



2000

Constitutional Law - Grandparent Visitation Rights: North Dakota Declares the Grandparent Visitation Statute Unconstitutional

David T. Whitehouse

Follow this and additional works at: <https://commons.und.edu/ndlr>



Part of the [Law Commons](#)

Recommended Citation

Whitehouse, David T. (2000) "Constitutional Law - Grandparent Visitation Rights: North Dakota Declares the Grandparent Visitation Statute Unconstitutional," *North Dakota Law Review*: Vol. 76 : No. 1 , Article 7. Available at: <https://commons.und.edu/ndlr/vol76/iss1/7>

This Case Comment is brought to you for free and open access by the School of Law at UND Scholarly Commons. It has been accepted for inclusion in North Dakota Law Review by an authorized editor of UND Scholarly Commons. For more information, please contact und.common@library.und.edu.

CONSTITUTIONAL LAW—GRANDPARENT VISITATION RIGHTS:
NORTH DAKOTA DECLARES THE GRANDPARENT
VISITATION STATUTE UNCONSTITUTIONAL
Hoff v. Berg 1999 N.D. 115, 595 N.W.2d 285

I. FACTS

In 1992, Holly Berg and Nathan Hoff had a child, D.R.H., out of wedlock.¹ Nathan was in prison at the time of the birth, but Holly and Nathan began residing together when he was released.² Eventually, Holly asked Nathan to move out of their home because of his drinking and drug use.³ Although he was adjudicated the father of D.R.H., Nathan had never been formally granted visitation rights.⁴

During the first several years of D.R.H.'s life, Jerome and Nicolette Hoff, Nathan's parents, spent a significant amount of time with their grandson.⁵ They went out of their way to find time to see D.R.H.,⁶ and they purchased numerous items to make their grandson feel at home any time he came to visit.⁷ It was during this time that Jerome and Nicolette Hoff grew very close to D.R.H., developing what they described as a lasting bond.⁸

In 1995, Holly married Dan Berg, and D.R.H. was diagnosed as having Attention Deficit Hyperactive Disorder (ADHD) shortly after, in 1996.⁹ This condition requires a very strict schedule and consistent rules for D.R.H.¹⁰ Holly claimed that although she made attempts to get Jerome and Nicolette Hoff to work with her on D.R.H.'s ADHD care plan, the Hoff's ignored Holly's desires to keep D.R.H. away from what she perceived as the "negative influences" that surrounded the Hoff's household.¹¹

1. See *Hoff v. Berg*, 1999 N.D. 115, ¶ 2, 595 N.W.2d 285, 286.

2. Brief of Appellee at 1, *Hoff v. Berg*, 1999 N.D. 115, 595 N.W.2d 285 (No. 980208).

3. *Id.*

4. See Brief of Appellant at 3, *Hoff v. Berg*, 1999 N.D. 115, 595 N.W.2d 285 (No. 980208). Nathan also has been ordered to pay child support. *Id.*

5. See *id.* (stating that during the first several years of D.R.H.'s life, the Hoff's saw their grandchild on a daily basis).

6. *Id.* If Holly and Nathan needed a baby sitter, the Hoff's would cancel their plans in order to see D.R.H. and the Hoff's would volunteer to take D.R.H. any time Holly needed a break. *Id.*

7. See *id.* Jerome and Nicolette Hoff purchased a crib, a high chair, a swing, and a playpen. *Id.* When D.R.H. became a toddler, they purchased a bed for him, and they always made sure they were stocked with diapers, food, baby shampoo, socks, shoes, jackets, and anything they thought D.R.H. might need. *Id.*

8. *Id.*

9. Brief of Appellee at 2, *Hoff v. Berg*, 1999 N.D. 115, 595 N.W.2d 285 (No. 980208).

10. *Id.*

11. See *id.* The negative influences to which Holly was referring included Nathan's friends, the Hoff's pit bull that had snapped at D.R.H., allowing D.R.H. to watch adult television, and toys the

One of the major negative influences in D.R.H.'s life that concerned Holly was Nathan.¹² He had a history of run-ins with the law that included beating a person almost to death and assaulting a police officer.¹³ He also was known to associate with murderers and felons and had been a drug user and dealer.¹⁴ In addition, Nathan spent time in prison, including time spent for terrorizing Holly, and had threatened to kill Holly if she would not let him see D.R.H.¹⁵ For these reasons, Holly felt compelled to limit Jerome and Nicolette's visits with D.R.H.¹⁶

Although the Hofffs were unhappy with the visitation schedule Holly afforded them, they reluctantly agreed to it in order to see D.R.H.¹⁷ However, Holly did not permit the Hofffs to buy their grandson gifts, call or write him, or attend his public performances in gymnastics.¹⁸ This limited visitation prompted the Hofffs to sue Holly under North Dakota Century Code section 14-09-05.1, the grandparent visitation statute, for "implementation of a visitation schedule allowing the enforcement of their visitation rights."¹⁹

The trial court found North Dakota Century Code section 14-09-05.1 unconstitutional and dismissed the Hofffs' claim.²⁰ The Hofffs appealed, and the North Dakota Supreme Court *held* that North Dakota Century Code section 14-09-05.1 was unconstitutional because it violated parents' fundamental liberty interest by interfering with parents' right to choose those with whom their children may associate.²¹

II. LEGAL BACKGROUND

Prior to the adoption of grandparent visitation statutes, the issue of grandparent visitation was decided according to common law.²² Beginning in 1965, however, legislatures sympathetic to the plight of grand-

Hofffs gave D.R.H. that were inappropriate for his age. *Id.* at 4.

12. *Id.* at 3.

13. *Id.*

14. *Id.*

15. *Id.* Nathan was in jail for assaulting a police officer at the time of the trial and was also awaiting trial on rape and terrorizing charges. *Id.*

16. *Id.* at 5.

17. Brief of Appellant at 4, *Hoff v. Berg*, 1999 N.D. 115, 595 N.W.2d 285 (No. 980208).

18. *Id.* Holly cited Nathan Hoff's extensive legal problems as the reason for the Hofffs' restricted visitation. *Id.*

19. *Hoff v. Berg*, 1999 N.D. 115, ¶ 2, 595 N.W.2d 285, 286-87. Section 14-09-05.1 of the North Dakota Century Code, as amended in 1993, presumes that it is in the best interests of an unmarried minor for the minor's grandparents to be granted visitation rights. See N.D. CENT. CODE § 14-09-05.1 (1993).

20. N.D. Cent. Code § 14-09--5.1.; see also *Hoff*, ¶ 3, 595 N.W.2d at 287.

21. See *id.* ¶ 18, 595 N.W.2d at 291-92 (holding the parents' right to choose with whom their children may associate is a right protected by the Due Process Clause of United States and North Dakota Constitutions).

22. See *Jouett v. Rhorer*, 339 S.W.2d 865, 868 (Ky. Ct. App. 1960) (stating that under common law, grandparents had no legal visitation rights).

parents began to enact grandparent visitation statutes.²³ Several of these statutes have been constitutionally challenged as violating parents' fundamental right to raise their children.²⁴ This section focuses on the evolution of grandparent visitation rights, beginning with common law and then turning to the enactment of grandparent visitation statutes and discussing the constitutional questions surrounding them.²⁵

A. COMMON LAW

At common law, grandparents had no legal visitation rights.²⁶ The general rule compelling parents to allow grandparent visitation was a moral, rather than a legal, obligation.²⁷ The courts justified this rule for a number of reasons.²⁸ Some judges determined that granting grandparent visitation rights would undermine parental authority.²⁹ Thus, although courts deemed it desirable that ties between ascendants and their grandparents be strengthened and unceasing, the common law accorded grandparents no authority over their grandchildren.³⁰ If there was a conflict, therefore, the father and mother had supreme authority.³¹

Another justification for not ordering grandparent visitation was the concern that if grandparents were granted visitation rights, the child might be placed in an inter-generational conflict.³² There was concern that this conflict could negatively affect the grandchild's development³³ and possibly lead to physical and emotional trauma for the child.³⁴ For

23. See *infra* note 54.

24. See *Hoff*, ¶ 18, 595 N.W.2d at 291-92 (holding that section 14-09-05.1 of the North Dakota Century Code unconstitutionally infringed upon the fundamental rights of parents to raise their children); see also *Brooks v. Parkerson*, 454 S.E.2d 769, 774 (Ga. 1995) (finding a grandparent visitation statute unconstitutional); *Campbell v. Campbell*, 896 P.2d 635, 644 (Utah Ct. App. 1995) (challenging the constitutionality of Utah's grandparent visitation statute); *Michael v. Hertzler*, 900 P.2d 1144, 1151 (Wyo. 1995) (alleging Wyoming's grandparent visitation statute was unconstitutional).

25. See *Hoff*, ¶ 18, 595 N.W.2d at 291-92 (finding North Dakota's grandparent visitation statute unconstitutionally infringed upon the fundamental rights of parents to raise their children).

26. See *King v. King*, 828 S.W.2d 630, 632 (Ky.), *cert. denied*, 506 U.S. 941 (1992) (stating that grandparents had no legal right to visitation with their grandchildren at common law).

27. See *Ward v. Ward*, 537 A.2d 1063, 1067 (Del. Fam. Ct. 1987) (stating that, under common law, grandparents had no legal right to visitation and thus parents did not have a legal obligation to provide grandparents with visitation of their grandchildren).

28. Catherine M. Gillman, Note, *One Big Happy Family? In Search of a More Reasoned Approach to Grandparent Visitation in Minnesota*, 79 MINN. L. REV. 1279, 1284 (1995).

29. See *Odell v. Lutz*, 177 P.2d 628, 629 (Cal. Dist. Ct. App. 1947) (stating that the law accords ascendants no authority over children, and permitting them to intervene would occasion embarrassment and annoyance and would injuriously hinder proper paternal authority).

30. *Id.*; see also *In re Reiss*, 15 So. 151, 152 (La. 1894) (stating that during the life of the father and mother, the law accorded the grandparents no authority over grandchildren).

31. See *Odell*, 177 P.2d at 629-30.

32. *Noll v. Noll*, 98 N.Y.S.2d 938, 940 (N.Y. App. Div. 1950).

33. See *id.* (holding that where the mother was the proper, natural, and legal custodian of her child, the court could not interfere with her decision to decline visitation with the child's grandparents).

