody Disputes: Hearing Before the Subcomm. on Human Services of the House Select Comm. on Aging, 97th Cong., 2d Sess. 2-3 (1982)*. At the second hearing, Representative Downey noted that, in part due to the subcommittee's work, all states responded to the demands of grandparents by enacting their own grandparent visitation statutes. *Preserving Generational Bonds, supra* note 32, at 2.

36. 2 ATKINSON, *supra* note 12, § 8.11; Richard S. Victor et al., *Statutory Review of Third-Party Rights Regarding Custody, Visitation, and Support*, 25 FAM. L.Q. 19, 26-51 (1991) (listing the pertinent state statutes). The District of Columbia has not enacted a third-party visitation statute.

37. Bostock, *supra* note 32, at 321. See also Goff v. Goff, 844 P.2d 1087, 1091 (Wyo. 1993) (discussing the "four 'symbolic' roles that help explain the ways in which grandparents influence their families" (quoting Fernández, *supra* note 16, at 109-10)); 2 ATKINSON, *supra* note 12, § 8.12 ("The rationale most often expressed in support of grandparent visitation is that a child's contact with grandparents will enrich the child's life and give the child the love and security of an extended family."); Bostock, *supra* note 32, at 323-25 (discussing the evolution of the popular idea that grandparent involvement in the nuclear family benefits grandchildren).

38. Burns, *supra* note 16, at 62. For example, Minnesota's original Statute provided for grandparent visitation only where the spouse of the related parent held primary custody of the grandchild, due to the death or divorce of the related parent. Act of Apr. 8, 1976, ch. 198, § 1, 1976 Minn. Laws 670 (codified at MINN. STAT. § 257.022(1)-(2)). See *infra* notes 61-63 and accompanying text (discussing the provisions of original Statute). The original Statute paralleled the common law grant of visitation rights when the related parent could not exercise parental visitation rights. See *supra* notes 24-26 and accompanying text (discussing common law grants of visitation under derivative rights theory).

Fourteen states still condition visitation rights at least partially on the grandparent's relationship to the custodial parent. Bostock, *supra* note 32, at 342. In these states, courts routinely deny visitation when the related parent objects. *E.g.*, IOWA CODE ANN. § 598.35 (West Supp. 1994) (limiting visitation rights to parents of noncustodial parents); Lockhart v. Lockhart, 603 N.E.2d

nature of grandparent rights, giving grandparents an independent visitation right enforceable over the objection of the related parent.³⁹

Whereas courts recognize few common law exceptions to parental autonomy,⁴⁰ courts often take the legislative creation of grandparent visitation rights as a license to construe the statutes more liberally than their language explicitly requires.⁴¹ Courts justify their broad constructions by arguing that such interpretations promote the best interests of grandchildren⁴² and

864, 865-66 (Ind. Ct. App. 1992); *Olds v. Olds*, 356 N.W.2d 571, 574 (Iowa 1984); *In re Marriage of Woodley*, 474 N.W.2d 815, 816 (Iowa Ct. App. 1991).

39. *Bostock*, *supra* note 32, at 341-46 (citing 21 state statutes that do not contain language restricting the class of grandparents who may petition for visitation). *E.g.*, N.D. CENT. CODE § 14-09-05.1 (Supp. 1993) ("The grandparents of an unmarried minor must be granted reasonable visitation rights . . . by the district court upon application . . . unless a finding is made that visitation is not in the best interests of the minor. Visitation rights . . . are presumed to be in the best interest of the minor."); S.D. CODIFIED LAWS § 25-4-52 (1992) ("The circuit court may grant grandparents reasonable rights of visitation with their grandchild, with or without petition by the grandparents, if it is in the best interests of the grandchild."); WIS. STAT. ANN. § 767.245 (West 1993) ("Upon petition by a grandparent, . . . the court may grant reasonable visitation rights to that person if the parents have notice of the hearing and if the court determines that visitation is in the best interest of the child."). The majority of state courts that addressed the issue upheld the constitutionality of these broad statutes. *See infra* note 50 (citing cases sustaining grandparent visitation statutes).

40. *See supra* notes 24-26 and accompanying text (discussing the limited exceptions to the common law rule denying grandparents independent visitation rights).

41. *See, e.g.*, *A.F. v. B.F.O.*, 760 S.W.2d 916, 918 (Mo. Ct. App. 1988) (upholding standing because the statute did not specifically limit it); *Goff v. Goff*, 844 P.2d 1087, 1089-90 (Wyo. 1993) (same). *But see* *Van Cleve v. Hemminger*, 415 N.W.2d 571, 573-74 (Wis. Ct. App. 1987) (limiting the state's broad statute by requiring an "action affecting the family" before grandparents may petition for visitation).

42. *E.g.*, *Roberts v. Ward*, 493 A.2d 478, 481 (N.H. 1985) ("It makes little sense to consider the child's interest by according grandparents visitation rights . . . when a two-parent family dissolves, but to withhold such rights in a case . . . where a traditional two-parent family has never existed."); *Weichman v. Weichman*, 184 N.W.2d 882, 885 (Wis. 1971) (reasoning that, in tumultuous times, parents may put their own concerns ahead of their child's welfare and therefore implying the necessity of judicial interference to safeguard the child's best interests); *Goff*, 844 P.2d at 1091 (ruling that court-ordered grandparent visitation is in the grandchild's best interests, even when awarded against the parent's objection). In family law proceedings, the primary goal of courts and legislatures long has been to secure the best interests of the child. *State ex rel. Flint v. Flint*, 65 N.W. 272, 272-73 (Minn. 1895); *In re Welfare of R.A.N.*, 435 N.W.2d 71, 73 (Minn. Ct. App. 1989); *Roberts*, 493 A.2d at 481; *Goff*, 844 P.2d at 1090.

remove arbitrary limits on visitation.⁴³ Courts also proffer conclusory justifications for broadening grandparent visitation rights. For example, some courts believe that grandparent visitation eases a child's emotional transition during times of family upheaval.⁴⁴ Courts also declare that heredity binds grandparents to their grandchildren, suggesting continued contact between them will be beneficial.⁴⁵ Finally, the courts cite the erosion of the nuclear family to justify state intervention.⁴⁶

Some commentators argue that broad statutes, particularly statutes that authorize visitation over the objection of married parents in an intact family, unconstitutionally infringe on the rights of parents to control a third party's access to their child.⁴⁷ These commentators urge states to enact statutes that require

Courts emphasize that they protect the right of the grandchild to know the grandparents, not the right of the grandparents to visit the child. *Lucchesi v. Lucchesi*, 71 N.E.2d 920, 922 (Ind. Ct. App. 1947); *Roberts*, 493 A.2d at 481.

It would be shortsighted indeed, for this court not to recognize the realities and complexities of modern family life, by holding today that a child has no rights, over the objection of a parent, to maintain a close extra-parental relationship which has formed in the absence of a nuclear family.

Roberts, 493 A.2d at 481.

43. *Goff*, 844 P.2d at 1091-92. The relationship between the grandparent and grandchild, and the emotional implications of such a relationship, are likely to be the same regardless of the marital status of the parent. *Id.* at 1091.

44. *Mimkon v. Ford*, 332 A.2d 199, 204-05 (N.J. 1975); *In re Bomgardener*, 711 P.2d 92, 97 (Okla. 1985); *Goff*, 844 P.2d at 1091 (quoting Fernández, *supra* note 16, at 109-10).

45. *Mimkon*, 332 A.2d at 204 ("[V]isits with a grandparent are often a precious part of a child's experience."). See also *King v. King*, 828 S.W.2d 630, 632 (Ky.) ("There is no reason a petty dispute between a father and a son should be allowed to deprive a grandparent and grandchild of the unique relationship that ordinarily exists between those individuals."), *cert. denied*, 113 S. Ct. 378 (1992); *Emanuel S. v. Joseph E.*, 577 N.E.2d 27, 29 (N.Y. 1991).

46. *E.g.*, *Roberts*, 493 A.2d at 481. The common law's protection of parental autonomy relied heavily on the existence of a nuclear family. "The family has been seen as the 'basic building block' of society. . . . The realities of modern living, however, demonstrate that the validity of according almost absolute judicial deference to parental rights has become less compelling as the foundation upon which they are premised, the traditional nuclear family, has eroded." *Id.* (quoting Bartlett, *supra* note 7, at 879-80, 887-90).

47. *E.g.*, *Schoonmaker et al.*, *supra* note 30, at 113 ("A number of broad visitation statutes appear to have broken through a constitutional barrier in an attempt to confer state perceived benefits."). The Supreme Court has not yet ruled on the constitutionality of grandparent visitation statutes, and denied certiorari in two recent cases. *King*, 828 S.W.2d at 630-33 (upholding validity of state's grandparent visitation statute which authorizes visitation over the objection of married, biological parents of the grandchild); *In re C.G.F.*, 483 N.W.2d 803, 804-07 (Wis.) (upholding grant of visitation to parents of deceased father when natural mother remarried and stepfather adopted grandchild), *cert. denied*, 113 S. Ct. 408 (1992).

courts to find that the deprivation of grandparent visitation sufficiently harms the child to warrant state intervention,⁴⁸ before considering whether awarding visitation will be in the best interests of the child.⁴⁹ That two-step test parallels the constitutional requirements for state intervention in other areas of family life.⁵⁰ For example, a state may intervene once it shows that a minor child is subject to demonstrable physical or emotional harm.⁵¹ Absent identifiable harm, however, the state may not intervene to provide a benefit.⁵²

C. THE EVOLUTION OF MINNESOTA'S STATUTE

Minnesota followed the strict common law rule adopted in other states, which generally denies grandparents an independ-

48. According to one such commentator:

[There is] pressure . . . to use the legal system to meet every situation in which a child needs help. We [have] to remind ourselves that neither law, nor medicine, nor science has magical powers and that there is no societal consensus about what is "best" or even "good" for all children.

GOLDSTEIN ET AL., *supra* note 29, at 133.

49. *E.g.*, Kathleen S. Bean, *Grandparent Visitation: Can the Parent Refuse?*, 24 J. FAM. L. 393, 394-95, 407-13 (1985-86); Nolan, *supra* note 8, at 59-60; 59 AM. JUR. 2D *Parent and Child* § 11 (1987 & Supp. 1994). *Cf.* GOLDSTEIN ET AL., *supra* note 29, at 4-5 (expressing a preference for minimum state intervention but noting that the best interests of the child must control once intervention is justified). For a discussion of the state's *parens patriae* power, see *supra* note 30.

