

Spring 1986

## Grandparent Visitation Statutes: A Proposal for Uniformity, 19 J. Marshall L. Rev. 703 (1986)

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### Recommended Citation

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## GRANDPARENT VISITATION STATUTES: A PROPOSAL FOR UNIFORMITY

Grandpa, can I see you?  
Could you take me to the fair,  
Would you read me a little story,  
And tell me that you care.  
Grandpa would you walk with me?  
Or hold me on your knee?  
I wish that I could talk to you,  
Grandpa why can't it be?  
Grandpa do you love me?  
Yes, I love you too.  
I dream of us together,  
Do dreams ever come true?  
Grandpa can I see you,  
I know this isn't fair?  
But thing will soon be changing  
And we can be a pair.  
Grandpa, we'll be together  
Just wait a little while.  
Grandpa, don't stop trying,  
I want to see you smile.<sup>1</sup>

### INTRODUCTION

The problems and perplexities associated with grandparent visitation privileges have become the focus of an expanding public policy controversy escalating the topic into a major issue in the national political arena.<sup>2</sup> The unfortunate severance of the grandparent-

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1. *Grandparents: The Other Victims of Divorce and Custody Disputes: Hearing Before the Subcommittee on Human Services of The Select Committee on Aging, House of Representatives, 97th Cong., 2d Sess. 4 (1982)* (poem by Susan Vaughn written about an eighty-two-year-old grandfather who has been denied the right to see his only granddaughter) [hereinafter cited as *Hearings*].

2. Today, about seventy five percent of all older Americans are grandparents. Many belong to the group labeled the "young-old" age fifty-five to seventy. As a group, these grandparents are healthier, more affluent, and better educated than ever before. Based on current life expectancies, many will be grandparents for twenty to thirty years. Thus, more and more grandparents are refusing to resign themselves to the denial of the greatest reward of their golden years, the right to cherish and love their grandchildren. Ingulli, *Grandparent Visitation Rights: Social Policies and Legal Rights*, 87 W. VA. L. REV. 295, 297 (1985). See generally Foster & Freed, *The Child's Right to Visit Grandparents*, 20 TRIAL 38 (1984); A. KORNHABER & W. WOODWARD, *GRANDPARENTS GRANDCHILDREN: THE VITAL CONNECTION*, 55 (1981) (discusses reasons precipitating the evolution of the grandparent visitation movement).

The political clout of grandparents is best evidenced by the nationwide rush to pass grandparent visitation statutes. *Grandparents: The Other Victims of Divorce*

grandchild relationship occurs most frequently in cases of divorce or cases of adoption resulting from the death of one or both parents.<sup>3</sup> In the United States today, over one million marriages per year end in divorce.<sup>4</sup> Studies predict that over one-third of all minor children will experience the consequences of divorce.<sup>5</sup> As a result, thousands of children face a potential childhood void of grandparent involvement. The severance of this vital relationship poses a serious threat to a child's psychological development since the grandparent-grandchild bond is second only in emotional importance to the par-

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*and Custody Disputes: Hearing Before the Subcommittee on Human Services of The Select Committee on Aging, House of Representatives, 98th Cong., 1st Sess. 2 (1983) [hereinafter cited as Grandparent Hearings]. Presently, forty-nine states have enacted legislation regarding grandparent visitation privileges. For a listing of all state legislation, see *infra* note 10. Three congressional hearings have been conducted on the topic in response to the introduction of a congressional concurrent resolution recommending the enactment of a Uniform Grandparent Visitation Act. H.R. Con. Res. 45, 98th Cong., 1st Sess., 129 Cong. Rec. 2127 (1983). The media has been sensitive to coverage of the subject and several national organizations have been formed in response to public sentiment and political pressure. The strength of the grandparent movement is effectively summarized in a statement made by Congressman Mario Biaggi, "over my fourteen year career in Congress I have rarely seen such a response to an issue as this." *Grandparent Hearings, supra* at 2.*

3. See Comment, *Grandparent Visitation Statutes: Remaining Problems And The Need for Uniformity*, 67 MARQ. L. REV. 730 (1984) [hereinafter cited as *Grandparent Visitation Statutes*]; Comment, *Grandparental Rights to Visitation And Custody: A Trend In The Right Direction*, 15 CUM. L. REV. 161 (1984) (discussion on the unfortunate severance of the grandparent-grandchild relationship at the time of divorce or adoption).

