

6-1-1995

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### Recommended Citation

Cynthia F. Zebrowitz, *Brooks v. Parkerson: To Grandmother's House We Go - The Visitation Rights of Grandparents in Georgia*, 11 GA. ST. U. L. REV. (1995).

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## BROOKS V. PARKERSON: TO GRANDMOTHER'S HOUSE WE GO—THE VISITATION RIGHTS OF GRANDPARENTS IN GEORGIA

### INTRODUCTION

We have all seen the bumper stickers, "Happiness is being a grandparent." Unfortunately, this statement is not true for all grandparents. In years past, several generations of a family may have lived in the same house or at least in the same town. Today, some grandparents and grandchildren<sup>1</sup> rarely see one another because times change and families disperse geographically and become involved in their own lives. More and more attention is being focused on the rights of grandparents because the divorce rate has climbed, society has grown more mobile, and the elderly population has increased.<sup>2</sup> In some families, in which a child's parents and grandparents have had some sort of "falling out," the parents have forbidden the grandparents to have contact with the grandchild.<sup>3</sup> Organizations have been formed to address this scenario and other issues involving grandparents' rights.<sup>4</sup> State legislatures have responded—today, all fifty states have enacted grandparent visitation statutes.<sup>5</sup>

Early in 1995, in *Brooks v. Parkerson*,<sup>6</sup> the Georgia Supreme Court held the state's current grandparent visitation statute

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1. The use of the words "grandchildren," "grandchild," "children," and "child" in this Comment, as they pertain to grandparents' rights, refers only to minors.

2. COMMISSION ON LEGAL PROBLEMS OF THE ELDERLY, AMERICAN BAR ASSOCIATION, GRANDPARENT VISITATION DISPUTES: A LEGAL RESOURCE MANUAL 1 (Ellen C. Segal & Naomi Karp eds., 1989) [hereinafter GRANDPARENT VISITATION DISPUTES].

3. See, e.g., *Hawk v. Hawk*, 855 S.W.2d 573, 576 (Tenn. 1993), discussed *infra* Part II.B.

4. See generally Mark Curriden, *Grandparents: When Visitation Fights Tear Families Apart*, ATLANTA CONST., June 21, 1993, at B1, B5 (mentioning Georgia Grandparents Inc.).

5. GRANDPARENT VISITATION DISPUTES, *supra* note 2, at 5.

6. *Brooks v. Parkerson*, 454 S.E.2d 769 (Ga. 1995). As this issue went to press, Ms. Parkerson filed a petition for writ of certiorari with the United States Supreme Court. *Parkerson v. Brooks*, 63 U.S.L.W. 49 (U.S. June 15, 1995) (No. 94-2068) (found in Table of Cases and Case Status Report).

unconstitutional, leaving the future status of grandparents' visitation rights in Georgia uncertain. This Comment examines *Brooks* and the cases and statutes involving grandparents' visitation rights that preceded it. Part I describes the history, evolution, and judicial application of the Georgia grandparents' visitation statute.<sup>7</sup> Part II discusses a 1992 Kentucky Supreme Court decision that upheld the constitutionality of the state's grandparents' visitation statute under the United States Constitution<sup>8</sup> and a 1993 Tennessee Supreme Court decision that held its grandparents' visitation statute unconstitutional under Tennessee's Constitution.<sup>9</sup> Part III analyzes why the Georgia Supreme Court held the Georgia grandparents' visitation statute unconstitutional.<sup>10</sup> This Comment concludes with suggested changes to Georgia's statute and to the issue of grandparents' visitation.

## I. THE HISTORY AND EVOLUTION OF THE GEORGIA GRANDPARENTS' VISITATION STATUTE

### A. Grandparents' Rights Under the Common Law<sup>11</sup>

At common law, Georgia courts, and those of most other states, decided issues involving children by considering either the parents' rights to control and maintain custody of the child (parents' rights) or the child's welfare and best interests (best interests).<sup>12</sup> In early cases, Georgia courts used both standards, sometimes even in the same case, to determine issues of grandparent visitation.

In 1911, the Georgia Court of Appeals defined and applied the best interests approach in *Evans v. Lane*.<sup>13</sup> In *Evans*, a young father, who felt he was unable to care for his newborn daughter immediately following the mother's death, requested that the maternal grandmother care for the child.<sup>14</sup> When the father

7. O.C.G.A. § 19-7-3 (Supp. 1994).

8. *King v. King*, 828 S.W.2d 630 (Ky.), cert. denied, 113 S. Ct. 378 (1992).

9. *Hawk v. Hawk*, 855 S.W.2d 573 (Tenn. 1993).

10. *Brooks v. Parkerson*, 454 S.E.2d 769 (Ga. 1995).

11. Only a relatively brief summary of the prestatute, common law approach is provided here. For a more complete discussion, see Bruce Sostek, Note, *Grandparents' Visitation Rights in Georgia*, 29 EMORY L.J. 1083 (1980).

12. *Id.* at 1087.

13. 70 S.E. 603, 605 (Ga. Ct. App. 1911).

14. *Id.* Convinced that the father intended the arrangement to be temporary and not a permanent surrender of his parental rights, the court commented, "He perhaps

reclaimed the little girl a few years later, the grandmother filed a habeas corpus action for custody.<sup>15</sup> The lower court awarded permanent custody to the father, but granted "visitation" rights to the grandmother.<sup>16</sup> In determining that the lower court had not abused its discretion when it awarded visitation to the maternal grandmother, the court of appeals stated, "The single object to be kept in view . . . is the welfare of the little one. And by welfare we mean, not alone its financial well-being, but also that peacefulness of mind and sweet content upon which its happiness depends."<sup>17</sup>

In *Scott v. Scott*,<sup>18</sup> a 1922 divorce case, the Georgia Supreme Court held that a lower court had not abused its discretion in awarding twice-a-month visitation to a child's father and paternal grandparents even though the grandparents were not parties to the divorce action.<sup>19</sup> The court seemed to apply both the best interests standard and the parents' rights standard when it found that the visits could be discontinued if they appeared to be "not for the best interest of the child or were unreasonably annoying to the mother" who had custody.<sup>20</sup>

By 1956, the Georgia Supreme Court had apparently abandoned the best interests approach to grandparent visitation in favor of the parents' rights standard. In *Davis v. Davis*<sup>21</sup> a child's paternal grandparents filed a habeas corpus action against their son for custody of their grandson.<sup>22</sup> The grandparents contended the father had relinquished his right to custody of the child by voluntary contract when he told the child's grandmother,

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did not then see clearly how utterly impossible it would be for any man to nurse and administer, as only tender woman can, to the wants of a new-born baby, even if it be well." *Id.*

15. *Id.* at 603-04.

16. *Id.* at 604. The "visitation" arrangement in this case was for the little girl to spend alternate months with her father and maternal grandmother until the age of seven. *Id.* Today such an arrangement might be regarded as joint or shared custody. See BLACK'S LAW DICTIONARY 385 (6th ed. 1990).

17. *Evans*, 70 S.E. at 605. Note that despite the court's apparent concern for the child's happiness and welfare, Justice Russell refers to her throughout the opinion as "it." See *id.* at 603.

18. 115 S.E. 2 (Ga. 1922), *overruled by* Price v. Dawkins, 247 S.E.2d 844, 845 (Ga. 1978) (overruling *Scott* on the issue of linking visitation to payment of child support or alimony).

19. *Id.* at 3.

20. *Id.*

21. 91 S.E.2d 487 (Ga. 1956).

22. *Id.* at 488.

“ ‘Mother, here he is; he’s yours. You’ve got to take care of him.’ ”<sup>23</sup> The grandparents further alleged that the father had relinquished custody by failing to provide “necessaries” for the child.<sup>24</sup> Finding that the evidence failed to show that the father had relinquished his parental rights, the lower court awarded custody to the father and visitation to the grandparents during the Christmas holidays and for two months in the summer.<sup>25</sup> In response to the father’s appeal regarding the visitation, the Georgia Supreme Court applied the parents’ rights doctrine to hold that the lower court had no authority to interfere with the father’s right to custody and control.<sup>26</sup> The court stated:

The right to determine whom the child shall visit and associate with, and when, where, and how often these visits and associations shall take place is an inseparable and inalienable ingredient of the right of a parent to custody and control of a minor child. The parent having the right of custody and control of a minor child has the right to make these determinations, and a court has no authority to interfere unless it first appears that the parent has forfeited his rights in a manner recognized by law.<sup>27</sup>

Despite the fact that the child had lived with and had been cared for by the grandparents for years,<sup>28</sup> the court did not mention in the opinion the child’s happiness or best interests.<sup>29</sup>

*Jackson v. Martin*,<sup>30</sup> a 1969 case, also illustrates the Georgia Supreme Court’s shift away from the best interests standard. In *Jackson*, another habeas corpus action, a divorced father sued to recover custody of his child from the maternal grandparents after the child’s mother, who was awarded custody in the divorce, died.<sup>31</sup> Despite the grandparents’ contention that the father had contractually surrendered parental control to them, the lower court awarded custody to the father and visitation privileges to the grandparents on specific weekends and during the

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23. *Id.* at 489.