50. *See supra* note 30 (discussing the constitutional standards applied to state action that interferes with parental rights). In a case decided under the right to privacy protected by the Tennessee constitution, the state supreme court held "without a substantial danger of harm to the child, a court may not constitutionally impose its own subjective notions of the 'best interests of the child' when an intact, nuclear family with fit, married parents is involved." *Hawk v. Hawk*, 855 S.W.2d 573, 579 (Tenn. 1993) (finding that Tennessee's broad grandparent visitation statute violated the state's constitution). The court later opined that the same standard applied under federal cases. *Id.* at 580. *See also King*, 828 S.W.2d at 633-34 (Lambert, J., dissenting) (arguing the state grandparent visitation statute unconstitutionally infringes on constitutional right of parental autonomy); *Herndon v. Tuhey*, 857 S.W.2d 203, 211-12 (Mo. 1993) (Covington, J., dissenting) (same). Most other courts disagree and hold that a state-ordered grant of grandparent visitation rights does not unconstitutionally infringe on parental rights. *Spradling v. Harris*, 778 P.2d 365, 367 (Kan. Ct. App. 1989) (rejecting the argument that the state's statute violated a parent's fundamental right to privacy); *Herndon*, 857 S.W.2d at 209 (reasoning that the state's grandparent visitation statute contemplates "less than substantial encroachment on a family"); *R.T. v. J.E.*, 650 A.2d 13, 16 (N.J. Super. Ct. Ch. Div. 1994) ("[T]he New Jersey statute is rationally related to the legitimate interest . . . in promoting grandparent-grandchild relationships.").

51. *Schoonmaker et al.*, *supra* note 30, at 105-06.

52. *Id.*

ent legal right to visit with a grandchild.⁵³ In 1974, however, the Minnesota Supreme Court called for the state legislature to join the emerging trend and statutorily abrogate the harsh common law rule. In the case *In re Niskanen*,⁵⁴ the Minnesota Supreme Court denied a grandmother's request for visitation with her two grandchildren after they were adopted by their respective foster parents.⁵⁵ Reluctantly concurring in the court's decision, Justice Yetka wrote that "[g]randparents sometimes are as much attached to their grandchildren as to their own children."⁵⁶ Building on this belief, he emphasized the inadequacies of the common law and called for legislative relief: "I find the end result of [our] decision, which will have the practical effect of denying to a maternal grandparent all contact with her grandchildren, almost barbaric and one literally crying out for some legislative reform."⁵⁷ The Minnesota Legislature quickly responded to his plea in 1976⁵⁸ by enacting a grandparent visitation statute ("the Statute").⁵⁹

The Statute currently contains three distinct provisions governing a grandparent's standing to petition for visitation. The Statute's death provision grants courts jurisdiction to hear a petition from a grandparent⁶⁰ whose child has died.⁶¹ The dis-

53. *In re Niskanen*, 223 N.W.2d 754, 757 (Minn. 1974) (Yetka, J., concurring). Justice Yetka cited no precedent in support of his conclusion. *Id.* Subsequent courts, however, embraced Justice Yetka's conclusion as a correct statement of Minnesota's common law. *Olson v. Olson*, 518 N.W.2d 65, 66 (Minn. Ct. App. 1994), *review granted*, No. C7-93-2425 (Minn. Aug. 29, 1994); *In re Welfare of R.A.N.*, 435 N.W.2d 71, 72 (Minn. Ct. App. 1989).

54. 223 N.W.2d 754 (Minn. 1974).

55. *Id.* at 755-56. The grandmother sought visitation rights with her two grandchildren after her daughter terminated all parental rights, the father's parental rights were adjudicatively terminated, and the foster parents adopted the children. *Id.* at 755. The court denied her request, noting that upon adoption, visitation between the grandchildren and their natural grandparents rests solely in the discretion of the adoptive parents. *Id.* at 756.

56. *Id.* at 757 (Yetka, J., concurring).

57. *Id.*

58. Act of Apr. 8, 1976, ch. 198, § 1, 1976 Minn. Laws 670 (codified at MINN. STAT. § 257.022). In explaining the genesis of the bill, Senate sponsors quoted from Justice Yetka's *Niskanen* concurrence. See *Hearing on H.R. 790 Before the Senate Judiciary Comm.*, 69th Minn. Leg. (Mar. 16, 1976) [hereinafter *1976 Senate Comm. Hearing*] (statement of Sen. Merriam) (available on tape at the Minnesota Historical Society, No. 73.Z.4.1B).

59. MINN. STAT. § 257.022.

60. The Statute gives rights to both grandparents and great-grandparents. See *infra* notes 61, 62, 69 (quoting text of Statute). Because both parties retain identical rights under the Statute, this Note will refer to both under the general title of grandparents.

61. Subdivision 1 provides:

solution provision⁶² originally granted standing only to parents of the non-custodial parent to petition during marriage dissolution proceedings.⁶³ In 1977, however, calling the previous limitation an inadvertent oversight,⁶⁴ the Minnesota Legislature amended the provision to afford parents of either party in a dissolution proceeding the opportunity to petition a court for visita-

If a parent of an unmarried minor child is deceased, the parents and grandparents of the deceased parent may be granted reasonable visitation rights to the unmarried minor child during minority by the district or county court upon finding that visitation rights would be in the best interests of the child and would not interfere with the parent child relationship. The court shall consider the amount of personal contact between the parents or grandparents of the deceased parent and the child prior to the application.

MINN. STAT. § 257.022(1).

62. Subdivision 2 currently reads:

In all proceedings for dissolution, custody, legal separation, annulment, or parentage, after the commencement of the proceeding, or at any time after completion of the proceedings, and continuing during the minority of the child, the court may, upon the request of the parent or grandparent of a party, grant reasonable visitation rights to the unmarried minor child, after dissolution of marriage, legal separation, annulment, or determination of parentage during minority if it finds that visitation rights would be in the best interests of the child and would not interfere with the parent child relationship. The court shall consider the amount of personal contact between the parents or grandparents of the party and the child prior to the application.

MINN. STAT. § 257.022(2).

63. "In all proceedings for dissolution . . . the court may, upon the request of the parent or grandparent of a *non-custodial* party, grant reasonable visitation rights . . ." Act of Apr. 8, 1976, ch. 198, § 1(2), 1976 Minn. Laws 670 (codified at MINN. STAT. § 257.022(2)) (emphasis added).

64. *House Debate on H.F. 56*, 70th Minn. Leg. (Mar. 21, 1977) [hereinafter *1977 House Debate*] (statement of Rep. Sieben) (available on tape at the Minnesota Historical Society) (stating the discrepancy between ancestors of custodial and non-custodial parents was unintentional); *Hearing on H.F. 56 Before the House Comm. on Health and Welfare*, 70th Minn. Leg. (Mar. 15, 1977) [hereinafter *1977 House Comm. Hearing*] (statement of Rep. Sieben) (available on tape at the Minnesota Historical Society, No. 73.Z.2.7B); *Hearing on H.F. 56 Before the Subcomm. on Social Services of the House Comm. on Health and Welfare*, 70th Minn. Leg. (Mar. 10, 1977) [hereinafter *1977 House Subcomm. Hearing*] (statement of Rep. Sieben) (available on tape at the Minnesota Historical Society). Not all legislators agreed with Representative Sieben. During the Senate Judiciary Committee debate on the bill, Senator Merriam, the Senate sponsor of the original grandparent visitation bill, argued courts should interfere with the parent-child relationship only in the absence of a blood relationship between the grandparent and custodial parent. *Hearing on H.F. 56 Before the Senate Judiciary Comm.*, 70th Minn. Leg. (Apr. 29, 1977) [hereinafter *1977 Senate Comm. Hearing*] (statement of Sen. Merriam) (available on tape at the Minnesota Historical Society, No. 73.Z.4.12F). Nonetheless, he later voted in favor of the bill. 2 1977 JOURNAL OF THE SENATE, *supra* note 20, at 2246.

tion.⁶⁵ A 1988 amendment⁶⁶ further expanded the scope of the dissolution provision to allow courts to entertain petitions during proceedings for custody, legal separation, annulment, or parentage.⁶⁷ In 1993, the legislature confirmed that grandparents may petition for visitation under the dissolution provision any time during the child's minority.⁶⁸

65. Act of May 25, 1977, ch. 238, § 1, 1977 Minn. Laws 379 (codified at MINN. STAT. § 257.022(2)). See also *Senate Debate on H.F. 56*, 70th Minn. Leg. (May 12, 1977) [hereinafter *1977 Senate Debate*] (statement of Sen. Sikorski) (available on tape at the Minnesota Historical Society) (stating the bill effectively gives parents and grandparents of custodial parents "a day in court"); *1977 House Debate*, *supra* note 64 (statement of Rep. Sieben) (stating that the bill clarifies the right of custodial grandparents to seek visitation rights).

66. Act of Apr. 26, 1988, ch. 668, § 4, 1988 Minn. Laws 1008-09 (codified at MINN. STAT. § 257.022(2)). The legislature included this amendment within a larger bill significantly altering laws related to child support and spousal maintenance awards. Therefore, the legislative history provides little discussion of the purpose of this amendment to the dissolution provision. One legislator, however, recognized that the amendment expanded the rights of grandparents under the Statute and asked that it be deleted from the House version of the bill so that it could receive appropriate scrutiny and discussion. *Hearing on H.F. 2118 Before the House Subcomm. on Child Support, Custody, and Maintenance of the House Judiciary Comm.*, 75th Minn. Leg. (Feb. 29, 1988) [hereinafter *1988 House Subcomm. Hearing*] (statement of Rep. Kelly) (available on tape at the Minnesota Legislative Library). Although the House bill thus did not contain the provision, the companion Senate bill did. The legislature ultimately passed a compromise version of the Senate bill. 4 JOURNAL OF THE HOUSE OF REPRESENTATIVES: SEVENTY-FIFTH SESSION OF THE LEGISLATURE 11,300-01 (1988); 4 JOURNAL OF THE SENATE: SEVENTY-FIFTH SESSION OF THE LEGISLATURE 7539 (1988).