34. See *Flannery v. Sharp*, 30 A.2d 810, 812 (Pa. 1943).

example, the Pennsylvania Supreme Court in *Flannery v. Sharp*³⁵ found that quarrels between the grandparents and the child's mother had a negative effect on the child's health.³⁶ Courts generally strive to avoid this type of situation,³⁷ and at common law, courts primarily focused on the health and welfare of the child and considered legal conflicts over custody extremely detrimental to a child's well-being.³⁸ Therefore, forcing a child to endure visitations away from home in an environment to which the child was not accustomed was considered injurious to the child's health.³⁹

In addition, courts justified the lack of grandparent visitation by holding that parental autonomy is a fundamental constitutional right recognized by the Fourteenth Amendment.⁴⁰ Absent a showing that equity required intervention, courts did not have the power to intercede when parents prevented the grandparents from visiting their grandchildren.⁴¹ Courts thus held that granting separate grandparent visitation rights would infringe on parents' fundamental constitutional rights.⁴²

However, the common law did recognize exceptions to the general refusal to award grandparent visitation rights.⁴³ The most common exceptions were instances in which the parent was unfit to care for the child or the child had been previously living with the grandparent.⁴⁴ If the child had developed a close personal relationship with the grand-

35. 30 A.2d 810 (Pa. 1943).

36. *Flannery v. Sharp*, 30 A.2d 810, 812 (Pa. 1943). John's doctor testified that quarrels between his grandparents and mother tended to make John neurotic. *Id.* John had several absences from school that were contributed to intestinal disturbance in the upper abdomen; in the doctor's opinion, the disturbance was primarily due to nervousness brought on by the conflict between his grandparents and mother. *Id.*

37. *Id.*

38. *Id.*

39. *See id.*

40. *See Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (stating that the 14th Amendment protects against those privileges long recognized at common law as essential to the orderly pursuit of happiness by free people).

41. *See Theodore R. v. Loretta J.*, 476 N.Y.S.2d 720, 721 (N.Y. Fam. Ct. 1984) (holding that grandparents could not obtain visitation with a child in an intact family absent a showing of conditions or circumstances which would justify intervention of equity).

42. *See Hawk v. Hawk*, 855 S.W.2d 573, 577-78 (Tenn. 1993). During Bob and Bay Hawk's marriage, their children frequently visited Bill and Sue Hawk, Bob's parents. *Id.* at 575. Despite these frequent visits, conflicts developed between various members of the Hawk family and Bob and Bay eventually refused to allow Bill and Sue to see their grandchildren. *Id.* at 576. The grandparents sought court-ordered visitation with their grandchildren. *Id.* The court held that the parents had a fundamental right to raise their children without unwarranted state intervention and denied the grandparents' request. *Id.* at 583; *see also Theodore R.*, 476 N.Y.S.2d at 721 (denying grandparent visitation because there should not be any judicial interference with the parents' fundamental parenting rights).

43. *See Chodzko v. Chodzko*, 360 N.E.2d 60, 62 (Ill. 1976) (stating that in cases involving special circumstances, such as the death of a parent, grandparents may sometimes be granted court-ordered visitation).

44. AMERICAN BAR ASSOCIATION, GRANDPARENT VISITATION DISPUTES: A LEGAL RESOURCE MANUAL 24 (Ellen C. Segal & Naomi Karp eds., 1989).

parents, common law courts would sometimes make an exception and allow the grandparents visitation rights.⁴⁵ However, these exceptions usually only applied in situations involving a parent's inability to exercise visitation or in circumstances involving a death or divorce.⁴⁶

The rationale behind the common law rule and its exceptions was that it served the best interests of the child.⁴⁷ If there was a conflict between parents and grandparents, it was presumed that judicial intervention did not further the child's best interests.⁴⁸ This meant that when courts did intervene and grant visitation to grandparents, they did so with the best interests of the child in mind.⁴⁹ However, at common law, even if a close relationship had developed between a child and his or her grandparents, visitation rights could still be denied if the parent opposed the visitation and other qualifying circumstances were present.⁵⁰ The policy of protecting the nuclear family was the underlying goal sought to be obtained by common law,⁵¹ and in the absence of special circumstances involving the best interests of the child, the courts generally sought to preserve the nuclear family.⁵² However, following states' adoption of statutes allowing grandparents visitation rights, courts are

45. See *Hawkins v. Hawkins*, 430 N.E.2d 652, 654 (Ill. App. Ct. 1981) (awarding grandparent visitation because the natural mother was deceased and the child had a particularly close relationship with his grandparents because of daily association).

46. See *Boyles v. Boyles*, 302 N.E.2d 199, 201 (Ill. 1973) (holding that after the death of the mother, it was in the best interests of the child for the grandparents to be granted visitation).

47. See *People ex rel. Edwards v. Livingston*, 247 N.E.2d 417, 421-22 (Ill. 1969) (stating that the court's discretion to modify provisions of the decree concerning custody or to alter visitation rights must be exercised for the best interests of the child involved); see also Catherine Bostock, *Does the Expansion of Grandparent Visitation Rights Promote the Best Interests of the Child?: A Survey of Grandparent Visitation Laws in the Fifty States*, 27 COLUM. J. L. & SOC. PROB. 319, 327 (1994).

48. See *Chodzko*, 360 N.E.2d at 63 (concluding the trial court erred by giving visitation rights to the grandfather over the objections of the mother in the absence of any special circumstances justifying the interference with the superior custodial right of the natural parent); see also Bostock, *supra* note 47, at 327.

49. See *Boyles*, 302 N.E.2d at 201 ("[W]here a parent has died, the continuation of the relationship between [the] child and grandparents, which may be promoted by visitation, may be a positive benefit affecting the best interests of the child."); see also Bostock, *supra* note 47, at 327.

50. See *Chodzko*, 360 N.E.2d at 63 (holding that even though the father was willing to have the court grant his father visitation during the time that the father normally had the children, this was no reason for the court to give judicial sanction to such an arrangement because the mother opposed the visitation); see also Bostock, *supra* note 47, at 328. This conforms with the parental rights doctrine, which is mainly concerned with protecting the autonomy of parents. Bostock, *supra* note 47, at 328. Child rearing is a fundamental value under common law, and courts are very hesitant to invoke the state's *parens patriae*, or its power as the guardian of those in its boundaries, and intervene in the family relationship. Bostock, *supra* note 47, at 328.

51. Bostock, *supra* note 47, at 329.

52. Bostock, *supra* note 47, at 330.

now willing to interfere with parental rights when the best interests of the child are at stake.⁵³

B. STATUTORY ADOPTION

The common law is no longer the rule with regard to grandparent visitation rights, and in response to changing circumstances, all fifty states have enacted some form of grandparent visitation legislation.⁵⁴ States enacted these statutes for a variety of reasons.⁵⁵ For example, the number of unmarried and divorced parents has increased, along with an increase in the number of stepfamilies.⁵⁶ State legislatures have also recognized the significant role grandparents play in the development of a child and have taken note of the state's duty to protect children's welfare.⁵⁷ In addition, the longevity of grandparents has increased, while

53. See *King v. King*, 828 S.W.2d 630, 632 (Ky. 1992) (holding that since the statute stipulated grandparent visitation should be granted upon a finding that the best interests of the child be served by granting or denying visitation, it would not be an injustice or an unwarranted intrusion into the fundamental liberty of the parents and the child for the grandparents to be granted visitation).

54. See ALA. CODE §§ 26-10A-30, 26-10A-31 (1975); ALA. CODE § 30-3-4 (repealed 1999); ALASKA STAT. § 25-20-065 (Michie 1996); ARIZ. REV. STAT. ANN. § 25-409 (West Supp. 1997); ARK. CODE ANN. § 9-13-103 (Michie 1998); CAL. FAM. LAW CODE §§ 3103, 3104 (West 1994); COLO. REV. STAT. ANN. § 19-1-117 (1997); CONN. GEN. STAT. ANN. § 46b-59 (West 1986); DEL. CODE ANN. tit. 10, § 1031 (Supp. 1996); FLA. STAT. ANN. §§ 61.13, 752.01 (West 1997 & Supp. 1998); GA. CODE ANN. § 19-7-3 (Supp. 1998); HAW. REV. STAT. § 571-46 (Supp. 1997); IDAHO CODE § 32-719 (1996); 750 ILL. COMP. STAT. ANN. § 5/607 (West Supp. 1998); 755 ILL. COMP. STAT. ANN. § 5/11-7.1 (West 1993); IND. CODE ANN. § 31-17-5-2 (Michie 1997); IOWA CODE § 598.35 (West Supp. 1998); KAN. STAT. ANN. §§ 38-129, 38-130, 60-1616 (1986 & Supp. 1993); KY. REV. STAT. ANN. § 405.021 (Michie Supp. 1996); LA. REV. STAT. ANN. § 9:344 (West Supp. 1998); LA. CIV. CODE ANN. art. 136, (West 1994); ME. REV. STAT. ANN. tit. 19, §§ 1001-1004 (West 1994); MD. CODE ANN. FAM. LAW § 9-102 (Supp. 1997); MASS. GEN. LAWS ANN. ch. 119, § 39D (West 1993); MICH. COMP. LAWS ANN. § 722.27b (West 1998); MINN. STAT. ANN. § 257.022 (West 1998); MISS. CODE ANN. §§ 93-16-1, 93-16-3 (1994); MO. REV. STAT. § 452-402 (West 1997); MONT. CODE ANN. §§ 40-9-101 to -102 (1997); NEB. REV. STAT. § 43-1802 (1993); NEV. REV. STAT. § 125A.340 (1997); N.H. REV. STAT. ANN. § 458:17-d (1993); N.J. STAT. ANN. § 9:2-7.1 (West Supp. 1998); N.M. STAT. ANN. § 40-9-2 (Michie 1994); N.Y. DOM. REL. LAW § 72 (Consol. Supp. 1998); N.C. GEN. STAT. § 50-13.2 (1995); N.D. CENT. CODE § 14-09-5.1 (1993) (declared unconstitutional in *Hoff v. Berg*); OHIO REV. CODE ANN. § 3109.051 (Anderson Supp. 1997); OKLA. STAT. ANN. tit. 10, § 5 (West 1998); OR. REV. STAT. § 109.121 (1997); 23 PA. STAT. ANN. §§ 5311-5313 (West 1991 & Supp. 1997); R.I. GEN. LAWS § 15-5-24.3 (1996); S.C. CODE ANN. § 20-7-420 (Law. Co-op 1993); S.D. CODIFIED LAWS ANN. §§ 25-4-52, 25-4-54 (Michie 1992); TENN. CODE ANN. §§ 36-6-302, -306, -307 (Supp. 1997); TEX. FAM. CODE ANN. § 153.433 (West Supp. 1998); UTAH CODE ANN. § 30-5-2 (Supp. 1998); VT. STAT. ANN. tit. 15, §§ 1101, 1102 (1993); VA. CODE ANN. § 63.1-204.1 (Michie 1995); WASH. REV. CODE ANN. § 26.09.240 (West 1997); W. VA. CODE § 48-2B-1 (1996); WIS. STAT. ANN. § 767.245 (West 1993 & Supp. 1997); WYO. STAT. ANN. § 20-7-101 (Michie 1997).