24. *Id.* at 490.

25. *Id.* at 488.

26. *Id.* at 490.

27. *Id.*

28. *Id.* at 487.

29. *See Davis*, 91 S.E.2d 487.

30. 167 S.E.2d 135 (Ga. 1969).

31. *Id.* at 136.

summer.<sup>32</sup> On appeal, the Georgia Supreme Court stated that "full and complete custody" had vested in the father when the child's mother died.<sup>33</sup> The court held that the lower court abused its discretion in awarding visitation to the grandparents because the father had not lost his parental rights in any legally recognized way.<sup>34</sup> Two justices, advocating the best interests standard, dissented.<sup>35</sup> Citing to both *Scott* and *Evans*, the dissent stated: "It has always been the law in this State that in cases involving the custody of children the chief concern is the best interest and welfare of the child, and that the court has a wide discretion in achieving this."<sup>36</sup>

*B. The 1976 Enactment of the Grandparents' Visitation Rights Statute: Decisions and Unanswered Questions*

In 1976, the Georgia General Assembly enacted Code section 19-7-3,<sup>37</sup> which some courts have called the Grandparents' Bill of Rights.<sup>38</sup> The statute provided: "Whenever any court in this State shall have before it any question concerning the custody of or guardianship of any minor child, the court may, in its discretion, grant reasonable visitation rights to the maternal and paternal grandparents of the child."<sup>39</sup> According to the title of the Act, the intent was "to provide for the grant of visitation rights to the grandparents of certain children."<sup>40</sup> Although granting to grandparents a legal right previously unavailable to them, this version of the statute left some questions unanswered.

First, the statute did not specify whether the best interests or parents' rights standard should be used in determining grandparents' visitation.<sup>41</sup> Instead, it simply left the determination to the discretion of the court.<sup>42</sup> As illustrated in

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32. *Id.* at 136-37.

33. *Id.* at 137.

34. *Id.*

35. *Id.* (Grice, J., dissenting). Justice Mobley joined in the dissent. *Id.*

36. *Id.*

37. See 1976 Ga. Laws 247 (current version at O.C.G.A. § 19-7-3 (Supp. 1994)).

38. See, e.g., *Heard v. Coleman*, 354 S.E.2d 164, 165 (Ga. Ct. App. 1987).

39. 1976 Ga. Laws 247 (current version at O.C.G.A. § 19-7-3 (Supp. 1994)).

40. *Id.*

41. See *id.*

42. *Id.*

*George v. Sizemore*<sup>43</sup> and *Spitz v. Holland*,<sup>44</sup> this discretion led to the use of inconsistent standards even by the same court.

In addition, the statute did not specify whether grandparents must be parties to the suit or whether they could intervene in a custody or guardianship case between other parties.<sup>45</sup> The Georgia Supreme Court had an opportunity to interpret this issue in *George v. Sizemore*, a case in which maternal grandparents lost custody of their grandchild to the biological father when he filed a habeas corpus petition to obtain legal custody of the child.<sup>46</sup> The habeas action took place in 1975, before Code section 19-7-3 was enacted.<sup>47</sup> After the enactment, the grandparents filed a petition to modify the judgment to grant them visitation rights pursuant to the new statute.<sup>48</sup> The father argued that the new statute did not apply because there was no "question concerning the custody of . . . any minor child" presently before the court as required by the statute, and he further argued that retroactive application of the statute would be improper.<sup>49</sup> The Georgia Supreme Court stated that the state's high interest in the welfare of minor children in custody disputes warrants ongoing jurisdiction in the habeas corpus court.<sup>50</sup> Thus, the court determined that the modification action fit the description of "any question concerning the custody" and the grandparents had standing to bring their petition because they had been parties to the original custody action.<sup>51</sup> In granting the grandparents visitation, the court called the statute a "departure from the old law" under which parents retained absolute control of their children unless their rights had in some way been legally terminated.<sup>52</sup> Instead, the court seemed to apply the best interests of the child standard when it noted that

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43. 233 S.E.2d 779 (Ga. 1977).

44. 252 S.E.2d 406 (Ga. 1979).

45. Sostek, *supra* note 11, at 1100; see 1976 Ga. Laws 247 (current version at O.C.G.A. § 19-7-3 (Supp. 1994)).

46. 233 S.E.2d at 780.

47. *Id.*

48. *Id.* at 781.

49. *Id.* at 782 (quoting 1976 Ga. Laws 247 (current version at O.C.G.A. § 19-7-3 (Supp. 1994))).

50. *Id.*

51. *Id.* at 781-82.

52. *Id.*

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the state has a continuing interest in the welfare of children and that "no person has a vested right in the custody of a child."<sup>53</sup>

By contrast, in *Spitz v. Holland*, the Georgia Supreme Court held that the maternal grandparents of children in the custody of their widowed biological father did not have standing to seek visitation under Code section 19-7-3.<sup>54</sup> In *Spitz*, the maternal grandparents had filed a habeas action against the father to obtain either custody or visitation of their two grandchildren.<sup>55</sup> Unlike the grandparents in *George*, the grandparents in *Spitz* apparently never had custody of their grandchildren.<sup>56</sup> Adhering to the rule that neither the common law nor the habeas statute allowed a habeas corpus action to be brought by someone who has no "legal right of custody," the court held that the grandparents lacked standing to bring the habeas action and dismissed their petition.<sup>57</sup> This holding was, in essence, an application of the parents' rights doctrine—only a parent has the legal right of custody unless he or she has lost it in some way under the law.<sup>58</sup> As a result of the dismissal of the habeas action, no question concerning custody was before the court and the grandparents could not invoke Code section 19-7-3 to pursue their claim for visitation.<sup>59</sup>

Thus, one commentator has suggested that under the court's interpretation of the 1976 statute in these two cases, grandparents could only initiate a visitation action in two limited circumstances: cases in which grandparents had a legal right to custody, perhaps through contract or court decree, and challenged a third party's claim to custody, or cases in which grandparents had no legal right to custody, but had possession of the child and a third party instituted a custody action against them.<sup>60</sup> The ruling in *Spitz* foreclosed the ability of grandparents to "create" a custody question in order to seek

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53. *Id.* at 782.

54. *Spitz v. Holland*, 252 S.E.2d 406 (Ga. 1979).

55. *Id.* at 407.

56. *See id.*

57. *Id.* at 407-08.

58. *See Davis v. Davis*, 91 S.E.2d 487, 490 (Ga. 1956).

59. *Spitz*, 252 S.E.2d at 408.

60. Sostek, *supra* note 11, at 1108. This second circumstance seems to be based on the *George* case. However, the facts as recited in *George* do not indicate whether the grandparents merely had possession of the children or had some form of court ordered custody. Thus, it is unclear what kind of "custody" was considered a sufficient basis for standing. *See George*, 233 S.E.2d at 780.



visitation under Code section 19-7-3.<sup>61</sup> The question whether grandparents could intervene for visitation in a case already before the court, such as a custody dispute between parents, remained open.<sup>62</sup>

Another issue the 1976 statute did not address was how grandparents' visitation rights would be affected by the adoption of the grandchild.<sup>63</sup> The Georgia Supreme Court addressed the issue of adoption by a stepparent in *Sachs v. Walzer*.<sup>64</sup> In *Sachs*, a father gained custody of his daughter after his ex-wife, who had custody, died.<sup>65</sup> The maternal grandparents filed a habeas petition claiming the father was unfit and were granted visitation rights.<sup>66</sup> When the father remarried, his new wife adopted the child and the grandparents filed a contempt action to enforce the visitation rights.<sup>67</sup> After the trial court upheld these visitation rights, the father appealed, contending that when his new wife adopted his child, the grandparents' rights were terminated.<sup>68</sup> The Georgia Supreme Court agreed, stating that Code section 19-7-3, as well as subsequent judicial decisions, affords grandparents only a right to request visitation, not a right to the visitation itself.<sup>69</sup> The court went on to state that granting such a request is purely discretionary and should be based on a finding that conditions are appropriate.<sup>70</sup> The court held that "the adoption . . . is such a drastic change from the conditions which existed when the visitation rights were granted, that the grandparents' rights are not enforceable . . ."<sup>71</sup> The court applied the parents' rights doctrine, stating that in a case such as *Sachs*, in which disputes exist between the parents and grandparents, the courts should not "encourage litigation to the harassment of the parents in whom rests exclusive control of the child."<sup>72</sup> The court reasoned that its decision was consistent with

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61. Sostek, *supra* note 11, at 1101, 1106.