67. An "action for parentage" refers to a proceeding under Minnesota's Parentage Act, MINN. STAT. §§ 257.51-.75 (1994).

68. Act of Apr. 30, 1993, ch. 62, § 1, 1993 Minn. Laws 201 (codified at MINN. STAT. § 257.022(2)). The House sponsor of the bill believed the amendment did not expand the rights of grandparents but merely clarified existing law for the courts. *Hearing on H.F. 79 Before the House Subcomm. on Criminal Justice and Family Law of the House Judiciary Comm.*, 78th Minn. Leg. (Feb. 19, 1993) (statement of Rep. Peterson) (available on tape at the Minnesota Legislative Library). The Senate sponsor, however, understood that the amendment expanded existing rights by permitting courts to entertain grandparent visitation petitions beyond the end of the underlying family court proceeding. *Hearing on H.F. 79 Before the Senate Subcomm. on Family Law of the Senate Judiciary Comm.*, 78th Minn. Leg. (Mar. 15, 1993) [hereinafter *1993 Senate Subcomm. Hearing*] (statements of Sen. Betzold and Sen. Vickerman) (available on tape at the Minnesota Legislative Library).

The legislature also added two procedural directives to the Statute in 1993. Act of May 20, 1993, ch. 322, §§ 3-4, 1993 Minn. Laws 1954 (codified at MINN. STAT. § 257.022(4)-(5)). To defeat the petition of a grandparent who has standing, parents must show, by a preponderance of the evidence, that visitation detrimentally interferes with the custodial parent-child relationship. MINN. STAT. § 257.022(4). The Statute also prohibits a grandparent from combining a visitation petition with a domestic abuse proceeding. MINN. STAT. § 257.022(5).

The legislature added the third standing provision, the cohabitation provision,⁶⁹ in 1977.⁷⁰ The cohabitation provision allows grandparents to petition for visitation when their grandchild has lived with them⁷¹ for a twelve-month period,⁷²

69. The cohabitation provision provides:

If an unmarried minor has resided with grandparents or great-grandparents for a period of 12 months or more, and is subsequently removed from the home by the minor's parents, the grandparents or great-grandparents may petition the district or county court for an order granting them reasonable visitation rights to the child during minority. The court shall grant the petition if it finds that visitation rights would be in the best interests of the child and would not interfere with the parent and child relationship.

MINN. STAT. § 257.022(2a).

70. Act of May 25, 1977, ch. 238, § 2, 1977 Minn. Laws 379 (codified at MINN. STAT. § 257.022(2a)). The inspiration for this amendment came from maternal grandparents who raised their granddaughter in their home for six years and then cared for her intermittently for the next six years. When the mother remarried and moved to Minnesota, her new husband denied the grandparents visitation. The grandparents sought redress with the legislature after being rejected by Minnesota courts. 1977 *Senate Debate*, *supra* note 65 (statement of Sen. Sikorski); 1977 *Senate Comm. Hearing*, *supra* note 64 (statement of Sen. Sikorski); 1977 *House Subcomm. Hearing*, *supra* note 64 (statements of Mr. and Mrs. Gerhard Luderman and Rep. Spanish).

The legislature added the cohabitation provision without serious discussion as part of the bill removing the word "non-custodial" from the dissolution provision. See *supra* note 65 (discussing the 1977 amendment). The original House version of the bill did not contain a cohabitation provision. During the Senate committee hearing on the House bill, one legislator emphasized that he wanted to address proactively the next "tough case" by adding a provision to grant standing to grandparents who had previously retained custody of their grandchildren. 1977 *Senate Comm. Hearing*, *supra* note 64 (statement of Sen. Davies). The Committee, however, failed to reach a consensus and recommended the bill to pass without any amendment. *Id.* Senator Sikorski then offered the cohabitation provision as an amendment on the Senate floor. 2 1977 *JOURNAL OF THE SENATE*, *supra* note 20, at 2182-83. The Senate adopted the amendment without discussion, 1977 *Senate Debate*, *supra* note 65, and passed the amended bill the next day. 2 1977 *JOURNAL OF THE SENATE*, *supra* note 20, at 2246. The House concurred in the Senate amendment without discussion. 1977 *House Debate*, *supra* note 64.

71. A growing number of grandparents raise their grandchildren. Between 1980 and 1990, the number of minor children living in households headed by grandparents rose from 2.3 million to almost 3.5 million. Compare BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1980 CENSUS OF POPULATION, LIVING ARRANGEMENTS OF CHILDREN AND ADULTS 1, tbl. 1 (1985) with BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1990 CENSUS OF POPULATION, GENERAL POPULATION CHARACTERISTICS: UNITED STATES 54, tbl. 41 (1992). In 1990, over 20,000 Minnesota children lived in households headed by their grandparents. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1990 CENSUS OF POPULATION, GENERAL POPULATION CHARACTERISTICS: MINNESOTA, at 142, tbl. 44 (1992). The percentage of racial minorities living in such Minnesota households (4.5%) is three times that of caucasians (1.5%). *Id.* For a discussion of the struggles such grandparents face and the tenuousness of their position, see

regardless of the marital status of the related parent.⁷³ The Statute denies standing under any of the three provisions, however, where a person other than a stepparent or grandparent adopts the grandchild.⁷⁴

Regardless of the standing provision under which grandparents petition, the Statute directs a court to ascertain whether visitation is in the "best interests of the child" in determining whether visitation is warranted.⁷⁵ The court must ensure that

Laurie Hertzell, *Burden and Joy*, MINN. MONTHLY, Jan. 1995, at 46; Rhonda Hillberg, *Grandparents Playing Larger Roles When Their Children Can't Raise Kids*, STAR TRIB. (Minneapolis), Oct. 13, 1994, at 1A.

72. The legislature apparently intended the cohabitation provision to grant standing to grandparents who previously held custody of their grandchildren. See *supra* note 70 (summarizing the origin of the amendment). The legislative history gives no clear indication as to why the legislature chose 12 months as the cohabitation period. The legislature may have intended to analogize the cohabitation provision to the common law *in loco parentis* doctrine. Under that doctrine, "a person who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation without going through the formalities necessary to legal adoption" is nonetheless treated as a parent. *London Guar. & Accident Co. v. Smith*, 64 N.W.2d 781, 784 (Minn. 1954) (citations omitted). The legislature may have imposed a statutory minimum cohabitation period to avoid the litigation created by the common law's fact-specific inquiry. *Simmons v. Simmons*, 486 N.W.2d 788, 791 (Minn. Ct. App. 1992).

73. In appropriate circumstances, the cohabitation provision allows grandparents to seek visitation with grandchildren living in an intact family. MINN. STAT. § 257.022(2a).

Recently, the legislature granted similar visitation rights to persons other than foster parents, but requires that those persons live with a child for at least two years rather than one. Act of May 25, 1989, ch. 248, § 1, 1989 Minn. Laws 835 (codified at MINN. STAT. § 257.022(2b)). That subdivision codifies, but does not supplant, rights existing under the common law for adults *in loco parentis* to a child. *Simmons*, 486 N.W.2d at 791 (upholding grant of visitation to former stepparent who lived with child for only 18 months). Unlike the analogous cohabitation provision in subdivision 2a, subdivision 2b specifically requires the petitioner to prove an established parent-child relationship. MINN. STAT. § 257.022(2b). In addition, that subdivision requires a court to consider the child's reasonable preferences with respect to visitation. *Id.*

74. MINN. STAT. § 257.022(3). The provision also automatically terminates any visitation rights granted under the Statute upon such adoption. *Id.* See also *In re Adoption of A.M.R. & D.N.R.*, 527 N.W.2d 565, 567 (Minn. Ct. App. 1995) (construing the adoption exception). This provision largely equates the rights of grandparents to those of parents upon adoption. Adoption relieves natural parents and the adopted child of all rights and duties relative to the other. MINN. STAT. § 259.59(1) (1994). The Statute's adoption exception severs all legal ties between the grandparent and the adopted grandchild, unless a grandparent or stepparent adopts the grandchild. MINN. STAT. § 257.022(3). Many other states, through statute or judicial decree, enforce a similar exception to their grandparent visitation statutes. *Bopp v. Lino*, 885 P.2d 559, 561 (Nev. 1994); 2 ATKINSON, *supra* note 12, § 8.15.

75. See *supra* notes 61, 62, 69 (quoting the Statute).

visitation will "not interfere with the parent child relationship."⁷⁶ The Statute, however, defines neither term.⁷⁷ Under the death and dissolution provisions, the court also must consider the amount of personal contact between grandparent and grandchild in adjudicating the petition.⁷⁸ The cohabitation provision presumes that a twelve-month cohabitation period provides sufficient personal contact and thus does not require courts to consider the quality of the grandparent-grandchild relationship.⁷⁹

In January 1995, four members of the Minnesota House of Representatives introduced a bill designed to greatly expand existing grandparent visitation rights.⁸⁰ The bill would repeal the three existing standing provisions⁸¹ and would instead give parents of either custodial or non-custodial parents standing to petition for visitation any time a court determines that visitation is in the best interests of the grandchild and would not interfere with the parent-child relationship.⁸² In contrast to the existing

76. *See id.* If the issue of grandparent visitation cannot be settled amicably but instead reaches court, some animosity undoubtedly will exist between the custodial parent and the petitioning grandparent. *Lo Presti v. Lo Presti*, 40 N.Y.2d 522, 526 (1976). The relevant question then becomes whether both parties can suppress their differences for the benefit of the grandchild. Minnesota courts have not addressed what constitutes "interference with the parent-child relationship." *See infra* notes 85-99 and accompanying text (summarizing the few appellate decisions construing the Statute, none of which addresses the animosity of the parties). For an overview of relevant decisions in other states, see 2 ATKINSON, *supra* note 12, § 8.17.

77. *See infra* notes 150-157 and accompanying text (discussing the ambiguity of terms used in the Statute).

78. *See* MINN. STAT. § 257.022(1)-(2); *see also supra* notes 61-62 (quoting these provisions). The Statute does not clearly dictate whether the amount of personal contact informs the determination of the child's best interests or affects the court's adjudication of the visitation petition in some other, undefined way. *See infra* notes 158-160 and accompanying text (analyzing the personal contact requirement).

79. *See supra* note 69 (quoting the cohabitation provision of the Statute).

80. MINN. H.F. 53, 79th Leg. § 257.022 (1995).

81. *Id.* § 257.022(2).