55. See *supra* note 54.

56. See *Hawk v. Hawk*, 855 S.W.2d 573, 577 n.1 (Tenn. 1993) (stating that the movement to create grandparent visitation statutes was a product of the nationwide increase in the number of families broken by divorce); see also Ann M. Jackson, *The Coming of Age of Grandparent Visitation Rights*, 43 AM. U. L. REV. 563, 563-64 (1994) (stating that the enactment of grandparent visitation statutes was a response to the increasing number of unmarried or divorced parents, the existence of stepfamilies, and the estrangement of extended families).

57. See *Clark v. Evans*, 778 S.W.2d 446, 448 (Tenn. App. 1989) (stating the rationale behind the enactment of grandparent visitation statutes was the competing interest of: 1) the parents and their right to custody and control of their child; 2) the state's duty to protect the child; and 3) the recognition that grandparents play a significant role in the development of a child).

the number of grandchildren has decreased.⁵⁸ These factors have all contributed to the enactment of grandparent visitation statutes in order to provide stability and security in the unstable lives of children.⁵⁹

The enactment of grandparent visitation statutes reflects upon the "special bond" that develops between a child and his or her grandparent.⁶⁰ There are at least four "symbolic" roles that social scientists have identified through which grandparents influence the lives of their families.⁶¹ The first is the role of "being there," which simply requires the grandparent be present in the child's life.⁶² This role assists the younger generation in two ways.⁶³ First, the grandparents' mere presence in a child's life appears to help maintain a familial identity.⁶⁴ Second, by simply being there, grandparents can provide a stable influence on children, which is particularly important for children born of early teenage mothers.⁶⁵

The second role of grandparents is watching over the child for signs of abuse or neglect and other traumatic occurrences that may be harming the child.⁶⁶ This "family watchdog" role serves as a lookout for signs that indicate the child needs more care or attention.⁶⁷ The third role grandparents play is that of "negotiator."⁶⁸ In this role, the grand-

58. Jackson, *supra* note 56, at 563-64; *see also* Christopher M. Bikus, *One Step Forward, Two Steps Back: The Nebraska Supreme Court Perpetuates the Uncertainty Surrounding the Grandparent Visitation Statute in Eberspacher v. Hulme*, 533 N.W.2d 103 (1995), 75 NEB. L. REV. 288, 291 (1996) (stating that one factor in states' enactment of grandparent visitation statutes was the increased life expectancy of grandparents).

59. *See Clark*, 778 S.W.2d at 448 (stating the statute was created to provide for the best interests of the child); *see also* Bikus, *supra* note 58, at 291.

60. *See Clark*, 778 S.W.2d at 448 (stating that legislatures recognized the significant role grandparents played in the development of children); *see also* Rebecca Brown, *Grandparent Visitation and the Intact Family*, 16 S. ILL. U. L. J. 133, 147-48 (1991) (stating that research supports the idea that a "special bond" exists between the grandparent and the grandchild, and this "special bond" provides security during times of instability in the child's life).

61. *See Goff v. Goff*, 844 P.2d 1087, 1091 (Wyo. 1993) (reviewing the four symbolic roles social scientists have identified by which grandparents influence the lives of their families); *see also* VERN L. BENGSTON, *DIVERSITY AND SYMBOLS IN GRANDPARENTAL ROLES* 21 (Vern L. Bengston & Joan F. Robertson eds., 1985) (describing the four major roles through which grandparents positively contribute to the family).

62. *See Goff*, 844 P.2d at 1091 (stating the "being there" role requires nothing more than a grandparents' presence); *see also* Bikus, *supra* note 58, at 292.

63. *See Goff*, 844 P.2d at 1091 (stating the "being there" role helps the younger generation in two ways).

64. *Id.* The grandparents' presence in a child's life can exert a calming influence on the child in times of transition, such as after the birth of a sibling or during a divorce. BENGSTON, *supra* note 61, at 22.

65. *See Goff*, 844 P.2d at 1091 (stating that grandparents can provide a stable environment for children born to unwed mothers); *see also* BENGSTON, *supra* note 61, at 22.

66. *See Goff*, 844 P.2d at 1091 (stating that grandparents can protect their grandchildren by looking for signs of abuse and neglect); *see also* BENGSTON, *supra* note 61, at 22.

67. *See Goff*, 844 P.2d at 1091 (stating grandparents can look for signs that indicate the family will need active care and protection); *see also* BENGSTON, *supra* note 61, at 22.

68. *See Goff*, 844 P.2d at 1091 (stating that an "arbitrating" role may be assumed when

parent acts as an impartial third party during differences between the child and parent.⁶⁹ Finally, grandparents fulfill the role of the "interpreter" of the family history.⁷⁰ By spending time conversing with his or her grandparents, a child learns about family history, helping to establish a sense of identity within the child.⁷¹

However, while grandparents have always played an important role in the lives of children, only recently has the judicial system responded to the belief that grandparents should be granted visitation rights.⁷² Much of the recent success of grandparent visitation legislation seems to be the result of senior lobbying in promoting the interests of grandparents.⁷³ This growing senior lobby is very active, and with regard to grandparent rights, it is very united in its purpose.⁷⁴ Thus, the trend is toward a continued push for the expansion of legislation involving grandparent visitation rights.⁷⁵

While every state has enacted some form of grandparent visitation statute, the effects and requirements of these statutes vary widely.⁷⁶ Generally, these statutes may be grouped into three basic classes.⁷⁷ The first and largest group of statutes require death, divorce, or a loss of parental rights in order for grandparents to be allowed visitation.⁷⁸ An

grandparents actively negotiate between parents and children concerning values and behaviors that may be more central to family continuity and individual enhancement than those that the parents' authority status allow to be expressed); *see also* BENGSTON, *supra* note 61, at 22 (stating that grandparents serve as a mediator between children and their parents in the "negotiator" role).

69. *See Goff*, 844 P.2d at 1091. This negotiation can occur when grandparents downplay disruptive or volatile differences between the parents and the children; *see also* BENGSTON, *supra* note 61, at 22.

70. *See Goff*, 844 P.2d at 1091; *see also* BENGSTON, *supra* note 61, at 24.

71. *See Goff*, 844 P.2d at 1091 (stating that building connections between the family's past, present, and future helps children form a sense of identity); *see also* BENGSTON, *supra* note 61, at 24 (stating that visits with grandparents are often a precious part of a child's experience, and the benefits a child receives from the relationship with his or her grandparents cannot be derived from any other relationship).

72. *See Hoff v. Berg*, 1999 N.D. 115, ¶ 5, 595 N.W.2d 285, 287 (stating North Dakota's grandparent visitation statute, section 14-09-05.1 of the North Dakota Century Code, was originally enacted in 1983); *see also* MINN. STAT. ANN. § 257.022 (originally enacted in 1976); Bostock, *supra* note 47, at 331 (stating the trend is toward continued expansion of statutory visitation rights for grandparents).

73. Bostock, *supra* note 47, at 331 (contributing much of the success of grandparent visitation legislation to the active senior lobby).

74. Bostock, *supra* note 47, at 325.

75. *See supra* note 54.

76. Mark Moody, *Grandparent Visitation and Due Process Standards*, MO. L. REV. 195, 208 (1995).

77. *Id.*

78. *See* ALASKA STAT. § 25-20-065 (Michie 1996); ARIZ. REV. STAT. ANN. § 25-409 (West Supp. 1997); ARK. CODE ANN. § 9-13-103 (Michie 1998); CAL. FAM. LAW CODE §§ 3103, 3104 (West 1994); COLO. REV. STAT. § 19-1-117 (1997); CONN. GEN. STAT. ANN. § 46B-59 (West 1986); DEL. CODE ANN. tit 10, § 1031 (Supp. 1996); FLA. STAT. ANN. §§ 61.13 752.01 (West 1997 & Supp 1998); GA. CODE ANN. § 19-7-3 (Supp. 1998); HAW. REV. STAT. § 571-46 (Supp. 1997); 755 ILL. COMP. STAT. ANN. § 5/11-7.1 (West 1993); IND. CODE ANN. § 31-17-5 (Michie 1997); IOWA CODE ANN. § 598.35 (West Supp. 1998); KAN. STAT. ANN. §§ 38-129, 38-130, 60-1616 (1986 & Supp. 1993); LA. REV. STAT. ANN. § 9:344 (West Supp. 1998); LA. CIV. CODE ANN. art. 136 (West 1994); ME. REV. STAT. ANN. tit. 19, §§ 1001-1004 (West 1994); MASS. GEN. LAWS ANN. ch. 119, § 39D (West 1993); MICH. COMP. LAWS ANN. § 722.27b

example of this type of grandparent visitation statute is that enacted by Wyoming.⁷⁹ When the Wyoming legislature adopted Wyoming Statute Annotated section 20-7-101 and amended section 20-2-113(c), the legislature departed from the traditional derivative rights theory.⁸⁰ Under the derivative rights theory, divorce could not give rise to grandparent visitation rights.⁸¹ This shift away from the traditional derivative rights theory demonstrates the recognition of the importance in the grandparent/grandchild relationship and focuses on the best interests of the child.⁸²

The second group of statutes allows visitation without taking into account the family situation.⁸³ For example, Kentucky Revised Statute Annotated section 405.021 states that paternal or maternal grandparents may be granted reasonable visitation rights as long as it is in the best interests of the child.⁸⁴ Thus, a petty dispute between parents and grandparents would not prevent the court from awarding the grandparents reasonable visitation with their grandchildren.⁸⁵

(West Supp. 1998); MINN. STAT. ANN. § 257.022 (West 1998); MISS. CODE ANN. §§ 93-16-1, 93-16-3 (1994); NEB. REV. STAT. § 43-1802 (1993); NEV. REV. STAT. § 125 A.340 (1997); N.H. REV. STAT. ANN. § 458:17-d (1992); N.J. STAT. ANN. § 9:2-7.1 (West Supp. 1998); N.M. STAT. ANN. § 40-9-2 (Michie 1994); N.Y. DOM. REL. LAW § 72 (Consol. Supp. 1998) (as interpreted in *Emanuel S. v. Joseph E.*, 560 N.Y.S.2d 211, 214 (N.Y. App. Div. 1990); OHIO REV. CODE ANN. § 3109.051 (Anderson Supp. 1997); 23 PA. STAT. ANN. §§ 5311-5313 (West 1991 & Supp. 1997); R.I. GEN. LAW § 15-5-24.3 (1996); TEX. FAM. CODE ANN. § 153.433 (West Supp. 1998); VT. STAT. ANN. tit. 15, §§ 1101, 1102 (1993); VA. CODE ANN. § 63.1-204.1 (Michie 1995); W. VA. CODE § 48-2B-1 (1996); WYO. STAT. ANN. § 20-7-101 (Michie 1997).

79. See *Goff v. Goff*, 844 P.2d 1087, 1090 n.2 (Wyo. 1993). The statute provides that a grandparent may be granted reasonable visitation if the grandparent's child, who is the parent of the minor grandchild, has died or has divorced the minor grandchild's other parent, and the person having custody of the minor grandchild has refused reasonable visitation rights to the grandparent. WYO. STAT. ANN. § 20-7-101 (Michie 1997).

