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GRANDPARENT VISITATION AND INTACT MARRIAGES: AN UNRESOLVED MARYLAND FAMILY LAW ISSUE

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I. INTRODUCTION

Visitation disputes traditionally involve husbands and wives battling to limit each other's visitation with their children. Recently, a surprising variation on the customary visitation dispute has emerged—parents in *intact* marriages who have denied estranged grandparents visitation with their grandchildren are forced to defend their decision in court. Eleven states have enacted legislation that appears to permit grandparents to petition for visitation rights without requiring standing based on a prior breakup of the nuclear family.[1]

This Article posits that current Maryland law permits a trial court to award a grandparent visitation with a grandchild over parental objection in an intact marriage when compelling circumstances exist. Depending on the view adopted by the appellate courts concerning the importance of the grandparent-grandchild relationship, however, it is possible that grandparents may be awarded visitation rights even absent compelling circumstances.

While it is easy to conceive of how the breakup of a marriage, with a concomitant custody battle, might generate a visitation conflict involving grandparents,[2] visitation disputes pitting grandparents against

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1. *See infra* Section VI. *Cf.* Smith v. Jones, 587 N.Y.S.2d 506 (Fam. Ct. 1992). New York has enacted legislation that appears to provide that grandparents in the intact marriage may be granted visitation if this is found to be in the best interests of the child. *See infra* note 160 and accompanying text. The *Jones* court strongly noted in dicta, however, the belief that courts have no constitutional authority to intercede in visitation issues when the parent's custody or right to custody has not been abrogated. *Jones*, 587 N.Y.S.2d at 511.
2. A number of states have enacted legislation to allow for grandparent visitation subsequent to the termination of the parent's marriage. *See* Annotation, *Grandparents' Visitation Rights*, 90 A.L.R.3d 222, 237-45 (1979).

parents in an intact marriage would seem an infrequent occurrence. As the ever-growing body of case law shows, however, such situations are not uncommon. They arise often where financial or other disputes lead parents to cut off their children's visitation with their grandparents.

To resolve these disputes, standing and other constitutional issues must be addressed. Even if the grandparent has standing, the courts must then determine if an award of visitation rights to grandparents violates the parents' constitutional rights.[3]

II. MARYLAND'S GRANDPARENT VISITATION STATUTE

A. Standing: Two Possible Interpretations

Maryland's grandparent visitation statute,[4] entitled "Petition by grandparents for visitation," provides as follows:

> At any time after the termination of a marriage by divorce, annulment, or death, an equity court may:
>
> (1) consider a petition for reasonable visitation by a grandparent of a natural or adopted child of the parties whose marriage has been terminated; and
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> (2) if the court finds it to be in the best interests of the child, grant visitation rights to the grandparent.[5]

As with similar statutes from other states, Maryland's grandparent visitation statute requires a two step inquiry.[6] A grandparent seeking visitation rights must first show that she or he has standing to petition the court,[7] and must then convince the court that visitation would be in the best interest of the child.[8]

Maryland's statute is susceptible to two interpretations regarding standing. The statute may be construed as limiting visitation to a situation in which the relationship between the mother and father has dissolved, in which case grandparents petitioning the court in an intact marriage would lack standing. Alternatively, the statute may

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3. This article does not address the issue of the child's right to petition the court for visitation.
4. MD. CODE ANN., FAM. LAW § 9-102 (1991).
5. *Id.*
6. Judith L. Shandling, Note, *The Constitutional Constraints on Grandparents' Visitation Statutes*, 86 COLUM. L. REV. 118, 122 (1986).
7. As used in this article, "standing" means that the grandparent has a sufficient stake in what is an otherwise justiciable controversy to obtain judicial resolution.
8. MD. CODE ANN., FAM. LAW § 9-102(2) (1991). This section was amended by the General Assembly during the 1993 legislative session. *See infra* note 161.

be interpreted as expressly granting power to the courts to grant grandparents' visitation in the case of the dissolved marriage, but not as limiting the courts' power to grant visitation in other circumstances.[9] Under this view, grandparents would not be denied standing to petition for visitation, even if the marriage was still intact.

The latter construction, allowing for grandparent visitation, is consistent with the decision of the Court of Special Appeals of Maryland in *Skeens v. Paterno*,[10] wherein the court interpreted the predecessor to the present grandparent visitation statute.[11] The statute provided in part that "[a]t any time following the termination of a marriage the court may consider a petition for reasonable visitation by one or more of the grandparents."[12] In *Skeens*, Debra Skeens, an unmarried minor, gave birth to a child, which she and her parents attempted to place for adoption. The child's father, Jeffrey Paterno, intervened, seeking visitation. The trial court not only granted Paterno liberal visitation, but additionally held that Paterno's visitation rights could be exercised by his parents while he was away on naval duty.[13]

The Skeenses appealed, maintaining that the grandparent visitation statute applied only to situations where a marriage had been

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9. *See* Skeens v. Paterno, 60 Md. App. 48, 58-59, 480 A.2d 820, 825-26, *cert. denied*, 301 Md. 639, 484 A.2d 274 (1984). Construing then MD. CODE ANN., CTS. & JUD. PROC. § 3-602(a)(4), the court of special appeals stated:

> According to the Skeenses, that language limits court-authorized grandparental visitation to a situation in which a marriage has terminated. In the case before us, there never was a marriage. Therefore, they insist, the court could not permit grandparental visitation. The statute is susceptible to that interpretation. It might also, however, be read as intending only to make it clear that a court may allow grandparental visitation after termination of a marriage, rather than as a limitation on such visitation in other circumstances.

Skeens, 60 Md. App. at 58-59, 480 A.2d at 825.

10. 60 Md. App. 48, 480 A.2d 820, *cert. denied*, 301 Md. 639, 484 A.2d 274 (1984).

11. MD. CODE ANN., CTS. & JUD. PROC. § 3-602(a)(4) (1984) provided:

> (a) *Jurisdiction of courts of equity.*—A court of equity has jurisdiction over the custody, guardianship, legitimation, maintenance, visitation and support of a child. In exercising its jurisdiction, the court may:
>
> . . . .
>
> (4) Determine who shall have visitation rights to a child. At any time following the termination of a marriage, the court may consider a petition for reasonable visitation by one or more of the grandparents of a natural or adopted child of the parties whose marriage has been terminated, and may grant such visitation if the court believes it to be in best interests of the child.

Id.

12. *Skeens*, 60 Md. App. at 58, 480 A.2d at 825 (quoting MD. CODE ANN., CTS. & JUD. PROC. § 3-602(a)(4) (1984)).

13. *Id.* at 53, 480 A.2d at 822.

terminated. Because Debra had never married, they argued that the trial court had clearly erred in allowing the child's paternal grandparents to exercise the father's visitation rights.[14] The court of special appeals rejected this narrow reading of the statute and held that a trial court is not so limited in granting grandparental visitation.[15] In declaring that the statute was not intended to limit grandparental visitation in this situation, the court stated the following:

> We hold . . . that § 3-602(a)(4) does no more than restate existing law as to grandparental visitation rights in a termination of marriage context. *It does not limit the power of a court as to custody and visitation by grandparents under other circumstances.*[16]

This statement by the court raises the question whether the court intended the "other circumstances" language to apply only to circumstances in which a parental relationship has dissolved, or whether it was meant to apply to all situations, including an intact marriage. If the statement was intended to apply only to a dissolved relationship, then grandparents in an intact marriage setting would lack standing to petition for visitation rights. If the "other circumstances" language was meant to be open-ended, dissolution of the parental relationship would not be a prerequisite for standing, and grandparents in an intact marriage setting would have standing to petition for visitation rights.