The rationale underlying a parent's denial of an opportunity for his child to communicate with loving and devoted grandparents covers a broad spectrum. First, a parent may desire to repress memories of a deceased spouse or a failed marriage. *Hearings, supra* note 1, at 16-50 (statement of grandparents). Second, estrangement may be the result of a power struggle between the parent and the grandparent stemming from the fear that the grandparent will repeat child rearing mistakes committed during the parent's childhood. See A. KORNHABER & K. WOODWARD, *supra* note 2, at 195-96. Third, a parent's desire to establish a new family perhaps with a new spouse as the child's adoptive parent may outweigh the importance of the grandparent-grandchild relationship. See *In re Goldfarb*, 6 N.J. Super. 543, 70 A.2d 94 (1949). The majority of jurisdictions have held that adoption statutes preempt visitation statutes. See, e.g., *Putral v. Henry*, 45 Ala. App. 214, 228 So.2d 827 (1969); *Wilson v. Wallace*, 274 Ark. 48, 622 S.W.2d 164 (1981); *Poe v. Case*, 263 Ark. 488, 565 S.W.2d 612 (1978); *Ferrell v. Ruege*, 397 So.2d 723 (Fla. Dist. Ct. App. 1981); *Smith v. Finstead*, 247 Ga. 603, 277 S.E.2d 736 (1981); *In re Adoption of Schumacher*, 120 Ill. App. 3d 50, 458 N.E.2d 94 (1983); *Matter of the Adoption of Gardiner*, 287 N.W.2d 555 (Iowa 1980); *Browning v. Tarwater*, 215 Kan. 501, 524 P.2d 1135 (1974); *Bikos v. Nobliski*, 88 Mich. App. 157, 276 N.W.2d 541 (1979); but see *Roquemore v. Roquemore*, 275 Cal. App. 2d 912, 80 Cal. Rptr. 432 (1969); *Minkon v. Ford*, 66 N.J. 426, 332 A.2d 199 (1975); *Scranton v. Hunter*, 40 A.D.2d 296, 339 N.Y.S.2d 708 (1973). For a discussion concerning the effect of adoption on visitation rights, see generally Comment, *Visitation After Adoption: In The Best Interests of the Child*, 59 N.Y.U. L. REV. 633 (1984).

4. THE WORLD ALMANAC & BOOK OF FACTS 906 (1984). Statisticians predict that by 1990, one out of every two marriages will terminate in divorce or separation. Children often bear the scars of these terrible statistics. *Hearings, supra* note 1, at 7 (statement of Congresswoman Delores G. Cooper, Atlantic City, New Jersey).

5. For a discussion of the increasing divorce rate and its effect upon children see *Grandparental Rights, supra* note 3.

ent-child bond.<sup>6</sup> During the turbulent period surrounding a divorce, a strong grandparent-grandchild association may provide indispensable support and stability for a child.<sup>7</sup> Thus, it is clear that the right of a child to visit a beloved grandparent should be effectuated in the form of a Uniform Grandparent Visitation Act.<sup>8</sup>

Ten years ago, the notion that a grandparent might have a legally enforceable right to visit his grandchild was virtually non-existent. Few courts and even fewer legislatures were willing to create such rights.<sup>9</sup> Today, however, statutory visitation rights exist in forty-nine states.<sup>10</sup> These visitation rights have proven to be a mixed

6. *Grandparent Hearings*, *supra* note 3, at 52 (statement by psychiatrist Arthur Kornhaber).

7. Psychiatrists, psychologists, social workers, and child guidance counselors strongly support the grandparents' rights position. Foster & Fried, *The Child's Right to Visit Grandparents*, 20 TRIAL 38 (1984). Consensus indicates that children should maintain meaningful relationships and a denial of grandparent contact may be classified as a deprivation of such relationships. *Id.* "Stability, continuity and opportunity, of and for meaningful associations are said to build a healthy psyche." *Id.* A national study conducted over a period of seven years by Dr. Arthur Kornhaber, a noted family psychiatrist, reveals that children who are close to grandparents are different from children without grandparents. See A. KORNHABER & K. WOODWARD, *supra* note 20, at 101. They are more patriotic, perform better scholastically, are more stable, and more engrained in family tradition. *Grandparent Hearings*, *supra* note 2, at 52. The social and emotional effects on children who have been abandoned by grandparents manifest themselves in the form of a chaotic younger generation, a confused and harassed middle generation and an unloved older generation. *Id.* at 55-56. (Dr. Kornhaber's study is entitled "Unwilling Divorce of Grandparents and Children").

