COMMENTS

THE COMING OF AGE OF GRANDPARENT VISITATION RIGHTS

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INTRODUCTION

As the nature of the American family changes, family law also changes.[1] One rapidly emerging area of family law is the legal right of grandparents to visit with their grandchildren.[2] In response to the increasing number of unmarried or divorced parents, the existence of step-families, the estrangement of extended families,[3] the decrease

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1. *See Grandparents: The Other Victims of Divorce and Custody Disputes: Hearing Before the Subcomm. on Human Services of the House Select Comm. on Aging*, 97th Cong., 2d Sess. 71 (1982) [hereinafter *1982 House Hearing*] (statement of Dr. Andre Derdeyn, Director, University of Virginia Child and Family Psychiatry Training Program) (explaining that "changes in the field of child custody and visitation in the United States which have occurred over most of the last three hundred years have evolved gradually as part of other social changes"); *see also* Ross A. Thompson et al., *Grandparents' Visitation Rights: Legalizing the Ties That Bind*, 44 AM. PSYCHOL. 1217, 1217 (1989) (suggesting that policy makers must be careful not to change nature of families through laws, but merely create laws to accommodate those changes in family life that have already occurred).

2. *See 1982 House Hearing*, *supra* note 1, at 71 (statement of Dr. Andre Derdeyn, Director, University of Virginia Child and Family Psychiatry Training Program) (noting that grandparent visitation statutes "have burst quite recently upon the scene").

3. *See* Hicks v. Enlow, 764 S.W.2d 68, 70-71 (Ky. 1989) (explaining that "grandparents' visitation statute was an appropriate response to the change in the demographics of domestic relations, mirrored by the dramatic increases in the divorce rate and in the number of children born to unmarried parents, and the increasing independence and alienation within the extended family inherent in a mobile society"); *Grandparents' Rights: Preserving Generational Bonds: Hearing Before the Subcomm. on Human Services of the House Select Comm. on Aging*, 102d Cong., 1st Sess. 3 (1991) [hereinafter *1991 House Hearing*] (statement of Rep. Snowe) (noting that soaring divorce rates, increased family mobility, fractured extended families, and politically active grandparents with increased life spans have resulted in increased focus on grandparent visitation laws); Sara S. Rorer, Comment, *Grandparents' Visitation Rights in Ohio: A Procedural Quagmire*, 56 U. CIN. L. REV. 295, 296 (1987) (indicating that grandparent visitation statutes arose in response to rising divorce rate and changing attitudes about child custody); Joseph L. Galloway & Patricia A. Avery, *America's Forgotten Resource: Grandparents*, U.S. NEWS & WORLD REP., Apr. 30, 1984, at 76, 76 (reporting that social changes in recent years, including increased mobility and high

in the number of grandchildren,[4] and the increased longevity of grandparents,[5] all fifty states, but not the District of Columbia, have enacted statutes giving grandparents visitation rights.[6] These statutes are due largely to the well-organized efforts of grandparents and their supporters, who have joined together to ensure that the law preserves the "special" relationship between grandparents and grandchildren.[7]

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divorce rates, have resulted in loss of grandparent-grandchild relationships).

4. *See* Sarah H. Matthews & Jetse Sprey, *The Impact of Divorce on Grandparenthood: An Exploratory Study*, 24 GERONTOLOGIST 41, 45 (1984) (noting that decrease in number of grandchildren in United States due to declining birth rate would logically result in greater efforts by grandparents to ensure grandparent visitation rights).

5. *See 1991 House Hearing*, *supra* note 3, at 3 (statement of Rep. Snowe) (noting that grandparents are retiring earlier, living longer, and becoming more politically active); *see also 1982 House Hearing*, *supra* note 1, at 1-2 (statement of Rep. Biaggi) (noting that current life expectancies suggest that adults will spend 20 to 30 years of their lives as grandparents); Judith L. Shandling, Note, *The Constitutional Constraints on Grandparents' Visitation Statutes*, 86 COLUM. L. REV. 118, 121 (1986) (noting that longer life expectancies increase average amount of time person will spend as grandparent).

6. *See* ALA. CODE § 30-3-4 (1989); ALASKA STAT. § 25.24.150 (1991); ARIZ. REV. STAT. ANN. § 25-337.01 (Supp. 1993); ARK. CODE ANN. § 9-13-103 (Michie 1991); CAL. CIV. CODE § 197.5 (West 1983 & Supp. 1993); COLO. REV. STAT. § 19-1-117 (Supp. 1993); CONN. GEN. STAT. § 46b-59 (West 1986); DEL. CODE ANN. tit. 10, § 950(7) (Supp. 1992); FLA. STAT. ANN. ch. 752.01 (Harrison Supp. 1992); GA. CODE ANN. § 19-7-3 (Supp. 1993); HAW. REV. STAT. § 571-46(7) (Supp. 1992); IDAHO CODE § 32-1008 (1983); ILL. ANN. STAT. ch. 750, para. 5/607(b)(1) (Smith-Hurd 1993); IND. CODE ANN. § 31-1-11.7-2 (Burns Supp. 1993); IOWA CODE ANN. § 598.35 (West Supp. 1993); KAN. STAT. ANN. § 60-1616(b) (1983); KY. REV. STAT. ANN. § 405.021 (Baldwin 1991); LA. CIV. CODE ANN. art. 132(B) (West 1993); ME. REV. STAT. ANN. tit. 19, §§ 1001-1004 (West Supp. 1993); MD. CODE ANN., FAM. LAW § 9-102 (1991); MASS. ANN. LAWS ch. 119, § 39(d) (Law. Co-op. Supp. 1992); MICH. STAT. ANN. § 25-312(7b) (Callaghan 1992); MINN. STAT. ANN. § 257.022 (West 1992); MISS. CODE ANN. § 93-16-3 (Supp. 1993); MO. ANN. STAT. § 452.402 (Vernon Supp. 1993); MONT. CODE ANN. § 40-9-102 (1993); NEB. REV. STAT. § 43-1802 (1988); NEV. REV. STAT. § 125A.340 (1991); N.H. REV. STAT. ANN. § 458:17-d (1992); N.J. STAT. ANN. § 9:2-7.1 (West 1993); N.M. STAT. ANN. § 40-9-2 (Michie 1989); N.Y. DOM. REL. LAW § 72 (McKinney 1989); N.C. GEN. STAT. § 50-13.2 (1987); N.D. CENT. CODE § 14-09-05.1 (Supp. 1993); OHIO REV. CODE ANN. §§ 3109.051 & 3109.11 (Anderson 1972 & Supp. 1992); OKLA. STAT. ANN. tit. 10, § 5 (West 1987 & Supp. 1993); OR. REV. STAT. § 109.121 (1991); 23 PA. CONS. STAT. ANN. §§ 5311-12 (1991); R.I. GEN. LAWS § 15-5-24.1 through 15-5-24.3 (1988); S.C. CODE ANN. § 20-7-420(33) (Law. Co-op. 1985); S.D. CODIFIED LAWS ANN. §§ 25-4-52 through 25-4-54 (1992); TENN. CODE ANN. § 36-6-301 (1991); TEX. FAM. CODE ANN. § 14.03(e) (West Supp. 1993); UTAH CODE ANN. § 30-5-2 (Supp. 1993); VT. STAT. ANN. tit. 15, §§ 1011-16 (1989); VA. CODE ANN. § 20-107.2 (Michie Supp. 1993); WASH. REV. CODE ANN. § 26.09.240 (West Supp. 1992); W. VA. CODE § 48-2B (1993); WIS. STAT. ANN. § 767.245 (West 1993); WYO. STAT. § 20-2-113(c) (1987); *see also* Richard S. Victor et al., *Statutory Review of Third-Party Rights Regarding Custody, Visitation, and Support*, 25 FAM. L.Q. 19, 52-53 (1991) (including chart of all 50 grandparent visitation statutes and respective enactments); Phyllis C. Borzi, Note, *Statutory Visitation Rights of Grandparents: One Step Closer to the Best Interests of the Child*, 26 CATH. U. L. REV. 387, 387-401 (1977) (recording that in 1977 only six states had grandparent visitation statutes).

7. *See 1991 House Hearing*, *supra* note 3, at 2 (statement of Rep. Downey) (claiming that senior citizens are "the most active lobby in this country, and when it comes to grandparents there is no one group more united in their purpose"); GRANDPARENT VISITATION DISPUTES: A LEGAL RESOURCE MANUAL 1 (Ellen C. Segal & Naomi Karp eds., 1989) [hereinafter GRANDPARENT VISITATION MANUAL] (reporting that grandparents are becoming increasingly vocal about being denied visitation rights with grandchildren); Edward M. Burns, *Grandparent Visitation Rights: Is It Time for the Pendulum to Fall?*, 25 FAM. L. Q. 59, 59 (1991) (acknowledging that older Americans currently are more vocal about expressing their concerns than they had been previously); Andre P. Derdeyn, *Grandparent Visitation Rights: Rendering Family Dissension More*

The legal entitlement of grandparents to visit with their grandchildren, however, remains in a state of flux.[8] The Supreme Court has traditionally deferred to state legislatures and state courts on family law matters, particularly on grandparent visitation rights.[9] The

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Pronounced, 55 AM. J. ORTHOPSYCHIATRY 277, 282 (1985) (suggesting that increased demand for grandparent visitation rights is due to today's generation of healthier, more powerful grandparents and to receptive legislators who recognize political power held by grandparents); Matthews & Sprey, *supra* note 4, at 45 (theorizing that expanding kinship systems due to divorce and decrease in number of grandchildren due to declining birth rate have combined to encourage grandparents to make concerted efforts to protect relationships with their grandchildren); Katrine Ames, *Grandma Goes to Court*, NEWSWEEK, Dec. 2, 1991, at 67, 67 (stating that "[v]isitation rights have become one of the most emotional issues of the growing grandparents' movement").

Several organizations assist grandparents in pursuing visitation rights with grandchildren, including Grandparents Anonymous, the Child Welfare League of America, the American Association of Retired People, and the National Council of Senior Citizens. In January of 1993, approximately 200 people converged on the Georgia State Capitol for a candlelight vigil expressing concern over the welfare of that state's children. *Candlelight Vigil to Underscore Concern for Georgia Children*, PR NEWSWIRE, Jan. 8, 1993, *available in* LEXIS, Nexis Library, Majpap File. The vigil was organized by The Georgia Council for Children's Rights (GCCR) and included, as part of the vigil, a listing of GCCR's six legislative goals for 1993, which included the "protection of multi-generational relationships." *Id.* The vigil also included a tribute to the Supreme Court's recent decisions to deny certiorari in cases upholding grandparents' visitation rights. *Id.* (referring to King v. King, 828 S.W.2d 630, 630-33 (Ky.), *cert. denied*, 113 S. Ct. 378 (1992) and H.F. v. T.F., 483 N.W.2d 803, 804-07 (Wisc.), *cert. denied*, 113 S. Ct. 408 (1992)). Previously, in July of 1992, 50 groups supporting grandparents' rights merged in Washington, D.C. to form the National Coalition of Grandparents. Sharon Theimer, *Grandparents Pressing Visitation Rights*, L.A. TIMES, Dec. 27, 1992, at A4.

8. Although all fifty states have enacted some form of a grandparent visitation statute, several states are currently considering legislation to amend their statutes. *See, e.g.*, Ariz. S. 1422, 41st Leg., Reg. Sess. (1993) (including stepgrandparents and great-grandparents among third parties able to petition for visitation); Colo. H. 1224, 59th Gen. Assembly, 1st Reg. Sess. (1993) (regarding grandparent visitation rights); Fla. S. 484, 13th Leg., 1st Reg. Sess. (1993) (providing additional grounds for granting grandparent visitation and providing additional factors in determining "best interests of the child"); Ga. H. 573, 142d Gen. Assembly, 1st Sess. (1993) (providing further definitions regarding grandparent visitation); Ind. S. 92, 108th Leg. Sess. (1993) (granting visitation to grandparents when custody has been given to grandparents' child); Iowa S. 213, 72d Gen. Assembly, 1st Reg. Sess. (1993) (relating to grandparent visitation); La. H. 663, Reg. Sess. (1993) (removing requirement that parents be interdicted, divorced, or dead for court to award grandparents visitation); Md. S. 612, 407th Leg. Sess. (1993) (broadening courts authority to grant grandparents visitation); Mich. S. 97, 87th Leg., Reg. Sess. (1993) (deleting grandparent visitation rights provision from adoption code); Minn. S. 106, 78th Leg. Sess. (1993) (regarding grandparent visitation rights); Miss. H. 986, 162d Leg. (1993) (providing grandparents visitation rights with adopted grandchildren); Mo. S. 264, 87th Leg. Assembly, 1st Reg. Sess. (1993) (providing presumption that when parents are married, they know what is in child's best interests regarding visitation); N.M. H. 225, 41st Leg., 1st Reg. Sess. (1993) (relating to grandparent visitation rights); Ore. H. 2588, 67th Leg. Assembly (1993) (allowing for mediation in grandparent visitation disputes); W. Va. H. 2703, 71st Leg., 1st Reg. Sess. (1993) (relating to grandparent visitation rights).

9. The Supreme Court denied certiorari and, thereby, implicitly upheld state supreme court decisions in King v. King, 828 S.W.2d 630, 630-33 (Ky.) (granting paternal grandfather right to visit with his granddaughter over objections of child's married, natural parents), *cert. denied*, 113 S. Ct. 378 (1992) and H.F. v. T.F., 483 N.W.2d 803, 804-07 (Wisc.) (granting paternal grandparents right to visit with grandchild despite adoption of child by stepfather), *cert. denied*, 113 S. Ct. 408 (1992). Both decisions boldly confirm the rights of grandparents to visit with their grandchildren, despite adoption of a child by a stepparent or the desires of a child's happily married, fit, natural parents to forbid visitation. These decisions will have a strong

Court's recent decision to deny certiorari in state grandparent visitation cases[10] provided little guidance to the states on how to interpret the constitutional breadth and depth of grandparent visitation rights.[11]

Congress has also refrained from acting on family law matters, proceeding on the assumption that family law is an area of state domain.[12] In 1983, Congress passed a resolution calling for the adoption of a uniform state act on grandparent visitation rights.[13] Despite mounting support for grandparent visitation rights, the discussion and controversy this issue has generated,[14] and additional congressional hearings on the topic in 1991,[15] the states have not acted on Congress' call for a uniform act.[16]

Also contributing to the uncertainty of grandparent visitation is the commonly used, but ill-defined, "best interests of the child" standard, which is a lodestar for courts to determine whether grandparent visitation should be allowed.[17] Because most grandparent visitation

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impact on the continuing development of grandparents' visitation rights in the future and enunciate some of the current fluctuations in the law regarding grandparent visitation.

10. *See supra* note 9 (discussing *King v. King* and *H.F. v. T.F.*).

11. *See* Theimer, *supra* note 7, at A4 (reporting that Supreme Court's rejection without comment of parent's appeal in *T.F. v. H.F.* does not clarify for grandparents or lower courts what rights of visitation grandparents actually possess or how extensive those rights are).

12. *See* U.S. CONST. art. I, § 8 (enunciating powers of Congress, which do not encompass power over family law or grandparents' visitation rights matters); U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); *see also* A BRIEFING BY THE CHAIRMAN OF THE SUBCOMM. ON HUMAN SERVICES OF THE HOUSE SELECT COMM. ON AGING, GRANDPARENTS: NEW ROLES AND RESPONSIBILITIES 102d Cong., 2d Sess. 1 (Comm. Print 1992) [hereinafter *1992 Briefing*] (stating that Congress does not have authority over family law matters); GRANDPARENT VISITATION MANUAL, *supra* note 7, at 1 (asserting that state law traditionally governs domestic relations).