The judicial treatment of New Jersey's grandparent visitation statute illustrates the validity of this query. Similar to Maryland's grandparent visitation statute with regard to the recital of the circumstances of death or divorce, New Jersey's statute provides for grandparent or sibling visitation

> [w]here either or both of the parents of a minor child is deceased, or divorced or living separate and apparent in different habitats, if the court determines that the best interests of the child may require, for visitation rights for such grandparent, grandparents, or sibling in respect to such a child.[17]

In *Thompson v. Vanaman*,[18] the New Jersey Superior Court held that New Jersey's grandparent visitation statute was not limited to

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14. *Id.* at 61, 480 A.2d at 826.
15. *Id.*
16. *Id.* (emphasis added); *see* Evans v. Evans, 302 Md. 334, 342, 488 A.2d 157, 161 (1985) (approving the *Skeens* construction of § 3-602(a)(4)).
17. N.J. STAT. ANN. § 9:2-7.1 (West 1992).
18. Thompson v. Vanaman, 509 A.2d 304 (N.J. Super. Ct. Ch. Div.), *rev'd*, 515 A.2d 1254 (N.J. Super. Ct. App. Div. 1986).

situations where the parental relationship had dissolved, and recognized that grandparents have standing in an intact marriage.[19] The appellate division, however, proffering that it was not in the child's best interest to force him into the midst of a conflict between the parents and grandparents,[20] reversed the trial court, holding that the statute was limited to situations where the parental relationship was disrupted.[21]

The treatment of New Jersey's grandparent visitation statute illustrates that although the protections of a statute might appear to be actuated only by termination of a marriage, judicial interpretation might nonetheless not *require* termination of marriage, thus allowing for the possibility of grandparent visitation in an intact marriage. Analysis of the legislative history and judicial interpretation of Maryland's statute supports the conclusion that in Maryland grandparents presently have standing to petition the court for visitation where the parents' relationship is intact.

B. Standing: Not Limited To A Dissolved Relationship

Historically, grandparental visitation has been grounded in parental permission.[22] Despite judicial recognition that visitation with grandparents may be in the best interests of the child,[23] grandparents have enjoyed neither common law, constitutional, nor explicit statutory rights to visitation with their grandchildren.[24] For example, Chapter 317 of the Acts of 1975, which enacted section 3-602(a)(4) of the Courts and Judicial Proceedings Article and provided that a court of equity's jurisdiction included the power to "determine who shall have visitation rights to a child,"[25] omitted a specific provision for grandparental visitation.

Not until the adoption of Senate Bill 333 in 1981 were grandparents in Maryland guaranteed the statutory right to visit their grandchildren. Adopted after a four-year effort to enact legislation, Senate Bill 333, which amended section 3-602(a)(4), was entitled

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19. *Thompson*, 509 A.2d at 306.
20. *Id.*
21. Thompson v. Vanaman, 515 A.2d 1254, 1255 (N.J. Super. Ct. App. Div. 1986).
22. L.F.M. v. Department of Social Servs., 67 Md. App. 379, 386, 507 A.2d 1151, 1154 (1986).
23. Skeens v. Paterno, 60 Md. App. 48, 61, 480 A.2d 820, 826, *cert. denied*, 301 Md. 639, 484 A.2d 274 (1984); Powers v. Hadden, 30 Md. App. 577, 353 A.2d 641 (1976).
24. *See, e.g.*, *L.F.M.*, 67 Md. App. at 386, 507 A.2d at 1154; Emanuel S. v. Joseph E., 560 N.Y.S.2d 211, 213 (N.Y. App. Div. 1990); *see also* Olds v. Olds, 356 N.W.2d 571, 574 (Iowa 1984); Mimkon v. Ford, 332 A.2d 199 (N.J. 1975). *See generally* Henry H. Foster, Jr., & Doris Jonas Freed, *Grandparent Visitation: Vagaries and Vicissitudes*, 23 ST. LOUIS U. L.J. 643 (1979).
25. 1975 Md. Laws 317.

"Visitation Rights—Grandparents" and was designed to clarify "that a court may grant visitation rights to grandparents of a child."[26]

As originally proposed, the bill was intended to amend section 3-602(a)(4) to read that the court may "[d]etermine who shall have visitation rights to a child, including any of the grandparents of the child if they so request and if the denial of their visitation rights is an issue in dispute."[27] Fearing that the amendment as proposed was susceptible to being read as precluding consideration of grandparental visitation if visitation had not been in dispute originally, the House of Delegates amended the bill to read as follows:[28]

> (a) . . . In exercising its jurisdiction, the court may:
>
> . . . .
>
> (4) Determine who shall have visitation rights to a child. At any time *following the termination of a marriage*, the court may consider a petition for reasonable visitation by one or more of the grandparents of a natural or adopted child of the parties whose marriage has been terminated, and may grant such visitation if the court believes it to be in the best interests of the child . . . .[29]

Since the new language was adopted to avoid the suggestion that grandparent visitation had to be previously in dispute in order to be awarded,[30] there is no indication that the phrase "following the termination of a marriage" was intended to address the issue of standing. Adopting this reasoning, the court of appeals in *Skeens* and in *Evans* rejected a narrow reading of the statute that would restrict it to circumstances involving marriage.[31]

As the Court of Appeals of Maryland discussed in *Evans*, the legislative history of the amendment to the visitation statute indicates that the bill was designed to encourage courts to consider visitation rights for grandparents after the termination of a marriage.[32] The court of appeals quoted the testimony of the sponsor of House Bill 1205, a grandparent visitation proposal rejected in 1979, which explained the continuing efforts to enact a grandparents' visitation rights bill:

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26. *Skeens*, 60 Md. App. at 59, 480 A.2d at 825 (citing 1981 Md. Laws 276).
27. *Id.*
28. Evans v. Evans, 302 Md. 334, 342, 488 A.2d 157, 161 (1985).
29. 1981 Md. Laws 276 (emphasis added).
30. *Evans*, 302 Md. at 342, 488 A.2d at 161.
31. *Evans*, 302 Md. at 342-43, 488 A.2d at 161 (granting visitation rights to a nonadoptive stepmother); *Skeens*, 60 Md. App. at 60, 480 A.2d at 826.
32. *Evans*, 302 Md. at 339-43, 488 A.2d at 159-61.

> In HB 1205 grandparents are not automatically deemed a group to be considered in the awarding of visitation rights. They are, however, a category that *may* be considered for visitation rights. And once they are considered, they may only be awarded the rights if it is in the best interest of the child . . . .
>
> However, the addition of the new language acts as a policy statement. It says that the legislature believes the courts should be considering rights for the grandparents if it is in the best interest of the child.[33]

Moreover, during the four years prior to 1981, opposition to the measure seemed to be succeeding because of a consensus in the legislature that existing law already afforded such visitation rights to grandparents.[34] Based on the statute's legislative history, the courts in *Skeens* and *Evans* thus construed the statute expansively, holding that the Maryland grandparent visitation statute does not preclude the award of visitation to grandparents of a child born out of wedlock or of a nonadoptive stepchild.

Based on the legislative history and the judicial construction of the grandparent visitation statute in *Skeens* and *Evans*, Maryland courts should grant standing to grandparents to petition for visitation rights in an intact marriage. As the court stated in *Skeens*,

> [t]he legislative history contains no indication that the bill was intended as a limitation on grandparental visitation—or any one else's visitation—in other contexts, such as a case involving an illegitimate child. . . . [The visitation statute] does not limit the power of a court as to custody and visitation by grandparents under other circumstances.[35]

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33. *Id.* at 340-41, 488 A.2d at 160 (quoting the sponsor of House Bill 1205 (1979)).
34. *Id.* at 340, 488 A.2d at 160. The court in *Evans* cited two letters demonstrating this consensus:
    > In a letter to counsel for the Senate Judicial Proceedings Committee about Senate Bill 53 (1978), the Managing Attorney and the Chief Attorney of the Domestic Law Unit of the Legal Aid Bureau posited that "[t]he Court under the present law, has the authority, and in fact does, grant visitation to any person that can further the best interests of the child." In a letter to a proponent of Senate Bill 415 (1979), the Chairman of the Senate Judicial Proceedings Committee explained the unfavorable report of the bill as follows: "The Equity Court at the present time has the authority to designate grandparents' visitation rights if in the judgment of the Court this is in the best interest of the child. It was for that reason that the Committee felt best not to mandate that which is now permitted."

    Id.
35. Skeens v. Paterno, 60 Md. App. 48, 60-61, 480 A.2d 820, 826, *cert. denied*, 301 Md. 639, 484 A.2d 274 (1984).