8. *Grandparent Hearings*, *supra* note 20, at 1. Grandparent visitation privileges benefit children even more than grandparents. *Id.* at 3. (Statement by Dr. Jonas Freed, Chairperson, Committee On Child Custody Section Of Family Law, American Bar Association); *Grandparental Rights*, *supra* note 3, at 161 (advocating adoption of a uniform statute); Comment, *Visitation After Adoption: In the Best Interests of The Child*, 59 N.Y.U. L. Rev. 633 (1981) (same). *But see* Ingulli, *supra* note 2, at 295 (criticizing the necessity of a uniform visitation act).

9. See Note, *Visitation Rights Of A Grandparent Over the Objection Of A Parent: The Best Interests of the Child*, 15 J. FAM. L. 51 (1976-1977). Nineteen states have added grandparent visitation statutes between 1980-84. See *infra* note 10. States at the forefront of the grandparent visitation movement include: California (1967); Idaho (1972); Kansas (1971); New Jersey (1971); New York (1966); Ohio (1972); Tennessee (1971).

10. ALA. CODE § 30-3-4 (1983); ALASKA STAT. § 25.24.150 (1983); ARIZ. REV. STAT. ANN. § 25-337.01 (Supp. 1983-84); ARK. STAT. ANN. §§ 34.1211.1, 57-135 (Supp. 1983); CALIF. CIV. CODE § 197.5 (Deering Supp. 1984) § 4601 (West 1984); COLO. REV. STAT. § 19-1-116 (Supp. 1983); CONN. GEN. STAT. § 46-b-59 (Supp. 1984); DEL. CODE ANN. tit. 10, § 950(7) (Supp. 1984); FLA. STAT. § 61.13(2)(c) (1984); GA. CODE ANN. § 74-112 (Supp. 1985); HAWAII REV. STAT. § 571-46 (Supp. 1985) IDAHO CODE § 32-1008 (1983); ILL. REV. STAT. ch. 40, § 607(b), ch. 110 ½, § 11-7.1 (1983); IND. CODE ANN. § 31-1-11.7-1 (Burns Supp. 1985); IOWA CODE IOWA CODE ANN. § 598.35 (West 1981) § 598.35 (1983); KAN. STAT. ANN. § 38-129 (Supp. 1984); KY. REV. STAT. §§ 403.021, 405.021 (Supp. 1983); LA. REV. STAT. ANN. §§ 9:572, 9:973 (West Supp. 1984); ME. REV. STAT. tit. 19, § 75 (Supp. 1984-85); MD. CTS. AND JUD. PROC. ANN. § 3-602(a)(4) (1984); MASS. ANN. LAWS ch. 119, § 39D (Michie/Law Co.-op 1975 & Supp. 1984); MICH. COMP. LAWS ANN. § 25.312(7) (Supp. 1985); MINN. STAT. ANN. § 257.022 (West 1982); MISS. CODE ANN. § 93-16-1 and 93-16-7 (Supp. 1983); MO. REV. STAT. §§ 452-400(3), 452.402 (Vernon Supp. 1984); MONT. CODE ANN. § 40-9-102 (1983); NEV. REV. STAT. § 123.123

blessing. Outward appearances indicate that the proliferation of state statutes will provide both grandparents and grandchildren alike an adequate mechanism to protect their highly cherished and irreplaceable relationship. However, practical applications of these statutes tend to create more problems than they solve, leaving both grandparent and grandchild in almost the same legally unprotected position they occupied prior to the legislation.<sup>11</sup>

The deficiencies inherent in the state statutes often impede their effective operation. First, the category of persons eligible to petition for visitation rights varies drastically from state to state.<sup>12</sup> Second, the circumstances that trigger the right to petition are inconsistent among the states.<sup>13</sup> Third, while most states utilize the "child's best interest" standard<sup>14</sup> in awarding visitation, this stan-