13. S. Con. Res. 40, 98th Cong., 1st Sess., 129 CONG. REC. 13,487 (1983) (enacted) ("[A] uniform State act should be developed and adopted which provides grandparents with adequate rights to petition State courts for privileges to visit their grandchildren following the dissolution (because of divorce, separation, or death) of the marriage of such grandchildren's parents, and for other purposes.").

14. *See 1982 House Hearing*, *supra* note 1, at 2 (statement of Rep. Biaggi) (commenting that upon announcement of House Hearings on grandparent visitation rights, there was "an influx of calls and letters from across the Nation").

15. *See 1991 House Hearing*, *supra* note 3, at 3 (statement of Rep. Snowe) (noting that purpose of hearing is to examine relationship between grandparent and grandchild).

16. *See 1991 House Hearing*, *supra* note 3, at 2 (statement of Rep. Downey) (noting that although Congress attempted to indirectly resolve problem of grandparent visitation through congressional resolution, states did not follow suit); *1992 Briefing*, *supra* note 12, at 1 (statement of Rep. Downey) (noting that Congress has been unable "to influence the states to adopt uniform grandparent visitation laws").

17. *See 1991 House Hearing*, *supra* note 3, at 16 (statement of John H. Pickering, Chair, Commission of Legal Problems of the Elderly, American Bar Association) (commenting that judges render inconsistent decisions because many state grandparent visitation statutes do not provide adequate standards and that highly defined, objective criteria would result in more principled decisions); *1982 House Hearing*, *supra* note 1, at 73 (statement of Judith Areen, Professor of Law, Georgetown University Law Center, and Professor of Community and Family

statutes do not indicate how to determine what is in the best interests of the child,[18] this difficult determination is left to the discretion and proclivities of the presiding judge.[19] Without guidance from the statutes, most courts embrace the notion that grandparents' visitation with grandchildren is beneficial.[20] Thus, courts do not fully analyze

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Medicine, Georgetown University Medical Center) (admitting that familiar standard of "best interests of the child" is too vague); GRANDPARENT VISITATION MANUAL, *supra* note 7, at 12 (acknowledging that familiar "best interests of the child" standard is vague and too broadly defined); Kathleen S. Bean, *Grandparent Visitation: Can the Parent Refuse?*, 24 J. FAM. L. 393, 394 (1985-86) (noting that although "best interests of the child" is commonly used standard for determining visitation rights, most courts fail to analyze specific needs of particular child involved); Rebecca Brown, *Grandparent Visitation and the Intact Family*, 16 S. ILL. U. L.J. 133, 146-47 (1991) (stating that primary problem with majority of states' grandparent visitation statutes is that "best interests of the child" has not been defined by legislature, and thus courts have enormous amount of discretion in deciding issue); Thompson et al., *supra* note 1, at 1219 (noting that basic problem with grandparent visitation statutes is failure to define "best interests of the child" standard).

18. *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-337.01 (1989 & Supp. 1992); ARK. CODE ANN. § 9-13-103 (Michie 1991); MD. CODE ANN., FAM. LAW § 9-102 (1991); N.Y. DOM. REL. LAW § 72 (McKinney 1989); UTAH CODE ANN. §§ 30-5-1, -2 (1989); WASH. REV. CODE ANN. § 26.09.240 (West 1989 & Supp. 1992); WIS. STAT. ANN. § 767.245 (West 1989 & Supp. 1992); *see also* Judy E. Nathan, *Visitation After Adoption: In the Best Interests of the Child*, 59 N.Y.U. L. REV. 633, 633 (1984) (commenting that notion of "best interests of the child" defies precise definition); Patrícia S. Fernández, *Grandparent Access: A Model Statute*, 6 YALE L. & POL'Y REV. 109, 122 n.62 (1988) (stating that only three state statutes provide criteria for determining "best interests of the child"). *But see 1982 House Hearing*, *supra* note 1, at 73 (statement of Judith Areen, Professor of Law, Georgetown, and Professor of Community and Family Medicine, Georgetown University Medical Center) (noting that although "best interests of the child" standard is too vague, it does focus on child, who is one most likely to suffer as result of conflict between adult members of family).

19. *See* Fernández, *supra* note 18, at 123 (asserting that "in states without enumerated criteria[,] the decisions are generally based on whatever criteria the judge feels is important").

20. *See, e.g.*, Mimkom v. Ford, 332 A.2d 199, 204-05 (N.Y. 1975). The court noted:

> [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 parents 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.

See also Bean, *supra* note 17, at 395 (articulating that most grandparent visitation cases presume that child benefits as result of visitation, and that detrimental effect of visitation must be shown to rebut presumed value of visitation); Ames, *supra* note 7, at 67 (noting psychologist's comments that in almost every case it is in child's best interest to visit with her grandparents); Galloway & Avery, *supra* note 3, at 76 (reporting comment of granddaughter that grandparent-grandchild relationship is special and uniquely different from relationships with parents because grandparents can be more objective and provide different perspective).

While a court's notion that visitation between grandparents and grandchildren is inherently beneficial may be misplaced in terms of adjudicating the rights of the parties, grandparents often play four important roles in the life of a child: first, they maintain the identity of the family, mitigate disturbing events of the outside world for children, and provide a stabilizing influence for children; second, grandparents can serve as "family watchdogs" for abuse or neglect; third, grandparents may play arbitrators between parents and children; and finally, grandparents allow children to build connections with their family history which can lead to a firmer self-identity. *See* Fernández, *supra* note 18, at 109-10 (citing Vern L. Bengston, *Diversity and Symbolism in Grandparental Roles*, *in* GRANDPARENTHOOD 11, 21-24 (Vern L. Bengston & Joan F. Robertson eds., 1985)).

whether the visitation rights at issue are truly in the best interests of the specific child.[21]

The expanding diversity of family relationships also creates difficulty in determining the best interests of the child.[22] As divorce and distance splinter families, the number of people seeking visitation with a child often increases.[23] Most states agree that grandparents should be granted visitation rights in certain situations, such as in the case of a divorce or the death of a parent.[24] States differ considerably, however, on whether grandparents should be allowed visitation rights after a child is adopted[25] or when the family is intact.[26]

The lack of uniformity among grandparent visitation statutes,[27] as

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21. *See* King v. King, 828 S.W.2d 630, 631 (Ky.), *cert. denied*, 113 S. Ct. 378 (1992). The Kentucky Supreme Court explained:

> If a grandparent is physically, mentally and morally fit, then a grandchild will ordinarily benefit from contact with the grandparent. That grandparents 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 often a part of an aging parent's life.

Id.; *see also* Bean, *supra* note 17, at 394 (noting that "the best interest of the child is often determined with scant reference to the needs of the particular child involved, and is overshadowed by the court's desire to contribute to the maintenance of a grandparent-grandchild relationship"); *see also* Robert Mnookin, *Child Custody Adjudication: Judicial Function in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROB. 226, 291 (1975) (criticizing visitation analysis by best interests of the child standard because "[i]ndividualized adjudication means that the result will often turn on a largely intuitive evaluation based on unspoken values and unproven predictions").

22. *See* Martha Minow, *All in the Family & In All Families: Membership, Loving, and Owing*, 95 W. VA. L. REV. 275, 279-97 (1992) (discussing influence of increasing family diversity on legal regulation of family).

23. *See* Sandra J. Morris, *Grandparents, Uncles, Aunts, Cousins, Friends: How is the Court to Decide Which Relationships Will Continue?*, FAM. ADV., Fall 1989, at 11, 13 (discussing logistical difficulty presented by expansion of third party visitation).

24. *See* Brown, *supra* note 17, at 133 (stating that majority of states only permit grandparent visitation where parents have separated or divorced or where one parent has died).

25. *See* GRANDPARENT VISITATION MANUAL, *supra* note 7, at 15-17 (describing various and often conflicting state provisions concerning grandparents' rights after adoption).

26. *See 1982 House Hearing*, *supra* note 1, at 117 (statement of Richard S. Victor, attorney) (noting that Michigan grandparent visitation statute does not address intact family situation because state legislature did not feel it should consider such controversial area); GRANDPARENT VISITATION MANUAL, *supra* note 7, at 8-9 (observing that while handful of state statutes allow visitation when family is intact, most states only intervene after divorce or death of parent).

27. *Compare* DEL. CODE ANN. tit. 10, § 950(7) (Supp. 1992) (providing that courts may grant grandparents reasonable visitation rights "regardless of marital status of the parents . . . or the relationship of the grandparents to the person having custody of the child; provided, however, that when the natural or adoptive parents of the child are co-habiting as husband and wife, grandparent visitation shall not be granted over both parents' objection") *with* KY. REV. STAT. ANN. § 405.021 (Baldwin 1991) ("The circuit court may grant reasonable visitation rights to . . . grandparents of a child . . . if it determines that it is in the best interest of the child to do so.") *with* ME. REV. STAT. ANN. tit. 19, § 752(6) (West Supp. 1993) (stating that "[t]he court may award reasonable rights of contact with a minor child to any 3rd persons") *with* MD. CODE ANN., FAM. LAW § 9-102 (1991) (providing that after marriage ends "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 (2) if the court

well as the inconsistent interpretation and enforcement of grandparents' visitation rights by state courts, has increased litigation,[28] litigation expenses,[29] and family animosity.[30] This ambiguity and lack of uniformity prevents parents and grandparents from fully understanding their custody and visitation rights[31] and encourages litigation. Consequently, judges decide visitation disputes. This deprives the family of the opportunity to resolve the matter through a more amicable and less traumatic proceeding, such as mediation,[32] that potentially could mitigate animosity and foster family understanding. Most importantly, the child, who is supposed to benefit from these visitation laws, often suffers the most as a result of these poorly defined statutes.

The highly emotional and contentious topic of grandparent visitation rights deserves a comprehensive review to insure that visitation laws appropriately reflect sociological changes in family operation, and are not altering family structure.[33] The present deficiencies in grandparent visitation laws highlight the need for

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finds it to be in the best interests of the child, grant visitation rights to the grandparent") *with* TENN. CODE ANN. § 36-6-301 (1991) (granting grandparents visitation rights "upon a finding that such visitation rights would be in the best interests of the minor child," providing that this statute "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," and providing for grandparent visitation if child is placed in foster home upon analysis of grandparents' past for determination of any criminal wrongdoing) *with* VT. STAT. ANN. tit. 15, §§ 1011-1016 (1989) (providing that grandparents may commence visitation petition "[i]f a parent of a minor child is deceased, physically or mentally incapable of making a decision or has abandoned the child," listing eight factors to consider in determining childs best interests, and automatically terminating visitation upon adoption by someone other than relative of child).

28. *See* Thompson et al., *supra* note 1, at 1221 (suggesting that if grandparent visitation rights were clearly enunciated, then both grandparents and parents would likely know outcome of legal battle, and with knowledge of probable outcome, parties could settle their disputes).

29. *See* Galloway & Avery, *supra* note 3, at 76 (describing plight of New York couple that spent $60,000 in legal fees over five years in effort to obtain visitation privileges with their two grandchildren whose mother had died); Theimer, *supra* note 7, at A4 (noting that grandparents accrued over $10,000 in legal fees in order to visit with their granddaughter for one day every three months).

30. *See* Derdeyn, *supra* note 7, at 278-79 (noting that to bring visitation problem to court for resolution, parties must have strong feelings of animosity for each other).

31. *See 1982 House Hearing*, *supra* note 1, at 44 (statement of Mr. Shumway, grandfather) (addressing implicit difficulties, but inherent importance, of formulating uniform grandparent visitation statute, and pondering "how to develop a law that would be mechanical enough to address your needs but human enough to allow some of these important factors to be taken into consideration").

32. *See 1982 House Hearing*, *supra* note 1, at 84 (statement of Richard S. Victor, attorney). *See generally infra* notes 178, 210-18 and accompanying text (discussing need for and benefits of mediation).

33. *See* Thompson et al., *supra* note 1, at 1217 (asserting that poorly designed policies can be particularly damaging in family law because "family law helps to define and institutionalize family structure and roles, [and thus] well conceived revisions in family law are especially important because they may not only reflect cultural changes in family life but also help to foster them").

greater continuity and stability in grandparent visitation statutes. A clearly defined and widely adopted model grandparent visitation statute would allow grandparents, parents, and children to know where they stand in relation to the law and, thus, encourage intra-family resolution of family visitation disputes.[34]

Part I of this Comment explores the constitutional background of parental rights focusing on parent's rights to make child-rearing decisions without state interference. Part II analyzes the history of grandparents' rights and traces the development of grandparent visitation statutes. Part III appraises two recent areas of expansion in grandparent visitation statutes, the intact family and adoptions. Part IV discusses the future of grandparent visitation rights and stresses that legislators must be careful to codify social changes and not force traditional notions of family by creating legally imposed visitation rights. Part IV also discusses the importance of uniformity in grandparent visitation rights, and the ways this uniformity can be achieved. Pursuing uniformity, Part V proposes a model grandparent visitation statute that is analyzed in Part VI.

I. CONSTITUTIONAL ANALYSIS OF PARENTAL RIGHTS

A. *The State's* Parens Patriae *Interest*

To understand the gravity of creating grandparent visitation rights, it is necessary to analyze the rights traditionally held by parents. Courts consistently recognize and protect family autonomy.[35] Further, parents' freedom in child-rearing is a fundamental right that courts have protected from unwarranted state interference.[36] The common-law concept that the state is the ultimate parent of every child, *parens patriae,* is one of the only limitations on parental

34. *See* Thompson et al., *supra* note 1, at 1221 (arguing that explicit standards regarding grandparent visitation might allow families to "bargain in the shadow of the law" because clear standards allow potential litigants to predict probable results of litigation, thereby diminishing grandparent visitation cases and encouraging intrafamily negotiations to resolve dispute).

35. *See, e.g.,* Santosky v. Kramer, 455 U.S. 745, 753 (1982) (confirming "historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment").

36. *See, e.g.,* Bellotti v. Baird, 443 U.S. 622, 638 (1979) (declaring that "deeply rooted in our Nation's history and tradition, is the belief that the parental role implies a substantial measure of authority over one's children"); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (holding that "custody, care and nurture of [children should] reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder"); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (recognizing "the liberty of parents and guardians to direct the upbringing and education of children under their control").

autonomy.[37] To protect parental autonomy, the Supreme Court has developed a threshold test for the imposition of the state's *parens patriae* interest.[38] Generally, the state cannot interfere with the parents' right to raise a child in a particular manner unless the parents' practice endangers the child.[39]

B. Rights of Parents to Raise Their Children Without Governmental Interference

One of the principal Supreme Court decisions on parental rights and childrearing is the 1923 case of *Meyer v. Nebraska*.[40] *Meyer* addressed a state statute prohibiting foreign language instruction to children prior to the ninth grade.[41] The goal of the statute was to instill children with American ideals and principles by grounding them in the English language.[42] The Court invalidated the statute, concluding that parents may engage a foreign language instructor because the Fourteenth Amendment grants parents the right to "establish a home and bring up children" without governmental interference.[43]

The Supreme Court reaffirmed parents' rights to raise a child without state interference in *Pierce v. Society of Sisters*.[44] In *Pierce*, the Court considered the validity of a state statute requiring parents to send their children to public schools, a requirement that precluded parents from sending their children to equivalent religious schools.[45] As in *Meyer*, the Court recognized parents' rights to direct the course of their children's upbringing without undue hindrance from the

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37. *See* Finlay v. Finlay, 148 N.E. 624, 626 (N.Y. 1925) (explaining that court "is to put [itself] in the position of a 'wise, affectionate, and careful parent' . . . and make provision for the child accordingly . . . by virtue of the prerogative which belongs to the [state] as *parens patriae*"); *see also* Bean, *supra* note 17, at 407 (noting that "[f]amily autonomy . . . has most often been limited by the state's *parens patriae* interest in protecting the children's welfare"); Roberta Kotkin, Note, *Grandparents Versus the State: A Constitutional Right to Custody*, 13 HOFSTRA L. REV. 375, 385-87 (1985) (suggesting that parental autonomy may be trespassed "when some parental act or omission triggers the interest and concern of the state"); Rorer, *supra* note 3, at 295 (noting that state may only intrude on family privacy under compelling circumstances).