Assuming, then, that grandparents have the right to petition for visitation rights, an analysis of the parents' and grandparents' constitutional rights must be undertaken, since a state statute that regulates the fundamental rights of citizens must be subjected to judicial review.[36]

III. CONSTITUTIONAL IMPLICATIONS

The relationship between grandparent, parent, child, and the state implicates the constitutionally protected interests of due process and equal protection. The due process right to privacy has received significant judicial attention, while analysis of the implications of disparate treatment of grandparents in intact marriages, as opposed to grandparents in dissolved marriages, under the Equal Protection Clause has received only scant recognition.[37]

A. Due Process Liberty Rights

The Fourteenth Amendment to the United States Constitution assures due process of law and restricts governmental interference with the liberty of an individual.[38] The applicable clause of the Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law."[39] The United States Supreme Court has interpreted the word "liberty" in this clause to provide for protection of substantive rights,[40] including the right of privacy to rear one's children free from unjustified state interference and the right of a person to define him or herself as part of the family.[41]

1. Right Of Privacy In Childrearing

The fundamental right of privacy, manifest in the right to raise one's children free from unjustified state interference, is supported by the United States Supreme Court's decisions in *Meyer v. Nebraska*[42]

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36. Roe v. Wade, 410 U.S. 113, 155 (1973).
37. *See, e.g.*, Emanuel S. v. Joseph E., 560 N.Y.S.2d 211 (N.Y. App. Div. 1990); *see also* Lehrer v. Davis, 571 A.2d 691 (Conn. 1990); Ward v. Ward, 537 A.2d 1063 (Del. Fam. Ct. 1987); Frances E. v. Peter E., 479 N.Y.S.2d 319 (N.Y. Fam. Ct. 1984).
38. Bowers v. Hardwick, 478 U.S. 186, 191 (1986).
39. U.S. CONST. amend. XIV, § 1.
40. *See Developments in the Law - The Constitution and the Family*, 93 HARV. L. REV. 1156, 1166-68 (1980).
41. Moore v. City of East Cleveland, 431 U.S. 494 (1977). For purposes of this article, "family" refers to the nuclear family, including a married mother and father and child or children, as well as, the grandparents.
42. 262 U.S. 390 (1923).

and *Pierce v. Society of Sisters*,[43] and has been expanded and reaffirmed in a long line of cases.[44]

In *Meyer*, a state statute prohibiting the teaching of foreign languages to children before the ninth grade was declared invalid on grounds that the statute violated parental rights to childrearing. The Court declared that the Fourteenth Amendment Due Process Clause protects "the right of the individual to . . . establish a home and bring up children."[45] In *Pierce*, a state statute requiring all children to attend public schools was invalidated as an impermissible interference with the parental right to direct the upbringing and education of children.[46] During the past seventy years, the Supreme Court's position on this issue has been well articulated in the language of a number of cases:

> It is clear that among the decisions that an individual may make without unjustified government interference are personal decisions relating to . . . childrearing and education . . . .[47]
>
> [The] primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.[48]

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43. 268 U.S. 510 (1925).
44. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 121-30 (1988) (finding putative natural father's substantive due process "liberty" rights were not violated in suit to establish paternity and rights of visitation); Santosky v. Kramer, 455 U.S. 745, 753-57, 769 (1982) (before state severs rights of parents of neglected children, due process requires state to support allegations by "clear and convincing evidence;" fundamental liberty interest of childrearing does not evaporate because parents have temporarily lost control to state); Bellotti v. Baird, 443 U.S. 622, 638 (1979) (state statute requiring pregnant minor seeking abortion to obtain parental consent or judicial approval unconstitutionally burdened right of pregnant minor to seek abortion); Carey v. Population Servs. Int'l, 431 U.S. 678, 687 (1977) (state statute prohibiting the distribution of contraceptives unconstitutional in its restriction of the fundamental right to choose to bear children without compelling state interest); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 647-48 (1974) (mandatory maternity leave rules held unconstitutional in violation of Fourteenth Amendment Due Process Clause); Wisconsin v. Yoder, 406 U.S. 205, 234 (1972) (state statute compelling Amish parents to cause their children to attend formal high school unconstitutional under First and Fourteenth Amendments); Stanley v. Illinois, 405 U.S. 645, 657-58 (1972) (under Due Process Clause of Fourteenth Amendment unwed father entitled to hearing on fitness as parent before his children could be taken from him in dependency proceeding after death of children's natural mother).
45. *Meyer*, 262 U.S. at 399.
46. *Pierce*, 268 U.S. at 534-35.
47. *Carey*, 431 U.S. at 684-85.
48. Wisconsin v. Yoder, 406 U.S. 205, 232 (1972).

> The custody, care and nurture of the child reside first in the parents. . . . [I]t is in recognition of this that [Supreme Court] decisions have respected the private realm of family life which the state cannot enter. . . .[49]

> The tradition of parental authority is not inconsistent with our tradition of individual liberty; rather, the former is one of the basic presuppositions of the latter.[50]

In acknowledging the constitutionally protected "liberty interest" of childrearing, the Supreme Court has not delineated to whom the right applies or whether it extends to a situation beyond day-to-day care of a child, such as to a grandparent who has some childrearing responsibilities during periodic visitation. In *Ward v. Ward*,[51] however, the Family Court of the State of Delaware held that grandparents do not possess a Fourteenth Amendment liberty interest right to enjoy a relationship with their grandchild "sustained only through periodic visitation."[52] The court's analysis centered on two areas: (1) the requirements for recognition of a liberty interest, and (2) the role of the biological link between grandparent and grandchild viewed against the role of caregiving in a liberty interest context.

The term "liberty" in the Fourteenth Amendment has no exact definition, but generally includes privileges recognized at common law. As stated in *Meyer v. Nebraska*, a liberty interest may include

> the right of the individual . . . to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to *enjoy those privileges long recognized at common law* as essential to the orderly pursuit of happiness by free men.[53]

Since at common law a grandparent's right to visit derived from parental permission, grandparents had no recognized common law visitation right.[54] Thus, a grandparent could claim a moral right for visitation, but could not assert a legal obligation to be granted the same.[55] Hence, grandparent visitation was not a liberty interest at common law. Furthermore, the grandparent's biological link to his or her grandchild does not overcome the lack of a common law right

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49. Prince v. Massachusetts, 321 U.S. 158, 166 (1944).
50. Bellotti v. Baird, 443 U.S. 622, 638 (1979).
51. 537 A.2d 1063 (Del. Fam. Ct. 1987).
52. *Id.* at 1069.
53. Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (emphasis added).
54. *Ward*, 537 A.2d at 1067.
55. *Id.* (citing 67A C.J.S. *Parent and Child* § 41(c) (1968)).

to justify creation of a liberty interest.[56] A biological tie, by itself, is not enough to warrant Fourteenth Amendment protection; rather, "the importance of the familial relationship to the individuals involved and to the society, stems from the *emotional attachments that derive from the intimacy of daily association.*"[57]

Liberty interests in the childrearing setting arise only with the establishment of a custodial relationship, similar to the parent-child relationship, where one undertakes day-to-day responsibility for nurturing and upbringing of the child.[58] Grandparents generally do not render daily care to grandchildren residing with their parents; thus no custodial relationship is created. Without a custodial relationship, the grandparent's interest is not deemed a "liberty interest"; therefore, any claim to visit grandchildren lacks constitutional protection.[59] Thus while parents enjoy Fourteenth Amendment protection in rearing their children, grandparents lack a "liberty interest" establishing a right to visitation based on care of the child.

2. Right of Privacy And Family Definition

Despite the grandparents' lack of a liberty interest to compel visitation, the argument has been made that a grandparent enjoys the right to include himself or herself in the grandchild's family.[60] If the grandparent has a right to be included in the family, it follows that the grandparent has the right to exercise that inclusionary right to compel visitation with his or her grandchild. A court's denial of a grandparents' petition for visitation rights would effectively exclude

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56. See L.F.M. v. Department of Social Servs., 67 Md. App. 379, 386-88, 507 A.2d 1151, 1154-55 (1986), in which natural grandparents petitioned for visitation after the termination of parental rights and placement of their grandchildren into a prospective adoptive home. In response to the grandparents' argument that they had a constitutionally protected right under the Due Process Clause of the Fourteenth Amendment, the court stated:

> In each of the cases we have examined . . . which extended the "family life" liberty interest beyond the marital or parent-child relationship, the petitioning party had, at some point, either actual or legal custody of the child or children involved. [The grandparents] in this case have never had, or sought, custody of their grandchildren. They seek only to continue visitation with them and we have found no authority to suggest that the visitation [they] enjoyed prior to May 1, 1984, was a constitutionally protected liberty interest.