(1979); N.H. REV. STAT. ANN. § 458.17 (1983); N.J. STAT. ANN. § 9:2-7.1 (West 1976); N.M. STAT. ANN. §§ 40-9-1, 40-9-4 (1983); N.Y. DOM. REL. LAW § 72 (McKinney 1977); N.C. GEN. STAT., §§ 50-13.2(b), 50-13-5(j) (1976 & Supp. 1983); N.D. CENT. CODE § 14-09-05.1 (Supp. 1983); OHIO REV. CODE ANN. §§ 3109.05, 3109.11 (Baldwin 1983); OKLA. STAT. ANN. tit. 10, § 5 (West Supp. 1983-84); OR. REV. STAT. § 109.121 (1983); PA. STAT. ANN. tit. 23, §§ 1001-1015 (Purdon Supp. 1984); R.I. GEN. LAWS § 15-5-24.2 (Supp. 1983); S.C. CODE ANN. § 20-7-120 (Law. Co-op Supp. 1983); S.D. CODIFIED LAWS ANN. § 25-4-52-4 (Supp. 1983); TENN. CODE ANN. § 36-6-301 (1984); TEX. FAM. CODE ANN. § 14.03(d) (Vernon 1975 & Supp. 1984); UTAH CODE ANN. §§ 30-3-5, 30-5-1-2 (Supp. 1984); VT. STAT. ANN. tit. 15, § 1011-1016 (Supp. 1984); VA. CODE § 20-107.2 (Supp. 1984); WASH. REV. CODE § 26.09.240 (1983); W. VA. CODE §§ 48-2-15(b)(1), 48-2b-1 (Supp. 1984); WIS. STAT. ANN. § 767.245 (West Supp. 1981-82); WYO. STAT. ANN. § 20-2-113 (Supp. 1985).

11. See *Grandparent Hearings*, *supra* note 2, at 2 for discussion of problems associated with the variety of state visitation statutes.

12. See *infra* notes 65-74 for discussion on individuals entitled to petition for visitation privileges.

13. Some grandparents are afforded more protection than others solely based upon their choice of residency. See *infra* notes 81-86.

14. The best interest standard is utilized in both custody and visitation proceedings. *Commonwealth ex rel. Flannery v. Sharp*, 151 Pa. Super. 612, 617, 30 A.2d 810, 812 (1943). The Uniform Marriage and Divorce Act lists five factors commonly utilized to access the child's best interests:

- (1) the wishes of the child's parent or parents as to his custody;
- (2) the wishes of the child as to his custodian;
- (3) the interaction and interrelationship of the child with his parent or parents, his siblings, or any other person who may significantly affect the child's best interests;
- (4) the child's adjustment to his home, school, and community;
- (5) the mental and physical health of all individual's involved.

UNIFORM MARRIAGE & DIVORCE ACT 402, 9A U.L.A. 197-98 (Supp. 1985). Although the preceding five factors are commonly evaluated in custody proceedings, grandparent visitation proceedings warrant a more indepth analysis. Foster & Freed, *The Child's Right to Visit Grandparents*, 20 TRIAL 38 (1984). *But see Grandparents Have Rights Too*, 4 CAL. LAW 20 (1984) (visitation is really a limited form of custody). For a discussion on additional factors utilized by courts in determining the child's best interest, see *infra* notes 125 & 127. See also Note, *supra* note 9 (detrimental effects of divergent best interest standards); Note, *Statutory Visitation Rights of Grandparents: One Step Closer to the Best Interest of the Child*, 26 CATH. U. L. REV. 387 (1977) (same).

A uniform best interest standard would alleviate the problem of vagueness inher-

dard is vague and overlooks the vital connection between grandparent and grandchild.<sup>15</sup> Finally, state adoption statutes often tend to conflict with state visitation statutes rendering the latter unenforceable.<sup>16</sup> Clearly, state legislatures and the courts have taken a monumental step by recognizing the psychological and social benefits which result from nurturing and protecting the bonds between grandparents and grandchildren. However, the ultimate goal of legally protecting the child's rights will not be attained until the above mentioned problems are alleviated by the adoption of a Uniform Grandparent Visitation Act by all fifty states.<sup>17</sup>

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ent in the present system while emphasizing the vital connection between grandparent and grandchild. An illustrative uniform standard would provide for an examination of the following relevant factors:

1. The love, affection, and . . . emotional ties existing between the grandparent and the child.
2. The capacity and disposition of the parties involved [as to] giving the child love, affection, and guidance.
3. The moral fitness of the parties involved.
4. The mental and physical health of both the grandparent and the grandchild.
5. The reasonable preference of the child if the court deems the child to be of sufficient age to express preference.
6. The amount of personal contact between the grandparent and grandchild prior to the institution of visitation proceedings.
7. Any other factor considered by the court to be relevant and equitable to a determination of the amount and extent of the requested visitation.