80. See WYO. STAT. ANN. § 20-2-113(c) (1991). Prior to the amendment, the statutory text provided that if one or both parents died or remarried, or if the parents were divorced, the grandparents could be granted visitation rights if it was in the best interests of the child. WYO. STAT. ANN. § 20-2-113(c) (repealed 2000).

81. See *Goff*, 844 P.2d at 1091. Under the derivative rights theory, divorce could not give rise to grandparental visitation rights because the related parent was not legally absent. *Id.*

82. *Id.*

83. See ALA. CODE §§ 26-10A-30, 26-10A-31 (1975); ALA. CODE § 30-3-4 (repealed); IDAHO CODE § 32-719 (1996); KY. REV. STAT. ANN. § 405.021 (Michie Supp. 1996); MD. CODE ANN., FAM. LAW § 9-102 (Supp. 1997); MO. ANN. STAT. § 452.402 (West 1997); MONT. CODE ANN. §§ 40-9-101 to -102 (1997); N.D. CENT. CODE § 14-09-05.1 (1993) (declared unconstitutional in *Hoff v. Berg*); N.C. GEN. STAT. § 50-13.2 (1995); OKLA. STAT. ANN. tit. 10, § 5 (West 1998); OR. REV. STAT. § 109.121 (1997); S.C. CODE ANN. § 20-7-420 (Law. Co-op. Supp. 1997); S.D. CODIFIED LAWS ANN. §§ 25-4-52, 25-4-54 (Michie 1992); TENN. CODE ANN. § 36-6-302, -306, -307 (Supp. 1997); UTAH CODE ANN. § 30-5-2 (Supp. 1998); WIS. STAT. ANN. § 880.155 (West 1991 & Supp. 1997).

84. See *King v. King*, 828 S.W.2d 630, 632 (Ky. 1992) (stating that if the grandparent is physically, mentally, and morally fit, it is in the best interests of the child to have contact with the grandparent) (citing Ky. Rev. Stat. Ann. § 405.021 (1994)). Some laws, such as Oklahoma's visitation statute, rely on factors the court must weigh in determining the best interests of the child. OKLA. STAT. ANN. tit. 10, § 5 (West 1998). Other states' statutes have relied on the court's discretion to determine the best interests of the child. See, e.g., ALA. CODE § 30-3-4 (repealed 1999).

85. See *King*, 828 S.W.2d at 635 (holding that even though the father and grandfather's relationship was strained, it was in the best interests of the child for the grandparents to be granted visitation).

The third group of statutes also does not take into account the family situation, instead allowing visitation if the child had a substantial relationship with the grandparents before the parents denied visitation.⁸⁶ This is exemplified by the Minnesota Supreme Court decision in *In re Santoro*.⁸⁷ The court held that since there was no substantial relationship between the grandparents and their grandchildren, the grandparents were not entitled to visitation rights.⁸⁸

However, despite differences among the various state grandparent visitation statutes, all of the statutes share the same basic two-step structure.⁸⁹ In the first step, the statutes generally specify circumstances that establish standing requirements for grandparents.⁹⁰ In the second step, the court decides, based on the facts of the case, the extent of the grandparent visitation under either a best interests of the child standard or a reasonableness standard.⁹¹ While some statutes establish factors the court must weigh in determining the best interests of the child,⁹² other statutes have relied on the court's discretion to determine the best interests of the child.⁹³ Regardless of how the grandparent visitation statutes are structured, however, opponents of these statutes argue that they infringe upon

86. See CAL. FAM. LAW CODE §§ 3103, 3104 (West 1994); MINN. STAT. ANN. § 257.022 (West 1998); MISS. CODE ANN. §§ 93-16-1, 93-16-3 (1994); NEB. REV. STAT. § 43-1802 (1993); N.M. STAT. ANN. § 40-9-2 (Michie 1994); 23 PA. STAT. ANN. §§ 5311-5313 (West 1991 & Supp. 1997); R.I. GEN. LAWS 15-5-24.3 (1996); TEX. FAM. CODE ANN. § 153.433 (West Supp. 1998); W. VA. CODE § 48-2B-1 (1996); WYO. STAT. ANN. § 20-7-101 (Michie 1997).

87. 594 N.W.2d 174, 179 (Minn. 1999) (holding the trial court abused its discretion by awarding the grandparents visitation rights).

88. See *In re Santoro*, 594 N.W.2d 174, 179 (Minn. 1999) (holding the grandparents should not have been allowed visitation rights since a significant amount of time had transpired during which the children had no relationship with their grandparents).

89. Bostock, *supra* note 47, at 332.

90. Bostock, *supra* note 47, at 332. For example, Minnesota's grandparent visitation statute contains three provisions governing a grandparent's standing to petition for visitation. MINN. STAT. ANN. § 257.022. The death provision permits courts to grant jurisdiction to hear a petition from a grandparent whose child has died. MINN. STAT. ANN. § 257.022(1). The second provision, regarding dissolution, grants standing to parents of the custodial or non-custodial parents to petition during marriage dissolution proceedings. MINN. STAT. ANN. § 257.022(2). The third provision, which concerns cohabitation, allows grandparents the right to petition for visitation when their grandchildren have cohabited with them for a 12-month period, regardless of marital status of the related parent. MINN. STAT. ANN. § 257.022(2a).

91. Bostock, *supra* note 47, at 332.

92. Bostock, *supra* note 47, at 332. For example, Oklahoma lists the following factors to be considered in determining the best interests of the grandchild: 1) the willingness of the grandparents to encourage a close relationship between the grandchild and the parents; 2) the length and quality of the prior relationship between the grandchild and grandparents; 3) preference of the grandchild; 4) mental and physical health of the grandchild and grandparents; and 5) other factors. OKLA. STAT. ANN. tit. 10, § 5 (West 1998).

93. ALA. CODE § 30-3-4 (repealed 1999) (allowing visitation privileges for grandparents, in general, at the discretion of the court).

parents' fundamental right to raise their children, and these statutes have been constitutionally challenged on this basis.⁹⁴

C. CONSTITUTIONALITY OF GRANDPARENT VISITATION STATUTES

Many grandparent visitation statutes have been challenged on the ground that they violate the Due Process Clause of the Fourteenth Amendment.⁹⁵ The Due Process Clause protects against state actions that infringe upon fundamental rights and liberty interests.⁹⁶ Although the exactness of the fundamental rights and liberty interests guaranteed by the Fourteenth Amendment has not been defined, an important aspect of these interests is the right to marry, establish a home, and raise children.⁹⁷ The contention that grandparent visitation statutes are unconstitutional rests upon the theory that these statutes interfere with parents' fundamental right to raise their children by interfering with parents' decisions concerning with whom their children may associate.⁹⁸ When government action infringes upon a fundamental right or liberty interest, the preliminary issue to be determined by the court is the appropriate level of judicial review to be applied in determining if there has been a substantive due process violation.⁹⁹

94. See *King v. King*, 828 S.W.2d 630, 632 (Ky. 1992) (holding Kentucky's grandparent visitation statute constituted an unwarranted intrusion into the liberty interest of parents to rear their children as they see fit); see also *Hawk v. Hawk*, 855 S.W.2d 573, 582 (Tenn. 1993) (finding Tennessee's grandparent visitation statute violated the parents child-rearing rights).

95. See U.S. CONST. amend. XIV (stating in part that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States and that no State shall deprive any person of life, liberty, or property without due process of law); see also *Hoff v. Berg*, 1999 N.D. 115, ¶¶ 15-17, 595 N.W.2d 285, 291-92 (N.D. 1999) (determining North Dakota's grandparent visitation statute unconstitutionally infringed upon parents' fundamental rights to raise their children); *Brooks v. Parkerson*, 454 S.E.2d 769, 774 (Ga. 1993) (concluding Georgia's grandparent visitation statute violated the state and federal constitutions); *Campbell v. Campbell*, 896 P.2d 635, 644 (Utah App. Ct. 1995) (holding Utah's grandparent visitation statute violated the United States Constitution); *Michael v. Hertzler*, 900 P.2d 1144, 1151 (Wyo. 1995) (finding Wyoming's grandparent visitation statute violated the due process requirements of the United States Constitution).

96. See U.S. CONST. amend. XIV; see also *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997) (stating that no state shall infringe upon fundamental rights or liberty interests without due process of law).

97. See *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (holding that a Nebraska statute prohibiting the teaching of any language other than English unconstitutionally infringed upon the plaintiff's fundamental right to speak and teach a language other than English).

98. See *Hoff v. Berg*, 595 N.W.2d 285, 291-92 (N.D. 1999) (holding the grandparent visitation statute infringed upon the fundamental rights of parents to raise their children by infringing upon the right of parents to determine with whom their children may associate); see also *In re Smith*, 969 P.2d 21, 31 (Wash. 1998), cert. granted sub nom, *Troxel v. Granville*, 120 S. Ct. 11 (1999) (finding the Washington grandparent visitation statutes infringed upon parents' fundamental right to autonomy in childrearing matters).

99. See *Hoff*, ¶ 12, 595 N.W.2d at 289 (stating that to decide the constitutionality of a statute, the court must first determine the appropriate level of scrutiny).

There are two levels of scrutiny that courts consider when determining the constitutionality of grandparent visitation statutes.¹⁰⁰ The lowest standard of review to satisfy is "rational basis."¹⁰¹ This standard is applied when a fundamental liberty interest is not involved or when a court finds a fundamental right has not been infringed upon by an alleged state action.¹⁰² Under rational basis review, the statute need only "be rationally related to a legitimate government interest."¹⁰³ Therefore, if the state action bears a reasonable relation to a justifiable state interest, it will be upheld.¹⁰⁴

At the other end of the spectrum, the most difficult standard of review for a state action to survive is strict scrutiny.¹⁰⁵ Courts apply strict scrutiny if the enjoyment of a fundamental right has been infringed upon by a state action.¹⁰⁶ In *Moore v. City of East Cleveland*,¹⁰⁷ the United States Supreme Court defined a fundamental right as one of "those liberties that are deeply rooted in this Nation's history and tradition."¹⁰⁸ The Fourteenth Amendment forbids the government from infringing upon the fundamental liberty interests of the people; therefore, a state action will not survive "unless it is narrowly tailored to serve a compelling government interest."¹⁰⁹ Thus, the appropriate level of review applied by the court is a pivotal factor in determining the constitutionality of a statute.¹¹⁰

In order to analyze the constitutionality of grandparent visitation statutes, three questions must be asked.¹¹¹ The first question is whether

100. *Id.* ¶ 13, 595 N.W.2d at 290.

101. *See Alexander v. Whitman*, 114 F.3d 1392, 1403 (3d Cir. 1997) (stating a rational basis level of review is applied when fundamental rights or interests are not implicated); *see also Moody, supra* note 76, at 200.