Id. at 387, 507 A.2d at 1155; *see also Ward*, 537 A.2d at 1069.

57. Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, 844 (1977) (emphasis added) (citing Wisconsin v. Yoder, 406 U.S. 205, 231-33 (1972)).
58. *Ward*, 537 A.2d at 1067-69.
59. *Id.* at 1069.
60. Shandling, *supra* note 6, at 128-29.

the grandparent from the family, thus violating the grandparents' right to define the parameters of his or her family.

This "family definition" right was expounded in *Moore v. City of East Cleveland*,[61] in which the Supreme Court struck down a city zoning ordinance that prevented an extended family from living together. The ordinance, which had the effect of barring a grandmother from living with her son and two grandsons who were cousins and not brothers, was invalidated based on the Court's recognition that maintenance of the family structure is deserving of Fourteenth Amendment protection. The Court stated as follows:

> Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition.[62]

Moore has been used to advance the theory that both grandparents and parents have the right to define their family without state intervention.[63] "This family definition interest is the constitutional right that grandparents attempt to assert in grandparents' visitation conflicts . . . , the right to draw the boundaries of the family in such a manner that they could be included."[64]

In short, the Fourteenth Amendment grants parents the right to raise their children without unnecessary state interference. In addition, both grandparents and parents have the same right to define their family, which, in an antagonistic situation, creates conflicting family definitions. The parent defines the family to exclude the grandparent while the grandparent defines the family to include himself or herself.

3. Right of Privacy And The Strict Scrutiny Standard

Fundamental rights are not immune from state regulation, however, and are subject to state restriction when a compelling interest exists. As set forth in *Roe v. Wade*,[65] state action restricting fundamental rights may be justified under a strict scrutiny standard when it both serves a compelling interest and is narrowly drawn to restrict only those evils that are at stake.[66] States may regulate family life

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61. 431 U.S. 494 (1977).
62. *Id.* at 504 (plurality opinion) (footnote omitted).
63. Shandling, *supra* note 6, at 128-29. Although this theory was posited in 1986, judicial opinions dealing with grandparent visitation after 1986 have not referred to such a right. It is the authors' opinion that this theory deserves consideration, despite the lack of clarity as to who would be included in and be allowed to exercise the family definitional right.
64. *Id.* at 129.
65. 410 U.S. 113 (1973).
66. *Id.* at 155.

based on the common law doctrine of *parens patriae*, "the principle that the state must care for those who cannot take care of themselves, such as minors who lack proper care" from their parents.[67] This power to protect children may be exercised by the state in derogation of the parents' fundamental right only when the state has a compelling interest, such as in cases of abuse or neglect.[68] In considering awarding a grandparent visitation rights, a court must apply the strict scrutiny standard to see whether the parents' right to raise their children can be overcome. A court must find a compelling need in order to order visitation.[69]

When the strict scrutiny standard is applied to the grandparents' right to define their place in the family, the parents' competing right must be considered. Grandparents could assert the right to be included in the family through visitation with the grandchild. Conversely, parents could assert the right to define their family by excluding the grandparents' visitation with the nuclear family. Since these interests squarely conflict, neither adult can define their family to suit their purposes, and both parent and grandparent are prevented from asserting their family definitional rights effectively.[70]

The strict scrutiny analysis was applied to both the parents' and grandparents' rights in a recent challenge to Kentucky's grandparent visitation statute.[71] The attack averred that "the statute in question constitutes an unwarranted intrusion into the liberty interest of

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67. BLACK'S LAW DICTIONARY 1114 (6th ed. 1990).

68. *See* Samuel V. Schoonmaker, III, et al., *Constitutional Issues Raised by Third-Party Access to Children*, 25 FAM. L.Q. 95, 105 n.43 (1991); *see also* Herron v. Seizak, 468 A.2d 803 (Pa. Super. Ct. 1983) (dictum).

69. *See, e.g.*, Brown v. Earnhardt, 396 S.E.2d 358, 360 (S.C. 1990) (grandparents must show exceptional circumstances to be granted visitation).

70. Shandling argues, based on Planned Parenthood v. Danforth, 428 U.S. 52 (1976), that when a situation arises involving conflicting constitutional interests, a balancing approach is used to reconcile the conflict. Shandling, *supra* note 6, at 130, 132. When interests are equally weighted, they are counterbalanced and ineffective when asserted. *Id.*

In *Planned Parenthood*, a wife succeeded in having the Court invalidate a state statute requiring married women to obtain their husband's consent before terminating a pregnancy. *Planned Parenthood*, 428 U.S. at 68. The Court considered the wife's and the husband's interests and reasoned that "[i]nasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, *the balance weighs in her favor*. *Id.* at 71 (emphasis added). Justice Stewart's concurring opinion emphasized that in balancing the constitutionally protected interests, the woman's constitutional right prevailed. *Id.* at 90. Unlike the parties in *Planned Parenthood*, the parent and grandparent share equally weighted interests, and, hence, the interests counterbalance and are ineffective.

71. KY. REV. STAT. ANN. § 405.021 (Baldwin 1984) provides that "[t]he circuit court may grant reasonable visitation rights to either the paternal or maternal grandparents of a child and issue any necessary orders to enforce the decree if it determines that it is in the best interest of the child to do so." *Id.*

parents to rear their children as they see fit."[72] In *King v. King*,[73] a grandfather petitioned the court for visitation rights with his granddaughter, with whom he had established a relationship when she and her parents resided on his farm for sixteen months. During that time, the grandfather had almost daily contact with his granddaughter. After a quarrel, however, the family was asked to leave. When the grandfather's request to visit his grandchild was rejected, he filed suit to compel visitation under Kentucky's grandparent visitation statute, which provides "[t]he circuit court may grant reasonable visitation rights to either the paternal or maternal grandparents of a child and issue any necessary orders to enforce the decree if it determines that is in the best interests of the child."[74]

Following award by the trial court of visitation to the grandfather, the parents appealed, challenging both the constitutionality of the statute and the trial court's finding that visitation would be in the child's best interest. The Supreme Court of Kentucky rejected the parents' argument that the statute violated the Fourteenth Amendment of the United States Constitution, holding that the state's interest in protecting the grandparent-grandchild relationship overrides the parent's right of privacy in the upbringing of their child.[75] The court noted that the grandparent visitation statute was adopted to strengthen familial bonds in an age when divorce is prevalent and people live far away from their extended family.[76] The court stated the following:

> If a grandparent is physically, mentally and morally fit, then a grandchild will ordinarily benefit from contact with the grandparent. That grandparent and grandchildren normally have a special bond cannot be denied. Each benefits from contact with the other. The child can learn respect, a sense of responsibility and love. The grandparent can be invigorated by exposure to youth, can gain an insight into our changing society, and can avoid the loneliness which is so often a pare of an aging parent's life. These considerations by the state do not go too far in intruding into the fundamental rights of parents.[77]

The court found that parents, grandparents, and children are sufficiently protected by the statute. The parents' rights are protected because the grandparents must file an action in court, a hearing must be conducted, and findings of fact and conclusions of law must be

72. King v. King, 828 S.W.2d 630 (Ky.), *cert. denied*, 113 S.Ct. 378 (1992).
73. 828 S.W.2d 630 (Ky.), *cert. denied*, 113 S.Ct. 378 (1992).
74. KY. REV. STAT. ANN. § 405.021 (Baldwin 1984).
75. *King*, 828 S.W.2d at 631-32.
76. *Id.* at 632.
77. *Id.*

entered that the best interests of the child will be served by the court's order.[78] Based on the importance of the relationship between the grandparent and grandchild and the judicial protection offered the parents, the court held the statute constitutional.[79] The court also affirmed the trial court's decision that visitation would be in the child's best interest.[80]

B. Equal Protection

The *Skeens* court, which held that Maryland's grandparent visitation statute was not limited to the marriage context,[81] recognized that "possible equal protection implications" would result from legislation intended to restrict visitation rights to the marriage situation.[82] The Fourteenth Amendment's Equal Protection Clause would, perhaps, be violated by the denial of visitation to grandparents of children whose parents live together while granting visitation to grandparents of children whose parents do not reside together.[83]

The equal protection guarantee of the Fourteenth Amendment demands that similarly situated individuals be treated alike.[84] Classification by the legislature must not be arbitrary, and there must be a valid reason for disparate treatment.[85] To be upheld, a statutory classification that interferes in a significant manner with a fundamental right must meet strict scrutiny standards by satisfying a compelling state interest and being narrowly tailored to further that interest.[86] Grandparents denied visitation rights in an intact marriage situation could argue that an award of visitation to grandparents in a dissolved marriage situation violates equal protection. Because the fundamental right of "family definition" is implicated, the state would have to show a compelling interest to justify the disparate treatment of grandparents.