*Grandparent Hearings*, *supra* note 2, at 106 (prepared statement of Richard S. Victor, attorney).

15. Psychologically every child develops not only in the world of his/her parents but within the larger world of his/her grandparents. *Grandparent Hearings*, *supra* note 2, at 55. Grandparenting is a natural instinct deeply rooted within our biological make-up, manifested by emotions and behavior. *Id.* at 56. When a grandchild is born special emotions are triggered within a grandparent. If a grandparent is afforded an opportunity to share in the child's early life, instinctual emotions of love, affection, and devotion develop, leading to the formation of a vital connection. *Id.* This vital connection manifests itself in the form of an enduring emotional bond established through shared experiences and emotional commitment. *Id.*

In a study focusing on the nature of the grandparent-grandchild relationship, Dr. Arthur Kornhaber made three important findings which support the thesis that a vital connection exists between grandparents and grandchildren. First, the grandparent-grandchild bond is second only in emotional importance to the bond between parents and children. Second, problems that develop between grandparent and parent are not directly passed on from grandparent to grandchild. Finally, grandparents and grandchildren affect one another only because they exist. *Id.* For details, see A. KORNHABER & K. WOODWARD, *supra* note 2, at 101.

16. See *supra* note 3 and *infra* notes 150-152 for discussion on the conflict between state visitation and state adoption statutes.

17. Congressman Mario Biaggi has been the sponsor of two bills advocating the adoption of a Uniform Grandparent Visitation Act. H.R. Con. Res. 45, 98th Cong., 1st Sess., 129 Cong. Rec. 2127 (1983); H.R. Con. Res. 67, 99th Cong., 1st Sess., 131 Cong. Rec. H714 (daily ed. Feb. 26, 1985). House Resolution 67 calls for the development and adoption by all fifty states of a Uniform Grandparent Visitation Act which:

- (1) provides grandparents with adequate rights to petition state courts for and to be fully heard in such courts with respect to the granting of privileges to visit such grandparents' grandchildren after dissolution (because of divorce, separation, or death) of the marriage of such grandchildren's parents;
- (2) ensures that such rights extend to cases in which after dissolution, such

This comment will begin by analyzing the common law regarding grandparent visitation privileges. Second, the vast array of state statutes now in effect will be discussed together with recent congressional hearings stressing the need for federal uniformity producing legislation. Third, this comment will identify and analyze the statutory deficiencies precipitating the congressional quest for uniformity. Visitation rights in cases of divorce and adoption will also be explored, placing an emphasis on the deficiencies inherent in the Illinois Visitation Statute. Finally, this comment will prove that present state legislation is ineffective and uniformity is necessary to delineate the scope of grandparent visitation rights and guarantee protection of these rights once they have been awarded.

### I. COMMON-LAW OBLIGATION TO VISIT GRANDPARENTS IS MORAL AND NOT LEGAL

*Succession of Reiss*<sup>18</sup> is recognized as the first American case in which a grandparent sued for visitation privileges. In *Reiss*, the defendant was the father of two minor children, ages six and eight, whose mother had died six years earlier.<sup>19</sup> The plaintiff was the maternal grandmother.<sup>20</sup> The lower court ordered the father to send the children to visit their grandmother and further ordered that the grandmother be allowed to visit the children in their home on alternate weeks.<sup>21</sup> The grandmother appealed this judgment petitioning for the unilateral right to visitation by the grandchildren in her own home.<sup>22</sup> The Louisiana Supreme Court held that the grandmother

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parents remarry and stepparents adopt such grandchildren; and

(3) establishes procedures for the interstate recognition and enforcement of state court orders granting such visitation privileges.

H.R. Con. Res. 67, 99th Cong., 1st Sess., 131 Cong. Rec. H714 (daily ed. Feb. 26, 1985). Finally, the Secretary of Health and Human Services, through the National Center for Child Abuse and Neglect and the Administration on Aging will provide technical assistance to the states for developing, publishing, and disseminating guidelines regarding the best interest standard. *Id.*

It is quite clear that the development of a proposed act would alleviate the deficiencies in the present statutory system while ensuring that the child's best interests receives paramount consideration. The congressional resolution recognizes that the child's best interests are often served by maintaining relationships with grandparents. H.R. Rep. 52, 99th Cong., 1st Sess. 2 (1985). Furthermore, given the fact that forty-nine states have presently enacted separate grandparent visitation statutes, "[t]he adoption of a uniform approach could only facilitate interstate recognition and promote the equal protection clause of the laws as envisioned by the Constitution." *Id.* Thus, a uniform act would serve as an effective implementation mechanism to the forty-nine state legislatures who have recognized a legal right in grandparents to petition for visitation privileges with their grandchildren.