82. *Id.* § 257.022(1). The new standing provision would read as follows:

A grandparent . . . may petition . . . for reasonable visitation rights to an unmarried minor child during the child's minority. Visitation rights may be granted regardless of who has custody of the child. Visitation shall be ordered if the court finds that it would be in the best interests of the child and would not interfere with the relationship between the child and the parent, guardian, or other custodian with whom the child resides.

Id. The proposal would equate Minnesota's law with the broad, open-ended statutes enacted in several other jurisdictions. *See supra* note 36 (citing several broadly-worded state statutes). It goes further than the model statutes proposed by some commentators, which are designed to eliminate arbitrary line-

statutory framework, the proposed bill would not limit when a grandparent may file visitation petitions to enumerated court proceedings.⁸³ The proposal also would eliminate the requirement that courts analyze the existing grandparent-grandchild relationship in determining whether to award visitation.⁸⁴

D. NARROWING THE STATUTE THROUGH JUDICIAL INTERPRETATION: *OLSON V. OLSON*

In the few cases in which the Minnesota Court of Appeals has interpreted the Statute,⁸⁵ the court repeatedly has construed it narrowly,⁸⁶ despite the seemingly broad legislative mandate.⁸⁷ For example, the Minnesota Court of Appeals repeatedly affirms that the Statute does not authorize courts to ignore standing requirements and look only at the best interests

drawing. See Fernández, *supra* note 16, at 129-32 (making grandparent visitation dependent upon a "substantial relationship" rather than any underlying family disruption); Bostock, *supra* note 32, at 369-71 (same).

83. The Statute currently allows grandparents to file visitation petitions following the death of the related parent, following proceedings for divorce, custody, legal separation, annulment, or parentage, or upon the cohabitation of the grandparent and the grandchild. See *supra* notes 61, 62, 69 (quoting the Statute).

84. See *supra* note 82 (quoting the proposed amendment).

85. The Statute has been cited in twelve appellate decisions since enactment. Gary v. Hauschildt, No. C4-94-1968, 1995 WL 90168, at *2-*3 (Minn. Ct. App. Mar. 7, 1995); *In re Adoption of A.M.R. & D.N.R.*, 527 N.W.2d 565, 565-68 (Minn. Ct. App. 1995); Courey v. Courey, 524 N.W.2d 469, 472-73 (Minn. Ct. App. 1994); Barber v. Olmb, No. C1-94-566, 1994 WL 373424, at *1 (Minn. Ct. App. July 19, 1994); Olson v. Olson, 518 N.W.2d 65, 66-67 (Minn. Ct. App. 1994), *review granted*, No. C7-93-2425 (Minn. Aug. 29, 1994); Weiler v. Lutz, 501 N.W.2d 667, 672 (Minn. Ct. App. 1993), *aff'd sub nom.*, Valentine v. Lutz, 512 N.W.2d 868 (Minn. 1994); *In re Guardianship of J.R.F.*, No. C5-92-33, 1992 WL 166784, at *1 (Minn. Ct. App. July 21, 1992); Simmons v. Simmons, 486 N.W.2d 788, 790-91 (Minn. Ct. App. 1992); Kulla v. McNulty, 472 N.W.2d 175, 180-82 (Minn. Ct. App. 1991), *review denied*, No. CX-90-2629 (Minn. Aug. 29, 1991); Westphal v. Westphal, 457 N.W.2d 226, 229 (Minn. Ct. App. 1990); Koesler v. Anderson, No. C6-90-134, 1990 WL 68619, at *1 (Minn. Ct. App. May 29, 1990); *In re Welfare of R.A.N.*, 435 N.W.2d 71, 72-73 (Minn. Ct. App. 1989).

86. See *infra* notes 88-99 and accompanying text (discussing strict judicial interpretations of the Statute). In strictly construing the Statute, the courts have held that it does not broadly preempt existing common law rights unless the legislature explicitly expresses such an intent. *Simmons*, 486 N.W.2d at 791.

87. See, e.g., *supra* notes 63-68 and accompanying text (discussing legislative expansion of the dissolution provision). Other state courts broadly construe their statutes. See *supra* notes 41-46 and accompanying text (discussing expansive judicial constructions of broad statutes).

of the child in granting visitation to third parties.⁸⁸ The court also imposes a heavy burden of proof on grandparents under the Statute by requiring them to make a prima facie case establishing all statutory factors before being entitled to a trial on the merits.⁸⁹ The Minnesota Court of Appeals justified this result by noting that the common law grants no independent visitation rights to third parties and that this approach furthers public policy, which favors development of and harmony within a family unit.⁹⁰

Recently, in *Olson v. Olson*,⁹¹ the Minnesota Court of Appeals continued its strict interpretation of the Statute by narrowly construing standing under the dissolution provision. The court denied a maternal grandmother's request for visitation with her eight-year-old granddaughter after the divorce of the related parent, the grandmother's daughter, who objected to visitation.⁹² The appellate court first determined the grandmother had no standing under common law to petition for visitation because the grandparent's common law derivative visitation right⁹³ is enforceable only against the unrelated parent.⁹⁴ De-

88. *Kulla*, 472 N.W.2d at 183; *R.A.N.*, 435 N.W.2d at 73. The court acknowledged that this decision sometimes might be detrimental to both the grandchild and the grandparents. *R.A.N.*, 435 N.W.2d at 73-74.

89. *Kulla*, 472 N.W.2d at 180-81. The *Kulla* court rejected the petitioner's argument that, because parents possess the information regarding the parent-child relationship, she should not have to prove that visitation rights would not interfere with the parent-child relationship. *Id.*

90. *Id.* at 181-82.

91. 518 N.W.2d 65 (Minn. Ct. App. 1994), *review granted*, No. C7-93-2425 (Minn. Aug. 29, 1994).

92. *Id.* at 67. Although the grandmother and mother maintained a very close relationship following the granddaughter's birth, conflict arose between the two women after the mother's divorce, and the mother denied the grandmother any opportunity to see her grandchild. *Id.* at 66. Appellant's Brief to the Minnesota Supreme Court at 3, *Olson* (No. C7-93-2425). The grandmother petitioned for visitation in order to continue the close relationship she shared with her grandchild. The parties agreed the grandmother was very important to her granddaughter. *Id.*

The parties originally attempted to mediate their dispute through the Department of Court Services. *Id.* at 3-4. They reached visitation agreements in 1992 and again in 1993, but each time the mother refused to comply with the terms of each agreement. *Id.* at 4. The court ordered further mediation. *Id.* A family court referee then determined it was in the child's best interest to continue visitation and established a visitation schedule. *Id.* at 5. To protect the relationship between mother and grandchild, the court ordered the grandmother and mother to refrain from making negative comments about each other. *Id.* The mother, unhappy with the mediated settlement, asked the trial court to review the order. *Id.*

93. *See supra* notes 22-26 and accompanying text (explaining the common law derivative rights theory).

spite evidence of a contrary legislative intent,⁹⁵ the court then determined that the Statute merely codified the common law and thus provided the grandmother, the mother of the custodial parent, no legal basis for her claim.⁹⁶ The court reasoned that providing relief to a grandparent over the related parent's objection in a dissolution context "makes little sense" because the Statute does not allow such relief when the spouse of the related parent dies or the family is intact.⁹⁷ The court did not specifically address the best interests of the child,⁹⁸ but merely noted that allowing visitation in this case would be "potentially disturbing."⁹⁹

II. EXPOSING THE STATUTE'S INCOHERENCE AND AMBIGUITY

Olson highlights the judiciary's difficulty in applying the terms of the inconsistent and incoherent Statute.¹⁰⁰ The Statute lacks coherence and confuses courts by purposely distinguishing among classes of grandparents based on the family and custodial status of their related child.¹⁰¹ Rather than reflecting a reasoned balancing of the conflicting interests of grandparents, parents, and grandchildren, the Statute demonstrates an intermittent legislative reaction to a powerful grandparent lobby.¹⁰² The Statute also presents only a vague outline of the

94. *Olson*, 518 N.W.2d at 66.

95. See *supra* notes 63-68 and accompanying text (discussing the legislative expansion of dissolution provision).

96. *Olson*, 518 N.W.2d at 67.

97. *Id.* The court viewed its decision as consistent with its prior decisions "recogniz[ing] the public policy reasons that support a denial of visitation to uphold the independence and decision-making integrity of the newly created family unit." *Id.* (quoting *In re Welfare of R.A.N.*, 435 N.W.2d 71, 72 (Minn. Ct. App. 1989)).

98. See *supra* note 92 (summarizing the referee's findings). The referee concluded visitation would be in the best interests of the child. Appellant's Brief at 5, *Olson* (No. C7-93-2425).

99. 518 N.W.2d at 67.

100. *Id.* at 65.

101. See *infra* part II.B (discussing the inconsistency of standing requirements).

102. Statements in the legislative history evidence the strength of Minnesota's grandparent lobby. See, e.g., 1988 House Subcomm. Hearing, *supra* note 66 (statement of Rep. Vallenga) (noting she introduced the bill after learning of problems with the existing statute); 1977 Senate Debate, *supra* note 65 (statement of Sen. Sikorski) (noting the sponsors intended the 1977 amendment to help Mr. and Mrs. Gerhard Luderman, grandparents trying to win visitation rights with their grandchild); 1976 Senate Comm. Hearing, *supra* note 58 (statement of Sen. Merriam) (noting that the plight of the grandparents in the

standards for courts to apply in adjudicating visitation petitions.¹⁰³ It thus provides neither notice to parents of when their actions might result in state intervention nor sufficient guidance to courts to ensure the consistent application of the state's police power.¹⁰⁴ Finally, the Statute does not address several important visitation issues addressed in Minnesota's parental visitation statutes.¹⁰⁵ As a result, both parents and grandparents criticize the Statute.¹⁰⁶

A. *OLSON*: COMPLETING THE COURT'S STATUTORY ANALYSIS

The *Olson* court erroneously denied visitation on the basis of the Statute's lack of positive language granting standing to the petitioning grandparents.¹⁰⁷ The court flagrantly misconstrued the dissolution provision, which actually does not restrict the class of grandparents who may petition for visitation under the Statute.¹⁰⁸ The *Olson* court also ignored the Statute's legislative history, which demonstrates a clear intent to open the judicial system to grandparents from both sides of the family in a dissolution proceeding.¹⁰⁹ In fact, the legislatures amended the Statute specifically to provide parents of both custodial and non-

case of *In re Niskanen*, 223 N.W.2d 754 (Minn. 1974), provided the genesis for the original Statute). The proposed amendment introduced in the 1995 Minnesota Legislature resulted from 18 months of intensive lobbying by grandparent groups. See *supra* note 15 (discussing the genesis for the proposal).