A grandparent asserting an equal protection argument must attempt to persuade the court that the state's interest is insufficiently compelling to override the grandparent's fundamental right of family

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78. *Id.*
79. *Id.*
80. *Id.* at 632-33.
81. Skeens v. Paterno, 60 Md. App. 48, 60-61, 480 A.2d 820, 826, *cert. denied*, 301 Md. 639, 484 A.2d 274 (1984); *see also supra* notes 10-16 and accompanying text.
82. *Skeens*, 60 Md. App. at 61, 480 A.2d at 826.
83. U.S. CONST. amend. XIV, § 1. The Fourteenth Amendment provides: ". . . nor deny to any person within its jurisdiction the equal protection of the laws."
84. JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW, § 14.1 at 523 (3rd ed. 1983).
85. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).
86. NOWACK, *supra* note 85, § 14.3 at 530.

definition. Hence, the state's interference with that right would be declared a violation of the Equal Protection Clause and the grandparent would be awarded visitation. Only one court has explored the equal protection implications of grandparent visitation. In *Ward v. Ward*, the Family Court of the State of Delaware stated that

> [t]here appears to be valid reasons to support the legislative grant of power to parents living together as opposed to parents who are living apart or where one parent or both are deceased. Stated simply, parents . . . living together as husband and wife are more likely to make decisions regarding with whom their children associate in a manner that protects their children's best interests. Personal animosity towards the other parent and his [or her] family is less likely to color this visitation decision. Furthermore, parents living together are equally informed regarding the children's needs and desires.[87]

The court relied on this rationale to dismiss the grandparents' cause of action based on an equal protection argument where no fundamental right was involved.[88] The court held that the state interest was "reasonably conceived" and justified the legislative differentiation of grandparents.[89]

IV. SURVEY OF STATE COURT DECISIONS

The state courts rendering decisions in cases involving grandparent visitation in intact marriages have reached their holdings by balancing the statutory and constitutional interests at stake. The states of New York, Wisconsin, North Carolina, Pennsylvania, and New Jersey have decided cases based on the standing issue, while Connecticut, Delaware, and Kentucky have addressed the constitutional issues. These decisions are instructional as to the possibilities available to Maryland courts.

The courts of New York have resolved the issue of standing to petition for visitation in an intact marriage in favor of the grandparents. In *Emanuel S. v. Joseph E.*,[90] the Court of Appeals of New York resolved a conflict among the lower courts, holding that section 72 of New York's Domestic Relations Law, which provides for grandparent visitation, may be applied to grant standing to grand-

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87. *Id.* at 1070.
88. Due to Delaware custom that family law briefs are available only to parties to the litigation, the authors were unable to determine whether the grandparents asserted the violation of a "fundamental right."
89. *Ward*, 537 A.2d at 1070.
90. 577 N.E.2d 27 (N.Y. 1991).

parents seeking visitation with a grandchild when the nuclear family is intact and the parents object to visitation.[91]

In the case, Emanuel S., the grandfather of one-year-old Max, petitioned the family court for visitation with his grandchild. Emanuel and his wife visited with Max during the first three months of his life but were spurned when their relationship with Max's parents deteriorated. A petition was filed under section 72 of New York's Domestic Relations Law, which provides that visitation may be awarded "where circumstances show that conditions exist which equity would see fit to intervene."[92] The court noted that the statute requires the family court to deal with the question of standing to petition for visitation and the question of the child's best interests. Rejecting previous judicial construction, the court interpreted the equitable circumstances clause to include not only the disrupted nuclear family, but the intact nuclear family as well.[93] The court of appeals directed family courts to exercise discretion in conferring standing, making it conditional on the grandparents demonstrating a sufficient existing relationship with their grandchild. In cases where that relationship has been frustrated by the parents, grandparents must show a sufficient effort to establish a grandparent-grandchild relationship, measured by what the grandparents had done against what they reasonably could have done.[94] Focusing only on whether the grandparents had standing to seek visitation, the court did not address any constitutional implications.[95]

Similar to New York's statute, in that it is not limited to visitation arising from a circumstance of dissolution or death, Wis-

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91. In the previous decade, the New York lower courts split over the five litigated cases involving an intact marriage. In two cases, visitation rights in an intact marriage were held to be compatible with the statute. Frances E. v. Peter E., 479 N.Y.S.2d 319 (Fam. Ct. 1984); Matter of La Russo, N.Y.L.J., Aug. 10, 1983, p. 14, col. 6 (Westchester Fam. Ct.). In the other three cases, visitation rights in an intact marriage were held incompatible with the statute. Frances S. v. Rachel K., 563 N.Y.S.2d 625 (App. Div. 1990); Emanuel S. v. Joseph E., 560 N.Y.S.2d 211 (App. Div. 1990); Theodore R. v. Loretta J., 476 N.Y.S.2d 720 (Fam. Ct. 1984).

92. N.Y. DOM. REL. LAW § 72 (McKinney 1992) provides:

> Where either or both of the parents of a minor child, residing within this state, is or are deceased, or where circumstances show that conditions exist which equity would see fit to intervene, a grandparent or the grandparents of such child may apply to the supreme court by commencing a special proceeding . . . [and] the court, by order, after due notice to the parent or any other person or party having care, custody, and control of such child . . . may make such direction as the best interest of the child may require, for visitation rights for such grandparent or grandparents in respect to such child.

93. *Emanuel S.*, 573 N.Y.S.2d at 38.

94. *Id.* at 39.

95. *Id.*

consin's grandparent visitation statute[96] has been narrowly construed to reject visitation rights in an intact setting. The 1981 version of Wisconsin's grandparent visitation provided as follows:

> The court may grant reasonable visitation privileges to a grandparent or greatgrandparent of any minor child upon the grandparent's or greatgrandparent's petition to the court with notice to the parties if the court determines that it is in the best interest and welfare of the child and issue any necessary order to enforce the same.[97]

In *Van Cleve v. Hemminger*,[98] the Court of Appeals of Wisconsin limited the statute's application to cases where an underlying action affecting the family unit had been previously filed.[99] The case involved a petition by a grandmother for visitation in a situation where there was an intact marriage with no prior action affecting the parents and their two children. The grandmother's petition for visitation was dismissed by the trial court. Rejecting a literal reading of the statute which supported the grandmother's position and relying on legislative history that suggested an intent to restrict standing to situations in which an action had been instituted, the court of appeals affirmed the trial court.[100] The court cited public policy reasons to support its view that the legislature had intended to craft a narrow statute. The court further suggested that it is appropriate for a court to protect the child's best interests by ordering visitation with grandparents "to mitigate the trauma and impact of a dissolving family relationship,"[101] but in the absence of this trauma and crisis, the state has no justifiable reason to override a parental determination as to what is in the best interests of their child.[102]

Similarly, the State of North Carolina's grandparent visitation statute[103] has been restricted to situations where the custody of minor

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96. The current version of WIS. STAT. § 767.245 (1991) provides:
> (1) Upon petition by a grandparent, great-grandparent, step parent or person who has maintained a relationship similar to a parent-child relationship with the child, the court may grant reasonable visitation rights to the person if the parents have notice of the hearing and if the court determines that visitation is in the best interest of the child. . . .
> (2) Whenever possible, in making a determination under sub. (1), the court shall consider the wishes of the child.