18. 46 La. Ann. 347, 15 So. 151 (1894).

19. *Id.* at 349-50, 15 So. at 151.

20. *Id.*

21. *Id.*

22. Although the son-in-law admitted that he believed that there was a law of nature establishing that children should visit grandparents, he had not sent his chil-

had no legal right to visitation.<sup>23</sup>

The Louisiana Supreme Court in *Reiss* performed a bifurcated analysis, focusing on two concepts: the application of the "best interest of the child" standard<sup>24</sup> and the application of the "parental rights doctrine."<sup>25</sup> First, under the "best interest" standard, the court noted that relations between the grandmother and father were not only strained but acrimonious.<sup>26</sup> Thus, the court questioned whether the children's best interests would be served by forcing them into a conflict of authority between the parent and the grandparent.<sup>27</sup> Had relations between the father and his mother-in-law been more docile, the court may have been more inclined to allow visitation. Nevertheless, the majority held that the issue of grandparent visitation was one best determined from a moral perspective

dren to visit their grandmother in over six years. *Id.* at 350, 15 So. at 152. The grandmother's primary reason for requesting visitation solely in her own home rested upon her belief that the children should be sent to visit her. However, due to the fact that the children lived with their father and other members of his family, visits at the home of the father may have been quite unpleasant for the grandmother. Furthermore, the court noted that relations between the father and grandmother demonstrated much bitterness and resentment. *Id.* at 350, 15 So. at 151.

Since the subject matter of the case was novel, the court looked to the French Civil Code for guidance. French authorities were divided on the issue. One view held that the precept of Deuteronomy "*Honora patem tuum et matrem*" also included the grandfather and grandmother and a court could intervene without regard to the will of the parents. *Id.* at 350, 15 So. at 152. Other courts have held that under the laws of nature a child is under the authority of the remaining parent after the death of either. *Id.* The court noted quoted from French authorities as follows:

[c]an the ascendant demand that the authority of the mother and father be limited? In truth, . . . ascendants have certain rights [but these rights become effective] . . . only when the father and mother are dead, or are incapable of manifesting their will. [Although] it is desirable that the ties of affection . . . between . . . ascendants and their grandchildren be [strong] and unceasing but if there is a conflict, the [parents alone have total authority regarding their children]. The law gives no right of action to the grandparents.

*Id.* at 352, 15 So. at 152.

23. Referring to the French authorities, the court held that the obligation to visit grandparents was moral not legal. *Id.* at 353, 15 So. at 152. However, the court noted that cases which exhibit severe cruelty and evil may necessitate judicial intervention. The case at bar did not disclose such an issue since the father admitted the respect due to the grandmother by his children. *Id.* Thus, the ties of nature would prove more effective in restoring family relations than would the coercive measures which flow from judicial intervention. *Id.*

24. Referring to French commentators, the court noted that allowing grandparents to intervene would hinder parental authority by dividing it. The child's best interest would not be served by fostering a conflict of authority. *Id.* at 352, 15 So. at 152.

25. The court's analysis regarding ascendants legal rights is referred to as the "parental rights doctrine." This doctrine states that ascendants have legal rights under certain circumstances. A grandparent's legal right is limited to the situation where both parents are dead or unfit to care for the child. *See Grandparental Rights, supra* note 3, at 164.

26. *Reiss*, 46 La. Ann. at 350, 15 So. at 151.