62. *Id.* at 1101.

63. *See id.* at 1109; 1976 Ga. Laws 247 (current version at O.C.G.A. § 19-7-30 (Supp. 1994)).

64. 251 S.E.2d 302 (Ga. 1978).

65. *Id.* at 303.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* (citing *Rhodes v. Peacock*, 235 S.E.2d 762 (Ga. Ct. App. 1977)).

70. *Id.*

71. *Id.*

72. *Id.*

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public policy favoring adoption and with the adoption statute then in effect, which severed all relations between an adopted child and his biological parent except a biological parent who is married to the adoptive parent.<sup>73</sup>

The court also denied visitation in another stepparent adoption case, *Mead v. Owens*.<sup>74</sup> In *Mead*, paternal grandparents petitioned for visitation during a proceeding in which their ex-daughter-in-law's new husband was seeking to adopt their grandchild.<sup>75</sup> Their son, the child's biological father, had lost his paternal rights for failure to pay child support.<sup>76</sup> The court held that an adoption proceeding was not a custody or guardianship issue within the meaning of Code section 19-7-3 and thus was an impermissible forum in which to seek visitation.<sup>77</sup> Justice Shulman, concurring specially, agreed with the legal premise of the decision, but expressed his hope "that in a more enlightened time, the strong and natural love that grandparents have for their grandchildren will be recognized to a greater extent and that their rights to implement that affection will be legally enlarged."<sup>78</sup>

### C. Post-1976 Amendments and Decisions

#### 1. The 1980 Amendment

The year following the *Mead* decision, Justice Shulman's hope was realized, at least to some extent, when the Georgia General Assembly amended Code section 19-7-3.<sup>79</sup> The amended statute allowed grandparents to intervene for visitation when questions of guardianship were before a court and to file an original action

73. *Id.* at 303 & n.2. The adoption statute provided:

(a) A decree of adoption . . . shall have the following effect . . .

(1) Except with respect to a spouse of the petitioner and relatives of the spouse, to relieve the natural parent(s) of the adopted individual of all parental rights and responsibilities, and to terminate all legal relationships between the adopted individual and his relatives, including his natural parent(s), so that the adopted individual thereafter is a stranger to his former relatives for all purposes . . . .

1977 Ga. Laws 201, 219 (current version at O.C.G.A. § 19-8-19 (1991)).

74. 254 S.E.2d 431 (Ga. Ct. App. 1979).

75. *Id.*

76. *Id.*

77. *Id.* at 432.

78. *Id.* (Shulman, J., concurring).

79. See 1980 Ga. Laws 936 (current version at O.C.G.A. § 19-7-3 (Supp. 1994)).

whenever: (1) one parent dies; (2) one parent dies and the survivor remarries regardless of whether the child has been adopted by the stepparent; or (3) the parental rights of one of the biological parents have been terminated.<sup>80</sup>

Under the amendment, grandparents were permitted to bring a visitation petition after a stepparent adoption had been granted, even if no issue of custody was before the court.<sup>81</sup> In *Houston v. Houston*,<sup>82</sup> the Georgia Court of Appeals heard a paternal grandfather's appeal of two orders denying him visitation rights after his divorced son died and his grandchild was adopted by his former daughter-in-law's new husband.<sup>83</sup> Twelve days after the trial court entered its order, the amendment giving a grandparent whose own child has died the right to file an original pleading took effect.<sup>84</sup> The court of appeals concluded that the trial court had correctly interpreted the statute as it existed at the time of its judgment, but applied the amended statute to the appeal under the doctrine that the law existing at the time of review applies unless it impairs a vested right under the prior law.<sup>85</sup> Quoting the Georgia

80. *Id.* The statute reads in relevant part:

(a) Whenever any court in this State shall have before it any question concerning the guardianship of any minor child or whenever one parent shall die or whenever one parent shall die and the survivor remarry regardless of whether the minor child is adopted by its stepmother or stepfather or whenever any court has terminated the parental rights of one of the natural parents of the minor child, the court may, in its discretion pursuant to subsection (b), grant reasonable visitation rights to the maternal and paternal grandparents of the child. Any court granting such rights may issue its necessary order to enforce the grant.

(b)(1) Any grandparent shall have the right to intervene in an action involving the guardianship of any minor child to obtain visitation rights to said minor child.

(2) The parent of the minor child's parent who has died shall have the right to file an original pleading, but not more than once during any calendar year, to obtain visitation rights to said minor child.

(3) The parent of the minor child's parent whose parental rights have been terminated shall have the right to file an original pleading, but not more than once during any calendar year, to obtain visitation rights to said minor child.

*Id.* at 937.

81. *Id.*

82. 274 S.E.2d 91 (Ga. Ct. App. 1980).

83. *Id.* at 91.

84. *Id.* at 92.

85. *Id.*

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Supreme Court's statement in *George v. Sizemore*<sup>86</sup> that no one has a vested right in a child, the court of appeals concluded that the grandfather had standing to bring his action and remanded the case for a determination of the grandfather's visitation rights under the amended statute.<sup>87</sup>

A few months later, the Georgia Supreme Court examined the legislative intent of the amended statute in *Smith v. Finstad*,<sup>88</sup> in which paternal grandparents sought visitation with their granddaughter after she had been adopted by their former daughter-in-law's new husband.<sup>89</sup> The court stated: "The legislature's intent in enacting the 1980 amendment . . . was to give grandparents standing to seek visitation in a situation in which their own child had lost his or her parental rights through death or termination."<sup>90</sup> The court then held that the 1980 amendment constituted a specific exception to the provision in the adoption statute that the adoptee "become[s] a legal 'stranger to his former relatives.'"<sup>91</sup>

However, in 1984 the Georgia Supreme Court, in *Mitchell v. Erdmier*,<sup>92</sup> held that the amended Code section 19-7-3 was not an exception to the adoption decree statute when both biological parents have released their child for adoption.<sup>93</sup> The court stated that the right of grandparents to seek visitation was limited to stepparent adoptions following the death of a biological parent and that to hold otherwise would frustrate the purpose of the adoption statute, which severs all ties with former relations.<sup>94</sup> This holding in *Mitchell*, that the "legal stranger" exception applied only to stepparent adoptions, was superseded by a provision in the 1988 amendment to Code section 19-7-3, which provided for grandparent visitation rights following an adoption by a child's blood relatives.<sup>95</sup>

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86. 233 S.E.2d 779 (Ga. 1977).

87. *Houston*, 274 S.E.2d at 92.

88. 277 S.E.2d 736 (Ga. 1981).

89. *Id.* at 737. The opinion does not mention of the whereabouts of the biological father except to say that the biological parents divorced and the mother subsequently remarried. *See id.*

90. *Id.* at 738.

91. *Id.* (quoting 1977 Ga. Laws 201, 219).

92. 320 S.E.2d 163 (Ga. 1984).

93. *Id.* at 164.

94. *Id.*

95. *See* 1988 Ga. Laws 864, 867; *see also* *Motes v. Love*, 415 S.E.2d 334 (Ga. Ct. App. 1992). The 1988 amendments are discussed at *infra* Part I.C.4.

The 1980 amendment, unlike the previous version of the statute, did not include the word "custody."<sup>96</sup> Thus, the amendment left unclear whether grandparents had the right to intervene only in guardianship cases and had lost the right to intervene in custody disputes.<sup>97</sup> The amendment also left unanswered whether the courts should look to parents' rights or to the best interests of the child in deciding the visitation rights question.<sup>98</sup>

## 2. *The 1981 Amendment*

In 1981, the grandparents' visitation statute was amended by limiting the number of times a grandparent whose own child had died or whose child had parental rights terminated could file an original pleading from once during any calendar year to once during any two-year period.<sup>99</sup> Perhaps because of the uncertainty regarding when a grandparent could either intervene or file an independent action, an additional subsection was added to the statute.<sup>100</sup> That subsection provided:

Whenever any court in this State shall have before it any question concerning the custody of any minor child or whenever the parents of the minor child have been divorced or are engaged in legal proceedings to obtain a divorce, any grandparent of the child may be granted reasonable visitation rights upon proof of special circumstances which make such visitation rights necessary to the best interests of the child. There shall be no presumption in favor of visitation by any grandparent, and the court shall have discretion to deny such visitation rights. Any grandparent shall have the right to intervene and petition for visitation rights in any action involving the custody of any minor child or in any divorce action. If the parents of the minor child have been divorced, a parent of either parent of the minor child shall have the right to file an original pleading requesting visitation rights, but not more than once during any two year

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96. Compare 1976 Ga. Laws 247 ("custody of or guardianship of") with 1980 Ga. Laws 936 ("guardianship of").