97. WIS. STAT. § 767.245(4) (1981).
98. 415 N.W.2d 571 (Wis. Ct. App. 1987).
99. *Id.* at 573.
100. *Id.* at 573-74.
101. *Id.* at 574.
102. *Id.*
103. N.C. GEN. STAT. § 50-13.2(b1) (1987) provides that "[a]n order for custody of a minor child may provide visitation rights for any grandparent of the child as the court, in its discretion, deems appropriate."

children is being litigated. In *Moore v. Moore*,[104] the relationship between paternal grandparents and their married son and daughter-in-law was terminated by the son after a dispute involving business matters. Although the grandparents had visited frequently with their grandchildren prior to the dispute, afterwards the parents foreclosed all visitation. The Court of Appeals of North Carolina affirmed the trial court's dismissal of the grandparents' petition on the ground that the grandparents lacked standing to bring suit.[105] The court noted that whereas North Carolina's statute "authorizes the court to provide visitation rights of grandparents when the custody of minor children is being litigated, it does not authorize the court to enter such an order when the custody of the children is not even in issue."[106] The court added that it "is fundamental that parents who have lawful custody of their minor children have the prerogative of determining with whom their children shall associate."[107] Assuming even that children would benefit by visits with their grandparents, the court recognized the restriction promulgated by the legislature and concluded that "our courts have no blanket commission from the law to control children for their benefit."[108]

Pennsylvania courts have similarly maintained a strict reading of their grandparent visitation statute. In *Herron v. Seizak*,[109] the Superior Court of Pennsylvania held that absent parental abuse or neglect, a grandparent has no right to obtain a visitation order in an intact marriage.[110] After being denied visitation with their grandchild, the Herrons petitioned the court for visitation, but their petition was dismissed. On appeal to the superior court, the Herrons argued that the best interests of the child would be served by allowing visitation, "because the child will be hurt psychologically if she is permitted to grow up knowing that her parents forbid her to visit with her maternal grandparents and knowing that she is not permitted to speak to them when they telephone."[111] The court rejected the Herrons' petition based on a lack of standing, holding that the courts may intrude into family life only in the three circumstances listed in the statute:[112] (1) when a parent is deceased, (2) when the parents' marriage is dissolved, or (3) when the child has resided with grandparents for a period of twelve months or more.[113] Because both

104. Moore v. Moore, 365 S.E.2d 662, 663 (N.C. Ct. App. 1988).
105. *Id.* at 663.
106. *Id.*
107. *Id.*
108. *Id.*
109. 468 A.2d 803 (Pa. Super. Ct. 1983).
110. *Id.* at 805.
111. *Id.* at 804.
112. PA. STAT. ANN. tit. 23, §§ 1001 - 1015 (1981) (repealed 1985).
113. *Herron*, 468 A.2d at 805.

parents of the grandchild were alive and married to one another, the Herrons' petition failed to engage the protections afforded by the statute.[114]

The State of New Jersey's visitation statute provides for grandparent visitation where either or both of the parents of a minor child is deceased or where the parents are divorced or living apart if the court determines that such visitation would be in the best interests of the child.[115] In *Thompson v. Vanaman*,[116] the trial court, construing the statute in a broad manner, allowed grandparent visitation in an intact marriage setting.[117] The court reasoned that the legislative intent was not to limit grandparent visitation only to those situations mentioned in the statute, but rather that the court should be concerned with the overall welfare of the child.[118]

The facts in *Thompson* provided a strong argument for awarding grandparent visitation. The grandmother petitioning for visitation cared for her grandchildren daily over a four-year period while the children's parents worked. Despite the fact that the grandmother provided care that otherwise would have been supplied by the children's mother, the children's parents halted all contact between the grandmother and the grandchildren after a dispute. The trial court stated that "[t]he mere fact that a parent does not desire visitation between his children and their grandparents can never by itself be sufficient reason for denying that visitation."[119]

On appeal, the Superior Court of New Jersey reversed and denied the grandmother visitation, holding that the statute limited visitation to the situations recited.[120] Citing the general common law rule that grandparent visitation is based upon parental approval, the court explained that it is in the child's best interest to respect the

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114. *Id.*

115. N.J. REV. STAT. ANN. § 9:2-7.1 (West 1992) provides:

> Where either or both of the parents of a minor child, residing within the State, is or are deceased, or divorced or living separate and apart in different habitats, regardless of the existence of a court order or agreement, a grandparent or the grandparents of such child, who is or are the parents of such deceased, separated or divorced parent or parents, or any sibling of the child may apply to the Superior Court, in accordance with the Rules of Court, to have such child brought before such court; and the court may make such order or judgment, as the best interest of the child may require, for visitation rights for such grandparent, grandparents or sibling in respect to such child.

116. 509 A.2d 304 (N.J. Super. Ct. Ch. Div.) (*Thompson I*), *rev'd*, 515 A.2d 1254 (N.J. Super. Ct. App. Div. 1986) (*Thompson II*); *see also supra* notes 17-21 and accompanying text.

117. *Thompson I*, 509 A.2d at 306.

118. *Id.*

119. *Id.*

120. *Thompson II*, 515 A.2d at 1255.

wishes of the parent and not thrust the child into the midst of a conflict between the parents and the grandparents.[121] Construing the statute narrowly, the court reasoned that only when the nuclear family is disrupted does the grandparent have an independent cause of action for securing visitation rights. In other circumstances, the court lacks the authority to force the child into a situation filled with anger.[122]

Connecticut's visitation statute was construed in *Lehrer v. Davis*,[123] in which the court concluded that it could not adjudicate the constitutional claim made by the grandparents due to the lack of a sufficient statement of facts.[124] Despite this conclusion, the court proceeded to analyze the constitutional implications of Connecticut's statute, an analysis the concurrence derisively termed "obiter dicta."[125]

The parties in *Lehrer* stipulated that Rosalind and Irving Lehrer were the grandparents of Philip and Penny Davis's two minor children, both of whom lived with their parents in an intact family setting. As the natural grandmother, Rosalind brought the original petition, but was later joined by Irving, the stepgrandfather, who intervened in the proceeding. The petition noted that the grandchildren had never lived with their grandparents and had virtually no face-to-face or telephonic contact with them for over a year. The Lehrers petitioned the court to permit them to visit their grandchildren on the authority of Connecticut General Statutes section 46b-59, which provides for visitation to any person when the court deems it in the best interest of the child.[126] The Davises moved to strike the Lehrers' cause of action on two grounds: first, that the common law afforded them no authority for such relief, and second, that the visitation statute was unconstitutional.[127] Upon request of both parties, the trial court granted a motion for reservation upon stipulated

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121. *Id.*
122. *Id.*
123. 571 A.2d 691 (Conn. 1990).
124. *Id.* at 695.
125. *Id.* (Shea, J., concurring).
126. CONN. GEN. STAT. § 46b-59 (1986) provides:

> COURT MAY GRANT RIGHT OF VISITATION TO ANY PERSON. The superior court may grant the right of visitation with respect to any minor child or children to any person, upon an application of such person. Such order shall be according to the court's best judgment upon the facts of the case and subject to such conditions and limitations as it deems equitable. . . . [T]he court shall be guided by the best interest of the child, giving consideration to the wishes of such child if he is of sufficient age and capable of forming an intelligent opinion.

127. *Lehrer*, 571 A.2d at 692.

facts for the Supreme Court of Connecticut to resolve the question of the constitutionality of the statute in question.[128]

The Supreme Court of Connecticut first noted that the stipulation lacked essential information concerning the extent of the earlier relationship between the Lehrers and their grandchildren, the reasons for the Davises' severing of contacts, the presence or absence of reason to believe that one or both of the Lehrers may have been abusing the children or acting in some manner inconsistent with their best interests, the presence or absence of reason to believe that one or both of the Davises may have been abusing the children or acting in some manner inconsistent with their best interests, or the opinions of the children themselves concerning the proposed visitation.[129] After determining that the stipulation was, in essence, a request for advice about the facial validity of the statute in a factual vacuum, the court entered a lengthy discussion addressing the constitutional challenge to the statute.