27. *Id.* at 352, 15 So. at 152.



rather than a legal perspective.<sup>28</sup>

Second, with regard to the "parental rights doctrine," the court formulated the general rule that a grandparent acquires visitation rights only when the parents are deceased or unfit to care for the child.<sup>29</sup> Noting that grandparents have certain rights under the natural law, the court emphasized that these rights are limited to the two situations described above.<sup>30</sup> In *Reiss*, the father was determined to be mentally and physically capable of caring for his children, therefore, the court concluded that judicial intervention was inappropriate.<sup>31</sup> In an attempt to alleviate the harshness of its holding, the court stated that judicial intervention may be appropriate in cases which exhibit severe cruelty.<sup>32</sup> In *Reiss*, a rearrangement of facts whereby the grandmother had been willing to visit the grandchildren in their father's home and the father had totally denied the grandmother access to the children, may have elicited a different result. In this hypothetical situation, the court may have been more inclined to grant legal visitation rights for the grandparent since a total parental denial of visitation indicates that the parent may not be acting in the child's best interests.<sup>33</sup>

## II. COMMON LAW APPLICATION OF THE PARENTAL RIGHTS AND BEST INTEREST DOCTRINES

The concepts formulated in *Reiss* were generally followed in subsequent common law cases.<sup>34</sup> In *Odell v. Lutz*<sup>35</sup> a California ap-

28. *Id.* See *supra* note 23 for a discussion on the rationale the court utilized to reach this decision.

29. See *supra* note 25.

30. *Reiss*, at 352, 15 So. at 152.

31. *Id.* at 353, 15 So. at 152.

32. However, in a case where the parent recognizes the respect due to a grandparent by his children but animosity between parent and grandparent poses an obstacle to visitation, judicial intervention is not warranted. *Id.*

33. In *Reiss*, though the court recognized that visits at the father's home might be unpleasant for the grandmother, it knew that the grandmother would be allowed to see the children because the father did recognize the respect due the grandmother by his children. *Reiss*, 46 La. Ann. at 350, 15 So. at 151. Thus, the grandmother's failure to provide an adequate reason to justify an award of unilateral visitation may have precipitated the unseemingly harsh decision. For an analysis of the *Reiss* case see Zaharoff, *Access to Children: Towards a Model Statute for Third Parties*, 15 FAM. L.Q. 165, 168 (1981); Gault, *Statutory Grandchild Visitation*, 5 ST. MARY'S L.J. 478 (1973).

34. See, e.g., *Veazey v. Stewart*, 251 Ark. 334, 472 S.W.2d 102 (1971) (visitation denied custodial parent objected); *Odell v. Lutz*, 78 Cal. App. 2d 104, 177 P.2d 628 (1947) (visitation denied—parental rights doctrine prevails); *Jackson v. Fitzgerald*, 185 A.2d 724, 98 A.L.R.2d 322 (1962) (visitation denied—no allegation of parental unfitness); *Noll v. Noll*, 277 A.D. 286, 98 N.Y.S.2d 938 (1950) (visitation denied—no allegation of parental unfitness); *Commonwealth ex rel. McDonald v. Smith*, 170 Pa. Super. 254, 85 A.2d 686 (1952) (visitation denied—hostility between parent and grandparent); *Green v. Green*, 485 S.W.2d 941 (Tex. Civ. App. 1972) (visitation denied—no legal right). For a discussion of common law visitation, see generally Foster

pellate court utilized the concepts of the "best interest of the child" standard and the "parental rights doctrine." In *Odell*, the maternal grandmother sought visitation privileges with her deceased daughter's child, the sole beneficiary of a trust created by her grandfather.<sup>36</sup> The child's father had remarried and his new wife had adopted the child. Applying the "parental rights doctrine," the court observed that because the fitness of the custodial parents was not an issue, the court was without power to compel the parents to allow the grandmother the visitation right.<sup>37</sup> In addition, the court analyzed the benefit the child would receive from an association with her grandmother. Nevertheless, the court noted that it did not have the authority to grant visitation simply based on the benefits of that relationship.<sup>38</sup> Thus, the grandmother was denied visitation.<sup>39</sup>

At common law, challenging the fitness of a custodial parent under the "parental rights doctrine" was virtually an unsurmountable task.<sup>40</sup> The common law did, however, recognize three excep-

& Freed, *Grandparent Visitation: Vagaries and Vicissitudes*, 23 Sr. Louis U.L.J. 643 (1979).

35. 78 Cal. App. 2d 104, 177 P.2d 628 (1947).