38. *See infra* notes 40-60 and accompanying text (discussing evolution of Supreme Court test for state intervention). *See generally* Bean, *supra* note 17, at 407-22 (describing development of Supreme Court guidelines for state intervention in parents' right to raise child).

39. *See* Bean, *supra* note 17, at 422.

40. 262 U.S. 390 (1923).

41. Meyer v. Nebraska, 262 U.S. 390, 403 (1923).

42. *Id.* at 393-94.

43. *Id.* at 399.

44. 268 U.S. 510 (1925).

45. Pierce v. Society of Sisters, 268 U.S. 510, 530-31 (1925).

state and declared the statute invalid.[46]

C. *Harm to the Child as the Determinative Test*

In *Wisconsin v. Yoder*,[47] the Supreme Court established the "harm to the child" test to determine if a state has authority to invoke the doctrine of *parens patriae*.[48] In *Yoder*, Amish parents wanted to prevent their child from receiving state-mandated secondary school education.[49] The Court acknowledged the potential for parents to act contrary to the best interests of their child,[50] but concluded that if the parents' method of raising their child does not "jeopardize the health or safety of the child, or have a potential for significant social burdens,"[51] the State shall not interfere.[52]

In *Lassiter v. Department of Social Services*,[53] the Supreme Court affirmed the "harm to the child" inquiry and the doctrine of parental autonomy.[54] *Lassiter* involved an imprisoned mother whose parental rights were terminated after she failed to have any contact with her child, who was in foster care for over two years.[55] The Supreme Court stated: "This Court's decisions have by now made plain [that] . . . a parent's desire for and right to the 'companionship, care, custody, and management of his or her children' is an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection.'"[56]

Thus, the Supreme Court has granted parents an extraordinary amount of privacy and protection regarding the upbringing of their child.[57] Until recently, the only exception to parental autonomy was

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46. *Id.* at 534-35; *see also* Stanley v. Illinois, 405 U.S. 645, 651 (1972) (holding that right to raise one's children is essential and "undeniably warrants deference and, absent a powerful countervailing interest, protection"). In *Stanley*, an unmarried father challenged an Illinois law that declared his children wards of the State upon the death of their mother merely because the children's parents had never married. *Stanley*, 405 U.S. at 646. The Supreme Court held that intervention by the State prior to a hearing on the father's fitness as a parent was a due process violation. *Id.* at 649.

47. 406 U.S. 205 (1972).

48. Wisconsin v. Yoder, 406 U.S. 205, 234 (1972).

49. *Id.*

50. *Id.*

51. *Id.* at 234.

52. *See id.* at 232 ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.").

53. 452 U.S. 18 (1981).

54. Lassiter v. Department of Social Servs., 452 U.S. 18 (1981).

55. *Id.* at 20-21.

56. *Id.* at 27 (quoting Stanley v. Illinois, 405 U.S. 645, 651 (1972)).

57. *See* Fernández, *supra* note 18, at 113 (asserting that parental judgment in matters of nurturing child makes sense as practical matter because state does not have expertise or

the state's *parens patriae* interest, which states could invoke only when the parents' actions endangered a child.[58] The introduction of statutory visitation rights for grandparents, however, places a further limitation on parental autonomy[59] and increases the level of state interference in childrearing by granting grandparents visitation rights that they did not ordinarily possess in the past.[60]

II. HISTORY OF GRANDPARENT VISITATION RIGHTS

A. *Grandparent Visitation Rights at Common Law*

Due to the common-law emphasis on parental autonomy, grandparents traditionally have no right to visit with their grandchildren if the parents choose to deny them access.[61] Judges have enunciated several reasons for denying grandparents visitation rights. Some judges have opined that granting grandparents an independent right

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resources to govern upbringing of every child in its domain). *See generally* Kotkin, *supra* note 37, at 380-88 (analyzing development of parental autonomy rights).

58. *See supra* notes 47-56 (discussing harm prerequisite for state intervention).

59. *See* Michael J. Lewinski, Note, *Visitation Beyond the Traditional Limitations*, 60 IND. L.J. 191, 192-93 (1984) (describing visitation privileges as form of limitation placed on custody because in visitation, custodian has care and control of child even if only for limited period); Rorer, *supra* note 3, at 298 (acknowledging that visitation is infringement on parents' custody rights).

60. *See* Michael J. Minerva, Jr., *Grandparent Visitation: The Parental Privacy Right to Raise Their "Bundle of Joy,"* 18 FLA. ST. U. L. REV. 533, 533 (1991) (explaining that grandparent visitation statutes provide grandparents with rights that they did not previously have absent death of grandchild's parent or dissolution of parents' marriage).

61. *See, e.g., Ex parte* Bronstein, 434 So. 2d 780, 784 (Ala. 1983) (Shores, J., concurring) (recognizing that common law does not grant grandparent visitation rights), *superseded by statute as stated in* Mills v. Parker, 549 So. 2d 97 (Ala. Ct. App. 1989); White v. Jacobs, 243 Cal. Rptr. 597, 598 (Ct. App. 1988) (denying grandparent visitation rights at common law); Odell v. Lutz, 177 P.2d 628, 629 (Cal. Dist. Ct. App. 1947) (conceding that grandparents do not possess visitation rights under common law); Chodzko v. Chodzko, 360 N.E.2d 60, 63 (Ill. 1976) ("The right to determine the third parties who are to share in the custody and influence of and participate in the visitation privileges with the children should vest primarily with the parent who is charged with the daily responsibility of rearing the children."); *In re* Goldfarb, 70 A.2d 94, 96 (N.J. Super. Ct. Ch. Div. 1949) (holding that grandparents do not have visitation rights under common law); Shriver v. Shriver, 219 N.E.2d 300, 303 (Ohio Ct. App. 1966) (disapproving parents' decision to deny grandparents visitation with grandchild, but conceding that court cannot create visitation rights for grandparents); Jefferies v. Jefferies, 253 S.E.2d 689, 691 (W. Va. 1979) (holding that grandparents have no legal right to visitation with grandchildren).

There are four possible rationales for the common-law rule disallowing grandparent visitation: first, a parent's obligation to allow grandparent visitation is moral, not legal; second, a judicial award of visitation would jeopardize parental authority; third, forcing a child into the center of a conflict between parents and grandparents is contrary to the child's best interests; and finally, natural ties, not judicial intervention, are the best formula for restoring family accord. GRANDPARENT VISITATION MANUAL, *supra* note 7, at 24; *see* Katherine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family has Failed*, 70 VA. L. REV. 879, 881 (1984) ("According to traditional parental rights doctrine, applied still in many states, the state will not recognize relationships formed by adults other than the child's legal parents unless the parents are unfit or have abandoned the child.").

of visitation would undermine parental authority.[62] Other courts were concerned that an intergenerational conflict would only hurt the development of the child involved.[63] Finally, courts traditionally have treated parental autonomy as a fundamental value that should not be impeded by granting grandparent visitation rights.[64]

Although they lack common-law visitation rights, grandparents do have nominal constitutional rights regarding their extended family. The Supreme Court has "accepted an enlarged definition of 'family' when to do so will nurture and protect established familial and cultural bonds."[65] In *Moore v. City of East Cleveland*,[66] a zoning ordinance defined "family" so narrowly that it prevented the appellant from sharing her home with her son and her two grandsons, who were first cousins.[67] The Supreme Court determined that personal choices in matters of family definition are protected by the Due Process Clause, a determination that protects the tradition of the extended family.[68]

The Court further intimated that in certain instances, grandparents have constitutionally protected family rights.[69] The Court in *Moore*, however, only discussed situations where the grandparent was already living with the grandchild.[70] Because grandparents at common law generally do not have a right to visit with their grandchildren,[71] a due process argument promoting grandparent visitation would probably fail because a traditionally protected right is not being asserted.[72] Thus, *Moore* does little to provide grandparents whose

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62. *Odell*, 177 P.2d at 629 ("'To permit grandparents to intervene would . . . injuriously hinder proper parental authority by dividing it.'") (quoting Succession of Reiss, 15 So. 151, 152 (La. 1894)).

63. Flannery v. Sharp, 30 A.2d 810, 812 (Pa. 1952); *see also* Cox v. Stayton, 619 S.W.2d 617, 621 (Ark. 1981) ("To create new, enforceable rights in grandparents could lead to results that would burden . . . the welfare of the child.").

64. Theodore R. v. Loretta J., 476 N.Y.S.2d 720, 721 (Fam. Ct. 1984) (denying grandparents' request for visitation rights and reiterating that "there should not be any judicial interference with the fundamental constitutional rights of a parent").

65. Kotkin, *supra* note 37, at 388.

66. 431 U.S. 494 (1977).

67. Moore v. City of East Cleveland, 431 U.S. 494, 495-96 (1977).

68. *Id.* at 502-04.

69. *Id.* at 504 ("Ours is by no means a tradition limited to respect for the bonds uniting 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.").

70. *Id.* at 495-96.

71. *See supra* note 61 (discussing grandparents' lack of visitation rights at common law).

72. *See* Ward v. Ward, 537 A.2d 1063, 1067 (Del. Fam. Ct. 1987) (holding that grandparent can claim deprivation of liberty interest "only where the grandparent-grandchild relationship is essentially a custodial one"); *see also* Brown, *supra* note 17, at 143 (asserting that for interest to be entitled to due process protection, it must be generally recognized as right protected by Constitution and that grandparent visitation does not fall within this rubric).

grandchildren have never lived with them with a constitutional right of visitation.[73]

B. Enactment of Grandparent Visitation Statutes

Since 1965, state legislatures, sympathizing with the plight of grandparents, have enacted grandparent visitation statutes.[74] Not coincidentally, these statutes secured grandparent visitation rights as the divorce rate increased and the birth rate declined in America.[75] Often when there is a divorce or the death of a parent, relations among the parent and former in-laws, the child's grandparents, become strained.[76] State legislatures have determined that, in such instances, multigenerational ties between grandchildren and grandparents should not suffer because of strained relations between parents and former in-laws.[77] Further, as the American birth rate began to decline, grandparents had fewer grandchildren and, therefore, had an increased interest in maintaining contact with those grandchildren

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73. Brown, *supra* note 17, at 142 (reasoning that under *Moore*, definition of "family" excludes grandparents unless grandparents are living with grandchild, and that once these living arrangements change, courts will deny grandparents right to visit with grandchild).

74. *See supra* note 6 and accompanying text (listing grandparent visitation statutes); *see also Ex parte* Bronstein, 434 So. 2d 780, 784 (Ala. 1983) (Shores, J., concurring) (recommending that Alabama legislature extend right of visitation to grandparents because "[p]recious little remains of the family structure, which played such a vital part in the development of this nation. It seems unconscionable to allow its futher fragmentation."); King v. King, 828 S.W.2d 630, 632 (Ky.) (enunciating that statutes granting grandparent visitation rights are legislative attempts to strengthen familial bonds in face of general disintegration of family unit), *cert. denied*, 113 S. Ct. 378 (1992).

75. *See* Fernández, *supra* note 18, at 115 (noting that initiation of grandparent visitation statutes occurred as divorce rate in America tripled); Matthews & Sprey, *supra* note 4, at 45 (suggesting that expanded kinship systems created by increasing divorce rate and declining birth rate have compelled grandparents to take legal action to preserve their visitation rights with grandchildren); *supra* notes 3-4 and accompanying text (discussing how grandparent visitation statutes were result of changing demographics and increasing divorce rate); *see also 1982 House Hearing*, *supra* note 1, at 3 (statement of Rep. Biaggi) (describing goal of congressional hearings as launching national debate on issue of grandparent visitation rights in event of marital dissolution).

76. *See 1982 House Hearing*, *supra* note 1, at 16 (statement of Mr. and Mrs. Max Chasens, grandparents) (describing disputes between grandparents and parents). Mr. Chasens noted:

> [Some disputes] may be sincere or may be prompted by dislike and distrust between the generations. For instance, a mother with custody may deny her ex-husband's parents permission to see their grandchildren because she disapproves of their religion, their morals or their attitudes. Or she may want revenge for real or imagined insults by the parents or her former husband.

Id. (quoting Alice Eckerson, *Grandparents Fight for Visiting Rights*, ATL. CITY PRESS, Apr. 13, 1982, at 10). The strain of divorce may become exacerbated when the custodial parent moves away, and as a result of unrelated personal feelings, the custodial parent may deny visitation to the grandparents. This same predicament may also develop when a spouse dies, and the parent denies the deceased spouse's parents access to the grandchild. Fernández, *supra* note 18, at 116.

77. Fernández, *supra* note 18, at 116.

they did have.[78] Grandparent visitation statutes were a response to these developments and an acknowledgement of the unique and nostalgic relationship between grandparents and grandchildren.[79]

Originally, grandparent visitation statutes were enacted to protect children from the emotional harm of abruptly ending meaningful grandparent-grandchild relationships during times of family crisis.[80] As time has progressed, many state legislatures have broadened the scope of grandparent visitation statutes to allow visitation whenever it would be in "the best interests of the child."[81] Expanding the scope of grandparent visitation rights is problematic in a variety of ways. First, while using "the best interests of the child" as a guide for granting grandparent visitation is a noble idea, it often fails to achieve its goal because legislatures fail to define "the best interests of the child."[82] Also, because most family law matters, including grandparent visitation, are left to the discretion of individual states, grandparents' visitation rights vary considerably from state to state, raising the problem of inconsistent treatment.[83]

III. RECENT EXPANSION IN GRANDPARENT VISITATION STATUTES

Initially, most grandparent visitation statutes only encompassed

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78. *See supra* note 4 (discussing relationship between declining birth rate and grandparent visitation disputes).

79. *See supra* note 20 and accompanying text (discussing benefits of unique relationship between grandparents and grandchildren).

80. *See* Samuel V. Schoonmaker III et al., *Constitutional Issues Raised by Third-Party Access to Children*, 25 FAM. L.Q. 95, 95-96 (1991) (discussing development of and change in character of grandparent visitation statutes).

81. *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-337.01 (Supp. 1993); ARK. CODE ANN. § 9-13-103 (Michie 1991); CAL. CIV. CODE § 197.5 (West 1983 & Supp. 1993); KY. REV. STAT. ANN. § 405.021 (Baldwin 1991); MD. CODE ANN., FAM. LAW § 9-102 (1991); N.Y. DOM. REL. LAW § 72 (McKinney 1989); TENN. CODE ANN. § 36-6-301 (1991); UTAH CODE ANN. § 30-5-2 (Supp. 1993); VT. STAT. ANN. tit. 15, § 1013(a) (1989); WASH. REV. CODE ANN. § 26.09.240 (West Supp. 1992); WIS. STAT. ANN. § 767.245(4) (West 1993).

82. *See supra* notes 17-21 and accompanying text (discussing problems with "best interests of the child" standard).