102. *See Alexander*, 114 F.3d at 1403 (stating a rational basis level of review is applicable when fundamental liberty interests are not at stake).

103. *See Glucksberg*, 521 U.S. at 728 (finding Washington's ban on assisted suicide rationally related to legitimate government interests of protecting disabled and terminally ill people from prejudice, negative and inaccurate stereotypes, and "societal indifference").

104. *See Reno v. Flores*, 507 U.S. 292, 305 (1993) (stating that a governmental action will be upheld under rational basis scrutiny as long as there is a "reasonable fit" between the governmental purpose and the means chosen to advance that purpose).

105. *See Glucksberg*, 521 U.S. at 721 (stating the 14th Amendment forbids the government to infringe upon a fundamental right unless the infringement is narrowly tailored to serve a compelling state purpose); *see also Moody, supra* note 76, at 199.

106. *See Alexander* 114 F.3d at 1403 (stating that when fundamental rights or liberty interests are involved, strict scrutiny is the applicable standard of review).

107. 431 U.S. 494 (1977).

108. *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977).

109. *See Glucksberg*, 521 U.S. at 721 (holding that assisted suicide is not a fundamental right, and therefore strict scrutiny was not applicable).

110. *See Hoff v. Berg*, 1999 N.D. 115, ¶ 12, 595 N.W.2d 285, 289 (stating that in order to decide the constitutionality of North Dakota's grandparent visitation statute, the court must first determine the appropriate level of scrutiny).

111. *Moody, supra* note 76, at 201.

grandparent visitation infringes upon a liberty interest or fundamental right.¹¹² Second, if the grandparent visitation does infringe upon a liberty interest, the court must determine the appropriate level of scrutiny.¹¹³ The last question asks if the state's justification for infringing upon the liberty interest can satisfy the appropriate standard of review.¹¹⁴

The liberty interest guaranteed by the Fourteenth Amendment includes "the right of the individual to . . . marry, establish a home and bring up children, . . . and generally enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."¹¹⁵ Accordingly, it is likely that statutes allowing grandparent visitation do infringe upon a liberty interest since it is the parents' decision to allow grandparents visitation with their children.¹¹⁶ Therefore, it is the second and third questions that pose a tougher challenge to the constitutionality of grandparent visitation statutes.¹¹⁷

There is a division among the courts as to which standard of review is applicable, despite the importance of the appropriate standard of review chosen when determining the constitutionality of grandparent visitation statutes.¹¹⁸ The majority of courts have determined that rational basis is the appropriate level of review.¹¹⁹ Many of these cases rely on the United States Supreme Court cases of *Cleveland Board of Education v. LaFleur*,¹²⁰ *Moore v. City of East Cleveland*,¹²¹ and *Meyer*

112. See *Moore*, 431 U.S. at 503 (defining fundamental rights as "those liberties that are deeply rooted in this Nation's history and tradition"); see also *Moody*, *supra* note 76, at 201.

113. *Moody*, *supra* note 76, at 201.

114. *Moody*, *supra* note 76, at 201.

115. See *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

116. *Moody*, *supra* note 76, at 201. Although parents have a fundamental right to raise their children without state interference, the court in *King v. King* recognized that grandparents have a fundamental right to visit their grandchildren. *King v. King*, 828 S.W.2d 630, 632 (Ky. 1992)

117. See *Hoff v. Berg*, 1999 N.D. 115, ¶ 12, 595 N.W.2d 285, 289 (deciding the appropriate level of scrutiny).

118. See, e.g., *King*, 828 S.W.2d at 632 (applying rational basis scrutiny by attempting to balance the fundamental rights of the parents, grandparents, and child); *Hoff*, ¶ 16, 595 N.W.2d at 291 (applying strict scrutiny because the statute infringed upon the parents' fundamental right to control their children's associations).

119. See, e.g., *Bailey v. Menzie*, 542 N.E.2d 1015, 1019-20 (Ind. Ct. App. 1989) (applying a rational basis level of review because the family itself is not beyond regulation in the public interest, and under certain circumstances, grandparents should have continuing contacts with the child's development if it is in the best interests of the child); *King*, 828 S.W.2d at 632 (applying a rational basis level of review in order to balance the fundamental rights of the parents, grandparents, and the child); *Herndon v. Tuhey*, 857 S.W.2d 203, 209 (Mo. 1993) (applying a rational basis level of review because the statute did not impose an obstacle to the enjoyment of the parents' childrearing rights); *Sibley v. Sheppard*, 429 N.E.2d 1049, 1052 (N.Y. 1981) (applying a rational basis level of review because the family is not beyond regulation in the public interest).

120. 414 U.S. 632, 640 (1974) (applying rational basis review in holding that a regulation requiring teachers to take maternity leave after five months of pregnancy and to wait three months after giving birth to return to work was constitutional).

121. 431 U.S. 494, 495 (1977) (holding that parents have a fundamental right to raise their children, but declining expressly to employ strict scrutiny in striking down a zoning ordinance that

v. Nebraska,¹²² which recognize that the family is not beyond regulation in the public interest.¹²³ Thus, when determining whether a state's interference with the family relationship is proper, many courts apply a less rigorous standard of review.¹²⁴

For example, in *Sibley v. Sheppard*,¹²⁵ although the New York Court of Appeals recognized that parents have a fundamental right to raise their children, the court also noted that "[p]rotecting the best interests of the child is unquestionably a proper exercise of police power."¹²⁶ Using a rational basis test, the court held that awarding the grandparents visitation rights did not infringe upon the adoptive parents' childrearing rights because the state can properly exercise its police power to protect the best interests of the child.¹²⁷ Thus, even though the adoptive parents objected to the grandparent visitation, the statute was deemed constitutional because it was rationally related to protecting the best interests of the child.¹²⁸

Additionally, in *Herndon v. Tuhey*,¹²⁹ the Missouri Supreme Court held that the grandparent visitation statute at issue did not impose an undue burden on parents' childrearing rights and was narrowly tailored to protect the interest of the parties.¹³⁰ The best interests of the child was the focal point, and if the grandparent visitation was not in the child's best interest, the grandparents were denied visitation.¹³¹ In finding grandparent visitation to be in the child's best interest, the court held the statute constitutional.¹³²

The court in *Herndon* closely followed the Kentucky Supreme Court's reasoning in *King v. King*,¹³³ in which the court implemented a

forbade a mother from living with her son and two grandsons, who were cousins rather than brothers).

122. 262 U.S. 390, 399-400 (1923) (holding the constitution prevents legislative action which is arbitrary or without reasonable relation to some state purpose and thus finding a Nebraska statute that forbade the teaching of a foreign language to any student who had not passed the eighth grade infringing upon parents' fundamental childrearing rights).

123. See, e.g., *King*, 828 S.W.2d at 631; *Sibley*, 429 N.E.2d at 1052.

124. *Sibley*, 429 N.E.2d at 1052.

125. 429 N.E.2d 1049 (N.Y. 1981). After Willie's mother died, he was placed in a home for neglected children. *Sibley*, 429 N.E.2d at 1050. He was then placed under adoption by respondents, who frustrated visitation with Willie's grandparents. *Id.* The grandparents then commenced action against Willie's adoptive parents, seeking visitation rights. *Id.*

126. *Sibley*, 429 N.E.2d at 1053.

127. *Id.* at 1052.

128. *Id.* at 1053.

129. 857 S.W.2d 203 (Mo. 1993).

130. See *Herndon v. Tuhey*, 857 S.W.2d 203, 209 (Mo. 1993) (stating a rational basis level of review was applicable because grandparent visitation was not a substantial encroachment on the family). The statutory text stated that the court may award grandparents visitation rights when a grandparent has been unreasonably denied visitation with the child for a period exceeding 90 days. See MO. REV. STAT. § 452.402.1(3) (Supp. 2000). Also, grandparent visitation may be granted if the court finds it is in the best interests of the child for the grandparents to be allowed visitation. MO. REV. STAT. § 452.402.2 (Supp. 2000).

131. See *Herndon*, 857 S.W.2d at 209.

132. *Id.*

133. 828 S.W.2d 630 (Ky. 1992).

rational basis level of review.¹³⁴ In *King*, the court held that the Kentucky grandparent visitation statute was constitutional.¹³⁵ However, the court took a slightly different approach when it declared that grandparents had a fundamental right to visit their grandchildren¹³⁶ by stating that the legislature had the power to strengthen family bonds.¹³⁷ The court therefore used a rational basis level of scrutiny and granted visitation to the grandparents.¹³⁸

However, not every grandparent visitation statute has been declared constitutional.¹³⁹ In *Brooks v. Parkerson*,¹⁴⁰ the Georgia Supreme Court found that there was insufficient evidence supporting the position that grandparents' visitation with their grandchildren always promoted the children's health and welfare.¹⁴¹ The statute also failed to require a showing of harm before state interference because the state could only impose visitation over parents' objections on a showing that failing to do so would be harmful to the child.¹⁴² Thus, in applying strict scrutiny, the court found the statute unconstitutional because it interfered with the parents' constitutional child-rearing rights.¹⁴³

The court also applied strict scrutiny to Tennessee's grandparent visitation statute in *Hawk v. Hawk*.¹⁴⁴ In finding the statute unconstitutional, the court refused to accept the argument that the best interests of the child constituted a compelling state interest which would be upheld in a strict scrutiny analysis.¹⁴⁵ Likewise, in *Beagle v. Beagle*,¹⁴⁶ the

134. See *Herndon*, 857 S.W.2d at 209 (stating the court decides if grandparent visitation is in the best interests of the child).

135. See *King v. King*, 828 S.W.2d 630, 632 (Ky. 1992).

136. See *id.* (stating that the "statute seeks to balance the fundamental rights of the parents, grandparents, and the child").

137. See *id.* (stating that some considerations, such as maintaining the special bond between grandparents and grandchildren, easing the loneliness grandparents often feel by a lack of contact with the child, and letting the child benefit from contact with the grandparents, are all rationally related to the statute's goal of strengthening family bonds).

138. *Id.*

139. See, e.g., *Beagle v. Beagle*, 678 So. 2d 1271, 1276 (Fla. 1996) (finding the grandparent visitation statute unconstitutional because it violated parents' fundamental childrearing rights, a violation for which the state did not demonstrate a compelling interest); *Brooks v. Parkerson*, 454 S.E.2d 769, 774 (Ga. 1995) (holding the grandparent visitation statute violated the constitutionally protected interest of parents to raise their children without undue state interference); *Hawk v. Hawk*, 855 S.W.2d 573, 577 (Tenn. 1993) (holding the grandparent visitation statute violated the state constitutional right to privacy in parenting decisions).

140. 454 S.E.2d 769 (Ga. 1995).

141. See *Brooks v. Parkerson*, 454 S.E.2d 769, 774 (Ga. 1995).

142. *Id.*

143. See *id.* (applying strict scrutiny because the statute infringed upon parents' fundamental right to raise their children).