103. See *infra* notes 146-160 and accompanying text (discussing the Statute's undefined standards).

104. See GOLDSTEIN ET AL., *supra* note 29, at 15-18 (arguing that statutes authorizing state interference with the family should give parents "fair warning of what constitutes a breach of their child care responsibilities" and "notice of the extent of the state's power to intervene" as well as provide guidance to courts and agencies to avoid unlimited discretion).

105. MINN. STAT. §§ 257.025, 518.17 (1994). See *infra* notes 172-178 and accompanying text (comparing grandparent visitation to non-custodial parent visitation).

106. Minnesota grandparent-visitiation advocates were "dismayed" by the Court of Appeals decision in *Olson* and proposed new legislation to expand grandparents' rights. Hillbery, *supra* note 15, at 5A. On the other side of the debate, parents question whether courts should even interfere in disputes between a grandparent and the related parent. *Id.*

107. See *supra* notes 93-99 and accompanying text (summarizing the court's reasoning).

108. See *supra* note 62 (quoting the text of dissolution provision). The text refers only to "party" without modifying language describing the required relationship between the petitioning grandparent and the party.

109. See *supra* notes 63-65 and accompanying text (discussing the 1977 amendment according parents of either party the opportunity to petition for visitation).

custodial parents "a day in court."¹¹⁰ The sponsors knew that particular amendment would grant greater rights to grandparents whose child had divorced than to grandparents whose child had died or lived in an intact family.¹¹¹ Nonetheless, legislators passed the amendment to remove the standing inequality between sets of grandparents upon dissolution of their child's marriage.¹¹² Although the *Olson* court raises an appealing point by suggesting that these standing distinctions "make[] little sense,"¹¹³ the court's reasoning should not override either the clear legislative intent or the Statute's express language.

B. THE INCONSISTENCY OF STANDING

Although the *Olson* court reached the wrong result, it correctly identified the Statute's inconsistencies. Because the current Statute reflects a patchwork of legislative amendments, it distinguishes between classes of grandparents in determining who gets "a day in court."¹¹⁴ On the one hand, the death provision¹¹⁵ strictly follows the common law derivative rights theory by granting standing only to grandparents whose access to their grandchild is impaired by their child's death.¹¹⁶ In contrast, the dissolution provision,¹¹⁷ as properly interpreted, grants standing to grandparents regardless of the custodial status of the related parent.¹¹⁸ The cohabitation provision¹¹⁹ similarly allows visitation regardless of custodial status, even over the objection of married parents in an intact family.

110. See *supra* note 65 (citing relevant legislative history).

111. One member of the House Committee considering the bill also noted the amendment would give more rights to grandparents upon divorce than they would have if there were no dissolution or no marriage at all. *1977 House Comm. Hearing, supra* note 64 (statement of Rep. Forsythe). The legislature thus demonstrated its awareness of the very distinction that concerned the *Olson* court.

112. *1977 House Comm. Hearing, supra* note 64 (statement of Rep. Sieben).

113. 518 N.W.2d 65, 67 (Minn. Ct. App. 1994), *review granted*, No. C7-93-2425 (Minn. Aug. 29, 1994).

114. See *supra* note 65 (citing relevant legislative history).

115. MINN. STAT. § 257.022(1); see also *supra* note 61 (quoting this provision).

116. See *supra* notes 22-26 (discussing the common law derivative rights theory).

117. MINN. STAT. § 257.022(2); see also *supra* note 62 (quoting this provision).

118. See *supra* notes 108-113 and accompanying text (criticizing the holding of *Olson* as contrary to legislative intent).

119. MINN. STAT. § 257.022(2a); see also *supra* note 69 (quoting this provision).

1. The Death Provision: Unnecessarily Narrow

The death provision closely follows the common law derivative rights theory by limiting standing to parents of the deceased spouse. The Statute apparently presumes that parents of the surviving parent will have access to their grandchild through their child. If the legislature merely intended to ensure that "no child should be cut off entirely from one side of its family,"¹²⁰ the presumption may make sense.¹²¹ The presumption also prevents courts from becoming involved in inter-generational family disputes.¹²²

The Statute, however, purports to protect the best interests of all children.¹²³ Given that purpose, it is unclear why the Statute ensures access for only one side of the family. Although studies differ on the unique benefits of grandparent visitation,¹²⁴ they show that the quality and strength of support a child receives following the death of a parent may protect the child from later psychiatric disorders.¹²⁵ Maintaining existing ties to adults outside the nuclear family may help minimize a

120. Commonwealth *ex rel.* Williams v. Miller, 385 A.2d 992, 995 (Pa. 1978).

121. In that case, an unbroken blood relationship exists between the grandparent, the surviving parent, and the grandchild. The Statute therefore protects only the side of the family no longer represented by the deceased parent.

122. See *supra* notes 27-31 and accompanying text (discussing the reasoning behind the strict common law rule).

123. See *supra* note 42 (noting courts use grandparent visitation statutes to promote the rights of grandchildren to visit their grandparents, not the reverse). See also *supra* notes 32-37 and accompanying text (discussing the impetus for grandparent visitation statutes). The state protects children in these situations under the guise of its *parens patriae* power. See *supra* note 30 (discussing the state's *parens patriae* power).

124. One group of researchers concluded grandparents play a significant role in the emotional life of a grandchild, regardless of the amount of contact between the two. Children who maintained significant contact with their grandparents benefitted emotionally, while children who spent little or no time with their grandparents expressed distress and resentment. ARTHUR KORNHABER, M.D. & KENNETH L. WOODWARD, GRANDPARENTS/GRANDCHILDREN: THE VITAL CONNECTION 37-42 (1985). The researchers concluded grandchildren feel "a natural connection between themselves and their grandparents," and that children possess "a strong emotional need for close attachment to at least one grandparent." *Id.* at 51.

Commentators criticized the scientific methodology of that research, particularly because other researchers have been unable to duplicate the results. Ingulli, *supra* note 9, at 299-300. Indeed, other researchers concluded that physical proximity of grandparents and grandchildren correlated with "poorer behavioral and psychological adjustment." *Id.* at 300.

125. Ingulli, *supra* note 9, at 311-12 (citing Norman Garnezy, *Stressors of Childhood*, in STRESS, COPING AND DEVELOPMENT IN CHILDREN 59 (Norman Garnezy & Michael Rutter eds., 1983)).

child's sense of grief and loss following a parent's death.¹²⁶ In addition, granting standing to parents of both custodial and non-custodial parents under the death provision ensures a remedy for grandparents who have provided significant assistance in raising grandchildren.¹²⁷ Therefore, the death provision should grant standing to grandparents on both sides of the family.¹²⁸

2. The Dissolution Provision: Rigid But Constitutional

The dissolution provision furthers several laudable goals in limiting the instances in which grandparents may file visitation petitions to a list of specific family court proceedings.¹²⁹ The enumeration adds needed statutory clarity, thereby providing proper notice to parties and guidance to the courts.¹³⁰ Limiting judicial intervention to situations involving disruption of the nuclear family is also consistent with the state's traditional use of its inherent police power.¹³¹ The legislature rightly presumed that the disruption or absence of a nuclear family causes harm to the child sufficient to justify interfering with the custodial parent's traditional autonomy.¹³² The 1995 Minnesota Legislature's proposed amendment, which contains an open-ended standing provision, achieves neither of these goals.¹³³

126. *Id.* at 312.

127. *See supra* notes 1-6 and accompanying text (detailing the conflict that arose between a custodial mother and a maternal grandmother who had provided significant assistance in rearing grandchild).

128. The proposed 1995 amendment to the statute adopts this expanded view of standing in the death context. *See supra* notes 80-82 and accompanying text (discussing standing under the proposed amendment).

129. The dissolution provision grants standing to grandparents "[i]n all proceedings for dissolution, custody, legal separation, annulment, or parentage." MINN. STAT. § 257.022(2); *see also supra* note 62 (quoting the statute). Grandparents, however, may bring a visitation petition any time during the minority of their grandchild. MINN. STAT. § 257.022(2); *see also supra* note 68 and accompanying text (quoting this provision).

130. *See supra* note 104 (discussing the need for statutory guidelines). Statutory clarity is particularly important in the area of grandparent visitation to avoid potential negative effects on grandchildren from needless litigation. Inguilli, *supra* note 9, at 297-98.

131. *See supra* notes 48-52 and accompanying text (discussing the two-step test for invocation of state's *parens patriae* power). The proposed Minnesota amendment fails to follow this traditional two-step test. Presuming harm through an open-ended statute thus may unconstitutionally infringe on parental autonomy.

132. *See supra* note 46 and accompanying text (quoting a New Hampshire court that noted the deference accorded to parental autonomy presumes a nuclear family consisting of two parents).

133. *See supra* notes 80-82 and accompanying text (discussing standing under the proposed bill).

The existing dissolution provision, however, unnecessarily confines standing to narrowly-defined situations.¹³⁴ For example, the dissolution provision allows parents of either parent to petition for visitation after the courts judicially establish the parentage of their grandchild.¹³⁵ This provision fails to recognize that the legal parentage is not adjudicated for every child born out of wedlock.¹³⁶ Moreover, the Statute does not allow grandparents to petition for visitation when grandchildren are placed in foster homes or subjected to a family trauma not resolved through divorce, judicial separation, or annulment.¹³⁷ A grandparent's standing to petition for visitation thus depends more on the related parent's contact with the judicial system rather than on the best interests of the child.

Intra-family litigation represents a significant source of stress for children.¹³⁸ The legislature thus may have limited its

134. The legislature amended the Statute only as constituents brought seemingly inequitable situations to the legislature's attention. *See supra* notes 62-68 and accompanying text (discussing the evolution of the dissolution provision); *supra* note 102 (discussing the genesis of the amendments).

135. Generally, a putative parent may file a judicial action for parentage under Minnesota's Parentage Act to establish a legally-recognized parent-child relationship. *See* MINN. STAT. §§ 257.51-.74.

136. For example, the mother may establish a parent-child relationship by proving that she gave birth to the child. MINN. STAT. § 257.54(a). Realistically, there should be few actions challenging the mother's parental status. In most cases, then, maternal grandparents do not possess standing to petition for visitation until paternity is judicially determined.