83. *Compare* FLA. STAT. ANN. ch. 752.01 (Harrison Supp. 1992) (providing that grandparents may petition for visitation privileges when: (1) one or both parents of child are deceased, (2) parents are divorced, or (3) one or both parents have deserted child) *with* KY. REV. STAT. ANN. § 405.021 (Baldwin 1991) ("The 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."). The Florida statute is the most common type, limiting grandparent visitation to cases of divorce, death, or abandonment by one of the child's parents. *See* Rorer, *supra* note 3, at 298 (contending that majority of grandparent visitation statutes require "disruptive precipitating event"). The Kentucky statute, on the other hand, typifies a broader grant of grandparent visitation rights, as it is loosely written and can be interpreted to allow grandparent visitation rights even when the child's family is intact. *See generally* Shandling, *supra* note 5, at 119-21 (noting lack of uniformity among grandparent visitation statutes); *supra* note 27 and accompanying text (discussing variation among grandparent visitation statutes).

family situations complicated by the death, separation, or divorce of the parents.[84] Today, grandparent visitation statutes are expanding beyond their original limited scope.[85] The two most controversial issues in this area are whether grandparents should have the right to visit grandchildren in an intact family and whether grandparents should have the right to visit with grandchildren who have been adopted.[86]

A. Grandparent Visitation Statutes and the Intact Family

In some states, grandparent visitation laws limit visitation to nonintact[87] or disrupted families.[88] Several state statutes, however, are broadly written and could be interpreted to permit grandparents to visit with grandchildren in an intact family.[89] This potential

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84. *See* Brown, *supra* note 17, at 133; Fernández, *supra* note 18, at 128 & n.81.

85. *See* Burns, *supra* note 7, at 60 (noting trend among state legislatures to expand grandparent visitation rights); *see also supra* note 8 (citing proposed amendments to state grandparent visitation statutes).

86. *See* Amy D. Marcus, *Grandparents Seek Their Rights in Court*, WALL ST. J., June 5, 1991, at B6 (reporting that while majority of grandparent visitation cases involve disrupted or broken families, increasing percentage of cases regard intact families); *see also* GRANDPARENT VISITATION MANUAL, *supra* note 7, at 34 (reporting that grandparent visitation in intact family is among most controversial situations).

87. For purposes of this Comment, a nonintact family refers to a family that has endured a disruptive event such as death, separation, or divorce.

88. *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-337.01(A)(1)-(2) (Supp. 1993) (providing court with discretion to grant visitation rights to grandparents if "marriage of parents . . . has been dissolved for at least three months . . . [or if a] parent . . . has been deceased or missing for at least three months"); ARK. CODE ANN. § 9-13-103(a)(1) (Michie 1991) (allowing petition for grandparent visitation "if the marital relationship between the parents of the child has been severed by death, divorce, or legal separation"); MD. CODE ANN., FAM. LAW § 9-102 (1991) (permitting grandparent visitation petition "[a]t any time after the termination of a marriage by divorce, annulment, or death"); *see also* Towne v. Cole, 478 N.E.2d 895, 900 (Ill. App. Ct. 1985) (finding no visitation right where family has not experienced death or divorce); *In re* Meek, 443 N.E.2d 890, 891 (Ind. Ct. App. 1983) (finding no cause of action for visitation where parent is deceased or remains married); McCarty v. McCarty, 559 So. 2d 517, 517-18 (La. Ct. App. 1990) (holding that grandparent has no right to visitation where child's family is intact); Thompson v. Vanaman, 515 A.2d 1254, 1255-56 (N.J. Super. Ct. App. Div. 1986) (finding that there must be disruption in child's family for grandparent to have cause of action); Herron v. Seizak, 468 A.2d 803, 805 (Pa. Super. Ct. 1983) (noting that court cannot interfere with intact family); Theodore R. v. Loretta J., 476 N.Y.S.2d 720, 720-21 (Fam. Ct. 1984) (denying grandparent right to visitation in intact family absent extenuating circumstances that would justify intervention); Hawk v. Hawk, 855 S.W.2d 573, 581-82 (Tenn. 1993) (holding that granting grandparent visitation rights when family is intact violates privacy interest of parents in child-rearing under Tennessee state constitution). *But see* ILL. ANN. STAT. ch. 40, para. 607(b)(1)(B) (Smith-Hurd 1989) (broadening, for first time, grandparent visitation rights and allowing grandparents to petition for visitation without requiring marriage dissolution or death of parent). The Illinois statute was amended again in 1990 to ban grandparent interference in intact families. ILL. ANN. STAT. ch. 750, para. 5/607(b)(1) (Smith-Hurd 1993).

89. *See, e.g.*, ALA. CODE § 30-3-4(c) (1989) (providing that "[a]t the discretion of the court, visitation rights for grandparents . . . shall be granted . . . [if a] grandparent is unreasonably denied visitation . . . for a period exceeding 90 days"); CONN. GEN. STAT. ANN. § 46b-59 (West 1986) (noting that "[t]he superior court may grant the right of visitation . . . to any person . .

expansion of grandparent visitation rights into the intact family jeopardizes parental autonomy by subjecting intact functioning parents to unwarranted state interference.[90] Recently, Kentucky's broadly written grandparent visitation statute was at issue in *King v. King*.[91] In *King*, the Supreme Court denied certiorari to a Kentucky Supreme Court decision that interpreted the Kentucky grandparent visitation statute[92] to allow a child's paternal grandfather to visit with the child twice weekly against the wishes of the child's married, fit, and natural parents.[93] The Court's decision not to hear this case and, thus, to allow the Kentucky statute to stand as constitutional, has been hailed as a major advancement in grandparent visitation rights[94] because it recognizes grandparents' rights to visit with grandchildren in intact nuclear families.[95]

The intriguing aspect of the *King* decision is that it allows the visitation rights of grandparents to impinge upon parental autonomy. The *King* decision permits grandparent visitation even when the child's parents are fit and happily married, but for one reason or

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. [and] shall be according to the court's best judgment . . . and subject to such conditions and limitations as deems equitable"); KY. REV. STAT. ANN. § 405.021 (Baldwin 1991) (providing that "[t]he circuit court may grant reasonable visitation rights to . . . grandparents . . . if it determines that it is in the best interest of the child to do so").

90. *See* Ward v. Ward, 537 A.2d 1063, 1070 (Del. Fam. Ct. 1987) (acknowledging valid reasons for not subjecting intact families to grandparent visitation laws). The court noted:

> [P]arents, natural or adoptive, 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.

91. 828 S.W.2d 630 (Ky.), *cert. denied*, 113 S. Ct. 378 (1992).

92. KY. REV. STAT. ANN. § 405.021 (Baldwin 1991).

93. King v. King, 828 S.W.2d 630, 632-33 (Ky.) (finding that there is no reason to permit "trivial disagreement between a father and son" to deprive grandchild and grandparent from developing natural bond), *cert. denied*, 113 S. Ct. 378 (1992). *But see id.* at 633 (Lambert, J., dissenting) (acknowledging that evidence supports parents contention that grandfather "is an overbearing individual who intruded with impunity upon respondents' family life demonstrating total indifference to their wishes"). Mr. King petitioned the court for the right to visit with his granddaughter after her parents denied him permission to visit with her. *Id.* at 631. Mr. King had almost daily contact with the child for sixteen months while she and her parents lived and worked on Mr. King's tobacco farm. *Id.* at 630. When relations between the grandfather and the child's parents deteriorated, the parents moved off the farm and did not allow Mr. King to visit with their child. *Id.* at 630-31. Accordingly, Mr. King filed a petition for visitation rights. *Id.* The *King* decision supports grandparents' position that they should have equal rights to visitation, regardless of the status of the grandchild's parents. *See infra* notes 112-16 and accompanying text (discussing policy arguments in support of absolute right to grandparent visitation).

94. Bob Dart, *Grandparents' Rights Upheld in Court Ruling*, HOUS. CHRON., Oct. 25, 1992, at A27, *available in* LEXIS, Nexis Library, Majpap File (reporting that contrary decision by Supreme Court in *King* would have jeopardized grandparent visitation rights throughout country).

95. *Id.*

another, do not want their child to associate with the grandparents.[96] The Kentucky statute at issue in *King* is so broad that its scope is limited only by a nebulous test of what the court believes is in the child's best interests.[97] The broad scope of the statute creates serious conflicts with parents' rights to raise their child without state interference,[98] and fails to appreciate the potentially detrimental effect that such visitations over parental objections may have on a child.[99] The high value traditionally placed upon parental autonomy in American society[100] makes this expansive grant of rights to

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96. *See King*, 828 S.W.2d at 632 (justifying grant of visitation rights to grandfather against wishes of happily married, fit parents because "a petty dispute between a father and son should [not] be allowed to deprive a grandparent and grandchild of the unique relationship that ordinarily exists between those individuals").

97. KY. REV. STAT. ANN. § 405.021 (Baldwin 1991).

98. *See supra* notes 35-60 and accompanying text (discussing constitutional analysis of parental rights).

99. *See* Commonwealth *ex rel.* Zaffarano v. Genaro, 455 A.2d 1180, 1181-82 (Pa. 1983) (refusing grandparents' request for unsupervised visitation with child because hard feelings existing between father and grandparents would place child in crossfire between adults); Commonwealth *ex rel.* Flannery v. Sharp, 30 A.2d 810, 812 (Pa. 1943) (denying grandparents visitation rights or custody because visitations, intra-family quarrels, and legal proceeding were causing child to suffer from nervousness and stomach problems). The *Flannery* court determined:

> [T]he health and welfare of a child must not be shattered in the crossfire of supposedly conflicting legal rights as to its custody. Despite the fact that grandparents may have become so deeply attached to a child that it will be a real hardship to be deprived of his society, sympathy for them cannot be permitted to interfere with the best interest and future welfare of the child.

Flannery, 30 A.2d at 812; *see also* Brown, *supra* note 17, at 134 (noting that Illinois General Assembly restricted previously liberal grandparent visitation statute and suggesting that because of intrusion on parental autonomy and stress on child due to court-imposed visitations, this decision was correct one); Sharon F. Ladd, Note, *Tennessee Statutory Visitation Rights of Grandparents and the Best Interests of the Child*, 15 MEM. ST. U. L. REV. 635, 652-54 (1985) (arguing that "[i]f the natural parents have a viable marriage, it is not wise to allow parents of either parent to bring suit as this could have a devastating effect on the marriage and therefore the child"); *see also* Cox v. Stayton, 619 S.W.2d 617, 621 (Ark. 1981) (disallowing grandparents visitation rights in intact family because such rights were not expressly provided for in statute and noting that despite genuine relational link between grandchildren and grandparents, "the sanctity of the relationship between the parent and the child must be the overriding concern"). In *Cox*, the court noted that "[t]o create new, enforceable rights in grandparents could lead to results that would burden rather than enhance the welfare of children." *Cox*, 619 S.W.2d at 621.

100. *See supra* notes 35-36 (citing cases affirming parental autonomy at common law); *see also* White v. Jacobs, 243 Cal. Rptr. 597, 597-98 (Ct. App. 1988) (refusing to allow grandparents to visit with grandchild against wishes of child's parents and noting that hostility between child's parents and grandparents resulted in emotionally traumatic visitations for child). The court further noted that even when grandparent visitation is provided for by statute, there is a presumption against allowing such privileges if the parent's object to the visitation. *Id.* at 598; *see also* Moore v. Moore, 365 S.E.2d 662, 663 (N.C. Ct. App. 1988) (ruling against allowing grandparent visitation in intact family because fundamental rights of parental autonomy preclude grant of visitation rights to grandparents), *superseded by statute as stated in* Ray v. Ray, 407 S.E.2d 592 (N.C. Ct. App. 1991). One commentator, questioning the soundness of subjecting parental decisionmaking to court judgment, asked:

> Should we be subjecting mutual parental decisions made in a whole marriage to adjudication? Can the courts stand in the position of the parents well enough to

grandparents highly unusual.

This extraordinary grant of visitation rights to grandparents generally fails to consider the best interests of the child,[101] relying instead on traditional and emotional conceptions of the family.[102] The *In re La Russo*[103] decision exhibits this reliance on traditional notions of family life. In *La Russo,* a married couple prevented paternal grandparents from visiting their grandchildren for several years.[104] This hindrance was the result of a longstanding dispute between the child's father and grandfather regarding the grandfather's preferential treatment of the father's sister and the father's allegation that his mother physically abused him.[105] The court overcame this family dissension, and decided that "[t]he mere fact that the parents and grandparents have had a falling out and that animosity exists between them should not preclude visitation if the court finds that visitation would be in the best interest of the children."[106] The court in *La Russo* apparently clings to the nostalgic concept of an extended family in which there are differences of opinion, but whose members are joined together by the common bond of family unity.[107] Allegations of physical abuse and courtroom battles, however, do not comport with this nostalgic notion of the family. It is difficult to comprehend how legally imposed visitation with the grandparents in this situation could be in the child's best interest when the visitation places the child in the middle of an emotional minefield. Such visitation rights are especially troublesome when, in situations like *La Russo,* the child has not had contact with the grandparents and does not have a close, psychologically beneficial relationship with them.

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decide whether the parental judgment is or is not reasonable? Is it in "the best interests of the child" per se to question parental decisions in the whole marriage, and to weaken parental authority? Access to courts establishes a certain kind of power. Will the threat of adjudication influence reasonable parental decisions adversely?

Grandparents' Visitation Rights: Hearings on S. Con. Res. 40 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 98th Cong., 1st Sess. 6 (1983) [hereinafter *1983 Senate Hearings*] (statement of John M. McCabe, Legislative Director, National Conference of Commissioners on Uniform State Laws).

101. *See* Brown, *supra* note 17, at 147 (arguing that because best interests of child standard is poorly defined in many state statutes, judges have discretion to impose their personal views and concerns regarding family structure when considering child's best interests).

102. *See, e.g.*, Brown, *supra* note 17, at 137-38 (noting that Illinois legislature's debates on whether to expand grandparent visitation rights focused on emotion and traditional conceptions of family).

103. 9 Fam. L. Rep. (BNA) 2646 (N.Y. Fam. Ct. Aug. 10, 1983).

104. *In re* La Russo, 9 Fam. L. Rep. (BNA) 2646, 2647 (N.Y. Fam. Ct. Aug. 10, 1983).

105. *Id.*

106. *Id.* at 2648.

107. *See id.* (noting that grandparents had made sincere effort to see grandchildren, had attended school functions, and had sent gifts).