97. See 1980 Ga. Laws 936 (current version at O.C.G.A. § 19-7-3 (Supp. 1994)).

98. See *id.*

99. Compare 1980 Ga. Laws 936 with 1981 Ga. Laws 1318.

100. 1981 Ga. Laws 1318 (current version at O.C.G.A. § 19-7-3 (Supp. 1994)).

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period and not during any year in which another custody action has been filed concerning said child.<sup>101</sup>

Thus, in addition to being able to seek visitation under the conditions set out in the 1980 amendment,<sup>102</sup> a grandparent could intervene in a custody or divorce action to petition for visitation rights or could file an original action if the parents were already divorced.<sup>103</sup> The new subsection also established the "best interests of the child" standard as controlling, at least in situations in which visitation was sought pursuant to a custody or divorce action.<sup>104</sup>

The Georgia Court of Appeals applied the best interests standard in 1982 in *Ryback v. Cobb County Department of Family & Children Services*,<sup>105</sup> when it affirmed a lower court's denial of visitation to a child's maternal grandparents.<sup>106</sup> *Ryback* involved a six-year-old girl who was permanently in the county's custody after her mother had repeatedly abused her.<sup>107</sup> Even two years after the little girl was taken away from her mother, she became hysterical when confronted with the suggestion of contact with her mother.<sup>108</sup> For this reason, a psychologist recommended that although the child's trauma was in no way the fault of the grandparents, the court would be ill-advised to disturb the fragile stability she had finally found in the home of potential adoptive parents.<sup>109</sup> Following that recommendation, the trial court denied the grandparents' visitation request.<sup>110</sup> The court of appeals agreed, stating that the lower court's application of the best interests standard was the "proper yardstick."<sup>111</sup>

### 3. *The 1986 Amendment*

In 1986, the Georgia General Assembly amended Code section 19-7-3 to allow grandparents to file an original pleading

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101. *Id.* at 1319.

102. *See supra* notes 79-80 and accompanying text.

103. 1981 Ga. Laws 1318 (current version at O.C.G.A. § 19-7-3 (Supp. 1994)).

104. *Id.*

105. 293 S.E.2d 563 (Ga. Ct. App. 1982).

106. *Id.* at 565.

107. *Id.* at 564.

108. *Id.*

109. *Id.* at 564-65.

110. *Id.* at 564.

111. *Id.* at 565.

requesting visitation rights if the parents of the minor child "have been divorced or if custody of the minor child has been granted in any other action, *except an adoption in which all legal relationships between the adopted child and the adopted child's relatives have been terminated as provided in Code Section 19-8-14.*"<sup>112</sup> This amendment was an apparent codification of the holding in *Mitchell v. Erdmier*.<sup>113</sup> Arguably this change conflicted with other language in the statute, added in 1980,<sup>114</sup> that provided a parent of a deceased parent may petition for visitation regardless of whether the child was adopted by a stepparent. However, courts did not interpret it this way.

The court of appeals interpreted the 1986 amendment in *Heard v. Coleman*,<sup>115</sup> at least as it applied to a parent of a biological parent whose parental rights had been terminated by a stepparent adoption.<sup>116</sup> In *Heard*, a paternal grandmother sought visitation rights with her granddaughter under Code section 19-7-3 after the child's mother remarried and the new husband adopted the child.<sup>117</sup> Although the child's biological father had never married the mother nor legitimated the child and was in prison at the time of the action,<sup>118</sup> the court did not use this information to reach its decision.<sup>119</sup> The grandmother asserted that Code section 19-7-3 was an exception to Code section 19-8-14, and she argued her son's parental rights were terminated by the adoption; thus, she had a right to seek visitation.<sup>120</sup> In denying the grandmother's petition, the court relied on *Mitchell v. Erdmier*, in which the court stated:

The only provision which grants grandparents visitation rights after an adoption is the limited one of the death of one parent, the remarriage of the surviving parent, followed by the adoption of the child by the stepparent. *In other adoptions, such as this one, the severance of relationships*

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112. 1986 Ga. Laws 1516 (current version at O.C.G.A. § 19-7-3 (1994)) (emphasis added). See *supra* note 73 for provisions of adoption statute, O.C.G.A. § 19-8-19 (1991) (formerly found at O.C.G.A. § 19-8-14 (1988)).

113. See 320 S.E.2d 163 (Ga. 1984).

114. See 1980 Ga. Laws 936; *supra* note 80 and accompanying text.

115. 354 S.E.2d 164 (Ga. Ct. App. 1987).

116. *Id.*

117. *Id.* at 165.

118. *Id.*

119. See *Heard*, 354 S.E.2d 164.

120. *Id.* at 166.

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*provision of OCGA § 19-8-14 controls, and no rights of visitation by former grandparents exist.*<sup>121</sup>

Although *Mitchell* was decided prior to the 1986 amendment, the majority held that the 1986 amendment reinforced the holding in *Mitchell*.<sup>122</sup> However, Judge Beasley concurred specially to explain that the majority's result should not be controlled by *Mitchell*'s interpretation of the severance of relationship provision, but rather by the express language of the 1986 amendment, which according to Judge Beasley, "excepted adoptions where all legal relationships between the adopted child and the adopted child's relatives were 'terminated.'"<sup>123</sup> Therefore, although Judge Beasley agreed with the grandmother that visitation rights may be recognized when parental rights have been terminated, these visitation rights do not extend "to cases where not only termination but also adoption has occurred."<sup>124</sup>

#### 4. The 1988 Amendment: A Major Overhaul

In its 1988 amendment to Code section 19-7-3, the Georgia General Assembly completely rewrote the Code section.<sup>125</sup> For

121. *Id.* (quoting *Mitchell v. Erdmier*, 320 S.E.2d 163, 164 (Ga. 1984)). This language in *Mitchell* severely limited the holding of *Smith v. Finstad*, 277 S.E.2d 736 (Ga. 1981), in which the court held that stepparent adoptions were a specific exception to the adoption statute. See *Mitchell*, 320 S.E.2d at 164. Interestingly, it was unnecessary for the court in *Mitchell* to limit grandparents' visitation rights to situations involving the death of a biological parent, when the court could have limited its holding to the facts of the case. In *Mitchell*, both biological parents surrendered their parental rights. See *id.*

122. *Heard*, 354 S.E.2d at 166.

123. *Id.* at 166-67 (Beasley, J., concurring).

124. *Id.* at 167.

125. See 1988 Ga. Laws 864 (codified as amended at O.C.G.A. § 19-7-3 (Supp. 1994)). The full text of the statute reads:

(a) As used in this Code section, the term 'grandparent' means the parent of a parent of a minor child, the parent of a minor child's parent who has died, and the parent of a minor child's parent whose parental rights have been terminated.

(b) Any grandparent shall have the right to file an original action for visitation rights to a minor child or to intervene in and obtain visitation rights in any action in which any court in this state shall have before it any question concerning the custody of a minor child, a divorce of the parents or a parent of such minor child, a termination of the parental rights of either parent of such minor child, or visitation rights concerning such minor child or whenever there has been an adoption in which the adopted child has been adopted by the child's blood relative, notwithstanding the provisions of Code Section 19-8-14.



the first time, the statute provided a definition for "grandparent."<sup>126</sup> Most significantly, the statute permits grandparents to have the right to file an original action, even when no issues of custody or guardianship are before the court, and to intervene in any action "concerning the custody of the minor child, a divorce of the parents . . . , a termination of the parental rights of either parent . . . , visitation rights . . . ."<sup>127</sup> The statute also allows grandparents to seek visitation rights when the child has been adopted by the child's blood relative.<sup>128</sup>

Ironically, this last provision prohibited grandparents from seeking visitation when their grandchild had been adopted by a stepparent, as the 1980 amendment provided.<sup>129</sup> The court of appeals confirmed this interpretation of the provision in 1989 in *Campbell v. Holcomb*,<sup>130</sup> when it held that visitation rights previously granted to the grandparents were terminated when the child was adopted by his stepfather.<sup>131</sup> The court stated that the only exception to the adoption decree statute is the limited one set forth in Code section 19-7-3—adoption by a blood relative.<sup>132</sup>

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(c) Upon the filing of an original action or upon intervention in an existing proceeding under subsection (b) of this Code section, the court may grant any grandparent of the child reasonable visitation rights upon proof of special circumstances which make such visitation rights necessary to the best interests of the child. There shall be no presumption in favor of visitation by any grandparent; and the court shall have discretion to deny such visitation rights. An original action requesting visitation rights shall not be filed by any grandparent more than once during any two-year period and shall not be filed during any year in which another custody action has been filed concerning the child. After visitation rights have been granted to any grandparent, the legal custodian, guardian of the person, or parent of the child may petition the court for revocation or amendment of such visitation rights, for good cause shown, which the court, in its discretion, may grant or deny; but such a petition shall not be filed more than once in any two-year period.