144. 855 S.W.2d 573, 582 (Tenn. 1993).

145. See *Hawk v. Hawk*, 855 S.W.2d 573, 582 (Tenn. 1993) (applying strict scrutiny in finding the grandparent visitation statute unconstitutional). The court stated that unless there was a "showing of harm to the child, there is no compelling state interest in intervention into affairs of an autonomous family, and any statute which authorizes such intervention violates the parents' liberty interest under

Supreme Court of Florida held that if a natural parent objects to court-ordered grandparent visitation, any visitation infringes upon the parents' fundamental parenting rights.¹⁴⁷ Since the statute infringed upon a fundamental right, the court applied strict scrutiny and held the statute unconstitutional.¹⁴⁸

Although parents have a fundamental right to marry, establish a home, and bring up their children, these cases illustrate the discrepancy among the courts as to the appropriate level of scrutiny to be applied when deciding the constitutionality of grandparent visitation statutes.¹⁴⁹ Thus, while some states have held their grandparent visitation statutes to be constitutional,¹⁵⁰ other states, including North Dakota, have determined their grandparent visitation statutes are unconstitutional.¹⁵¹

D. NORTH DAKOTA GRANDPARENT VISITATION STATUTE

The original North Dakota grandparent visitation statute was enacted in 1983 and was codified at North Dakota Century Code section 14-09-5.1.¹⁵² This statute provided in part:

The grandparents and great-grandparents of an unmarried minor may be granted reasonable visitation rights to the minor during the period of minority by the district court upon a finding that visitation would be in the best interests of the minor and would not interfere with the parent-child relationship.¹⁵³

The reasoning behind the adoption of the grandparent legislation centered on the grounds that "very often a close relationship develops between the grandparent and a child and . . . severing it would be damaging to the mental health of the child involved."¹⁵⁴ Another sponsor of the legislation also noted that a grandparent may be very

the 14th Amendment." *Id.*

146. 678 So. 2d 1271 (Fla. 1996).

147. *See* *Beagle v. Beagle*, 678 So. 2d 1271, 1276 (Fla. 1996).

148. *See id.* at 1277 (stating that because the parents opposed the visitation awarded to the grandparents, the statute unconstitutionally infringed upon parents' fundamental right to raise their children).

149. *See id.* (applying strict scrutiny in holding the grandparent visitation statute unconstitutional). *But see* *Sibley v. Sheppard*, 429 N.E.2d 1049, 1053 (N.Y. 1981) (applying rational basis review in holding the grandparent visitation statute constitutional).

150. *See, e.g., Herndon v. Tuhey*, 857 S.W.2d 203, 210 (Mo. 1993) (holding the grandparent visitation statute constitutional); *Sibley v. Sheppard*, 429 N.E.2d 1049, 1053 (N.Y. 1981) (holding the grandparent visitation statute constitutional).

151. *See, e.g., Hoff v. Berg*, 1999 N.D. 115, ¶ 17, 595 N.W.2d 285, 291-92 (N.D. 1999) (holding North Dakota's grandparent visitation statute unconstitutionally infringed upon parents' fundamental childrearing rights); *Hawk v. Hawk*, 855 S.W.2d 573, 582 (Tenn. 1993) (holding Tennessee's grandparent visitation statute unconstitutional).

152. *See Hoff*, ¶ 5, 595 N.W.2d at 288.

153. N.D. CENT. CODE § 14-09-05.1 (as enacted in 1983).

154. Brief of State Attorney General at 20-21, *Hoff v. Berg*, 1999 N.D. 115, 595 N.W.2d 285 (N.D. 1999) (No. 980208) (citing *Hearings on HB 1274 Before the House Judiciary Comm.*, 48th Legis. (North Dakota Jan. 19, 1983) (statement of Senator Maixner)).

influential in exposing the child to his or her heritage.¹⁵⁵ Thus, without the bill, it would be extremely difficult for grandparents to petition for visitation rights of their grandchildren.¹⁵⁶

In 1993, the legislature amended the statute to strengthen the ability of grandparents to visit their grandchildren.¹⁵⁷ The amended statute provided in part:

The grandparents of an unmarried minor must be granted reasonable visitation rights . . . to the minor . . . by the district court upon application by the grandparents . . . unless a finding is made that visitation is not in the best interests of the minor. Visitation rights of grandparents to an unmarried minor are presumed to be in the best interests of the minor.¹⁵⁸

This amendment was proposed because in situations in which a step-parent adopted the child, the contact between grandparents and grandchild was often terminated.¹⁵⁹ The difference between the original statute and the amended version is that the amended statute presumes grandparent visitation is in the best interests of the child.¹⁶⁰ This presumption places the burden on the custodial parent to produce evidence that grandparent visitation is not in the best interests of the child.¹⁶¹

Specific findings of fact concerning the best interests of the child are required by the court in order to award grandparents visitation rights.¹⁶² Under North Dakota Century Code section 14-09-05.1, the court is required to consider "the amount of personal contact between the grandparents or great grandparents of the minor, and the minor's parents, prior to the application."¹⁶³ In *Schempp v. Cook*,¹⁶⁴ a 1990 case, the court held that the trial court failed to make specific findings of fact as to whether grandparent visitation was in the best interests of the

155. *Id.* at 21 (citing *Hearings on HB 1274 Before the House Judiciary Comm.*, 48th Legis. (North Dakota Jan. 19, 1983) (statement of Senator Meiers)).

156. *Id.* at 21 (citing *Hearings on HB 1274 Before the House Judiciary Comm.*, 48th Legis. (North Dakota Jan. 19, 1983) (statement of Rep. Wentz)).

157. *Id.* at 21 (citing 1993 N.D. Sess. Laws ch. 150).

158. N.D. CENT. CODE § 14-09-05.1 (as amended in 1993).

159. Brief of State Attorney General at 21, *Hoff* (No. 980208) (citing *Hearings on HB 1462 Before the House Judiciary Comm.*, 53d Legis. (North Dakota Jan. 27, 1993) (statement of Senator Mahoney)).

160. N.D. CENT. CODE § 14-09-05.1 (1997).

161. Brief of State Attorney General at 21-22, *Hoff* (No. 980208) (citing *Hearings on HB 1462 Before the House Judiciary Comm.*, 53d Legis. (North Dakota Jan. 27, 1993) (statement of Senator Mahoney)).

162. See *Schempp v. Cook*, 455 N.W.2d 216, 217 (N.D. 1990) (reversing the trial court's order granting the grandparents visitation because the trial court did not make findings as required by section 14-09-05.1 of the North Dakota Century Code).

163. See N.D. CENT. CODE § 14-09-05.1 (stating the requirements for the court to consider when determining if grandparent visitation is in the best interests of the minor).

164. 455 N.W.2d 216 (N.D. 1990).

child and so reversed the trial court's decision awarding visitation to the grandparents.¹⁶⁵

Although *Schempp* was decided in 1990, findings of fact that grandparent visitation is in the best interests of the child are still important under North Dakota Century Code section 14-09-05.1.¹⁶⁶ However, the situation under the 1993 amended version of the statute is different because of the presumption that grandparent visitation is in the best interests of the child.¹⁶⁷ The burden thus shifts to the parents of the child to show that grandparent visitation is not in the best interests of the child.¹⁶⁸ Absent these findings of fact, the grandparents must be awarded visitation rights.¹⁶⁹ It was the presumption that grandparent visitation was in the best interests of the child that spurred the constitutional challenges of North Dakota Century Code section 14-09-05.1.¹⁷⁰

In *Peterson v. Peterson*,¹⁷¹ the parents challenged the constitutionality of North Dakota Century Code section 14-09-05.1, alleging the statute infringed upon their fundamental right to raise their child without state interference.¹⁷² The parents also argued that the scope of the grandparent visitation awarded by the trial court infringed upon their parenting roles because it reduced the father's overtime and also made it difficult to enroll their child in gymnastics and other extracurricular activities.¹⁷³ However, the case was reversed and remanded for other reasons; therefore, the court did not decide the constitutionality of North Dakota Century Code section 14-09-05.1.¹⁷⁴

165. See *Schempp v. Cook*, 455 N.W.2d 216, 217 (N.D. 1990).

166. See N.D. CENT. CODE § 14-09-05.1 (1993) (stating the court shall consider the amount of personal contact between the grandparents and the grandchild).

167. See *id.* (stating grandparent visitation is presumed to be in the best interests of the minor).

168. *Id.*

169. See *id.* (stating grandparents must be granted visitation rights unless a finding is made that visitation is not in the best interests of the minor).

170. See *Peterson v. Peterson*, 1997 N.D. 14, ¶ 22, 559 N.W.2d 826, 832 (declining to decide if section 14-09-05.1 of the North Dakota Century Code unconstitutionally infringed upon parents' fundamental right to be free from undue state interference on parents in raising their child).

171. 1997 N.D. 14, 559 N.W.2d 826.

172. See *Peterson v. Peterson*, 1997 N.D. 14, ¶ 6, 559 N.W.2d 826, 828.

173. *Id.* at 828-29. After Kent and Tracy's son Brett was born, the couple developed marital conflicts that resulted in Kent living on the farm with his parents while Tracy lived with Brett 25 miles away in Valley City. *Id.* ¶ 2, 559 N.W.2d at 828. Tracy refused to let Kent's parents visit with Brett, prompting them to petition for visitation with their grandson. *Id.* The court awarded visitation to Kent's parents on the first Saturday of each month from 10 a.m. to 7 p.m. and on the third weekend of the month from Friday at 7 p.m. to Saturday at 7 p.m. *Id.* ¶ 3. The court also ordered visitation to Kent's parents on the Christmas holiday. *Id.* Shortly after the court granted visitation to Kent's parents, Kent and Tracy reconciled their marriage, and the couple moved to Fargo where Kent began working construction and Tracy became a full-time homemaker. *Id.* ¶ 4. Kent's parents then sought an order to show cause alleging Tracy was not complying with the visitation order. *Id.*

174. See *id.* ¶ 22, 559 N.W.2d at 832 (stating that it was not necessary to determine the constitutionality of section 14-09-05.1 of the North Dakota Century Code because the reversal was due to the trial court's erroneous expansion of visitation hours without a request by the grandparents to do so).