Recently, in *Hawk v. Hawk*,[108] the Tennessee Supreme Court addressed grandparent visitation rights in an intact family and concluded that imposing the court's opinion of what is in the best interests of the child over the parents' objections is an unjustified intrusion into the "protected sphere of family life."[109] Instead, the court held that when the family is intact there must be a finding of substantial harm to the child, and then the court may levy its own subjective opinions of what the best interests of the child demands.[110] By employing this careful two-step analysis, the court sought to avoid the pitfall of assuming grandparent-grandchild visitation is always beneficial and to respect parental autonomy.[111]

1. *Arguments in favor of grandparent visitation rights in an intact family*

The arguments that grandparents voice in response to attempts to limit visitation rights to nonintact families are twofold. First, limiting grandparent visitation rights to nonintact families constitutes disparate treatment of grandparents in violation of the Equal Protection Clause of the Constitution.[112] For example, some grandparents may be able to petition for visitation if the grandchild's parents are divorced or if some other event has disrupted the intact family, while other grandparents cannot petition for visitation solely because the grandchild's parents have a solid marriage and the family is intact. Grandparents argue that the status of the grandchild's parents should not affect the grandparents' right to visit with their grandchild.[113]

The second argument that grandparents proffer involves a two-step analysis. First, they maintain that the childrearing practices of all parents should be liberated from state interference and that this right does not apply solely to parents in an intact family.[114] Typically,

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108. Hawk v. Hawk, 855 S.W.2d 573 (Tenn. 1993).
109. *Id.* at 577.
110. *Id.* at 579.
111. *Id.* at 581.
112. U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."); *see* Ward v. Ward, 537 A.2d 1063, 1069-70 (Del. Fam. Ct. 1987) (noting petitioner's argument that this differing treatment of grandparents is "an arbitrary and invidious discrimination against one group of grandparents" but holding that state had "valid reasons" for decision and treatment was not equal protection violation).
113. *See* Brown, *supra* note 17, at 144-45 (discussing grandparents' equal protection argument in favor of visitation).
114. Frances E. v. Peter E., 479 N.Y.S.2d 319, 322 (Fam. Ct. 1984). The counter argument that parents proffer is that grandparents have a derivative right to visitation based on the right of the deceased or noncustodial parent. *Id.* Because neither parent in the intact family wants the grandparent to be allowed visitation rights, parents contend that the grandparent does not have a derivative right to visitation. *Id.*

grandparent visitation statutes only grant visitation upon an event which is disruptive to family unity.[115] When the court or the legislature contends that parents who have experienced a disruptive event, such as a divorce, separation, or death, are susceptible to greater state interference through statute-created grandparent visitation rights, the state is making an inappropriate and overinclusive judgment about the parents' ability to raise their children adequately.[116] In the final step of the analysis, grandparents argue that all states should treat intact and nonintact families equally and should permit all grandparents to petition for visitation rights.

2. Previous contact and grandparent visitation in the intact family

In granting grandparent visitation rights when the nuclear family is intact, state legislatures have not consistently or thoroughly addressed the time that the grandchild may have spent living in daily contact with the grandparent and how that should affect a court's decision to allow grandparent visitation rights in an intact family.[117] New York's highest court recently addressed this issue in *In re Emanuel S. v. Joseph E.*,[118] ruling that grandparents have standing to petition for visitation with their grandchildren in an intact family if they either have previously formed a relationship with the grandchildren, or have made a sincere effort to establish a relationship with the grandchildren but were rebuffed by the children's parents.[119] Similarly, in *Moore v. City of East Cleveland*,[120] the U.S. Supreme Court held that when grandparents have lived with a grandchild for a significant period of time before estrangement, the grandparents may have some rights to continued contact with the child.[121]

Courts generally agree that the goal of grandparent rights

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115. *See* GRANDPARENT VISITATION MANUAL, *supra* note 7, at 8-9 (noting that most grandparent visitation statutes only intervene after divorce or death of parent).

116. *See Frances E.*, 479 N.Y.S.2d at 322. The grandparents argued:

> This right to be free from state interference . . . inures to all parents and should have no greater application to parents who are married and residing together in an "intact family." To assert that, as a matter of law, a widowed, divorced, remarried, or unmarried parent is subject to greater state 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.

Id.

117. GRANDPARENT VISITATION MANUAL, *supra* note 7, at 32 (noting that few state statutes provide specific guidelines for determining whether grandparent visitation should be permitted when grandchild has spent time living with grandparent). In Minnesota, the state legislature has determined that where a minor has lived with the grandparent for at least one year, the grandparent may petition for visitation privileges. MINN. STAT. ANN. § 257.022 (West 1992).

118. 577 N.E.2d 27 (N.Y. 1991).

119. *In re* Emanuel S. v. Joseph E., 577 N.E.2d 27, 27 (N.Y. 1991).

120. 431 U.S. 494 (1977).

121. Moore v. City of East Cleveland, 431 U.S. 494, 503-06 (1977).

legislation is to maintain already existing vital relationships between grandparents and grandchildren, not to forge new relationships.[122] For example, when the grandparents have provided daily care for the child for a significant period of time,[123] the grandparents may argue that they have served as a "psychological parent"[124] to the child and disruption of this relationship would be psychologically unsettling for the child.[125] It is valid to distinguish grandparents' psychological relationship with the child from their biological relationship because granting grandparent visitation rights based solely on their biological relationship with the child bases the right of visitation on the grandparents' best interests instead of on the child's best interests.[126]

B. Grandparent Visitation Statutes and Adoption

Courts have held that when a child is adopted, all previous ties with the child's natural family are abolished.[127] State legislatures also

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122. *See* Apker v. Malchak, 490 N.Y.S.2d 923, 925 (App. Div. 1985) (denying grandparents visitation rights because they had not seen grandchildren in nine years and thus lacked any meaningful relationship with their grandchildren); Looper v. McManus, 581 P.2d 487, 488 (Okl. App. 1978) ("Visitation is not solely for the benefit of the adult visitor but is aimed at fulfilling what many conceive to be a vital, or at least a wholesome contribution to the child's emotional well-being by permitting partial continuation of an earlier established close relationship."); *1982 House Hearing*, *supra* note 1, at 70 (statement of Dr. Andre Derdeyn, Director, University of Virginia Child and Family Psychiatry Training Program) ("Whether grandparent visitation is awarded or not depends on the court's assessment of the value of continuing the child's relationship with the grandparent weighed against the amount of disruption to the child's immediate family unit and the amount of animosity the various adults hold for each other.").

123. *See, e.g.*, King v. King, 828 S.W.2d 630, 630 (Ky.) (noting that for 16 months while family lived on his farm grandfather had almost daily contact with child), *cert. denied*, 113 S. Ct. 378 (1992); Hawk v. Hawk, 855 S.W.2d 573, 575-76 (Tenn. 1993) (discussing previously frequent contact between grandparents and child in intact family, including weekly overnight visits).

124. *See* JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 98 (1979) (defining "psychological parent" as "one who, on a continuing, day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills the child's psychological needs for a parent, as well as the child's physical needs" and noting that "[t]he psychological parent may be a biological . . . parent . . . or any other person").

125. *See* Derdeyn, *supra* note 7, at 278 (contending that "[i]f decisions were truly guided by the principle of maintaining relationships with psychological parents," grandchild would remain with grandparent to maintain established psychological relationship). *But see* Thompson et al., *supra* note 1, at 1220 (commenting that although concept of "psychological parent" has been valuable construct in study of child development, institutionalizing such concept may foster changes in family functioning).

126. *See* Barbara S. Hughes, *The Effect of* C.G.F. *and Section 48.925 on Grandparental Visitation Petitions*, WISC. LAW., Nov. 1992, at 13, 14 (questioning "whether the proliferation of statutes granting third-party rights to visitation—based upon the third-party's interests rather than the child's relationship with that party or the parents constitutionally protected rights—is truly the best interest of the children and families involved").

127. *See Ex parte* Bronstein, 434 So. 2d 780, 781-82 (Ala. 1983) (noting that in adoption, state employs *parens patriae* authority to create status that severs all rights of natural parents), *superseded by statute as stated in* Mills v. Parker, 549 So. 2d 97 (Ala. Ct. App. 1989); Hill v. Garner, 561 S.W.2d 106, 107-08 (Ky. Ct. App. 1977) (holding that termination of parental rights

have determined that adoption statutes should supersede visitation statutes.[128] As a practical matter, this abdication of rights by the natural family is not greatly contested when the child is placed for adoption as an infant.[129] With the advent of increased stepchild adoption and adoption of older children, automatic termination of natural family rights sometimes seems counter to the best interests of the child.[130] As a result, some states have created an exception to the rule of automatic termination of rights upon adoption.[131]

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pursuant to statute permanently severs relationship of parent and child); Bowling v. Bowling, 631 S.W.2d 386, 391 (Tenn. 1982) (determining that adoption of child by maternal grandparents would sever prior legal relationships and end court-ordered visitation rights in paternal grandparents); *see also In re* Gardiner, 287 N.W.2d 555, 558 (Iowa 1980) (advancing two policy reasons for denying grandparent's rights upon adoption: (1) grandparent visitation against wishes of adoptive parents would never be in "best interests of the child;" and (2) grandparents' visitation rights are derivative of parents' rights and, thus, when parents' rights are terminated, grandparent rights are also terminated), *superseded by statute as stated in In re* A.C., 428 N.W.2d 297 (Iowa 1988); Jouett v. Rhorer, 339 S.W.2d 865, 868 (Ky. 1960) (noting "public policy demands that an adoption shall carry with it a complete breaking off of old ties").

128. *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-337.01(d) (1993) ("All visitation rights granted under this section automatically terminate if the child has been adopted or placed for adoption."); CAL. CIV. CODE § 197.5(c) (West 1983 & Supp. 1993) ("Any visitation rights granted pursuant to this section prior to the adoption of the child shall be automatically terminated upon such adoption."); MINN. STAT. ANN. § 257.022(3) (West 1992) ("Any visitation rights granted pursuant to this section prior to the adoption of the child shall be automatically terminated upon such adoption."); TENN. CODE ANN. § 36-6-301(b) (1991) ("This section shall not apply if the child has been adopted by a person other than a stepparent. Any visitation rights granted pursuant to this section prior to the adoption shall be automatically terminated upon such adoption."); VT. STAT. ANN. tit. 15, § 1016 (1989) ("When a child subject to an order under this chapter is later adopted, the order under this chapter expires except when the adopting parent is a stepparent, grandparent or other relative of the child."); *see also* Wilson v. Wallace, 622 S.W.2d 164, 165-66 (Ark. 1981) (holding that adoption severs all ties between child and natural relatives); Hicks v. Enlow, 764 S.W.2d 68, 73 (Ky. 1989) (dismissing grandparents' claim of visitation rights when child's parents were killed in auto accident and child was adopted by cousin); Smith v. Trosclair, 303 So. 2d 926, 927 (La. Ct. App. 1974) (determining that adoption legally severed relationship between child and natural grandmother), *aff'd*, 321 So. 2d 514 (La. 1975); *Appeals Court Rules in Visitation Case*, UPI, Dec. 17, 1992, *available in* LEXIS, Nexis Library, Wires File (discussing ruling that Ohio courts have no authority to grant grandparents visitation rights after child has been adopted).

129. *See* Fernández, *supra* note 18, at 119 (noting that in past, many children placed for adoption at infancy were illegitimate, and because of young age of children, terminating ties to natural families was logical).

130. *See* Nathan, *supra* note 18, at 635-36 (indicating that because older children are more likely to have meaningful relationships with natural family members, automatic termination of all visitation rights may be traumatic for child and may clash with child's best interests). *But cf.* Hood v. Connaughton, 426 N.Y.S.2d 574, 575 (App. Div. 1980) (holding that grant of rights to grandparents to visit deceased daughter's children was overextensive where visits would hinder children's adjustment to new family); Theimer, *supra* note 7, at A4 (noting that mother thought her child's visits with paternal grandparents after adoption of child by stepfather would be confusing to child).

131. *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-337.01(D) (Supp. 1993) (providing that automatic termination of visitation rights provisions do not apply "[i]f the child is removed from an adoptive placement" or if child adopted "by the spouse of a natural parent if the natural parent remarries"); MINN. STAT. ANN. § 257.022(3) (West 1992) (eliminating automatic termination where child is adopted by relative or stepparent); TENN. CODE ANN. § 36-6-301(a) (1991) (eliminating automatic termination where child is adopted by relative or stepparent); *see also*

In *H.F. v. T.F.*,[132] the Supreme Court denied certiorari and thereby upheld the Wisconsin Supreme Court decision that broadly interpreted grandparent visitation rights in the realm of stepparent adoption.[133] This case involved paternal grandparents who wanted the right to visit their deceased son's child.[134] The child's mother, upon her remarriage and the child's adoption by the stepfather, denied visitation to the grandparents.[135] The Wisconsin Supreme Court allowed the grandparents continued visitation rights despite adoption by the stepparent.[136] The court contrasted the situation in *H.F.* with the rights of grandparents to visit the child of a living son who terminated his parental rights.[137] In *H.F.*, the child's father remained the child's parent despite his death.[138] As the father had not voluntarily relinquished his rights, the grandparents' right to visitation likewise had not been relinquished.[139] Thus, *H.F.* takes a step toward recognizing that grandparents' right of visitation with grandchildren is not exclusively tied to the presence of the parents.[140]

In *H.F.*, the court addressed grandparent visitation rights in the

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Johnson v. Fallon, 181 Cal. Rptr. 414, 418-19 (Ct. App. 1982) (holding that in all adoptive situations, court is to weigh dual considerations of whether granting grandparent visitation is in child's best interests and, if so, whether grant of grandparent visitation would unduly impede adoptive relationship); Hicks v. Enlow, 764 S.W.2d 68, 71-73 (Ky. 1989) (allowing stepparent adoptions as sole exception to Kentucky statute terminating all connections with adopted child's natural family); People *ex rel.* Sibley v. Sheppard, 429 N.E.2d 1049, 1051-52 (N.Y. 1981) (holding that extinguishing grandparent visitation rights after adoption is overbroad reading of statute's termination provision and would disrupt court's obligation to protect child's best interests, and indicating that state had created adoptive relationship through statute and, therefore, should be able to determine extent of contact child should have with natural family); *infra* notes 133-47 and accompanying text (discussing move away from traditional termination of rights upon adoption).

For examples of statutes that do not provide for automatic termination, see ALA. CODE § 30-3-4 (1989); COLO. REV. STAT. § 19-1-117 (Supp. 1993); N.Y. DOM. REL. LAW § 72 (McKinney 1989); OKLA. STAT. ANN. tit. 10, § 5 (West 1987 & Supp. 1993).

132. 483 N.W.2d 803 (Wisc.), *cert. denied*, 113 S. Ct. 408 (1992).

133. *See* H.F. v. T.F., 483 N.W.2d 803, 804-06 (Wisc.) (finding that deceased father continues to be parent and that, accordingly, grandparents' rights are not terminated upon child's subsequent adoption), *cert. denied*, 113 S. Ct. 408 (1992).

134. *Id.* at 804.

135. *Id.*

136. *See id.* at 805-06 (noting Wisconsin Legislature's intent to maintain grandparent-grandchild relationships after adoption).

137. *Id.* at 805 (comparing *H.F.* with Soergel v. Raufman, 453 N.W.2d 624 (Wisc. 1990)). In *Soergel*, the father severed all of his rights to his minor child. *Soergel*, 453 N.W.2d at 624. The court in *H.F.* found that the circumstances in *H.F.* were qualitatively different than those in *Soergel*, where the father voluntarily abandoned his rights to his child. *H.F.*, 483 N.W.2d at 805.

138. *H.F.*, 483 N.W.2d at 805.

139. *Id.* at 805-06.

140. *See* Nathan, *supra* note 18, at 647 (noting that termination of grandparent visitation rights upon adoption of grandchild unfairly penalizes grandparents, who did not cause adoption or desire to terminate relationship with child).

specific context of adoption by a stepparent.[141] This decision does not provide guidance on more complicated adoption situations, such as adoption by someone other than a stepparent[142] or adoption when the other natural parent is still living and agrees to the adoption[143] and to the denial of the grandparents' visitation rights. In these instances, whether grandparents can petition for visitation depends on what the court perceives to be the basis for granting grandparent visitation rights. Two theories form the basis for granting grandparent visitation. First, the derivative rights theory bases grandparents' right to visitation as a derivative of the parents' legal relationship with the child.[144] The second more commonly accepted theory bases grandparent visitation on the statutory right which focuses on the grandparents past relationship with the child.[145] As the law has evolved and attempted to focus on the best interests of the child, grandparents' right to visitation has been increasingly based on the grandparents' prior relationship with the child and not on the grandparents' derivative right.[146] With domestic relations becoming more complex and adoption and grandparent visitation statutes developing in conflict, courts and legislatures can no longer adhere to the simplistic notion that all of a child's ties with his

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141. *See supra* notes 132-39 and accompanying text.