*Id.*

126. Compare 1988 Ga. Laws 864 with 1986 Ga. Laws 1516 and 1981 Ga. Laws 1318 and 1980 Ga. Laws 936 and 1976 Ga. Laws 247.

127. 1988 Ga. Laws 864; *Legislative Review*, 5 GA. ST. U. L. REV. 374 (1988).

128. 1988 Ga. Laws 864. Read literally, the statute permits grandparents to intervene only when "there has been an adoption." *Id.* (emphasis added). It is not clear whether grandparents can intervene during adoption proceedings.

129. See 1980 Ga. Laws 936 (current version at O.C.G.A. § 19-7-3 (Supp. 1994)).

130. 388 S.E.2d 65 (Ga. Ct. App. 1989).

131. *Id.* at 67.

132. *Id.* at 66; see also 1977 Ga. Laws 201, 219 (current version at O.C.G.A. 19-8-19 (1991)).

The granting of visitation rights was still limited by the best interests of the child and the discretion of the court under the 1988 amendment.<sup>133</sup> Because the amended statute provides grandparents the right to file original actions, it expands the opportunities for grandparents to seek visitation.<sup>134</sup> For example, grandparents may file original actions seeking visitation of their grandchild when the grandchildren reside in an "intact" or "traditional" family, when parents are separated but not divorced, or when the parents have never married.<sup>135</sup> In *Anderson v. Sanford*, the court upheld the right of grandparents to file an original action seeking visitation of their grandchildren even though the grandchildren lived in an intact family and the parents opposed visitation.<sup>136</sup>

### 5. 1993: *The Latest Amendment*

In an amendment effective July 1, 1993, the General Assembly added adoption by a stepparent to the list of actions in which grandparents have the right to intervene and petition for visitation.<sup>137</sup> This amendment closed the loophole in the 1988 statute that permitted one parent of a minor child, when the other parent had either died or had parental rights terminated, to legally deny the visitation to the other parents' parents (grandparents of the minor child) if the parent with custody remarried and the stepparent adopted the minor child.<sup>138</sup>

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133. 1988 Ga. Laws 864, 867 (codified as amended at O.C.G.A. § 19-7-3(c) (Supp. 1994)).

134. *Id.*; see also *Legislative Review*, *supra* note 127, at 375.

135. *Legislative Review*, *supra* note 127, at 375.

136. *Anderson v. Sanford*, 401 S.E.2d 604 (Ga. Ct. App. 1991). When the grandparents filed this original action, the parents sought to avoid visitation by arguing that the statute, which limits original actions requesting visitation to once during a two-year period and not in the same year in which another *custody action* has been filed, barred the grandparents from filing their visitation action. Earlier that year, the Department of Family and Children Services (DFACS) had brought a deprivation action against the parents and the grandparents had intervened. The court held that a deprivation action was not a custody action within the meaning of Code section 19-7-3(c) and therefore did not bar the grandparents' action. *Id.* at 604-05.

137. 1993 Ga. Laws 456 (codified at O.C.G.A. § 19-7-3(b) (Supp. 1994)).

138. See *supra* Part I.C.4.

## II. *KING V. KING* AND *HAWK V. HAWK*: DIFFERENT OUTCOMES TO SIMILAR STATUTORY CHALLENGES

One of the most controversial applications of grandparent visitation statutes occurs in cases in which grandparents seek visitation with their grandchildren who reside in an intact family. Two recent decisions, one in Kentucky and the other in Tennessee, illustrate the different approaches state supreme courts may take in deciding these cases. In 1991, the Kentucky Supreme Court held that the state's grandparent visitation statute<sup>139</sup> was constitutional under the United States Constitution as applied to an intact family in *King v. King*.<sup>140</sup> In June 1993, in *Hawk v. Hawk*,<sup>141</sup> the Supreme Court of Tennessee held its grandparents' visitation statute,<sup>142</sup> as applied to a married couple whose fitness as parents was unchallenged, violated state constitutional rights to privacy in making parenting decisions.<sup>143</sup>

### A. *King v. King: A Grandparent's Visitation with the Child of an Intact Family is in the Best Interests of the Child*

In *King v. King*, a paternal grandfather, W.R. King, sought visitation with his granddaughter, Jessica, who lived with her married, biological parents, Stewart and Ann.<sup>144</sup> W.R.'s relationship with his son and daughter-in-law had been severed

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139. KY. REV. STAT. ANN. § 405.021 (Michie/Bobbs-Merrill Supp. 1994). The statute provides in relevant part:

- (1) The Circuit Court may grant reasonable visitation rights to either the paternal or maternal grandparents of a child and issue any necessary order to enforce the decree if it determines that it is in the best interest of the child to do so.

*Id.*

140. 828 S.W.2d 630 (Ky.), *cert. denied*, 113 S. Ct. 378 (1992).

141. 855 S.W.2d 573 (Tenn. 1993).

142. TENN. CODE ANN. § 36-6-301 (1992). The statute provides in relevant part:

- (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. The provisions of this subsection shall not apply in the case of any child who has been adopted by any person other than a relative of the child or a stepparent of the child.

*Id.*

143. *Hawk*, 855 S.W.2d at 582.

144. *King*, 828 S.W.2d at 630-31.

after W.R. ordered Stewart and Ann to leave a house they occupied rent-free on his property.<sup>145</sup> Testimony at trial indicated that the parties' disagreements stemmed from W.R.'s feelings that his son drank too much and worked too little and Stewart and Ann's feelings that Stewart's father was intrusive and overbearing.<sup>146</sup> When W.R., who before the move had seen Jessica almost every day for sixteen months, asked Stewart and Ann to allow him to see Jessica after the move, they refused.<sup>147</sup> W.R. then filed for visitation rights pursuant to the Kentucky statute.<sup>148</sup> Stewart and Ann's answer argued that the statute violated the United States Constitution.<sup>149</sup> After a court-ordered psychological evaluation of all parties, including Jessica, and two hearings in circuit court, the trial court granted W.R. visitation, finding that Jessica's best interests would be served by the visitation.<sup>150</sup> The court of appeals reversed on the issue of the best interest of the child, without reaching the constitutional issue, and the Kentucky Supreme Court granted discretionary review.<sup>151</sup> The Kentucky Supreme Court examined whether the statute was constitutional and, if so, whether the trial court erred in determining that visitation was in Jessica's best interest.<sup>152</sup>

Stewart and Ann argued that the statute represented "an unwarranted intrusion into the liberty interest of parents to rear their children as they see fit"<sup>153</sup> under the Fourteenth Amendment to the United States Constitution.<sup>154</sup> The court rejected this argument.<sup>155</sup> The court acknowledged a United States Supreme Court decision that recognized the right to rear children without undue interference.<sup>156</sup> However, the Kentucky

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145. *Id.*

146. *Id.* at 630.

147. *Id.* at 630-31.

148. *Id.* at 631.

149. *Id.*; see *infra* note 156 and accompanying text.

150. *King*, 828 S.W.2d at 631.

151. *Id.*

152. *Id.*

153. *Id.*

154. U.S. CONST. amend. XIV, § 1 provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law . . ." *Id.*

155. *King*, 828 S.W.2d at 631-32.

156. *Id.* at 631 (citing *Meyer v. Nebraska*, 262 U.S. 390 (1923)). In *Meyer*, the Court stated that the guarantees of the Fourteenth Amendment include the right "to marry, establish a home and bring up children." *Meyer*, 262 U.S. at 399.

court stated that the “right is not inviolate,” and reasoned that the law imposes certain requirements on parents, such as sending their child to school and restraining a child when riding in cars, because they protect the safety, education, and welfare of children.<sup>157</sup> While acknowledging that a state cannot interfere with a liberty interest through “legislative action which is arbitrary or without reasonable relation to some purpose within the competence of the state to effect,”<sup>158</sup> the court looked at the “special bond” between grandparents and grandchildren.<sup>159</sup> The court stated that it is not unreasonable for a state to encourage a loving relationship between family members, as long as it is in the child’s best interest.<sup>160</sup> Stating that “[t]his statute seeks to balance the fundamental rights of the parents, grandparents and the child,”<sup>161</sup> the court held that the statute was constitutional and did not intrude too far on the parents’ fundamental rights.<sup>162</sup> Reiterating that the trial court had conducted two hearings and had reviewed psychological evaluations of all the parties, the court then held that the trial court did not err in determining that visitation between W.R. and Jessica would be in Jessica’s best interest.<sup>163</sup> The court concluded that a “trivial disagreement” should not prevent a grandparent and grandchild from developing a special bond.<sup>164</sup>

Two justices wrote strong dissenting opinions in *King*. Justice Lambert, advocating a parents’ rights approach, argued that “the issue is not whether visitation with a grandparent is desirable and in the best interest of the grandchild.”<sup>165</sup> Rather, the issue is whether the state, through a statute that incorporates only a subjective best interest standard, may invade an intact family

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157. *King*, 828 S.W.2d at 631.