More extensive provisions govern the legal recognition of the paternity of a child born out of wedlock. The Parentage Act, however, is not self-executing. It merely ensures that the child receives adequate support. *See In re Karger's Estate*, 93 N.W.2d 137, 143 (Minn. 1958) (discussing the remedial nature of paternity proceedings). If the mother and child do not seek to establish paternity to secure support and if the father does not wish to seek custody of or visitation with the child, the state is not required *sua sponte* to bring an action for parentage. The state may, however, bring an action through the agency "chargeable by law with the support of the child." MINN. STAT. § 257.57(2) (1994). Grandparents may bring an action to judicially determine their child's parental status only when the mother and presumed father have not married and the grandparent's child has died or is a minor. *Id.*

137. *See* Fernández, *supra* note 16, at 121 (enumerating situations of nuclear family disruptions that remain unaddressed by the majority of grandparent visitation statutes). Grandparent groups advocate the expansion of the Statute to cover situations of abuse and neglect. *See, e.g., 1993 Senate Subcomm. Hearings, supra* note 68 (statements of Luverne Knoll, Kathleen Stutz, and Muriel Hinich). Professor Fernández suggests "[g]randparent access may provide support for the unprepared mother, as well as protection for the child against parental ignorance, abuse, or neglect." Fernández, *supra* note 16, at 116.

138. Nolan, *supra* note 8, at 67 (citing Jody George, *Children and Grandparents: The Right to Visit*, 8 CHILDREN'S LEGAL RTS. J. 1, 4 (1987)); Bostock, *supra*

enumeration in order to minimize judicial intrusions into the family. The extent of judicial action, however, varies widely, even within the enumerated family situation.¹³⁹ Moreover, the legislature must not have been concerned about litigation *per se* because it amended the Statute to allow grandparents to bring an action even after a judicial proceeding is concluded but during the minority of the child.¹⁴⁰ Finally, the legislature may more effectively address its concern over excessive litigation by restricting the class of grandparents based on the quality of the grandparent-grandchild relationship, as discussed below,¹⁴¹ rather than arbitrarily limiting standing. The legislature achieves essential clarity by enumerating the family court proceedings after which a grandparent may seek visitation rights. The legislature, however, due to a lack of foresight, has unnecessarily limited standing to the exclusion of situations where visitation otherwise might be both justifiable and beneficial to the child.

3. The Cohabitation Provision: An Unprincipled Deviation from its Common Law Origins

The cohabitation provision partially codifies a corresponding common law doctrine¹⁴² by granting standing to any grandparent who has lived with a grandchild for twelve months.¹⁴³ The provision deviates from the common law, however, in that it neither requires that grandparents prove they had a custodial relationship with the grandchild nor defines the residency requirement sufficient to justify a presumed custodial relation-

note 32, at 366 (citing Andre P. Derdeyn, *Grandparent Visitation Rights: Rendering Family Dissension More Pronounced?*, 55 AM. J. ORTHOPSYCHIATRY 277, 285 (1985)).

139. For example, court involvement in an uncontested divorce, separation, or annulment is much less extensive than in contested cases. Ingulli, *supra* note 9, at 312-13. Furthermore, in the case of unwed parents, the mother and father may recognize the paternity of the father in a writing signed by them and filed with the state. MINN. STAT. § 257.75(1). In certain situations, that recognition "has the force and effect of a judgment or order determining the existence of the parent and child relationship" although neither party appears before a judge. MINN. STAT. § 257.75(3).

140. See *supra* note 66 and accompanying text (discussing the 1988 amendment).

141. See *infra* notes 158-166 and accompanying text (recommending that an existing relationship be a prerequisite to standing).

142. See *supra* note 72 (defining the *in loco parentis* doctrine).

143. Compare MINN. STAT. § 257.022(2a) (requiring a cohabitation period of 12 months for grandparents) with MINN. STAT. § 257.022(2b) (requiring a cohabitation period of 24 months for persons other than grandparents).

ship. For example, the Statute does not explicitly require a consecutive cohabitation period.¹⁴⁴ It also does not distinguish situations where the grandparent and grandchild lived together without the parent from situations where the three generations resided together. When the parent lives in the household and serves as the authority figure, it may not be realistic to presume the grandparent stands in a custodial relationship to the grandchild. Furthermore, the provision may unconstitutionally infringe on the parents' right of autonomy by authorizing grandparent visitation rights absent either a prior custodial relationship or a showing of harm to the grandchild from a lack of visitation.¹⁴⁵

C. THE UNCERTAINTY OF VISITATION AWARDS

Even if grandparents have standing, the courts must adjudicate their petition using undefined and inconsistent standards. The Statute sets forth only two standards to guide a court's adjudication of a grandparent's visitation petition: the best interests of the child and non-interference with the parent-child relationship.¹⁴⁶ The Statute, however, defines neither term, creating uncertainty for both courts and parties.¹⁴⁷ In addition, the Statute does not dictate the relevance of the existing

144. See MINN. STAT. § 257.022(2a). Arguably, a grandparent who resided with a grandchild for one month of each year for 12 years may petition for visitation under the literal language of the Statute. The relationship between grandparent and grandchild in such a case likely presents a qualitatively different situation than if the two had lived together for 12 consecutive months.

145. See *supra* notes 47-52 and accompanying text (discussing the constitutional balancing of parental autonomy rights and the state's *parens patriae* power). Although the state may reasonably presume such harm in cases of nuclear family disruption, traditionally the state does not make the same presumption in the intact family. For example, the state may transfer legal custody away from the legal parents only in limited situations. *E.g.*, MINN. STAT. § 260.185 (1994) (transferring custody in the case of a delinquent child); MINN. STAT. § 260.191 (1994) (providing for children in need of protection or services or who are neglected and in foster care); MINN. STAT. § 260.241 (1994) (discussing termination of parental rights).

146. See *supra* notes 61, 62, 69 (quoting relevant provisions of Statute).

147. The problems caused by the lack of definitive guidance remain under the amendment introduced into the 1995 Minnesota Legislature. See *supra* note 82 and accompanying text (discussing the proposed amendment).

It took an extreme situation for the courts to address the best interests standard under the Statute. In *In re Guardianship of J.R.F.*, the court upheld the district's decision denying a man convicted of murdering his wife the right to visit his wife's children, with whom he lived for eight years but did not adopt. No. C5-92-33, 1992 WL 166784, at *1-*2 (Minn. Ct. App. July 21, 1992). The court based its decision on the age of the children (11 and 6), and the testimony of the children's psychologist that visitation would not be in their best interest.

grandparent-grandchild relationship, although the Statute requires courts to consider that relationship in adjudicating certain visitation petitions.¹⁴⁸ Most troublesome is that the extent of judicial discretion involved in granting or denying visitation ultimately depends on the provision under which the grandparent must petition due to the family circumstances.¹⁴⁹

1. Vague Standards and Judicial Bias

The legislature may have intended the courts to construe the Statute's "best interests of the child" standard consistently with its construction under parental custody and visitation statutes.¹⁵⁰ Those statutes list specific factors a court should consider in awarding visitation to a noncustodial parent.¹⁵¹ In addition, those statutes limit judicial discretion by requiring a court to consider all the enumerated factors and to make detailed findings explaining how each factor led to its ultimate best interests determination.¹⁵²

Failing to define statutorily "the best interests of the child" or require specific findings does allow the court to tailor its judgment to the needs of the particular child. In the grandparent visitation arena, however, unlike in parental custody and visitation proceedings, these omissions allow a court to exercise virtually unlimited discretion in making its best interests

Id. at *1. The court did not, however, discuss the factors it used to determine the best interests of the child. *Id.*

148. See *supra* notes 78-79 and accompanying text (discussing this statutory requirement).

149. See *supra* notes 60-74 and accompanying text (discussing the three provisions governing standing).

150. MINN. STAT. § 257.025 (outlining the factors evaluated in custody disputes outside the dissolution context); MINN. STAT. § 518.17 (discussing custody and support of children upon marriage dissolution). Those two statutes contain the only enumeration of factors Minnesota courts should consider in determining the best interests of the child.

151. Those factors include: the wishes of the child and the parent(s); the intimacy of the parent-child relationship; the relationship between the child and siblings, parents, or other persons who may significantly affect the child's best interests; the mental and physical health of parties involved; and the capacity of each party to give the child love, affection, and guidance. MINN. STAT. § 257.025(a); MINN. STAT. § 518.17(1). The grandparent visitation statute specifically authorizes a court to consider the preferences of the child only in adjudicating the visitation petition of a person other than a grandparent who has lived with a child. See *supra* note 73 (summarizing provisions of MINN. STAT. § 257.022(2b)).

152. MINN. STAT. §§ 257.025(a)(12), 518.171(1)(13).

determination.¹⁵³ Such discretion allows a judge's personal biases to influence the decision.¹⁵⁴ The lack of definitive standards also encourages litigation because neither party in a visitation dispute knows what a court might consider in its determination.¹⁵⁵ That litigation may unnecessarily harm the grandchild.¹⁵⁶ The Statute's failure to define what constitutes interference with the parent-child relationship creates similar problems of judicial bias and uncertainty.¹⁵⁷

2. The Uncertainty of the Relevance of the Existing Grandparent-Grandchild Relationship

The death and dissolution provisions direct courts to consider the amount of personal contact between the grandparent and grandchild prior to the time a grandparent files the petition for visitation.¹⁵⁸ The Statute, however, does not dictate whether that contact informs the court's determination of the best interests of the child or whether that existing relationship is a prerequisite to standing.¹⁵⁹ Read most logically, the Statute directs the court to consider the amount of contact in determining

153. Appellate courts will not reverse a trial court's determination of the best interests of a child absent clear abuse of discretion. *Manthei v. Manthei*, 268 N.W.2d 45, 45-46 (Minn. 1978) (per curiam).

154. "[T]he fact that most judges are old enough to have grandchildren themselves may have a tremendous influence on the outcome of any given lawsuit." *Fernández*, *supra* note 16, at 129.

155. A few state statutes list factors courts should consider when determining whether grandparent visitation is in the best interests of the child. *Bostock*, *supra* note 32, at 355 n.190 (citing relevant state statutes). The American Bar Association also recommends that statutes outline the relevant factors courts should consider. COMMISSION ON LEGAL PROBLEMS OF THE ELDERLY, A.B.A., REPORT TO THE HOUSE OF DELEGATES (1989), reprinted in *Preserving Generational Bonds*, *supra* note 32, at 19-20.