142. *See, e.g.*, Hicks v. Enlow, 764 S.W.2d 68, 73 (Ky. 1989) (denying grandparents visitation rights to child adopted by cousin after accidental death of child's parents). In Lingwall v. Hoener, 483 N.E.2d 512, 512 (Ill. 1985), the Illinois Supreme Court wrote thoughtfully about the various interests at stake where grandparent visitation arises in the context of adoption:

> Absent an adoption of an infant by strangers, there is no reason to assume from the outset that termination of a grandparental relationship is in an adopted child's best interest; nor is there any reason to view grandparental visitation as an "unnecessary intrusion" in the lives of a reconstituted family. Of course the child's best interest is not entirely severable from the interests of the parents in a reconstituted family, and certainly the parents' attitude toward grandparental visitation is an important factor for the courts to consider in determining whether such visitation should be ordered. However, their attitude is not the only, or even the paramount, consideration. Such factors as the length and quality of the relationship between grandparents and child, the child's need for continuity in his relationships with people who may have played a significant nurturing role in his life, and the effect of the termination of the child's relationship with the parent who has relinquished his rights and responsibilities must also be considered. These factors will certainly outweigh the opposition of parents that is based on the mere inconvenience to them of such visits, or on their animosity toward the child's other natural parent.

Id. at 516-17.

143. *See, e.g.*, Soergel v. Raufman, 453 N.W.2d 624, 627-28 (Wisc. 1990) (concerning adoption of child while natural father is alive and natural father relinquishes all rights and responsibilities regarding child).

144. *See* Fernández, *supra* note 18, at 118-22.

145. The second theory is the more commonly accepted view and provides that visitation is a statutory right rather than a biological one. *See* Cox v. Stayton, 619 S.W.2d 617, 620 (Ark. 1981); *In re* Meek, 443 N.E.2d 890, 891 (Ind. Ct. App. 1983).

146. *See* Fernández, *supra* note 18, at 118-22. *But see* Rudolph v. Floyd, 832 S.W.2d 219, 220 (Ark. 1992) (noting that grandparent rights are derivative of their child's parental rights).

or her natural family cease upon adoption.[147]

IV. THE FUTURE OF GRANDPARENT VISITATION RIGHTS

As the American family continues to evolve and change in form, stepparents, extended family, and caretakers will wish to obtain rights to visit with the child.[148] To accommodate the new needs of the American family, the law too must change. Lawmakers must approach this change in policy carefully because family law both "define[s] and institutionalize[s] family structure and roles."[149]

Legislatures have initiated a change in family law policy through the enactment of grandparent visitation statutes. The variation among these statutes, and the lack of guidance from Congress or the Supreme Court, however, has created difficulties for both parents and grandparents in determining their respective rights regarding the children. These inconsistencies and ambiguities have created

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147. In Lingwall v. Hoener, 483 N.E.2d 512, 516 (Ill. 1985) the court noted:

> Different issues are involved in determining the best interest of the child in an adoption by strangers and in an adoption by a natural parent and a new spouse. In adoptions involving strangers, the primary policy concern has traditionally been with maximizing the pool of potential adoptive parents by guaranteeing, through the termination of the rights and responsibilities of the natural parents, that the adoptive parents will have "the opportunity to create a stable family relationship free from unnecessary intrusion . . . ."
>
> In adoptions by a natural parent and that parent's new spouse, the policy concern with maximizing the pool of adoptive parents is greatly diminished, since the act of becoming a stepparent most often occurs without regard to adoption and in spite of regular visitations between the child and the noncustodial natural parent.

Id.

148. The expansion of those who wish to obtain child visitation rights has already begun and is being addressed by legislatures. *See, e.g.*, ALASKA STAT. § 25.24.150 (1991) (providing visitation for "a grandparent or other person if that is in the best interests of the child"); CONN. GEN. STAT. ANN. § 46b-59 (West 1986) (allowing visitation with child to "any person" whom the court deems appropriate); ILL. ANN. STAT. ch. 750, para. 5/607(b)(1) (Smith-Hurd 1993) (providing visitation privileges to "grandparents, great-grandparents, or sibling of any minor child"); ME. REV. STAT. ANN. tit. 19, § 752(6) (West Supp. 1993) (awarding "reasonable rights of contact with a minor child to any [third] persons"); VA. CODE ANN. § 20-107.2 (Michie Supp. 1993) (granting "grandparents, stepparents or other family members" visitation with children); WASH. REV. CODE ANN. § 26.09.240 (Supp. 1992) (providing visitation rights "for a person other than a parent when visitation may serve the best interest of the child"); WIS. STAT. ANN. § 767.245(4) (West 1993) (allowing petition for visitation from "grandparent, greatgrandparent, stepparent or person who has maintained a relationship similar to a parent-child relationship with the child"); *see also* Simpson v. Simpson, 586 S.W.2d 33, 35-36 (Ky. 1979) (allowing stepparent to have full hearing to establish whether she should have visitation privileges with stepchild whom she cared for since child was 17 months old and suggesting that visitation may be in order). *But see* Hendershot v. Hendershot, 785 S.W.2d 34, 35-36 (Ark. Ct. App. 1990) (rejecting great-aunt's petition for visitation with child and refusing to extend grandparent visitation rights to great-aunt).

149. Thompson et al., *supra* note 1, at 1217 (noting that poorly conceived legal intervention can provide greater problems than no policy at all); *see also* Derdeyn, *supra* note 7, at 282 (noting that unlike other areas of family law, which codify social change, grandparent visitation legislation is creating changes in family structure and operation).

particular hardships for the children caught in a family tug-of-war. Although the courtroom is not the ideal forum to resolve family disputes,[150] it has become the last resort for the settlement of grandparent visitation disputes. To address this problem, state legislatures must develop and enact a more consistent set of visitation laws.[151] Thus, all the states and the District of Columbia need to work together to construct and adopt a model grandparent visitation statute.[152]

Although many grandparents and their supporters suggest that a federally mandated statute would create uniform grandparent

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150. *See, e.g., 1991 House Hearing, supra* note 3, at 14 (statement of John H. Pickering, Chair, Commission on Legal Problems of the Elderly, American Bar Association) (commenting that intrafamily conflicts are "emotionally wrenching; litigating them may intensify the emotions and create great problems for the grandchildren at issue"); *1983 Senate Hearings, supra* note 100, at 5 (statement of John M. McCabe, Legislative Director, National Conference of Commissioners on Uniform State Laws) (commenting that courts of law are poorly equipped to adjudicate current domestic relations issues and questioning whether it is prudent to add grandparent rights cases to already overloaded court dockets); *1982 House Hearing, supra* note 1, at 16 (statement of Mr. and Mrs. Max Chasens, grandparents) ("Pity the poor judge . . . who Solomon-like, must carve up a child's time between warring factions that have difficulty passing a civil word between them. The best solution . . . is one worked out not by the judge, but by the litigants.") (quoting Alice Eckerson, *Grandparents Fight for Visiting Rights*, ATL. CITY PRESS, Apr. 13, 1982, at 10); *see also 1991 House Hearing, supra*, at 3 (statement of Pat Slorah, grandparent) (commenting that judicial resolution of grandparent visitation disputes has replaced role traditionally fulfilled by religious leader, older family member, or leader of community); GOLDSTEIN ET AL., *supra* note 124, at 117. Goldstein et al. write:

> We reasoned, always from the child's point of view, that custodial parents, not courts or noncustodial parents should retain the right to determine when and if it is desirable to arrange visits. We took . . . this position because it is beyond the capacity of courts to help a child to forge or maintain positive relationships to two people who are at cross-purposes with each other because, by forcing visits, courts are more likely to prevent the child from developing a reliable tie to either parent [or grandparents]; and because children who are shaken, disoriented, and confused by the breakup of their family need an opportunity to settle down in the privacy of their reorganized family with one person in authority upon whom they can rely for answers to their questions and for protection from external interference.

GOLDSTEIN ET AL., *supra* note 124, at 117.

151. Dr. Andre Derdeyn discussed one problem with setting firm regulations regarding grandparent visitation statutes in *1982 House Hearing, supra* note 1, at 72, where he noted:

> [E]stablishing legislation will not adequately solve [this] problem[] [of grandparent visitation rights] . . . in this area, and the area of family law as a whole, I see too many instances where today's solution becomes tomorrow's problem. . . . I do not think that the major solution is going to come out of the legal system. I do not see how it can. These are not legal issues.

Id.

152. *See 1982 House Hearing, supra* note 1, at 76-77 (statement of Judith Areen, Professor of Law, Georgetown University Law Center, and Professor of Community and Family Medicine, Georgetown University Medical Center) (commenting that uniform model statutes have been used successfully in other areas of family law). Professor Areen also noted that while only seven states had adopted the Uniform Model Divorce Act (UMDA), "[i]t has been more influential than this number suggests . . . for it has been a source of both policy and language for many state legislatures." *Id.* at 83.

visitation rights, that option is impossible under the Constitution.[153] Article 1, Section 8 of the Constitution enumerates the areas in which Congress may legislate.[154] Family matters and grandparent visitation do not fall within any of Congress' enumerated powers. Under the Tenth Amendment to the Constitution, all powers not explicitly delegated to Congress are reserved to the States;[155] thus, grandparent visitation is in the domain of state control.

While a model statute seems ideal in theory, it is a difficult proposition to implement because Congress only has two indirect avenues available to encourage such changes. These options include preconditioning the receipt of federal funds on the adoption of a uniform grandparent visitation statute or establishing a resolution on the subject to encourage states to create a uniform statute.[156] Preconditioning the receipt of federal funding on compliance with certain federal standards cannot succeed in the realm of grandparent visitation. Currently, there is no federally funded program relating to visitation laws, and, thus, no nexus exists between federal funds and grandparent visitation.[157] Congress' attempt at the second indirect approach, a nonbinding congressional resolution, has met with little success.[158]

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153. *1982 House Hearing*, *supra* note 1, at 76-77 (statement of Judith Areen, Professor of Law, Georgetown University Law Center, and Professor of Community and Family Medicine, Georgetown University Medical Center). Professor Areen noted:

> On the one hand, both the variation in, and relatively recent date of, State legislative protection for grandparent visitation suggest it would be easier if we had a single, national standard. On the other hand, child custody matters have traditionally been left to the States. The one Federal statute that touches this area was explicitly intended to avoid inconsistent decisions by the courts of two or more States involving the custody of one child. The lack of Federal standards governing custody decisions reflects an important constitutional constraint: even if Congress wanted to act, it does not appear to have the constitutional authority to mandate standards for child custody or visitation.

Id.

154. U.S. CONST. art. I, § 8.

155. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

156. *1991 House Hearing*, *supra* note 3, at 200-03 (citing GINA M. STEPHENS & GLORIA SUGARS, CRS REPORT FOR CONGRESS: LEGAL OVERVIEW OF GRANDPARENT VISITATION RIGHTS 14-17 (1991) [hereinafter CRS REPORT] (discussing fact that Congress does not have authority to legislate on family law questions, and that accordingly, it must use indirect approaches such as nonbinding resolutions and conditioning of federal funds on compliance to affect such questions).

157. CRS REPORT, *supra* note 156, at 16 (discussing fact that Congress does not have preconditioning federal funding available in area of grandparent visitation because there is no federal program relating to visitation to which to link funds). Additionally, if substantial federal funds were preconditioned to the adoption of a model grandparent visitation statute, it might violate the Constitution by encroaching upon the states' rights under the Tenth Amendment to legislate on non-enumerated topics. *Id.*

158. *See* S. Con. Res. 40, 98th Cong., 1st Sess. (1983) (enacted); *see also* CRS REPORT, *supra* note 156, at 14-15 (discussing feasibility of nonbinding congressional resolutions in family law).

The uniformity a model statute would provide is necessary to ensure just enforcement of visitation rights. Currently, when a court grants grandparents a right of visitation, that right is enforceable only in the state in which it is granted. If the child's family moves to another state, the grandparent may have to file a new lawsuit to obtain visitation. A model statute with a uniform enforcement provision would eliminate this problem.

In formulating a model statute, the states must draft the provisions to benefit the child.[159] Although it may be beneficial for older generations to have contact with their grandchildren, the states should not use the statute to give "the aged their moral rights."[160] This Comment suggests that visitation is a state-conferred privilege, not an absolute right.[161] For this reason, a model statute should hold the best interests of the child paramount.[162] Thus, the statute should provide a procedural vehicle through which a grandparent can apply to a court for visitation rights.[163] The court should then apply a statutorily defined test to determine whether visitation[164] with the

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159. *See* Thompson et al., *supra* note 1, at 1220 (contending that assessment of whether visitation is in child's best interests often depends more on intuitive judgments of grandparents' "fitness" than on child-centered concerns).

160. *1982 House Hearing, supra* note 1, at 15 (statement of Mrs. Gerrie Highto, grandmother).

161. *See 1983 Senate Hearings, supra* note 100, at 6 (statement of John M. McCabe, Legislative Director, National Conference of Commissioners on Uniform State Laws) (suggesting that while grandparent visitation "has been proposed in terms of grandparents' rights . . . grandparents may receive what may be characterized as a privilege more than a right").

162. The doctrine of *parens patriae* is the basis for considering the best interests of the child as the paramount issue in granting grandparent visitation rights. By looking after the child's welfare, the state grants grandparents visitation with the child because the state has determined that such contact is in the best interests of the child. *See* Roberts v. Ward, 493 A.2d 478, 481 (N.H. 1985) ("[T]he superior court, as an instrumentality of the state, may use its *parens patriae* power to decide whether the welfare of the child warrants court-ordered visitation with grandparents to whom close personal attachments have been made."); *see also 1982 House Hearing, supra* note 1, at 76 (statement of Judith Areen, Professor of Law, Georgetown University Law Center, and Professor of Community and Family Medicine, Georgetown University Medical Center) (underscoring that because excessive psychological turmoil for even one child is unacceptable, it is important to make visitation decisions in context of parties involved).

163. *See* N.Y. DOM. REL. LAW § 72 (McKinney 1989) (providing that grandparent visitation statutes are "not intended to give grandparents an absolute or automatic right of visitation but, rather was designed to establish a procedural vehicle through which grandparents might assert that visitation of the child or children is warranted").

164. *1991 House Hearing, supra* note 3, at 29 (statement of John H. Pickering, Chair, Commission on Legal Problems of the Elderly, American Bar Association) (asserting that highly defined grandparent visitation guidelines both protect child and family and prevent judges from overlooking relevant factors). The term "visitation" is expansive, and usually denotes a custodial interest held by a noncustodial parent. JUDITH C. AREEN, FAMILY LAW: CASES AND MATERIALS 1301 (3d ed. 1992). This broad term may cause some parents to fear that the courts are taking some "right" from them and granting it to the grandparents. Perhaps, what grandparents request can be more loosely defined as "access" to their grandchildren. *Id.* When grandparents and grandchildren live far apart "access" may entail phone calls, letters, and occasional visits. *Id.* Thus, it may be more appropriate and conciliatory to substitute the term "access" for the more tainted term "visitation." This solution may assist grandparents secure the desired multi-

grandparent would be in the best interests of the child.