158. *Id.* at 632 (quoting *Meyer*, 262 U.S. at 400).

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.* at 632-33.

164. *Id.* at 633; see also *Herndon v. Tuhey*, 857 S.W.2d 203, 208 (Mo. 1993) (en banc) (holding the Missouri grandparents’ visitation statute constitutional). The Missouri court stated that “the magnitude of the infringement by the state is a significant consideration in determining whether a statute will be struck down as unconstitutional.” *Id.* The court further stated: “All of the considerations discussed by the Kentucky Court [in *King*] in support of their statute are equally applicable to support the Missouri statute.” *Id.* at 210.

165. *King*, 828 S.W.2d at 633 (Lambert, J., dissenting).

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and force the parents to deliver a child for visitation with someone against the parents' wishes.<sup>166</sup> According to Justice Lambert, "the majority makes little pretense of constitutional analysis but depends entirely on the sentimental notion of an inherent value in visitation between grandparent and grandchild . . . . The fatal flaw in the majority opinion is its conclusion that a grandparent has a 'fundamental right' to visitation with a grandchild."<sup>167</sup> Justice Lambert compared this visitation issue with a custody dispute, which requires a showing of harm to the child by parental unfitness before depriving a natural parent of custody.<sup>168</sup> He suggested a similar showing, that harm to the child would result from being deprived of the child's grandparents, before finding the state's interest compelling enough to interfere in parents' Fourteenth Amendment liberty interests.<sup>169</sup>

Justice Wintersheimer used a similar constitutional analysis in his dissent.<sup>170</sup> He noted that "[a]ny interference upon the fundamental right of the parents must pass the constitutional test of harm to the child to support a compelling governmental interest which would permit such interference."<sup>171</sup> He concluded that the majority opinion was a "radical extension"<sup>172</sup> of the statute and that the "immediate intact family unit must take priority over the extended family unit."<sup>173</sup>

The United States Supreme Court was asked to review the *King* decision on a right-to-privacy theory and declined to do so.<sup>174</sup> The United States Supreme Court has thus far never entertained a case challenging grandparents' visitation rights.<sup>175</sup>

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166. *Id.*

167. *Id.*

168. *Id.* at 635.

169. *Id.*

170. *See id.* (Wintersheimer, J., dissenting).

171. *Id.* at 637 (citing 16A C.J.S. *Constitutional Law* § 464.a (1984)).

172. *Id.*

173. *Id.* at 638.

174. *King v. King*, 113 S. Ct. 378 (1992).

175. *Hawk v. Hawk*, 855 S.W.2d 573, 577 n.1 (Tenn. 1993).

*B. Hawk v. Hawk: A Return to the Parental Rights Approach in Tennessee?*

*Hawk v. Hawk* concerned a married couple, Bob and Bay Hawk, whose family history of “bickering and personality clashes” with Bob’s parents, Bill and Sue Hawk, resulted in their decision that they and their children, Megan and Steven, would no longer associate with the grandparents.<sup>176</sup> Bob worked for his father, and the two couples often attended church and social activities together.<sup>177</sup> The grandparents frequently baby-sat the children and often kept them overnight.<sup>178</sup> Nonetheless, some serious disputes arose between the parents and grandparents regarding the children’s discipline, activities, and schedules.<sup>179</sup> Eventually, the relationship between the parents and grandparents deteriorated to the point that Bob and Bay ended all contact with Bill and Sue and refused the grandparents’ efforts to see the children or send them gifts.<sup>180</sup> As a result, the grandparents petitioned for visitation with their grandchildren under Tennessee’s grandparents’ visitation statute.<sup>181</sup> The trial court awarded visitation and the court of appeals affirmed.<sup>182</sup>

On appeal to the Tennessee Supreme Court, the parents challenged the constitutionality of the Tennessee statute under the Fourteenth Amendment to the United States Constitution and, at the court’s request, under the state constitution as well.<sup>183</sup> The grandparents argued “that grandparent visitation is a ‘compelling state interest’ that warrants use of the state’s *parens patriae* power to impose visitation in [the] ‘best interests of the children.’”<sup>184</sup>

The Tennessee Supreme Court held that the state’s grandparents’ visitation statute is unconstitutional under the Tennessee Constitution as applied to Bob and Bay Hawk whose

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176. *Id.* at 575.

177. *Id.*

178. *Id.*

179. *Id.* at 575-76.

180. *Id.*

181. *Id.*

182. *Id.* at 575, 582.

183. *Id.* at 577.

184. *Id.* at 579 (footnote omitted). *Parens patriae* refers to the “role of [the] state as sovereign and guardian of persons under legal disability, such as juveniles or the insane.” BLACK’S LAW DICTIONARY 1114 (6th ed. 1990).

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fitness as parents had not been questioned.<sup>185</sup> The court thus did not reach the constitutionality of the statute under the United States Constitution.<sup>186</sup> However, looking to the interpretation of the United States Constitution for guidance, the Tennessee court stated that “the right to rear one’s children is so firmly rooted in our culture that the United States Supreme Court has held it to be a fundamental liberty interest protected by the Fourteenth Amendment . . . .”<sup>187</sup> The court noted that the United States Supreme Court has often reaffirmed this right<sup>188</sup> and has stated that this right is limited only if parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens.<sup>189</sup>

The relevant provision in the Tennessee Constitution, similar to the Fourteenth Amendment, provides that “no man shall be . . . deprived of his life, liberty or property, but by the judgment of his peers or the law of the land.”<sup>190</sup> The court reasoned that Tennessee has a “historically strong” interest in protecting parents’ rights.<sup>191</sup> Similar to the reasoning of the United States Supreme Court in other cases, the court held that parental rights are a fundamental liberty interest under the Tennessee Constitution.<sup>192</sup> The court further held that the liberty clauses of the Tennessee Declaration of Rights guarantee a right to individual privacy that “protects the right of parents to care for their children without unwarranted state intervention.”<sup>193</sup>

The Tennessee court rejected the grandparents’ argument that grandparent visitation is a compelling state interest that would justify invoking its *parens patriae* power to infringe upon parents’ state constitutional rights.<sup>194</sup> The court stated that absent a showing of potential harm to a child, the state lacks a “sufficiently compelling justification” for interfering in the parents’ fundamental right and may not intervene and determine

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185. *Hawk*, 855 S.W.2d at 577.

186. *Id.*

187. *Id.* at 578.

188. *Id.*; see, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 213-14 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510, 518 (1925).

189. *Hawk*, 855 S.W.2d at 578 (quoting *Yoder*, 406 U.S. at 233-34).

190. TENN. CONST. art. I, § 8.

191. *Hawk*, 855 S.W.2d at 579.

192. *Id.*

193. *Id.*

194. *Id.*



what it subjectively believes are the child's best interests.<sup>195</sup> By requiring a threshold finding of harm before a state may interfere in the parent-child relationship, the court discounted the Kentucky court's emphasis in *King* on the "special bond" between grandparent and grandchild as sentimental result-oriented.<sup>196</sup> The Tennessee court cited Justice Lambert's dissent in *King* in which he stated that the *King* majority's "assumption that deprivation of access to the grandparent is harm" is illogical and without authority.<sup>197</sup>

In reversing both the trial court and the court of appeals, the Tennessee Supreme Court stated that the trial court had made the same assumption that the *King* majority had made.<sup>198</sup> The supreme court stated that the trial court had merely paid "lip service" to the parents' rights to raise their child as they see fit and "imposed its own notion of the children's best interests over the shared opinion of these parents."<sup>199</sup>

The Tennessee Supreme Court limited its decision to married couples whose fitness as parents is unquestioned and whose actions do not substantially endanger the children's welfare.<sup>200</sup> In a footnote, the court observed that "the state has a stronger argument for court intervention to protect the extended family when the nuclear family has been dissolved."<sup>201</sup> The footnote suggests that the outcome would be different if the grandparents' visitation statute was challenged by, for example, a divorced couple or a single parent.<sup>202</sup>

### III. *KING OR HAWK*: GEORGIA'S SUPREME COURT DECIDES *BROOKS V. PARKERSON*

In 1995, *Brooks v. Parkerson*<sup>203</sup> answered the question whether, in the face of a challenge to the Georgia grandparents' visitation statute, the Georgia Supreme Court would adopt an

195. *Id.* at 579, 582.