156. See *supra* note 138 and accompanying text (citing psychologists as agreeing that litigation represents a significant source of stress for children).

157. Judges also may confuse interference with the parent-child relationship with their determination of the best interests of the child. *E.g.*, *Moses v. Cober*, 641 N.E.2d 668, 672 (Ind. Ct. App. 1994) (remanding for review of child's best interests because trial court focused on relationship between grandmother and mother rather than grandmother and grandchild).

158. See *supra* notes 61-62 (quoting the Statute). The proposed amendment introduced into the 1995 Minnesota Legislature would remove this requirement entirely. See *supra* notes 80-82 and accompanying text (discussing the proposed amendment).

159. Compare MINN. STAT. § 257.022(1) with IOWA CODE ANN. § 598.35 (West Supp. 1994) ("A petition for grandchild visitation rights shall be granted only upon a finding . . . that the grandparent had established a substantial relationship with the child prior to the filing of the petition.").

whether to grant visitation.¹⁶⁰ It thus constitutes another element in determining the best interests of the child.

In contrast to the death and dissolution provisions, the cohabitation provision does not direct courts to consider the amount of personal contact between a grandparent and grandchild prior to the time a grandparent files an application for visitation.¹⁶¹ Personal contact thus becomes irrelevant both to standing and the best interests determination. The Statute presumes, without justifying the presumption,¹⁶² that a grandparent and grandchild who have lived together will form a sufficiently strong bond to warrant visitation.¹⁶³ Although it may be reasonable to presume that a grandchild who has resided with a grandparent has a stronger attachment than a grandchild who periodically visits a grandparent, it is unreasonable to presume uniformity in all situations where grandparents and grandchildren reside together. The Statute's failure to define clearly whether the cohabitation period must be consecutive and exclusive of the parents amplifies the unreasonableness of this presumption.¹⁶⁴

A better approach may be to require an existing relationship between grandparent and grandchild as a prerequisite to standing in all situations. Psychologists generally agree that *maintaining* emotional ties is essential to a child's healthy development.¹⁶⁵ Where no such close relationship exists, the emo-

160. Although this conclusion may be logical, it is not indisputable. By placing the language regarding the strength of the grandparent-grandchild relationship after the best interests language, the legislature implied courts should consider the relationship in evaluating the best interests of the child. *See supra* notes 61-62 (quoting the text of death and dissolution provisions). In contrast to the death and dissolution provisions, the cohabitation provision does not direct courts to consider the amount of personal contact prior to application, even though the language regarding the best interests of the child is identical in the three provisions. *See supra* note 69 (quoting the cohabitation provision). The distinction thus creates uncertainty regarding whether the amount of personal contact informs the determination of the best interest of the child or influences the adjudication of visitation in some other, undefined way.

161. *See supra* notes 78-79 and accompanying text (distinguishing the cohabitation provision from the death and dissolution provisions).

162. *See supra* note 70 (discussing the dearth of recorded legislative debate).

163. In contrast, the Statute requires such a showing when the petitioning party is a person other than a grandparent who has lived with a child. *See supra* note 73 (discussing MINN. STAT. § 257.022(2b)).

164. *See supra* note 144 and accompanying text (highlighting this ambiguity in the cohabitation provision).

165. GOLDSTEIN ET AL., *supra* note 9, at 31-32; Bartlett, *supra* note 7, at 902. Cf. Ingulli, *supra* note 9, at 318 (citing a study concluding that children in long-term foster care benefit from contact with their biological family). The adverse

tional harm to the grandchild from the litigation conflict between parent and grandparent may exceed any benefits of grandparent visitation.¹⁶⁶ The goal of the Statute, therefore, should be to maintain the grandchild's beneficial emotional ties. By making the existing relationship a prerequisite to standing, the legislature can protect parents and grandchildren from unnecessary litigation and help ensure that courts hear only those disputes where visitation might arguably be in the child's best interest. Making the relationship a prerequisite to standing also forces courts to focus their subsequent best interests determination on the grandchild rather than the grandparent.

3. Judicial Discretion Versus Mandatory Visitation Awards

Once a court determines that visitation is in the best interests of the child and will not interfere with the parent-child relationship, the right to visitation differs according to the status of the petitioning grandparent. Under the death and dissolution provisions, courts have discretion in awarding visitation.¹⁶⁷ In contrast, the Statute mandates visitation under the cohabitation provision.¹⁶⁸ The proposed amendment introduced into the 1995 Minnesota Legislature would mandate visitation in all cases.¹⁶⁹

The legislative history sheds no light on the reason for the distinction under the existing framework.¹⁷⁰ It is illogical to im-

consequences of discontinuity may be severe. GOLDSTEIN ET AL., *supra* note 9, at 32-34.

166. Bostock, *supra* note 32, at 367 (citing psychologists who foresee additional problems for children when grandparents are also involved in custody litigation). See also *supra* note 138 (citing psychological studies reaching the same conclusion).

167. MINN. STAT. § 257.022(1)-(2); see also *supra* notes 61-62 (quoting these provisions).

168. MINN. STAT. § 257.022(2a); see also *supra* note 69 (quoting this provision).

169. MINN. H.F. 53, 79th Leg. § 257.022(1); see also *supra* note 82 (quoting the proposed standing provision).

170. See *supra* note 70 (noting that neither the Senate nor the House extensively discussed the cohabitation portion of the bill before passage). Mandating visitation analogizes grandparents to noncustodial parents. See MINN. STAT. § 518.175(1) (1994). The cohabitation provision, however, is not coextensive with the common law *in loco parentis* doctrine. See *supra* note 72 (discussing the *in loco parentis* doctrine); *supra* notes 142-144 (distinguishing the Statute from the common law). In addition, grandparents do not possess the same legal responsibility for their grandchild that a parent does. See Victor et al., *supra* note 36, at 24 ("There are no state statutes specifically imposing a support obligation on grandparents . . ."); Bostock, *supra* note 32, at 359. The analogy between grandparents and noncustodial parents thus may be inappropriate.

ply that withholding visitation is more harmful in grandparent cohabitation situations than in all other situations, including situations involving cohabitation with non-relatives.¹⁷¹ The arbitrary right to mandated visitation thus reflects the legislature's piecemeal approach to legislation in this area and the raw lobbying power of grandparent groups in Minnesota rather than a reasoned approach to the theory of grandparent visitation.

D. INCONSISTENCIES BETWEEN STATUTES

Although incoherent and poorly defined, the Statute governs standing and the grant of visitation rights. The Statute does not, however, contain the changed-circumstance safeguards provided in the corresponding parental visitation statute.¹⁷² The Statute, therefore, may not adequately protect parents and grandchildren from a subsequent change in circumstances.

Unlike the general statute governing visitation rights between a child and the noncustodial parent,¹⁷³ the Statute does not specifically subject grandparent visitation rights to modification.¹⁷⁴ Although the modification provision in the parental visitation statute directs the court to "modify an order granting or denying visitation rights whenever modification would serve the best interests of the child,"¹⁷⁵ the remaining language of that section implicitly describes only visitation between the child and noncustodial parent.¹⁷⁶ Moreover, the parental visitation statute does not clearly extend its remedies for failure to comply with an established visitation schedule to grandparent visitation cases.¹⁷⁷ Logically, grandparents should have no greater legal or moral claim to visit with their grandchildren than simi-

171. The Statute allows courts to exercise discretion in adjudicating the visitation petition of persons other than grandparents who have lived with a child. See *supra* note 73 (discussing MINN. STAT. § 257.022(2b)).

172. MINN. STAT. § 518.175. That statute provides remedies for violations of a visitation order and authorizes courts to modify visitation awards when appropriate. *Id.* § 518.175(4)-(6).

173. *Id.*

174. Compare MINN. STAT. § 257.022 with MINN. STAT. § 518.175. Section 518.175(7) incorporates but does not clearly apply the provisions of § 518.175 to the grandparent visitation statute.

175. MINN. STAT. § 518.175(5).

176. Section 518.175 is titled "Visitation of children and noncustodial parent." The language of the modification provision refers to "noncustodial parent" and provides that "[t]he court may . . . restrict a *parent's* visitation rights if necessary to protect the custodial parent or child from harm." MINN. STAT. § 518.175(5) (emphasis added).

177. MINN. STAT. § 518.175(4) (providing a civil contempt remedy for custodial parents who fail to comply with established visitation schedule).

larly-situated parents.¹⁷⁸ The Statute, therefore, should contain modification and remedial provisions to clarify that such provisions are applicable to grandparent visitation awards.

III. PROPOSING A REVISED MINNESOTA STATUTE

Although the Statute provides broad relief for grandparents and grandchildren, it contains numerous inconsistencies that limit its effectiveness in protecting the interests of children subject to nuclear family disruption. It also inadequately defines the factors courts should consider in adjudicating grandparent visitation petitions, creating a disincentive for settlement. Finally, the Statute lacks changed-circumstance safeguards contained in other visitation statutes to promote equity. To balance more consciously the competing rights of grandparents, parents, and grandchildren, this Note proposes a revised Minnesota statute that eliminates standing distinctions, gives depth to the standards for adjudicating visitation petitions, and adopts language analogizing grandparent visitation to parental visitation.

A. BROADEN AND CLARIFY STANDING REQUIREMENTS

The legislature should revise the Statute to grant equal standing to both maternal and paternal grandparents.¹⁷⁹ Although the results of psychological studies are inconclusive, they show that grandparent visitation benefits grandchildren irrespective of the biological relationship between the grandparent and custodial parent.¹⁸⁰

The Statute also should retain an enumeration of the family court proceedings after which grandparents may petition for vis-

178. See *supra* note 170 (highlighting the legal distinctions between grandparents and parents).

179. The Statute currently grants standing to both maternal and paternal grandparents following dissolution or cohabitation. See *supra* notes 117-119 and accompanying text (discussing standing rights under the dissolution and cohabitation provisions). The Statute should be revised to extend similar rights to grandparents whose children have died. See *supra* notes 120-128 and accompanying text (recommending that grandparents of the surviving or deceased parent be allowed to petition for visitation). The proposed amendment being considered by the 1995 Minnesota Legislature would achieve broadened standing. MINN. H.F. 53, 79th Leg. § 257.022(1); see also *supra* note 82 (quoting the proposed bill).