Under a due process analysis, the court recognized that the Davises, as parents, enjoyed a constitutional right to care for and manage the upbringing of their children. This protection included the right of the family to remain together without the coercive interference of the state.[130] The court noted, however, that the family is not beyond regulation in the public interest, and the rights of parenthood are not beyond limitation.[131] Legitimate state regulation of an intact family can be based upon the best interests of the child, despite the heightened claim of parents in an intact marriage to due process protection.[132] Such regulation would be valid, for instance, in the case of child abuse.[133] The court indicated that parents in an intact marriage enjoy greater due process protection than parents in a dissolved relationship, but later tempered this, stating that

> [t]he defendants' status as an intact family, while arguably heightening their claim to procedural due process . . . cannot fill this factual vacuum. The fact that a family is intact does not guarantee the absence of child abuse. Even absent child abuse, there is no compelling constitutional requirement that the legislature must defer, in every instance, to the child-rearing preferences of the nuclear family. "To assert that, as a matter of law, a widowed, divorced, remarried, or unmarried parent is subject to greater [s]tate

128. *Id.*
129. *Id.* at 692.
130. *Id.* at 693-94.
131. *Id.*
132. *Id.*
133. *Id.*

> interference than a married parent would be to assert that the former is less fit than the latter to raise his or her own child."[134]

In addition, the court stated that the legislature may recognize a public interest in affording a child access to those outside the nuclear family who manifest a deep concern for the growth and development of the child, and that depriving children of maintaining such meaningful relationships may violate the child's constitutional rights.[135] The court noted that grandparents are not automatically precluded from obtaining visitation rights; it determined, however, that the facts necessary to decide the issue had not been brought out at the trial level, thus it remanded the case for further adjudication.[136]

Delaware's grandparent visitation statute survived a two-prong constitutional attack in *Ward v. Ward*.[137] The statute provided that "when the natural or adoptive parents of the child are cohabiting as husband and wife, grandparent visitation shall not be granted over both parents' objection."[138] In *Ward*, Russell and Edna Ward petitioned the Family Court of Delaware for visitation rights with their grandchildren under Delaware's then-existing grandparent visitation statute,[139] which authorized the court to order visitation "regardless of marital status of the parents of the child or the relationship of the grandparents to the person having custody of the child."[140] The court found visitation would be in the best interests of the children and granted visitation one weekend per month.

The parents appealed the decision and requested the order be stayed pending appeal. The stay was denied, but while the matter was on appeal, the statute was amended to include the present language,[141] rendering the lower court decision moot.[142] The case was remanded to the family court, and the parents, Daniel and Barbara Ward, petitioned the court to modify visitation.[143] The grandparents moved to dismiss the modification petition, asserting that the statute

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134. *Id.* at 694-95 (quoting In the Matter of Frances E. v. Peter E., 479 N.Y.S.2d 319 (Fam. Ct. 1989)).
135. *Id.* at 695.
136. *Id.*
137. 537 A.2d 1063 (Del. Fam. Ct. 1987).
138. DEL. CODE ANN. tit. 10, § 950(7) (1990).
139. *Id.* § 950(7) (1976).
140. *Ward*, 537 A.2d at 1064.
141. *See supra* note 139 and accompanying text.
142. *Ward*, 537 A.2d at 1065.
143. Daniel and Barbara Ward originally filed an emergency motion for summary judgment and for stay of visitation. At that time, however, there was no formal summary judgment practice under the Rules of the Family Court. Additionally, it was not clear to the court what effect the amendment had on previously issued orders. *Id.* at 1065 n.2.

was unconstitutional on both due process and equal protection grounds.[144]

Under a due process analysis, the court rejected the grandparent's argument that the statute violated their constitutional right to have a relationship with their grandchildren.[145] Based on a lengthy analysis, the court stated that "[g]randparents, as a general rule, are not charged with the responsibilities of raising their grandchildren when the grandchildren reside with their parents, and, absent such a custodial relationship, no liberty interest is conferred upon them."[146] The court entertained the idea that grandparents may enjoy an enhanced constitutional interest by virtue of their biological tie coupled with a special and positive relationship, but it nonetheless held that when children reside with parents in an intact marriage, this interest can never supersede the fundamental interest of parents in raising their children in an intact family unit.[147]

The court also dismissed the grandparents' argument that their equal protection rights were violated under the Fourteenth Amendment of the United States Constitution. The grandparents argued that, as grandparents of grandchildren living in an intact marriage situation, they were unlawfully treated in a disparate fashion from grandparents of grandchildren living in a dissolved situation.[148] The court rejected this argument, reasoning that since no fundamental right of the grandparents was involved, the state had to show only a reasonable justification for the discriminatory statute.[149] Since parents living together as husband and wife are more likely to make decisions regarding their children without coloring such decisions with personal animosity towards the other parent, the decisions of these parents will more likely be in the best interest of the children. Parents who are separated or divorced, on the other hand, may be more likely to decide visitation based on animosity toward the other parent and their child's best interests may be affected. In the latter situation, the court found the state has a reasonable justification to

144. *Ward*, 537 A.2d at 1064-65. Russell and Edna Ward made a third argument under the Delaware constitution based on Separation of Powers, arguing that the Delaware General Assembly effectively denied them access to the court. The court stated that the Separation of Powers Doctrine under the Delaware constitution protects a litigant's right to raise fundamental rights in an appropriate judicial proceeding and that the legislature may not restrict this right. Since the court refused to recognize a fundamental right enjoyed by the grandparents, the court held that the legislature did not violate the grandparents' right to litigate the matter in an appropriate judicial setting. *Id.* at 1071.

145. *Id.* at 1066-69.

146. *Id.* at 1068-69.

147. *Id.* at 1069.

148. *Id.*

149. *Id.* at 1070.

interfere with parental decision-making; in the former situation, no such justification exists.[150]

Legislation in Illinois concerning grandparent visitation has come full circle, from recognizing visitation rights only when marriage dissolution proceedings have been instituted or a parent is deceased, to awarding visitation in an intact marriage, and then back again to allowing visitation only in a dissolution or death situation.[151] In 1982, the Illinois legislature amended the Illinois Marriage and Dissolution of Marriage Act ("IMDMA") to allow grandparents the right to petition for visitation.[152]

In *Towne v. Cole*,[153] the Appellate Court of Illinois construed this statute to give grandparents visitation rights only after proceedings to dissolve the marriage had been initiated by the parents of the grandchildren. In *Towne*, Joan Towne brought suit against her son and daughter-in-law, petitioning the court for visitation rights and seeking damages for intentional infliction of emotional distress after being denied contact with her two year old grandchild. The court analyzed the statute's legislative history, concluding that it provided for visitation only in the case of marriage dissolution or death of a parent.[154] Denying Ms. Towne's visitation rights, the court held the statute inapplicable and recognized the parent's common law right to exclude third parties from visiting with their children.[155] In addition, the court denied the grandmother's cause of action for emotional distress because she could not show that the parent's conduct was extreme and outrageous.[156]

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150. *Id.* The argument can be made that even in an intact marriage the best interests of a child will be compromised when visitation decisions regarding grandparents are made based on animosity toward the grandparents and not based on the child's welfare.

151. Edward M. Burns, *Grandparent Visitation Rights: Is It Time for the Pendulum to Fall?*, 25 FAM. L.Q. 59, 64-65, 74-75 (1991).

152. ILL. REV. STAT. ch. 40, para. 607(b) (1982) provided:

> (b)(1) The court may grant reasonable visitation privileges to a grandparent [or] great-grandparent of any minor child upon the grandparent's or great-grandparent's petition to the court, with notice to the parties required to be notified under Section 601 of this Act, if the court determines that it is in the best interests and welfare of the child and may issue any necessary orders to enforce such visitation privileges.
>
> . . . .
>
> (3) Further, the court, pursuant to this subsection, may grant reasonable visitation privileges to a grandparent or great-grandparent whose child has died where the court determines that it is in the best interests and welfare of the child.

153. 478 N.E.2d 895 (Ill. App. Ct. 1985).

154. *Id.* at 898-900.

155. *Id.* at 900.

156. *Id.* at 900-01.

In 1989, the Illinois legislature extended grandparent visitation rights to an intact marriage.[157] This extension was short lived, however, for effective July 1, 1991, the statute was revised to again restrict grandparents' visitation to dissolution or death.[158]

V. STATE GRANDPARENT VISITATION STATUTES

Many states permit grandparents to petition the court for visitation rights without basing standing on a prior breakup of the nuclear family. The states of Kentucky, New York, North Dakota, Oklahoma, Tennessee, and Utah apply a reasonableness and best interest standard. Idaho measures the reasonableness of awarding visitation. Alabama and South Carolina give the court sole discretion to award visitation. These states' grandparent visitation statutes are set forth in the Appendix.