To ensure uniform application of the law, standard criteria must exist so that judges throughout the United States have uniform guidelines to follow in determining the best interests of the child.[165] These guidelines should allow courts to consider each family situation independently. The guidelines, for example, should direct courts to consider the nature of the relationship between the grandparent and the child; if the relationship was a nurturing, caring relationship to which the child was accustomed, the court should not arbitrarily sever the relationship due to adoption[166] or family conflict.[167] The court should also consider the relationship between the grandparents and the child's parents. If the relationship is extremely volatile, allowing the grandparents visitation rights may place the child in the middle of an emotional battleground and not serve the child's best interests.[168] Finally, when both parents do not wish for the grandparents to have contact with the child, the court should respect their right of parental autonomy.[169]

Because courts are not the ideal domain for settling issues as fraught with emotion as visitation,[170] a model statute should require that the parties involved in a visitation dispute attempt some type of

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generational contact, and ease the apprehensions of parents who feel their rights are being jeopardized by an expansive grant of "visitation." *Id.*

165. *See Wilentz, Goldman and Spitzer Make Statement Regarding Senate Bill 774*, PR NEWSWIRE, Jan. 5, 1993, *available in* LEXIS, Nexis Library, Wires File (noting that central problem in draft of New Jersey grandparent visitation statute is lack of standards or criteria to determine application of grandparent visitation).

166. *See* Lingwall v. Hoener, 483 N.E.2d 512, 516-17 (Ill. 1985) (reporting that "child's need for continuity in his relationships with people who may have played a significant nurturing role in his life, and the effect of the termination of the child's relationship with the parent who has relinquished his rights and responsibilities must also be considered"); People *ex rel.* Sibley v. Sheppard, 429 N.E.2d 1049, 1052 (N.Y. 1981) (noting that "[b]y enacting [the visitation statute], the Legislature has recognized that, particularly where a relationship between the grandparents and the grandchild has been established, the child should not undergo the added burden of being severed from his or her grandparents, who may provide the natural warmth, interest, and support that will alleviate the child's misery"); *see also supra* notes 127-47 and accompanying text (discussing grandparent visitation in the context of adoption).

167. *See supra* notes 91-107 and accompanying text (discussing grandparent visitation disputes resulting from intrafamily conflict).

168. *See 1982 House Hearing*, *supra* note 1, at 70 (statement of Dr. Andre Derdeyn, Director, University of Virginia Child and Family Psychiatry Training Program) (recognizing that courts do not fully comprehend significant and potentially destructive effects that loyalty conflicts can have on children, regardless of whether it is conflict between two parents or parents and grandparents). *But see* Lo Presti v. Lo Presti, 355 N.E.2d 372, 374 (N.Y. 1976) (suggesting that if animosity between parents and grandparents were sufficient reason to deny grandparents visitation, then grandparent visitation statutes would accomplish very little, because without acrimony, visitation would have been arranged by mutual agreement among parties).

169. *See supra* notes 35-60 and accompanying text (analyzing common-law protection and limitations of parental autonomy).

170. *See supra* note 150 and accompanying text.

mediation procedure before bringing the case before a judge.[171] Such a requirement will likely reduce the trauma for the child, reduce intrafamily litigation, and benefit the parties involved by encouraging a conciliatory arrangement that does not require the enforcement authority of a judge.[172] Additionally, the court should assign the child separate counsel, a guardian *ad litem*,[173] to protect the child's interests and to keep the battle over visitation from becoming a legal and emotional tug of war. Both the parents and grandparents should share the expense of a guardian *ad litem*. This additional measure will ensure that the best interests of the individual child are promoted throughout the process.[174]

V. MODEL GRANDPARENT VISITATION STATUTE

Proposed model laws have had a major impact on the develop-

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171. *1982 House Hearing*, *supra* note 1, at 74 (statement of Judith Areen, Professor of Law, Georgetown University Law Center, and Professor of Community and Family Medicine, Georgetown University Medical Center) (noting that mediating solution to visitation dispute on private basis is preferable to going before judge); *see also id.* at 105 (statement of Richard S. Victor, attorney) (suggesting counseling in visitation disputes and recommending that parties' willingness to cooperate in such procedure be considered by judge if attempts to reconcile are not satisfactory, so that no single party can "control the proceedings by blatant avoidance of attempts to reconcile the dispute").

172. *See* GRANDPARENT VISITATION MANUAL, *supra* note 7, at 126-27 (describing benefits of mediation). The ABA handbook explains:

> Mediation fosters values of great importance in the resolution of family disputes: privacy and self-determination. One advantage of mediation is that it does not take away any legal rights . . . but it does add new possibilities for lasting solutions to family problems. Grandparent visitation disputes . . . often cannot be resolved by a single court hearing. But a mediated settlement, reached after intensive communication and compromise between the parties, is more likely to survive over time. Mediation experts suggest that referral is best done in the early stages of the legal dispute. Use of the adversarial system tends to exacerbate the family dispute and further harden divisions between the parties. Mediating the dispute at any point prior to a hearing on the merits will certainly save the parties, and especially the children who may be called to testify, the agonizing emotional experience of undergoing a trial involving sensitive private matters.

Id.

173. A guardian *ad litem* is usually an attorney or social worker appointed by the court to speak for the child's well-being. HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 795 (2d ed. 1988).

174. *See* Bahr v. Galonski, 257 N.W.2d 869, 874 (Wisc. 1977) (discussing value of guardian *ad litem* in custody proceedings). The Wisconsin Supreme Court explained the reasons for appointing a guardian *ad litem*:

> The requirement that the children have independent legal representation does not in any way suggest that the parents or the trial court were unmindful of the children's welfare. Rather, it reflects the conviction that the children are best served by the presence of a vigorous advocate free to investigate, consult with [the children] at length, marshal evidence, and to subpoena and cross-examine witnesses. The judge cannot play this role. Properly understood, therefore, the guardian *ad litem* does not usurp the judge's function; he aids it.

Id.

ment of family law. Individual states often incorporate these model laws into existing statutes or adopt them in their entirety.[175] To help maintain the political viability of a model statute, each state must have the opportunity to participate in its creation.[176] As this Comment has recommended, the states should create a model grandparent visitation statute that individual states can adopt or use as a basis for formulating or amending their current grandparent visitation statutes. To encourage this process, this Comment proposes the following model grandparent visitation statute:[177]

> *Preamble.* The goal of this statute is to maintain beneficial and substantial relationships that grandchildren have with their grandparents. Any benefit that grandparents may derive from the implementation of this statute is secondary.
>
> § 1
>
> (a) Grandparents may apply to the court of general jurisdiction over family matters or domestic relations for visitation privileges with their grandchildren.
>
> (b) Any grandparent shall have the right to intervene in an action involving the guardianship or custody of the child for the purpose of obtaining the privilege to visit with the child.
>
> § 2
>
> Upon petition for visitation, the court shall initiate professional mediation among the grandparent(s) and the child's legal parent(s) in an effort to create an amicable visitation agreement through communication among the parties, to diminish animosity

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175. *See* CRS REPORT, *supra* note 156, at 204 (noting that because of several controversial elements, only eight states have adopted Uniform Marriage and Divorce Act, but that all states have adopted Uniform Child Custody and Jurisdiction Act); *1982 House Hearing, supra* note 1, at 77 (statement of Judith Areen, Professor of Law, Georgetown University Law Center, and Professor of Community and Family Medicine, Georgetown University Medical Center) (commenting that Uniform Marriage and Divorce Act has had impact on development of family law at state level); *see also 1983 Senate Hearings, supra* note 100, at 3-4 (statement of John M. McCabe, Legislative Director, National Conference of Commissioners on Uniform State Laws) (stating that primary activity of National Conference of Commissioners on Uniform State Laws (NCCUSL) is to review all state family law and to propose uniform laws where need exists). The NCCUSL has developed a variety of uniform statutes, including the Uniform Marriage and Divorce Act, the Uniform Reciprocal Enforcement of Support Act, the Uniform Child Custody Jurisdiction Act, the Uniform Parentage Act, the Uniform Recognition of Foreign Divorces Act, the Uniform Marital Property Act, and the Uniform Premarital Agreement Act. *Id.* at 3-4.

176. *See 1982 House Hearing, supra* note 1, at 77 (statement of Judith Areen, Professor of Law, Georgetown University Law Center, and Professor of Community and Family Medicine, Georgetown University Medical Center) (noting positive political aspects of creating model statute with representatives from each state).

177. The proposed model grandparent visitation statute is not so much a radical departure from the norm as it is a clear enunciation of factors to consider in making a fair determination of visitation rights. By endorsing uniform adoption of a model grandparent visitation statute, states would not be inhibited from experimenting with and altering the elements of the statute to better fit the individual state's needs. To the contrary, states would have a common source from which to derive policy and statutory elements.

among the parties to the greatest extent possible, and to reduce trauma for the child involved.[178]

§ 3

If reasonable mediation efforts fail, the case may be brought before a judge. Where circumstances demonstrate that it would be in the best interests of the child to grant grandparent(s) visitation privileges, such privileges as the court and other appropriate professional consultants deem reasonable will be granted.[179]

§ 4

Where the child has lived peaceably with the grandparent(s) for more that twelve consecutive months within the five year period preceding the grandparents(s)' application for visitation privileges, there will be a rebuttable presumption in favor of granting grandparent visitation rights.[180]

§ 5

In determining the best interests of the child, the court shall consider the following factors and provide written findings accordingly:

(a) the love, affection, and other emotional ties that exist between the grandparent(s) and the child;[181]

(b) the nature and quality of the relationship between the grandparent(s) and the child, the length of time that such relationship has existed, and the desirability of maintaining that relationship;[182]

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178. *1982 House Hearing, supra* note 1, at 74 (statement of Judith Areen, Professor of Law, Georgetown University Law Center, and Professor of Community and Family Medicine, Georgetown University Medical Center) (observing that private mediation is always preferable to trial resolution); *see also id.* at 87, 105 (statement of Richard S. Victor, attorney) (stating that families will seek voluntary reconciliation of their disputes when legislation provides grandparents with ability to seek court enforcement of their rights and recommending that legislation prescribe mandatory counseling to assist families in resolving visitation disputes). *See generally* GRANDPARENT VISITATION MANUAL, *supra* note 7, at 121-27 (advocating mediation as part of settlement of grandparent visitation disputes).

179. CAL. CIV. CODE § 4351.5(h) (West 1983 & Supp. 1993) (declaring that if mediation is unsuccessful, parties will have opportunity to appear and settle matters in court).

180. MINN. STAT. ANN. § 257.022(2a) (West 1992) (granting visitation rights to grandparents when child has lived with them for 12 months or more but "is subsequently removed from the home by his parents," and the court "finds that visitation rights would be in the best interests of the child and would not interfere with the parent and child relationship"). *See generally supra* notes 123-25 and accompanying text (discussing psychological impact of severing previously formed grandparent-grandchild bond).

181. *E.g.*, ALASKA STAT. § 25.24.150(c)(4) (1991) (requiring courts to consider "the love and affection existing between the child and [the grandparent]"); ME. REV. STAT. ANN. tit. 19, § 1003(2)(F) (West Supp. 1993) (requiring courts to consider parties' "capacities to give the child love, affection and guidance"); VT. STAT. ANN. tit. 15, § 1013(b)(1) (1989) (requiring courts to consider "the love, affection and other emotional ties existing between the grandparents involved and the child"); *see also 1982 House Hearing, supra* note 1, at 106 (statement of Richard S. Victor, attorney) (proposing that emotional factors be considered in determining whether visitation is in best interests of child).

182. CAL. CIV. CODE § 197.5 (West 1983 & Supp. 1993) (requiring courts to consider "the amount of personal contact between [petitioning grandparents] and the minor children"); FLA.

(c) whether visitation will promote or disrupt the child's psychological development;[183]

(d) the physical, emotional, mental, religious, and social needs of the child;[184]

(e) the reasonable preference of the child, if the child is ten years of age or if the court deems the child to be of sufficient age and maturity to express a preference;[185]

(f) the wishes and opinions of the parent(s);[186]

(g) the willingness and ability of the petitioning grandparent(s) to facilitate and encourage a close relationship among the child and the parent(s);[187]

(h) the friction or animosity between the grandparent(s) and the legal parent(s) of the child and the reasons behind such acrimony, although consideration of this factor shall not be the sole basis for denial of visitation privileges;[188]

(i) whether the parties made a good faith effort to cooperate in mediation proceedings;[189] and

(j) any other consideration relevant to a fair and just determina-

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STAT. ANN. ch. 752.01(2)(b) (Harrison Supp. 1992) (requiring courts to consider "length and quality of the prior relationship between the child and the grandparent or grandparents"); OR. REV. STAT. § 109.121(1)(a)(A) (1991) (conditioning visitation in part on whether grandparent "has established or attempted to establish" ongoing relationship with child); VT. STAT. ANN. tit. 15, § 1013(b)(3) (1989) (requiring courts to weigh nature of grandparent-grandchild relationship and "desirability of maintaining that relationship"); *see also 1982 House Hearing, supra* note 1, at 74 (statement of Judith Areen, Professor of Law, Georgetown University Law Center, and Professor of Community and Family Medicine, Georgetown University Medical Center) (advocating that presumption in favor of continued contact should be fortified by evidence of established relationship between grandparents and grandchild); *id.* at 106-07 (statement of Richard S. Victor, attorney) (maintaining that relationship between grandparent and grandchild should be considered in visitation decision).

183. GRANDPARENT VISITATION MANUAL, *supra* note 7, at 122 (recommending that child's psychological development be considered in determining what is in child's best interests).

184. ALASKA STAT. § 25.24.150(c)(1) (1991) (requiring courts to evaluate "physical, emotional, religious, and social needs" of child in determining child's best interest); FLA. STAT. ANN. ch. 752.01(2)(d) (Harrison Supp. 1992) (requiring courts to consider mental and physical health of child); VA. CODE ANN. § 20-107.2(4) (Michie Supp. 1993) (requiring courts to consider "needs" of child).

185. ALASKA STAT. § 25.24.150(c)(3) (1991); CONN. GEN. STAT. ANN. § 46b-59 (West 1986); FLA. STAT. ANN. ch. 752.01(2)(c) (Harrison Supp. 1993); VT. STAT. ANN. tit. 15, § 1013(b)(6) (1989). *See generally* GRANDPARENT VISITATION MANUAL, *supra* note 7, at 123 (recommending that court consider reasonable preference of child in determining whether to grant grandparent visitation rights).

186. This factor addresses situations where both parents oppose grandparent visitation.

187. ALASKA STAT. § 25.24.150(c)(6) (1991); FLA. STAT. ANN. ch. 752.01(2)(a) (Harrison Supp. 1993); VT. STAT. ANN. tit. 15, § 1013(b)(7) (1989).

188. *See 1982 House Hearing, supra* note 1, at 105-06 (statement of Richard S. Victor, attorney) (suggesting that courts probe into reasons for animosity among parties).

189. ME. REV. STAT. ANN. tit. 19, § 1003-A (West Supp. 1993) (requiring mediation of visitation disputes and considering whether parties made good faith effort to resolve differences through mediation); *1982 House Hearing, supra* note 1, at 105 (statement of Richard S. Victor, attorney) (proposing that courts consider willingness of parties to cooperate in mediation proceedings).

tion of visitation rights.[190]

§ 6

This visitation statute shall apply in cases where a child has been adopted. Adoption shall not terminate the visitation rights of the child's grandparent(s), as long as visitation remains in the best interests of the child.[191]

§ 7

In an effort to promote the best interests of the child, the court shall appoint a guardian *ad litem*.[192] The grandparent(s) and the legal parent(s) of the child shall share the costs of such counsel.