180. See *supra* notes 124-126 and accompanying text (summarizing psychological studies of the relationship between grandparents and grandchildren). See also *Goff v. Goff*, 844 P.2d 1087, 1091 (Wyo. 1993) (concluding the relationship between the grandparent and grandchild and its emotional implications are the same regardless of the marital status of the parent).

itation because of the benefits of added clarity, despite the drawbacks of the resulting rigidity.¹⁸¹ The enumeration approach also follows the traditional constitutional test for state intervention.¹⁸² The legislature should expand the list, however, to include additional situations where the state constitutionally may intervene to protect the child.¹⁸³

Furthermore, the legislature should narrow the cohabitation provision to align itself with its common-law foundation and to clearly differentiate between consecutive and non-consecutive cohabitation. It should require that grandparents prove a custodial relationship before they may petition for visitation. Alternatively, to ease the burden of proof, the legislature should establish a reasonable presumption of custodial status by distinguishing situations where grandparents but not parents reside with grandchildren from situations where the three generations reside together.¹⁸⁴

Finally, to limit judicial intrusion to those cases where visitation is likely to be in the best interests of the child, the Statute should require as a prerequisite to standing that the grandparent and grandchild share an existing beneficial relationship or that the parent has precluded the formation of such a relationship.¹⁸⁵ These revisions should eliminate the standing distinctions that confuse courts without eliminating the constitutional

181. See *supra* notes 129-130 and accompanying text (arguing that specific guidelines add needed statutory clarity). The proposed 1995 amendment would eliminate the existing enumeration. See *supra* notes 80-82 (summarizing the amendment).

182. See *supra* notes 48-50 and accompanying text (discussing the constitutional test for state intervention). See also *supra* notes 131-132 and accompanying text (applying the test in the visitation context).

183. See *supra* notes 134-141 and accompanying text (analyzing the deficiencies of the Statute's current enumeration).

184. See *supra* notes 142-145 and accompanying text (criticizing the cohabitation provision's deviation from common law). The 24-month period of multi-generational cohabitation contemplated by the proposed statute mirrors the time-period contained in the current statutory provision governing visitation by persons other than grandparents who resided with a child. See *infra* note 186 (quoting the proposed statute). The length of the cohabitation periods included in the proposed statute thus follows the existing statutory framework and requires 12 months of cohabitation only where grandparents presumably stand in a custodial relationship to their grandchild.

185. See *supra* notes 158-166 and accompanying text (suggesting that personal contact should be a prerequisite to standing). By allowing a grandparent who can prove that the parent precluded the formation of a grandparent-grandchild relationship to petition for visitation, the amendment provides a remedy for grandparents whose children try to circumvent the proposed relationship requirement. For a decision applying a corresponding New York provision, see *Agusta v. Carouso*, 617 N.Y.S.2d 189, 189-90 (App. Div. 1994).

safeguards designed to protect parental autonomy and limit state intervention.¹⁸⁶

B. DEFINE THE STANDARDS GOVERNING JUDICIAL DETERMINATIONS

The Statute should retain the existing standards for judicial visitation grants: that visitation be in the best interests of the child and not unreasonably¹⁸⁷ interfere with the parent-child relationship. The Statute should be revised, however, to clarify the factors courts must consider in making these determina-

186. The revised standing provision might read as follows:

Subd. 1. Standing to Petition for Visitation.

a. A grandparent or great-grandparent of an unmarried minor child may petition the district or county court for reasonable visitation:

- (1) when a parent of the child has died;
- (2) after the married parents of the child commence a proceeding for dissolution, legal separation, or annulment;
- (3) with respect to a child born to a mother who was not married to the child's father when the child was born nor when the child was conceived, when a parent-child relationship has been established pursuant to section 257.54 or when the petitioning party can establish such a relationship;
- (4) when the child has resided with the petitioning party
 - (A) for a period of at least twelve consecutive months and the child's parent(s) was (were) not living in the same household, or
 - (B) for a period of at least twenty-four consecutive months and the child's parent(s) were living in the same household;
- (5) when the child is considered a "child in need of protection or services" pursuant to section 260.015(2a), as defined in section 260.015; or
- (6) when a parent of the child has been declared legally incompetent pursuant to section 525.54(2).

The petitioning party must allege and prove the existence of the relevant situation described above pursuant to which the visitation petition is brought.

b. For each petition brought pursuant to this section, the petitioning party must allege and prove an existing relationship with the child, or must allege and prove that the parent(s) of the child unreasonably prevented the petitioning party from forming such a relationship with the child.

c. The petitioning party may petition for the rights provided in this section any time after the occurrence of the event(s) described in (a) and continuing thereafter during the minority of the child.

187. The Statute only requires that visitation not interfere with the parent-child relationship. MINN. STAT. § 257.022(1)-(2a); *see also supra* notes 61, 62, 69 (quoting these provisions). If a visitation dispute proceeds to court, there undoubtedly exists some animosity between parent and grandparent which will have a residual effect on the grandchild. *See supra* note 76 (discussing the relevant inquiry in Minnesota). Therefore, this Note suggests that the legislature add the word "unreasonably" to clarify that the interference inherent in court-ordered visitation itself will be tolerated.

tions.¹⁸⁸ The Statute also should require courts to make detailed findings on each of the factors.¹⁸⁹ Finally, the Statute should make all visitation awards discretionary.¹⁹⁰ Although these revisions will not eliminate judicial discretion entirely, the resulting balance between judicial discretion and predictable results should analogize grandparent visitation to other areas of family law.¹⁹¹

188. See *supra* notes 150-157 and accompanying text (arguing the Statute should define the judicial standards similar to the way the standards are defined in other custody and visitation statutes). The factors identified in the proposed revision are similar or identical to the "best interests" factors listed in MINN. STAT. §§ 257.025, 518.17(1). See *infra* note 191 (quoting the proposed revision). When possible, this Note proposes identical language to promote consistency in the adjudication of custody and visitation disputes concerning minor children.

189. See *supra* note 152 and accompanying text (noting the corresponding parental custody and visitation statutes requires that courts make detailed findings of fact).

190. See *supra* notes 167-171 and accompanying text (criticizing the current scheme that makes some visitation awards mandatory and others discretionary).

191. This revised portion of the Statute might read as follows:

Subd. 2. Factors for the Court's Determination.

a. The court may, in its discretion, grant reasonable visitation when:

- (1) such visitation is in the best interests of the child; and
- (2) such visitation will not unreasonably interfere with the relationship between the parent(s) and child.

b. In determining the best interests of the child, the court shall consider and evaluate all relevant factors, including:

- (1) the reasonable preference of the child, if the court deems the child to be of sufficient age to express preference;
- (2) the intimacy and duration of the relationship between the petitioning party and the child;
- (3) the interaction and interrelationship of the child with the petitioning party and any other person with whom the child may have contact through the petitioning party who may significantly affect the child's best interests;
- (4) the mental and physical health of all individuals involved;
- (5) the capacity and disposition of the petitioning party to give the child love, affection, and guidance;
- (6) the likelihood that visitation will promote the child's physical or mental health and development;
- (7) the likelihood that visitation will provide support and stability for the child after a nuclear family disruption; and
- (8) the reasons given by the child's parent(s) for opposing visitation.

The court must make detailed findings on each of the factors and explain how the factors led to its conclusions and to the determination of the best interests of the child.

c. In determining whether visitation will interfere with the relationship between the parent(s) and child, the court shall consider and evaluate all relevant factors, including:

- (1) the quality of the relationship between the petitioning party and the child's parent(s);

C. ENUMERATE STANDARDS FOR TERMINATION, MODIFICATION, AND ENFORCEMENT OF VISITATION RIGHTS

The legislature should revise the Statute to subject grandparent visitation awards to modification and termination in appropriate circumstances and provide remedies for non-compliance with its visitation decrees. Although other statutes may provide for modification or enforcement, the Statute should contain its own provisions tailored to and clearly governing grandparent visitation.¹⁹² The clarity achieved by duplicating the modification, termination, and enforcement provisions within the Statute overrides any disadvantages of duplication.¹⁹³

CONCLUSION

Over the last three decades, dramatic social changes and the strong "senior lobby" have focused increasing national attention on the rights of grandparents to visit with their grandchild-

(2) whether the petitioning party is willing and able to encourage and facilitate a close and continuing relationship between the child and the child parent(s); and

(3) whether the petitioning party is willing and able to compromise and cooperate in matters involving the child's physical and emotional health and development.

The court must make detailed findings on each of the factors and explain how the factors led to its conclusions and to the determination of whether visitation will interfere with the relationship between the parent(s) and child.

192. See *supra* notes 173-178 and accompanying text (analyzing whether grandparent visitation awards are subject to modification and arguing the Statute should contain modification provisions similar to parental visitation statutes).

193. The Statute's revised termination provisions might read as follows:

Subd. 3. Duration of Rights.

a. Visitation rights granted pursuant to this section shall continue for the minority of the child, unless modified or terminated pursuant to subsection (b) of this subdivision.

b. The court shall modify an order granting visitation rights whenever modification would serve the best interests of the child, as defined in subdivision 2.

Subd. 4. Remedies and Sanctions.

a. Proof of an unwarranted denial of or interference with duly established visitation may constitute contempt of court.

b. If the court finds that a person has been wrongfully deprived of the duly established right to visitation, the court shall order the custodial parent to permit additional visits to compensate for the visitation of which the person was deprived. Additional visits must be:

- (1) of the same type and duration as the wrongfully denied visit;
- (2) taken within one year after the wrongfully denied visit; and
- (3) at a time acceptable to the person deprived of visitation.

dren. The Minnesota Legislature responded quickly to grandparents' appeals for legal relief from the restrictive common law. The legislative response, however, did not fully address the myriad of issues grandparent visitation presents.

This Note proposes a revised Minnesota statute designed to balance more consciously the competing interests of grandchildren, parents, and grandparents in the legislature's search to secure the best interests of the child. The revised statute would eliminate the existing biological relationship barriers to standing but would limit standing to situations where the state constitutionally may interfere with parental autonomy. The revised statute would require a pre-existing grandparent-grandchild relationship to limit standing to situations where the benefit of visitation arguably would outweigh the detriments of intra-family litigation. The revised statute also would define the standards for courts to apply in adjudicating visitation petitions to ensure more consistent application of the state's police power. Finally, the revised statute would authorize courts to modify visitation awards in appropriate circumstances and provide a means for enforcing those awards.