As asserted above, the grandparent's constitutional right to visitation rests on the fundamental right of family definition, which has yet to win widespread judicial recognition.[159] To ensure that grandparents have the ability to visit their grandchildren, the authors recommend that the Maryland legislature revise the present statute.

VI. A PROPOSED STATUTE FOR MARYLAND[160]

Section 9-102 of Maryland's family law article should be revised to take into account the interests of not only the child and the parents, but the grandparents as well. These interests include the child's welfare and best interests, the parents' interest in the relationship with their child, and the grandparent's interest in the relationship with their grandchild. The following proposed language would take such interests into account:

> The grandparents of a natural or adopted minor child may be granted reasonable visitation rights with the child if the

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157. ILL. REV. STAT. ch. 40, para. 607(b) (1989).

158. ILL. REV. STAT. ch. 40, para. 607(b) (1991) provides that grandparents may not petition for visitation in an intact marriage, unless one or more of the following exist:

> (A) the parents are not currently cohabiting on a permanent or an indefinite basis;
> (B) one of the parents has been absent from the marital abode for more than one month without the spouse knowing his or her whereabouts;
> (C) one of the parents is deceased;
> (D) one of the parents joins in the petition with the grandparents, great-grandparents, or sibling; or
> (E) a sibling is in State custody.

Id.

159. *See supra* notes 61-65 and accompanying text.

160. As this article went to print, the governor of Maryland signed into law Senate

> court finds it to be in the best interest of the child, and it would not unduly interfere with the parent-child relationship as determined by the court.

This proposed formulation would protect the best interests of the child while balancing the interests of the parents and grandparents. The parents' interests are protected by the provision for "reasonable" visitation. This qualifier allows the court to guard against visitation that would be burdensome for the parents. In addition, the parents' relationship with the child is protected by the requirement that the visitation not interfere excessively with the parent-child relationship. The grandparents' interest in obtaining visitation rights is met because the language provides for standing even in the intact marital situation. A requirement that the court consider the past relationship between the grandparent and grandchild has been omitted. This omission is based on the understanding that just because a relationship has been effectively stifled in the past, it need not be precluded in the future. By adopting this language, the Maryland legislature could assure that the interests of all of the parties involved will be considered by the court. Until such time as the legislature addresses this issue, parents and grandparents will have to rely on the Maryland courts to resolve their disputes regarding visitation.

VII. CONCLUSION

When Maryland courts wrestle with the issue of grandparents' visitation rights in an intact marriage, the decision may ultimately turn on how the appellate courts view the importance of the relationship between the grandparent and the grandchild. Based on a broad reading of the grandparent visitation statute (which would grant standing to grandparents), Maryland's appellate courts may be forced to determine whether the parents' constitutional rights are outweighed by the state's interest in allowing grandparent visitation. Apart from circumstances which are compelling due to child abuse or neglect, if the appellate courts view grandparent visitation as a compelling need, the parents' constitutional right of privacy can be overcome. If, however, the appellate courts do not view grandparent

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Bill 612, Chapter 252 of the Laws of Maryland 1993, revising section 9-102. The revised section reads:

> An equity court may:
> (1) consider a petition for reasonable visitation of a grandchild by a grandparent; and
> (2) grant visitation rights to the grandparent.

1993 Md. Laws 252.

visitation as compelling, the parents' privacy right will prevail and visitation will be denied.

Ultimately, the Maryland appellate system may be forced to take a legal stand regarding an oft-quoted New Jersey court's insight into the relationship between grandparents and grandchildren:[161]

> It is biological fact that grandparents are bound to their grandchildren by the unbreakable links of heredity. It is common human experience that the concern and interest grandparents take in the welfare of their grandchildren far exceeds anything explicable in purely biological terms. A very special relationship often arises and continues between grandparents and grandchildren. The tensions and conflicts which commonly mar relations between parents and children are often absent between those very same grandparents and their grandchildren. Visits with a grandparent are often a precious part of a child's experience and there are benefits which devolve upon the grandchild from the relationship with his grandparents which he cannot derive from any other relationship.[162]

APPENDIX

Alabama - Ala. Code § 30-3-4 (1989).

At the discretion of the court, visitation rights for grandparents of minor grandchildren shall be granted in the following cases:

(a) The parents of the child have filed for a dissolution of their marriage. . .;

(b) One parent of the child is deceased and the surviving parent denies reasonable visitation rights; or

(c) A grandparent is unreasonably denied visitation with the child for a period exceeding 90 days.

Connecticut - Conn. Gen. Stat. § 46b-59 (1986).

The superior court may grant the right of visitation with respect to any minor child or children to any person, upon an application of such person.

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161. See Fairbanks v. McCarter, 330 Md. 39, 622 A.2d 121 (1993), in which the Court of Appeals of Maryland cited with approval this section from Mimkon v. Ford, 332 A.2d 199 (N.J. 1975).

162. Mimkon v. Ford, 332 A.2d 199, 204-05 (N.J. 1975).

Idaho - Idaho Code § 32-1008 (1983).

When a grandparent or grandparents have established a substantial relationship with a minor child, the district court may, upon a proper showing, grant reasonable visitation rights to said grandparent or grandparents.

Kentucky - Ky. Rev. Stat. Ann. § 405.021 (Baldwin 1984).

(1) The circuit court may grant reasonable visitation rights to either the parental or maternal grandparents of a child and issue any necessary orders to enforce the decree if it determines that it is in the best interest of the child to do so.

Mississippi - Miss. Code Ann. § 93-16-3(2) (1992).

Any grandparent who is not authorized to petition for visitation rights pursuant to subsection (1) of this section may petition the chancery court and seek visitation rights with his or her grandchild, and the court may grant visitation rights to the grandparent, provided the court finds:

(a) That the grandparent of the child had established a viable relationship with the child and the parent or custodian of the child unreasonably denied the grandparent visitation rights with the child; and

(b) That visitation rights of the grandparent with the child would be in the best interests of the child.

New York - N.Y. Dom. Rel. Law § 72 (Supp. 1993).

Where either or both of the parents of a minor child, residing within this state, is or are deceased, or where circumstances show that conditions exist which equity would see fit to intervene, a grandparent or the grandparents of such child may apply to the supreme court by commencing a special proceeding or for a writ of habeas corpus to have such child brought before such court, or may apply to the family court pursuant to subdivision (b) of section six hundred fifty-one of the family court act; and on the return thereof, the court, by order, after due notice to the parent or any person or party having the care, custody, and control of such child, to be given in such manner as the court shall prescribe, may make such directions as the best interest of the child may require, for visitation rights for such grandparent or grandparents in respect to such child.[163]

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163. In *Smith v. Jones*, the Family Court for Nassau County stated in dicta its belief that New York's grandparent visitation statute was "repugnant to the Privacy Rights of Citizens as assured under the U.S. Constitution's 14th Amendment (and 9th Amendment)." Smith v. Jones, 587 N.Y.S.2d 506, 511 (1992) (citing Roe v. Wade, 410 U.S. 113 (1973)).

North Dakota - N.D. Cent. Code § 14-09-05.1 (1989).

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

Oklahoma - Okla. Stat. Ann. tit. 10, § 5 (West Supp. 1993).

A. 1. Pursuant to the provisions of this section, any grandparent of an unmarried minor child shall have reasonable rights of visitation to the child if the district court deems it to be in the best interest of the child. The right of visitation to any grandparent of an unmarried minor child shall be granted only so far as that right is authorized and provided by order of the district court.

South Carolina - S.C. Code Ann. § 20-7-420 (Law Co-op. 1985).

The family court shall have exclusive jurisdiction:

. . . .

(33) To order periods of visitation for the grandparents of the child.

Tennessee - Tenn. Code Ann. § 36-6-301 (1991).

(a) The natural or legal grandparents of an unmarried minor child may be granted reasonable visitation rights to the child during such child's minority by a court of competent jurisdiction upon a finding that such visitation rights would be in the best interests of the minor child.

Utah - Utah Code Ann. § 30-5-2 (1989).

The district court may grant grandparents reasonable rights of visitation to grandchildren, if it is in the best interest of the grandchildren.