196. *Id.* at 582; see *King v. King*, 828 S.W.2d 630, 632 (Ky. 1992).

197. *Hawk*, 855 S.W.2d at 582 (quoting *King*, 828 S.W.2d at 635).

198. See *id.*

199. *Id.*

200. *Id.*

201. *Id.* at 580 n.10.

202. See *id.*

203. *Brooks v. Parkerson*, 454 S.E.2d 769 (Ga. 1995), *petition for cert. filed*, 63 U.S.L.W. 49 (U.S. June 15, 1995) (No. 94-2068) (found in Table of Cases and Case Status Report).

approach like that in *King*, which recognizes significant grandparents' rights, or apply an analysis more consistent with *Hawk*, which emphasizes the parents' fundamental constitutional rights.

The plaintiff-appellee in *Brooks* was the maternal grandmother of the Brooks' daughter.<sup>204</sup> Following a disagreement with the parents, the grandmother was denied contact with her granddaughter. She then filed a petition for visitation pursuant to Code section 19-7-3.<sup>205</sup> The parents filed a motion to dismiss in the trial court, arguing the statute was unconstitutional.<sup>206</sup> Upon denial of that motion, the parents applied for, and were granted, discretionary appeal by the Georgia Supreme Court.<sup>207</sup>

In contrast to Kentucky's *King* decision, which addressed its discussion solely to the issue under the United States Constitution,<sup>208</sup> and Tennessee's *Hawk* decision, which focused on the state constitution,<sup>209</sup> the Georgia Supreme Court declared Georgia's statute unconstitutional under both the Georgia Constitution and the United States Constitution.<sup>210</sup> In reaching this conclusion, the court applied a two-part analysis in which it first identified the interests at issue and then analyzed the extent to which the state could infringe on those rights.<sup>211</sup>

The majority opinion relied heavily on a line of United States Supreme Court cases that had recognized a constitutionally protected interest of parents to raise their children without undue state interference.<sup>212</sup> Although concentrating mainly on the liberty interest of the Fourteenth Amendment, the Georgia court also noted: "Although the parents' right to rear children without state interference is largely expressed as a 'liberty' interest, the Supreme Court has also noted that that right

204. *Id.* at 770.

205. Appellee Elizabeth Parkerson's Response to Appellants' Stacy Elizabeth Brooks' and William David Brooks' Brief at 1, *Brooks v. Parkerson*, 454 S.E.2d 769 (Ga. 1995).

206. *Brooks*, 454 S.E.2d at 770.

207. *Id.*

208. *King v. King*, 828 S.W.2d 630 (Ky.), *cert. denied*, 113 S. Ct. 378 (1992).

209. *Hawk v. Hawk*, 855 S.W.2d 573, 577 (Tenn. 1993).

210. *Brooks*, 454 S.E.2d at 774.

211. *Id.* at 771-73.

212. *Id.* 771-72; *see, e.g.*, *Santosky v. Kramer* 455 U.S. 745 (1982); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Ginsberg v. New York*, 390 U.S. 629 (1968); *Prince v. Massachusetts* 321 U.S. 158 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

derives from privacy rights inherent in the constitution.<sup>213</sup> The court also held that parents have comparable interests under the Georgia Constitution.<sup>214</sup> Article I, Section 1, Paragraph 1 of the Georgia Constitution provides that “[n]o person shall be deprived of life, liberty, or property except by due process of law.”<sup>215</sup> This provision is virtually identical to the Tennessee provision<sup>216</sup> and the Fourteenth Amendment of the U.S. Constitution.<sup>217</sup>

In the second step of its analysis, the court examined under what conditions the state may interfere with the parents’ liberty interest in raising their children.<sup>218</sup> Again, the court looked to the United States Supreme Court, stating that the Court “has made clear that state interference with a parent’s right to raise children is justifiable only where the state acts in its police power to protect the child’s health or welfare, and where parental decisions in the area would result in harm to the child.”<sup>219</sup> The court also specifically followed the reasoning of the Tennessee court in *Hawk* finding it “implicit in Georgia case, statutory and constitutional law . . . that state interference with parental rights to custody and control of children is permissible only where the health or welfare of a child is threatened.”<sup>220</sup>

Under this analysis, the court found that the grandparents’ visitation statute “falls short both in its apparent attempt to provide for a child’s welfare and in its failure to require a showing of harm before visitation can be ordered.”<sup>221</sup> Although the state’s police powers permit interference in limited circumstances to protect or promote a child’s health or welfare, the court found no evidence that grandparent visitation would consistently serve that end.<sup>222</sup> The court further noted that a suit to enforce grandparents’ visitation rights over the objection of a child’s parents could, in fact, have the opposite effect.<sup>223</sup> The court may have attempted to soften the blow by stating that it recognized the bond that often exists between grandparents

213. *Brooks*, 454 S.E.2d at 772.

214. *Id.* at 5.

215. GA. CONST. art. I, § 1, ¶ 1.

216. See TENN. CONST. art. 1, § 8; *supra* note 190 and accompanying text.

217. See U.S. CONST. amend. XIV, § 1; *supra* note 154.

218. *Brooks*, 454 S.E.2d at 772-73.

219. *Id.* at 772.

220. *Id.* at 773.

221. *Id.*

222. *Id.*

223. *Id.*

and their grandchildren and that there is an "explicit policy in this state to 'encourage that a minor child has continuing contact with parents and grandparents.'"<sup>224</sup> However, the court concluded by stating that, in the face of parental objection, the state may only impose visitation "on a showing that failing to do so would be harmful to the child."<sup>225</sup>

Justice Sears wrote a moving concurrence, acknowledging that "[g]randparents can be important to the family mixture,"<sup>226</sup> but stating that despite the benefits grandparents can bring to the lives of their grandchildren, ultimately "the relationship between parent and child is paramount."<sup>227</sup> Accordingly, Justice Sears reasoned, nothing short of "a showing of absolute necessity" would be sufficient to support the "constitutionality of the political correctness"<sup>228</sup> of the visitation statute. Justice Sears wrote eloquently of the disappointments and triumphs of being a parent.<sup>229</sup> Sears concluded that nothing, even the good but unwelcome intentions of grandparents, should "separate fit parents from responsibility for and authority over their children."<sup>230</sup>

In his dissent in *Brooks*, Justice Benham criticized the majority for ignoring rules of statutory construction that require a court to "presume that a statute is valid and constitutional until the contrary appears" and to "construe a statute in such a way as to find it constitutional."<sup>231</sup> Justice Benham further criticized the majority for following the Tennessee Supreme Court's reasoning in *Hawk*, stating "what may fit Tennessee does not necessarily fit Georgia."<sup>232</sup> However, the dissent seemed to follow the approach of the Kentucky court in *King*, noting that the right to raise children without undue state interference is not absolute.<sup>233</sup>

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224. *Id.* (quoting O.C.G.A. § 19-9-3(d) (Supp. 1994)).

225. *Id.*

226. *Id.* at 778 (Sears, J., concurring).

227. *Id.*

228. *Id.*

229. *See id.* at 779.

230. *Id.* at 780.

231. *Id.* at 774 (Benham, J., dissenting).

232. *Id.* at 774-75. In making his criticism, Justice Benham seems to ignore that the relevant provisions in the Tennessee, Georgia, and United States Constitutions are virtually identical. *See* TENN. CONST. art. I, § 8; GA. CONST. art. I, § 1, ¶ 1; U.S. CONST. amend. XIV, § 1.

233. *See Brooks*, 454 S.E.2d at 775 (Benham, J., dissenting).