By enacting North Dakota Century Code section 14-09-05.1, the North Dakota legislature provided grandparents an opportunity to petition the court for formalized visitation with their grandchildren.¹⁷⁵ The 1993 amendment to this statute strengthened grandparents' rights to visitation with their grandchildren, but also raised constitutional issues surrounding the statute by presuming that grandparent visitation was in the best interests of the child.¹⁷⁶ Although the constitutionality of North Dakota Century Code section 14-09-05.1 was presented in *Peterson*, it was not ultimately decided until *Hoff v. Berg*.¹⁷⁷

The court's decision in *Hoff* demonstrates that questions surrounding grandparent visitation rights remain.¹⁷⁸ States' adoption of grandparent visitation statutes has replaced the common law, by which grandparents had no legal right to visitation with their grandchildren.¹⁷⁹ However, since the United States Supreme Court has held that parents have a fundamental right to raise their children, many of these grandparent visitation statutes, including North Dakota's, have been constitutionally challenged.¹⁸⁰ Thus, even though all fifty states have changed the common law by enacting grandparent visitation statutes, the constitutional challenges of these statutes demonstrate that the visitation rights of grandparents are an unsettled issue.¹⁸¹

III. ANALYSIS

In *Hoff*, the North Dakota Supreme Court recognized that when the constitutionality of a statute is challenged, it is presumed to be correct and valid unless it clearly impugns the state or federal constitution.¹⁸² However, the court also noted that a statute may be declared unconstitu-

175. See N.D. CENT. CODE § 14-09-05.1 (1997).

176. See N.D. CENT. CODE § 14-09-05.1 (as amended in 1993).

177. See *Hoff v. Berg*, 1999 N.D. 115, ¶ 18, 595 N.W.2d 285, 291-92 (finding section 14-09-05.1 of the North Dakota Century Code unconstitutional); see also *Peterson*, ¶ 6, 559 N.W.2d at 829.

178. See *Hoff*, ¶ 18, 595 N.W.2d at 291-92 (finding North Dakota's grandparent visitation statute unconstitutional); see also *King v. King*, 828 S.W.2d 630, 632 (Ky. 1992) (holding that Kentucky's grandparent visitation statute was constitutional).

179. See *King*, 828 S.W.2d at 632 (stating that under common law grandparents had no legal right to visitation with their grandchildren).

180. See *Hoff*, ¶ 18, 595 N.W.2d at 291-92 (holding North Dakota's grandparent visitation statute unconstitutionally infringed upon parents' fundamental rights to raise their children); see also *Brooks v. Parkerson*, 454 S.E.2d 769, 774 (Ga. 1993) (finding Georgia's grandparent visitation statute violated the state and federal constitutions); *Campbell v. Campbell*, 896 P.2d 635, 644 (Utah Ct. App. 1995) (concluding Utah's grandparent visitation statute violated the United States Constitution).

181. See *In re Smith*, 969 P.2d 21, 24 (Wash. 1998), cert. granted sub nom., *Troxel v. Granville*, 120 S. Ct. 11 (1999) (stating the United States Supreme Court has granted certiorari to decide the constitutionality of Washington's grandparent visitation statute).

182. See *Hoff*, ¶ 7, 595 N.W.2d at 288 (citing *Traynor v. Leclerc*, 561 N.W.2d 644 (N.D. 1997) (stating that the court will presume a statute is constitutional unless the challenger demonstrates the statute's constitutional infirmity)).

tional if at least four members of the court rule that the challenger has shown the constitutional infirmity of the statute.¹⁸³ The *Hoff* court emphasized that the power of courts to declare a statute unconstitutional should be exercised with restraint, caution, and reluctance because it is one of the highest functions of the courts.¹⁸⁴

Parents' right to make decisions concerning the rearing of their children is a very sensitive area, and the United States Supreme Court is often called upon to decide the constitutionality of statutes regarding parental rights.¹⁸⁵ The Supreme Court has consistently held that a parent's right to raise his or her children is an essential and basic civil right.¹⁸⁶ Thus, when there is governmental interference with the fundamental right of childrearing, the Supreme Court has determined that the Fourteenth Amendment's Due Process Clause provides a heightened protection against this interference.¹⁸⁷

The North Dakota Supreme Court has followed the United States Supreme Court, noting that, in due process claims, if a statute infringes upon a fundamental right, only a compelling state interest can warrant the infringement.¹⁸⁸ The statute must be narrowly tailored to serve this compelling interest; thus, the court stated that the statute will only be upheld if it satisfies strict scrutiny.¹⁸⁹ In contrast, the court reasoned that a rational basis level of scrutiny will be employed in situations where fundamental rights are not involved.¹⁹⁰ To survive rational basis review in a substantive due process challenge, the court reiterated that the legislation need only be rationally related to a legitimate government interest.¹⁹¹

The Hoff's argued that a rational relationship standard should have been applied since the statute did not infringe upon a fundamental right.¹⁹² Alternatively, the Hoff's contended that "if it is determined that North Dakota Century Code section 14-09-05.1 does substantially infringe upon parental rights, the State has shown a compelling interest

183. See *id.* (citing *Best Prods. Co. v. Spaeth*, 461 N.W.2d 91, 96 (N.D. 1990) (stating that in order for a statute to be declared unconstitutional, at least four members of the court must find that the challenger has shown the constitutional infirmity of the statute)).

184. See *id.*, 595 N.W.2d at 287-88 (quoting *Montana-Dakota Utils. Co. v. Johanneson*, 153 N.W.2d 414, 420 (N.D. 1967)).

185. See *id.* ¶ 8.

186. See *id.* (citing *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)).

187. See *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

188. See *Hoff*, ¶ 13, 595 N.W.2d at 290 (citing *Alexander v. Whitman*, 114 F.3d 1392, 1403 (3d Cir. 1997) (analyzing the recently employed levels of scrutiny in due process claims)).

189. See *id.* (citing *Alexander*, 114 F.3d at 1403).

190. *Id.*

191. *Id.*

192. *Id.* ¶ 16, 595 N.W.2d at 291.

in promoting the best interests of children, and the legislation is narrowly tailored to meet those ends.”¹⁹³ Likewise, the North Dakota Attorney General¹⁹⁴ claimed that a rational basis standard of review should be applied because reasonable grandparent visitation is only a minimal intrusion on parental rights, thus, the level of scrutiny should not be raised.¹⁹⁵ The Bergs, on the other hand, claimed that strict scrutiny should be applied because the statute interfered with their fundamental parenting rights.¹⁹⁶

The court resolved this disagreement in favor of the Bergs, stating:

[T]he pursuit of happiness guaranteed by [North Dakota Constitution Article I, section 1,] includes “the right to enjoy the domestic relations and the privileges of the family [and the home] . . . without restriction or obstruction . . . except in so far as may be necessary to secure the equal rights of others,” which is protected and insured by the due process clause of [North Dakota Constitution article I, section 12.]¹⁹⁷

In accordance with the North Dakota Constitution, the North Dakota Supreme Court had previously decided that “[p]arents have a fundamental, natural right to their children which is of constitutional dimension.”¹⁹⁸ Relying on earlier cases, therefore, the court stated that the constitutional right of parents to the custody and companionship of their children is paramount to the right of any other person to have the custody and companionship of the child.¹⁹⁹ The court held that only a

193. *Id.* (arguing that the statute is narrowly tailored to justify the ends).

194. *See* N.D. CENT. CODE § 10-32-134 (1997). When a proceeding involves legislation that is allegedly unconstitutional, section 10-32-134 of the North Dakota Century Code permits the attorney general to submit a brief. *Id.* The statute provides in part:

[I]f it appears at any state of a proceeding in a court in this state that the state is, or is likely to be, interested in the proceeding or that it is a matter of general public interest, the court shall order that a copy of the complaint or petition be served upon the attorney general in the same manner prescribed for serving a summons in a civil action.

Id. Thus, since the proceeding involved allegedly unconstitutional legislation, the attorney general was involved in the action. *Id.*

195. *Hoff*, ¶ 16, 595 N.W.2d at 291.

196. *Id.*

197. *Id.* ¶ 15, 595 N.W.2d at 290 (quoting *State v. Cromwell*, 9 N.W.2d 914, 919 (N.D. 1943)).

198. *Hoff*, ¶ 10, 595 N.W.2d at 289 (citing *In re L.F.*, 1998 N.D. 129, ¶ 9, 580 N.W.2d 573, 576; *Kleingartner v. D.P.A.B.*, 310 N.W.2d 575, 578 (N.D. 1981)).

199. *See id.* (citing *Boeddeker v. Reel*, 517 N.W.2d 407, 409 (N.D. 1994) (awarding custody of the children to the parents rather than the state because the parents have a constitutional right to custody of their child)); *Patzer v. Glaser*, 396 N.W.2d 740, 743 (N.D. 1986) (holding that even though the grandparents were the child’s psychological parents, it was not such an exceptional circumstance as to warrant placement of child with grandparents rather than the mother because the constitutional right of parents to the custody of their children is paramount to the right of any other person); *Hust v. Hust*, 295 N.W.2d 316, 318 (N.D. 1980) (reversing the trial court’s order granting the grandparents custody of their grandchild because the parents have a paramount and constitutional right to the custody and companionship of their children superior to that of any person)).

compelling state interest will justify legislation that burdens the fundamental right of parents to maintain a relationship with their children.²⁰⁰ The court recognized that the right to raise one's children without state interference is deeply rooted in American tradition.²⁰¹ It further acknowledged that American traditions dictate keeping state intervention out of the family home.²⁰²

Finally, the court determined that the right to raise one's child and choose with whom the child may associate is a right of the highest order, and that a state's infringement upon this right may only be justified by showing a compelling state purpose that furthers the best interests of the child.²⁰³ Accordingly, since North Dakota Century Code section 14-09-05.1 burdened parents' fundamental right to control their children's associations, the court employed strict scrutiny in determining that a compelling state purpose did not justify the infringement upon this right.²⁰⁴

The court stated that when North Dakota Century Code section 14-09-05.1 was amended in 1993, the statute not only presumed that grandparent visitation was in the best interests of the child, but it also stipulated that grandparents must be provided with visitation rights unless the court finds visitation not to be in the best interests of the child.²⁰⁵ The court also noted that this statute was sensitive to grandparents who desire to see their grandchildren, but for some reason or another they are denied visitation.²⁰⁶ However, while promoting grandparent visitation rights is a legitimate state interest, the court observed that the parental right of choosing with whom one's children may associate is among the most important parental rights.²⁰⁷

The court recognized that the Due Process Clause of the North Dakota Constitution protects parents' fundamental liberty interest of controlling with whom their children may associate.²⁰⁸ The court found that North Dakota Century Code section 14-09-05.1 infringed upon this right by presuming grandparent visitation was in the best interests of the child.²⁰⁹ Thus, because methods of promoting grandparent visitation may be more narrowly tailored to accomplish the purpose behind North

200. See *id.* (relying on *In re K.A.S.*, 499 N.W.2d 558, 564-65 (N.D. 1993) to show that the state bears the burden of demonstrating a compelling state interest that justifies infringement on the parents' fundamental right to raise their children).

201. See *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

202. See *Hoff*, ¶ 10, 595 N.W.2d at 289.

203. See *id.* ¶ 15, 595 N.W.2d at 290-91.

204. See *id.* ¶ 16, 595 N.W.2d at 291 (applying strict scrutiny).

205. See *id.* ¶ 17.

206. See *id.* ¶ 18.

207. *Id.*

208. *Id.* ¶ 18, 595 N.W.2d at 291-92.