§ 8

If there is a significant change of circumstances, the grandparent(s) or legal parent(s) may petition the court to consider whether visitation remains in the best interests of the child.[193]

VI. ANALYSIS OF THE PROPOSED MODEL GRANDPARENT VISITATION STATUTE

A. The Best Interests of the Child Standard

A problem inherent in the best interests of the child standard is that regardless of how many factors the courts consider, the analysis

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190. ALASKA STAT. § 25.24.150(c)(9) (1991) (allowing courts to consider other "pertinent factors"); FLA. STAT. ANN. ch. 752.01(2)(f) (Harrison Supp. 1993) (authorizing consideration of "[s]uch other factors as are necessary in the particular circumstances"); VA. CODE ANN. § 20-107.2(9) (Michie Supp. 1993) (authorizing courts to consider any factors necessary to determine best interests of child).

191. *See supra* notes 127-47 and accompanying text (discussing grandparent visitation in context of adoption). This provision of the model statute eliminates the artificial limitation that terminates visitation rights upon adoption or upon adoption by someone other than a stepparent. *See supra* note 128 (citing state statutes that terminate visitation upon adoption). These are artificial limitations because even when the child is adopted by strangers, it may be in the child's best interests to continue grandparent visitation in order to acclimate the child to his or her new surroundings.

192. ALASKA STAT. § 25.24.150(b) (1991) (suggesting use of guardian *ad litem*); GRANDPARENT VISITATION MANUAL, *supra* note 7, at 128 (summarizing ABA recommendation that effective representation by guardian *ad litem* can affect mediation, and thus protect child from emotional turmoil that accompanies protracted litigation).

193. *See* COLO. REV. STAT. § 19-1-117(4) (Supp. 1993) ("The court may make an order modifying or terminating grandchild visitation rights whenever such an order would serve the best interests of the child."); ILL. ANN. STAT. ch. 750, para. 5/607(c) (Smith-Hurd 1993) (allowing court to modify visitation order whenever modification would be in best interests of child); VT. STAT. ANN. tit. 15, §§ 1014-15 (1989) (allowing court to modify or terminate any order of visitation and that "[a]bsent a real, substantial and unanticipated change of circumstances, no person whose petition under this section is denied with prejudice may file another petition under this section sooner than one year after that denial"); WASH. REV. CODE ANN. § 26.09.240 (West 1989 & Supp. 1992) ("The court may modify an order granting or denying visitation rights whenever modification would serve the best interests of the child . . . ."). This requirement, among other things, would allow parents who adopt a child to petition to end grandparent visitation.

will never be complete.[194] Each year, states add factors for courts to evaluate in determining the best interests of the child.[195] But considering that the majority of states do not specify factors for determining the best interests of the child,[196] some guidelines are better than none at all. By providing judges with guidelines, states can prevent judges from relying on personal views and private agendas.[197] Statutorily articulated factors are more likely to reflect the will of the public because, compared to judges, the legislature is more accountable to the public and more accustomed to incorporating public sentiment in its decisions.[198] While far from perfect, the best interests of the child standard remains the preferred standard in determining child visitation rights.

1. Consideration of the grandparent-parent relationship

Unlike many current state statutes, the proposed model statute

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194. *See 1991 House Hearing*, *supra* note 3, at 49 (statement of Leslie I. Levine, attorney) (commenting that "the legislature can sit up all night and come up with criteria, [but] they are always going to miss some, and those that they have enumerated will get undue emphasis and those that they have left out will not receive any emphasis because the judge will then be bound"); Mnookin, *supra* note 21, at 289 ("An inquiry about what is best for a child often yields indeterminate results because of the problems of having adequate information, making the necessary predictions, and finding an integrated set of values by which to choose.").

195. *See* ALASKA STAT. § 25.24.150(c)(7) (1991) (noting that most recent addition to factors considered in determining best interests of child is family's history of abuse or neglect).

196. *See, e.g.*, ALA. CODE § 30-3-4 (1989); ARIZ. REV. STAT. ANN. § 25-337.01 (Supp. 1993); ARK. CODE ANN. § 9-13-103 (Michie 1991); CAL. CIV. CODE § 197.5 (West 1983 & Supp. 1993); COLO. REV. STAT. § 19-1-117 (Supp. 1993); CONN. GEN. STAT. ANN. § 46b-59 (West 1986); ILL. ANN. STAT. ch. 750, para. 5/607(b)(1) (Smith-Hurd Supp. 1993); KY. REV. STAT. ANN. § 405.021 (Baldwin 1991); MD. CODE ANN., FAM. LAW § 9-102 (1991); N.Y. DOM. REL. LAW § 72 (McKinney 1989); OKLA. STAT. ANN. tit. 10, § 5 (West 1987 & Supp. 1993); TENN. CODE ANN. § 36-6-301 (1991); UTAH CODE ANN. § 30-5-2 (Supp. 1993); WASH. REV. CODE ANN. § 26.09.240 (West Supp. 1992); WIS. STAT. ANN. § 767.245(4) (West 1993).

197. *See* Fernández, *supra* note 18, at 129 (arguing that "broad discretion allows for an unarticulated, private agenda to govern a dispute in which the court has no personal interest and is largely incapable of supervising on a day-to-day basis" and noting that many judges may be influenced by fact that they themselves are grandparents). *But see* Carl Schneider, *Discretion Rules and Law: Child Custody and the UMDA's Best-Interest Standard*, 87 MICH. L. REV. 2215, 2247 (1991) (noting that "[d]iscretion can lead to better decisions because they can be tailored to the particular circumstances of each case"). Schneider argues:

> Discretion gives the decisionmaker flexibility to do justice. It does so not just by allowing a decisionmaker to heed all the individual facts that ought to affect a decision but that could not be listed by rules. . . . Discretion may also conduce to better decisions by discouraging overly bureaucratic ways of thinking, since they often are born of too rigid an insistence on writing elaborate rules and on following them with too mechanical regularity.

Id.

198. *See* Fernández, *supra* note 18, at 129 ("Allowing a judge to impose personal values arguably is worse than directing him or her to impose values that a legislature has chosen, because a judge is less personally accountable to the public than is the representative legislature."). Although some state judges are elected, they are less accountable to the public than legislatures because, unlike legislatures, they do not receive abundant public comment and are not forced to compromise with others in an effort to pass a bill.

considers several important aspects of the relationship among the child's parents and grandparents. Although grandparent visitation can be beneficial for a child,[199] the contact between the grandparents and a grandchild is dictated by the child's parents. As a result, the relationship between the grandparents and the child's parents often determines how beneficial visitation will be for the child.[200] When the grandparent-parent relationship is contentious, that strain may expand into a legal battle for visitation, which can become a battle for the child's affections and amplify the acrimony among the adults.[201] Beginning the petition for visitation with mediation may help the parties come to an accord which is both mutually agreeable to the parties and beneficial to the child.[202] If mediation is not successful, the court will then consider the grandparent-parent relationship in determining whether visitation will be in the child's best interest.

2. Child's preference

Considering the child's preference in grandparent visitation disputes makes practical sense because the child's happiness should be the ultimate concern in such disputes. Utilizing the child's preference as a factor, however, does create some problems. For instance, the child may want to visit with a grandparent because the grandparent provides the child with special treats and attention. A child in this situation is not in any position to determine objectively whether visitation is in his or her best interest.[203] Additionally, expressing a preference that is contrary to the wishes of a parent can create a disturbing loyalty conflict for the child.[204] By limiting consideration of the child's preference to cases involving children at least ten years of age, courts are able to contemplate this factor only

199. *See* Thompson et al., *supra* note 1, at 1218-19 (discussing benefit to child of having access to grandparent as playmate, family historian, and mentor).

200. *See* Matthews & Sprey, *supra* note 4, at 41 (noting that most significant aspect of grandparent-grandchild bond is grandparent-parent relationship); Thompson et al., *supra* note 17, at 1219 (determining that nature of grandparent-parent relationship significantly affects benefits and nature of grandparent-grandchild relationship).

201. *See* Derdeyn, *supra* note 7, at 279 (positing that when visitation battle becomes contest for child's affection, such contest can be detrimental to child) (citing Commonwealth *ex rel.* McDonald v. Smith, 85 A.2d 686, 688 (Pa. Super. Ct. 1952)).

202. *See infra* notes 210-18 and accompanying text (discussing benefits and drawbacks of mediation on visitation proceedings).

203. *See* AREEN, *supra* note 164, at 560 (questioning how child is to determine which parent would be more fit in custodial situation).

204. *See* AREEN, *supra* note 164, at 560 (discussing loyalty conflict and "terrible responsibility" that expressing preference may impose on child).

when children are generally capable of making such decisions.[205] The diminution of a potential loyalty conflict and the child's personal investment in his or her own happiness establish the child's preference as a valuable factor.

B. *The Guardian* Ad Litem

As custody and visitation hearings increasingly concentrate on the best interests of the child, the use of guardians *ad litem* has expanded markedly.[206] The use of a guardian *ad litem* has been criticized as an unnecessary expense that simply adds another person to an already complicated domestic dilemma.[207] The guardian *ad litem*, however, can serve as an objective third party who can investigate the family dispute more completely than a judge can. Further, a guardian *ad litem* would ensure that the child's interests are not overlooked during the visitation determination, and can encourage resolution of the visitation problem on a more amicable basis.[208] The potential exists for the guardian *ad litem*'s role to become overbroad and overemphasized by the judge, but this danger can be prevented by allowing the parties to cross-examine the guardian and any witnesses that the guardian relied on in forming his or her evaluation, and by requiring the guardian to submit a written report of his or her findings.[209]

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205. *But see* AREEN, *supra* note 164, at 560-61 (preferring maturity test for child rather than chronological test and questioning whether child's best interests should be viewed from long-term or short-term perspective because "conditions that make a person happy at age seven may have adverse consequences at age thirty").

206. *See* GRANDPARENT VISITATION MANUAL, *supra* note 7, at 128 (noting that Wisconsin and New Hampshire, for example, now mandate appointment of guardians *ad litem* in contested custody cases).

207. *See* Mnookin, *supra* note 21, at 13 (criticizing use of guardian *ad litem*). Mr. Mnookin argues:

> [T]he child advocate is in no better position than the judge to determine the child's best interest. While he [sic] may have acquired a great deal of information regarding the past relationships among the parties, he [sic] cannot make predictions regarding the future of those relationships. . . . The result can only be an uncertain and perhaps unwarranted position or the substitution of the advocate's own feelings and values for the 'position of his [sic] client.'
>
> So long as the best interest test remains the standard in private custody disputes . . . the use of a child's advocate will probably grow. However, the appointment of an advocate will not make judicial decisions easier nor will the predicted results be any more accurate.

Id.

208. *See* GRANDPARENT VISITATION MANUAL, *supra* note 7, at 128 (extolling benefits of guardian *ad litem* in grandparent visitation proceedings).

209. *Cf.* Collins v. Collins, 324 S.E.2d 82, 85 (S.C. Ct. App. 1984) (holding that failure to make report of guardian *ad litem* available and to allow cross-examination is reversible error).

C. *Mediation*

Mediation is a positive alternative to courtroom litigation that addresses both the legal and emotional components of family disputes.[210] Mediation is not an adjudicatory process; rather, the parties attempt to achieve a resolution suitable to the family's particular desires and needs.[211] Because it is less adversarial than litigation, mediation provides numerous benefits to the family: it is less expensive than litigation, it provides a "personalized model for dispute resolution,"[212] and it helps the parties cooperate with each other.[213] And compared to other dispute resolution mechanisms, mediation minimizes state intervention in the family.[214] The state also benefits from mediation because resolving family disputes through mediation reduces the case burden on the court system.[215]

While mediation clearly has its advantages, it also has several disadvantages. Mediation does not use all of the defined procedures that accompany judicial proceedings, and as a result, the mediation process might fail to treat all of the parties fairly.[216] In addition,

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210. *See* Jay Folberg, *Divorce Mediation—A Workable Alternative*, *in* JUDITH AREEN, CASES AND MATERIALS ON FAMILY LAW 851 (3d ed. 1992) (asserting that mediation recognizes marital dissolution as "both a matter of the heart and of the law").

211. *See id.* at 853 (noting that mediation does not emphasize winning or losing but instead focuses on developing some "resolution that best meets the family's own unique needs"). Mediation is particularly effective in family disputes:

> [T]he mere presence of a third party tends to put the parties on their good behavior, [so] that the mediator can direct [the parties] verbal exchanges away from recrimination and toward the issues that need to be faced, that by receiving separate and confidential communications from the parties [the mediator] can gradually bring into the open issues so deep-cutting that the parties themselves had shared a tacit taboo against any discussion of them and that, finally, [the mediator] can by his management of the interchange demonstrate to the parties that it is possible to discuss divisive issues without either rancor or evasion.

Lon Fuller, *Mediation Its Forms and Functions*, 44 U.S.C. L. REV. 305, 314 (1971).

212. Folberg, *supra* note 210, at 852.

213. Folberg, *supra* note 210, at 852.

214. *See* Folberg, *supra* note 210, at 853 (attesting that mediation allows families to make decisions for themselves and encourages self-determination, thereby reaffirming "the dignity and importance of the family as a self-governing unit"). Folberg also points out that state intrusion into the decisionmaking role of the parents makes the family process less likely to operate independently in the future and, thus, increases the likelihood of continued state regulation through court-imposed orders. *Id.*; *see also* GRANDPARENT VISITATION MANUAL, *supra* note 7, at 126 (asserting that mediation fosters privacy and self-determination, both of which are important in resolving family disputes).

215. Folberg, *supra* note 210, at 851-58 (acknowledging and describing benefits of mediation).

216. *See* Folberg, *supra* note 210, at 854 (explaining that mediation "lacks the precise and perfected checks and balances that are the principal benefit of the adversary process" and that "[t]he purposeful 'a-legal' character of the mediation creates a constant risk of overreaching and dominance by the more knowledgeable, powerful or less emotional party"); *see also* Daniel Crouch, *The Dark Side Is Still Unexplored*, 4 FAM. ADVOC. 27, 33 (1982) (suggesting that mediation may simply add another layer to process that is already long and costly, and that one party's ignorance as to how adjudicatory proceeding would handle dispute usually benefits other party).

mediation considers the emotional elements of the family dispute; while this aspect of mediation makes it attractive to families, it is sometimes difficult to balance the emotional concerns with the legal considerations.[217] Further, mediation strives for compromise, but in certain circumstances, compromise may be neither appropriate nor feasible.[218] Mediation does not magically resolve all problems and leave every party satisfied. The benefits of allowing a family to resolve its own disputes and of limiting the psychological damage that a full-scale trial could have on a child, however, make mediation a positive contribution to the resolution of grandparent visitation disputes.

CONCLUSION

With increasing regularity, children find themselves the subject of legal disputes among family members. The toll that a legal visitation battle takes on a child is alarming. Domestic strife, always emotional, is especially disturbing to a child.

To alleviate the stress experienced by all parties involved in disputes over visitation rights, state legislatures need to provide courts with clearly defined guidelines for granting grandparent visitation rights. Currently, in deciding whether to grant grandparent visitation rights, courts attempt to determine what is in the best interests of the child. This noble endeavor is often defeated because legislatures fail to define how courts should determine such interests. A model grandparent visitation statute that would respect parental autonomy and establish clear, well-defined guidelines for determining when grandparent visitation would be in the best interests of the child is necessary. Adoption by all states and the District of Columbia of such a statute would ensure consistent and fair treatment for all parties and minimize trauma for the child.

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217. *See* Folberg, *supra* note 210, at 854.

218. *See* Folberg, *supra* note 210, at 856 (recognizing that some demands and expectations that cleave families are so emotionally harmful, either intentionally or from "emotional blindness," that compromise should not be realized, and mediator must be ready to facilitate appreciation of this possibility "and not hide behind the easy rubric that all positions can be compromised").