Noting that, as *parens patriae*, the state may impose certain restrictions such as mandatory education, inoculations, curfews,<sup>234</sup> and a child's name change,<sup>235</sup> the dissent concluded that "it is clear that the State may impose reasonable regulations that do not substantially interfere with the parents' fundamental right."<sup>236</sup> The dissent suggested that absent a direct and substantial interference with parents' fundamental rights, a statute such as the one at issue need only be reasonably related to a legitimate state interest.<sup>237</sup> The dissent cited the holdings of other states' courts in support of its *parens patriae* argument.<sup>238</sup> The dissent never seems to meet the majority's "fundamental rights" argument directly and instead relies on the fact that the statute merely confers standing on grandparents to petition for visitation and allows discretion by the trial court.<sup>239</sup> Moreover, the dissent argues the granting of visitation is not a permanent deprivation of parents' rights, but is limited and temporary.<sup>240</sup> As such, the dissent declares the statute to be "a legitimate exercise of the General Assembly's power to balance the competing interests of children, their parents, and their grandparents."<sup>241</sup> Thus, the dissent concludes that the statute does not "directly or substantially interfere with the parental rights, and is rationally related to a legitimate legislative goal."<sup>242</sup>

Previous hints in Georgia law made the outcome in *Brooks* predictable in most respects. First, the Georgia Supreme Court has previously expressed its opinion as to who should have control over children when there are differences between the parents and grandparents.<sup>243</sup> In *Sachs v. Walzer*, when maternal grandparents sought to continue visitation after their

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234. *Id.*

235. *Id.* at 775-76.

236. *Id.* at 775.

237. *Id.* If a statute "directly and substantially interferes" with parents' fundamental rights, Justice Benham argues that the court should invoke strict scrutiny. *Id.*

238. *Id.* at 776-77.

239. *See id.* at 777-78. The dissents also makes a distinction between a statute that confers a substantive right and one that merely provides a "procedural vehicle." *Id.* at 777.

240. *Id.*

241. *Id.*

242. *Id.*

243. *Spitz v. Holland*, 252 S.E.2d 406 (Ga. 1979); *Sachs v. Walzer*, 251 S.E.2d 302 (Ga. 1978); *see supra* notes 54-59, 64-73 and accompanying text.

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widowed son-in-law remarried and his new wife adopted the children, the court stated that the exclusive control over when and with whom children may visit should lie with their parents.<sup>244</sup> Further, the court stated that "where there are differences between the parents and grandparents, we see no reason why the courts should encourage litigation to the harassment of the parents in whom rests exclusive control of the child."<sup>245</sup> Although *Sachs* predates all the statutory amendments to Code section 19-7-3 and did not involve an intact family, it is hard to imagine that since the court made such statements in a case involving a remarriage that it would state otherwise in a case involving an intact family. Moreover, before the statute was enacted, Georgia courts had shown a marked preference for the parents' rights approach.<sup>246</sup> Even after the statute's enactment, some courts continued to use the parents' rights standard and did not employ the best interests standard until it was expressly established by the second amendment to the statute in 1981.<sup>247</sup>

Second, the Georgia courts use the best interests standard in custody and most other matters regarding children only when the dispute is between parents.<sup>248</sup> Between parents and third parties, courts often use the parents' rights standard, unless there is clear and convincing evidence that the parents are unfit.<sup>249</sup> For this reason, too, it was likely that the Georgia Supreme Court would examine the constitutionality of Code section 19-7-3 using the parents' rights approach.

What is somewhat surprising about the *Brooks* decision is that although the specific issue in *Brooks* concerned the right of grandparents to seek visitation over the objections of fit, married parents,<sup>250</sup> the court held the statute unconstitutional without reference to family status.<sup>251</sup> Thus, it appears that

244. *Sachs*, 251 S.E.2d at 303.

245. *Id.*

246. See *supra* Part I.A; see also *Sostek*, *supra* note 11, at 1086-99.

247. See, e.g., *Spitz*, 252 S.E.2d 406; *Sachs*, 251 S.E.2d 302; see also 1981 Ga. Laws 1318 (current version at O.C.G.A. § 19-7-3 (Supp. 1994)); *supra* Part I.C.2.

248. See, e.g., *Dorminy v. Dorminy*, 249 S.E.2d 49, 49 (Ga. 1978).

249. See, e.g., *Gazaway v. Brackett*, 244 S.E.2d 238, 240 (Ga. 1978).

250. Brief of Appellants Stacy Elizabeth Brooks and William David Brooks at 3, *Brooks v. Parkerson*, 454 S.E.2d 769 (Ga. 1995).

251. See *Brooks*, 454 S.E.2d 769 (Ga. 1995); cf. *Hawk v. Hawk*, 855 S.W.2d 573, 582 (Tenn. 1993) (making clear that the court found the state's grandparents' visitation statute unconstitutional only as applied to married couples whose fitness as parents

grandparents have not only lost the right to file an original petition for visitation, but also to intervene in custody and divorce actions already before the court.<sup>252</sup>

#### CONCLUSION

Now that the Georgia Supreme Court has struck down the grandparents' visitation statute, what, if anything, may be done to try to balance the interests of grandparents, parents, and grandchildren? The majority left the door open for a narrowly drawn statute to pass constitutional muster.<sup>253</sup> The statute could be amended to enumerate factors a court should consider when trying to determine the best interests of the child, such as the child's age and gender, the child's wishes, the parents' reasons for the decision not to allow visitation, the child's relationship with the grandparents, and the effect of the visitations on the child and the child's family. Some states have enumerated such factors.<sup>254</sup> Such an amendment has been proposed at least once in Georgia, but did not pass.<sup>255</sup> Such a

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is unquestioned).

252. It would be difficult, if not impossible, to envision circumstances in which a state would be justified in imposing grandparent visitation in a non-intact family when there is no question of parental unfitness. Such a decision seems to invite an equal protection challenge. However, the Tennessee Supreme Court suggested otherwise in *Hawk. Hawk*, 855 S.W.2d at 580 n.10.

253. See *Brooks*, 454 S.E.2d 769 (Ga. 1995). In *Brooks*, the court stated the statute is unconstitutional "because it does not clearly promote the health or welfare of the child and does not require a showing of harm before state interference is authorized." *Id.* at 774.

254. See, e.g., IND. CODE § 31-1-11.5-21 (1987) (providing factors courts should consider including: age and sex of the child; the wishes of child and the child's parent(s); the relationship among the child and the child's parent(s), siblings, and third parties who may significantly affect the child's best interests; the child's adjustment to home, school, and community; and the mental and physical health of all persons involved).

255. For example, SB 759, introduced in 1992, suggested adding a subsection to O.C.G.A. § 19-7-3. The proposed subsection provided:

(d) Factors to be used in determining whether grandparent visitation is in the best interest of the child shall include, but shall not be limited to, the following:

(1) The nature and quality of the relationship between the grandparent and the child, including such factors as whether emotional bonds have been established and whether the grandparent has enhanced or interfered with the parent-child relationship;

(2) Whether visitation will promote or disrupt the child's psychological development;

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statute would require, in lieu of the "special circumstances" proof required in the present law, a showing that allowing visitation promotes the health or welfare of the grandchild and that failing to allow visitation would be so harmful to the child that the state has a compelling need to impose visitation. Such an amendment would admittedly reduce some of the discretionary power given to the courts in the statute in its present form, but could also serve to inject some objectivity into the decisions and create more consistent results in what are invariably fact-bound and emotional cases.

It has also been suggested that the focus of the statute should not be only on grandparents, but on the caregiving role of the person seeking visitation.<sup>256</sup> If, for example, a child spent a substantial part of the child's life living with an aunt, the aunt would possibly be able to meet her burden of proving that the child's welfare will be promoted through maintained contact and that harm would result in its absence. She should not be prevented from doing so because she is an aunt and not a grandparent.<sup>257</sup>

Also, a mediation board should be established to help in some of the grandparents' visitation disputes.<sup>258</sup> Perhaps in a setting calmer than a courtroom, a compromise could be worked out

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(3) Whether visitation will create friction between the child and his or her parent or parents;

(4) Whether visitation will provide support and stability for the child after a nuclear family disruption;

(5) The capacity of the adults involved for future compromise and cooperation in matters involving the child;

(6) The child's wishes, if the child is able to freely form and express a preference; and

(7) Any other factor relevant to a fair and just determination regarding visitation.

SB 759, as introduced, 1992 Ga. Gen. Assem.

256. Telephone Interview with Timothy McCreary, Attorney at Law (Mar. 22, 1995). Although Mr. McCreary represented the parents-appellants in *Brooks v. Parkerson*, he is confident that the legislature could craft appropriate legislation that would protect the rights of all parties in a visitation dispute. *Id.*

257. *Id.* Drafting legislation in this way could avoid challenges to any revised statute based on an equal protection argument. *Id.*

258. Currently, at least one county, Cobb County, in the metropolitan Atlanta area has mandatory mediation for parents in all domestic cases in which custody is at issue, and judges in other metropolitan counties urge it, or even require it, on a case-by-case basis. Interview with M. Debra Gold, Attorney at Law, in Atlanta, Ga. (March 20, 1995).



between the parties. The animosity that usually results from litigation is not in anyone's best interests, certainly not a child's.

*Cynthia F. Zebrowitz*