209. *Id.*, 595 N.W.2d at 291.

Dakota Century Code section 14-09-05.1, the North Dakota Supreme Court found North Dakota Century Code section 14-09-5.1, as amended in 1993, unconstitutional.²¹⁰

IV. IMPACT

When the North Dakota Supreme Court declares legislation unconstitutional, it becomes void and is treated as if it were never enacted.²¹¹ Accordingly, unconstitutional legislation that modifies an existing statute is a nullity and cannot affect the existing statute in any manner.²¹² Thus, the extant statute remains in effect, and the unconstitutional legislation is disregarded.²¹³ By declaring North Dakota Century Code section 14-09-05.1, as amended in 1993, unconstitutional, the court left the 1983 statute intact until it is validly repealed or amended.²¹⁴

Shortly after *Hoff* was decided, the North Dakota Supreme Court resolved *Love v. Dewall*.²¹⁵ The facts in *Love* were different from *Hoff* because the grandparents had custody of their grandchild for a period of time during which the court deemed the biological parents unfit.²¹⁶ During that time, the grandparents became the child's psychological parents.²¹⁷ *Love* is contrasted by the more typical grandparent visitation cases, in which the grandparents have not actually had custody of the grandchild but are seeking visitation rights either to establish or to maintain a close relationship with their grandchild.²¹⁸ Although the court noted that North Dakota Century Code section 14-09-05.1, as amended in 1993, was deemed unconstitutional in *Hoff*,²¹⁹ the exceptional

210. See *id.*, 595 N.W.2d at 291-92 (finding section 14-09-05.1 of the North Dakota Century Code unconstitutional to the extent it required courts to award grandparents visitation rights with an unmarried minor unless visitation was found not to be in the best interests of the child).

211. See *id.* ¶ 19, 595 N.W.2d at 292 (citing *State v. Clark*, 367 N.W.2d 168, 169 (N.D. 1985)).

212. *Id.*

213. *Id.*

214. See *id.* (stating section 14-09-05.1 of the North Dakota Century Code, as enacted in 1983, remains intact).

215. See *Love v. Dewall*, 1999 N.D. 139, ¶ 1, 598 N.W.2d 106, 106.

216. *Id.* ¶ 2, 598 N.W.2d at 107. Three years after D.C. was born, the trial court determined that his biological parents were unfit parents and awarded custody of D.C. to his grandparents. *Id.* A year later, D.C.'s mother married D.C.'s stepfather and was awarded extended visitation with D.C. after complying with the trial court's rehabilitation requirements. *Id.* ¶ 3. A year after that, D.C.'s mother was granted sole custody of D.C., with visitation rights to the grandparents. *Id.*

217. See *id.* (explaining that when a person provides daily care and develops a close personal relationship with the child, that person becomes the psychological parent to whom the child turns for love, guidance, and security).

218. Compare *id.* (stating that this case was not a typical grandparent visitation case because the grandparents were the psychological parents of the child), with *Hoff*, ¶ 2, 595 N.W.2d at 286-87 (stating the grandparents sued because they were dissatisfied with the visitation afforded them), and *Peterson v. Peterson*, 1997 N.D. 14, ¶ 4, 559 N.W.2d 826, 828 (stating the grandparents essentially wanted their visitation rights enforced).

219. See *Hoff*, ¶ 18, 595 N.W.2d at 291-92.

circumstances surrounding the *Love* case dictated that the grandparents were entitled to maintain their visitation rights because a close bond still existed between the grandparents and their grandchild.²²⁰

Despite the decision in *Love*, the implications of *Hoff* point to an increased difficulty for grandparents to obtain visitation of their grandchildren.²²¹ North Dakota Century Code section 14-09-5.1, as amended in 1993, provided that grandparent visitation was presumed to be in the best interests of the child and that grandparents must be granted visitation unless the parents showed visitation was not in the best interests of the child.²²² However, since the statute was declared unconstitutional, the 1983 grandparent visitation statute remains intact until it is either repealed or amended.²²³ This statute provides that grandparents may be allowed visitation only if the court finds it is in the best interests of the child.²²⁴ The shifting of the burden places the grandparents in the difficult position of proving that visitation is in the best interests of the child.²²⁵

Nationally, however, the future of grandparent visitation statutes is uncertain. Recently, the Washington state grandparent visitation statute was declared unconstitutional by the Washington Supreme Court in *In re Custody of Smith*.²²⁶ The statute provided that any person could be granted visitation rights if the court found the visitation to be in the best interests of the child.²²⁷ After finding the petitioners had standing to petition the court for visitation,²²⁸ the court deemed the statute unconstitutional because it interfered with the parents' fundamental right to

220. See *Love*, ¶ 13, 598 N.W.2d at 110 (finding that since D.C.'s grandparents were his psychological parents, an exceptional circumstance existed that warranted granting D.C.'s grandparents visitation in the best interests of D.C.). Without explicitly stating so, the court seemed to refer to section 14-09-05.1 of the North Dakota Century Code, as enacted in 1983, to determine that it was in D.C.'s best interests that his grandparents be awarded visitation rights. *Id.* ¶ 9, 598 N.W.2d at 108-09.

221. See *id.* ¶ 13, 598 N.W.2d at 110; see also Brief of State Attorney General at 21, *Hoff v. Berg*, 1999 N.D. 115, 595 N.W.2d 285 (No.980208) (stating that legislative testimony indicates that under the old grandparent visitation statute, grandparents found it difficult to prove visitation was in the best interests of the child).

222. See N.D. CENT. CODE § 14-09-05.1 (1997).

223. See *Hoff*, ¶ 19, 595 N.W.2d at 292 (stating that unconstitutional statutes are void and should be treated as if they were never enacted).

224. See *id.* ¶ 5, 595 N.W.2d at 287 (placing the burden on the grandparents to show visitation is in the best interests of the child).

225. Brief of State Attorney General at 21-22, *Hoff* (No. 980208) (citing *Hearings on HB 1462 Before the House Judiciary Comm.*, 53d Legis. (North Dakota Jan. 27, 1993) (statement of Senator Mahoney)).

226. See *In re Smith*, 969 P.2d 21, 30-31 (Wash. 1998), cert. granted sub nom., *Troxel v. Granville*, 120 S. Ct. 11 (1999). The Washington Supreme Court consolidated three cases, *In re Wolcott*, *In re Troxel*, and *In re Smith*, in order to decide the constitutionality of Washington's grandparent visitation statute. *Id.* at 23.

227. See WASH. REV. CODE ANN. § 26.10.160(3) (West 1997).

228. See *Smith*, 969 P.2d at 27 (stating the plain language of the statute allows the petitioners to petition for visitation at any time).

make decisions regarding their children.²²⁹ In response, the grandparents appealed, and the United States Supreme Court granted certiorari.²³⁰ The case was argued before the United States Supreme Court, and the decision is expected in June of 2000.²³¹

The Washington and North Dakota grandparent visitation statutes, although both declared unconstitutional by their respective state supreme courts, share similarities and differences.²³² The Washington statute provided that any nonparent may be granted visitation with the child if the court finds that visitation is in the best interests of the child.²³³ In contrast, North Dakota Century Code section 14-09-05.1, as amended in 1993, presumed that only grandparents must be granted visitation unless visitation is not in the best interests of the child.²³⁴ The distinguishing factor is that any person may be granted visitation of the child in Washington,²³⁵ while in North Dakota only the grandparents' visitation rights were presumed to be in the best interests of the child.²³⁶

Despite the differences in standing requirements, the Washington statute and the original North Dakota grandparent visitation statute are generally quite similar.²³⁷ Since the amended version of North Dakota Century Code section 14-09-05.1 was declared unconstitutional,²³⁸ the original statute places the burden on the grandparents to show visitation is in the best interests of the child.²³⁹ Similarly, the Washington statute also places the burden on the petitioning party to show visitation is in the best interests of the child.²⁴⁰ Thus, in both states, if the court finds the third party visitation to be in the best interests of the child, visitation rights may be granted.²⁴¹

229. *See id.* at 30-31 (stating that the "best interests of the child" standard was insufficient to serve as compelling state interest that could overrule a parent's fundamental childrearing right).

230. *See id.*

231. *Id.*

232. *See Hoff v. Berg*, 1999 N.D. 115, ¶ 18, 595 N.W.2d 285, 291-92 (holding section 14-09-05.1 of the North Dakota Century Code, as amended in 1993, unconstitutional); *see also Smith*, 969 P.2d at 30-31 (holding the statutes addressing visitation rights of nonparents were unconstitutional).

233. *See WASH. REV. CODE ANN.* § 26.10.160(3) (West 1997). Washington Revised Code Annotated 26.10.160(3) provides that "any person may petition the court for visitation at any time including, but not limited to, custody proceedings." *Id.* It further provides that "the court may order visitation rights for any person when visitation may serve the best interests of the child whether or not there has been any change in circumstances." *Id.*

234. *See N.D. CENT. CODE* § 14-09-05.1 (1993).

235. *See WASH. REV. CODE ANN.* 26.10.160(3).

236. *See N.D. CENT. CODE* § 14-09-05.1.

237. *Compare N.D. CENT. CODE* § 14-09-05.1 (as enacted in 1983), with *WASH. REV. CODE ANN.* § 26.10.160(3).

238. *See Hoff v. Berg*, 1999 N.D. 115, ¶ 18, 595 N.W.2d 285, 291-92 (holding section 14-09-05.1 of the North Dakota Century Code, as amended in 1993, unconstitutional).

239. *See N.D. CENT. CODE* § 14-09-05.1 (as enacted in 1983).

240. *See WASH. REV. CODE ANN.* § 26.10.160(3).

241. *See id.*; *see also N.D. CENT. CODE* § 14-09-05.1 (an enacted in 1983).

Depending on the United States Supreme Court Ruling in *In re Smith*,²⁴² the decision could impact the state of North Dakota. If the Supreme Court rules the Washington statute is constitutional by concluding that grandparents may petition for visitation with their grandchildren, North Dakota Century Code section 14-09-05.1 will likely remain as held in *Hoff*.²⁴³ However, if the Court holds the Washington statute interferes with parents' right to raise his or her child, the original version of North Dakota Century Code section 14-09-05.1 also could be declared unconstitutional. One last possibility is that the Supreme Court may only decide the standing issue of the Washington statute and not rule on the constitutionality of the statute. If this happens, the decision will probably not impact North Dakota Century Code section 14-09-05.1, and the statute will remain as held in *Hoff*.²⁴⁴

David T. Whitehouse

242. See *In re Smith*, 969 P.2d 21 (Wash. 1998), cert. granted sub nom., *Troxel v. Granville*, 120 S. Ct. 11 (1999).

243. See *Hoff*, ¶ 19, 595 N.W.2d at 292 (stating unconstitutional legislation is void and is to be treated as if it were never enacted).

244. See *id.*