36. Under the terms of the trust fund the corpus and income were not payable to the beneficiary until she reached the age of twenty-five. *Id.*

37. The court noted that the rights of parenthood are not absolute, but subject to the superior authority of the state to protect the child against parental abuse. 78 Cal. App. 2d at 105, 177 P.2d at 629. However, in the absence of such abuse, the state may not constitutionally interfere with the natural liberty of the parent to direct the upbringing of his child. *Id.* As compensation for the legal obligations of parenthood, the law recognizes certain fundamental rights of parenthood. Thus, infringement of these rights has been held to constitute an impairment of the parents' personal liberty which is forbidden by the Constitution. *Id.* See Comment, *Grandparental Rights To Visitation and Custody: A Trend In The Right Direction*, 15 CUM. L. REV. 161, 164 (1984) (analysis of *Reiss* case).

38. There was nothing in the record which indicated that the association between grandparent and grandchild would be anything but beneficial. *Id.* However, the fact that the relationship would have been beneficial was deemed irrelevant in the final determination denying visitation. *Id.* The court cited a previous California case, *Robertson v. Robertson*, 72 Cal. App. 2d 129, 137, 164 P.2d 52, 57 (1945), for the proposition that grandparents' rights, if they exist, are no different than the rights of a third party or a stranger. *Id.* at 105, 177 P.2d at 629.

39. The court also concluded that the right to visit the beneficiary was not necessary for the administration of the trust. *Id.* at 108, 177 P.2d at 630.

40. The rationale underlying the "parental rights" and "best interests" doctrines was succinctly illustrated in *Jackson v. Fitzgerald*, 185 A.2d 724, 725-26, 98 A.L.R.2d 322, 325 (1962).

[I]n the absence of a charge of unfitness a grandparent is a "third person" without legal standing to demand custody. . . . The right of visitation derives from the right to custody. The court [can] not award . . . visitation rights without impinging upon the [father's] vested right of custody. . . . Courts are not insensitive to the yearning of grandparents . . . for the company of [grandchildren]. . . . But such cannot be translated into a legal right without a showing that it is dictated by the needs and welfare of the child. In the absence of such a showing, custodial control goes only with custodial responsibility.

*Id.* See *Veazey v. Stewart*, 251 Ark. 334, 335, 472 S.W.2d 102, 103 (1971) (grand-

tions to the general rule that grandparents would not be awarded visitation where the custodial parent was fit and objected to the visitation.<sup>41</sup> These exceptions were only applicable in every limited fact situations. They occurred: (1) when the parties to a divorce proceeding stipulated to grandparent visitation,<sup>42</sup> (2) when evidence was presented that the parent with custody was unfit,<sup>43</sup> or, (3) when the child resided with the person seeking visitation.<sup>44</sup> Additionally, the minority common law position awarded visitation when it was in the child's best interests.<sup>45</sup>

### III. STATUTORY VISITATION RIGHTS

The common law was, in most instances, quite unresponsive to grandparents' desires to visit with their grandchildren. In an attempt to eradicate the harshness of the common law rule, state legislatures began enacting grandparent visitation statutes in the late 1960's.<sup>46</sup> Presently all states except Nebraska have enacted legisla-

mother admitted that mother was a fit parent); *People ex rel Schachter v. Kahn*, 241 A.D. 686, 269 N.Y.S. 173, 174 (N.Y. App. Div. 1934) (per curiam) (father appeared to be proper guardian, thus court has no power to grant visitation rights).

41. See generally Note, *supra* note 9.

42. See *Brock v. Brock*, 281 Ala. 525, 527, 205 So.2d 903, 904 (1967) (legal validity of grandparents' right established in divorce decree); *Benner v. Benner*, 113 Cal. App. 2d 531, 532, 248 P.2d 425, 426 (1952) (continuation of grandparent-grandchild relationship was in the best interest of the child); *Boyles v. Boyles*, 14 Ill. App. 3d 602, 604, 302 N.E.2d 199, 201 (1973) (continued visitation by grandparents in child's best interest). But see *Commonwealth ex rel. McDonald v. Smith*, 170 Pa. Super. 254, 258-59, 85 A.2d 686, 688 (1952) (extensive visitation privilege deprives a parent of complete and uninterrupted custody). See also Note, *Statutory Visitation Rights of Grandparents: One Step Closer to the Best Interests of the Child*, 26 *CATH. U.L. REV.* 387, 390 (1977) (some courts have recognized limited right of grandparental intervention request made prior to divorce decree).

43. See Comment, *Grandparental Rights to Visitation And Custody: A Trend in the Right Direction*, 15 *CUM. L. REV.* 161, 164 (1984) (exceptions to common law rule denying grandparent visitation).

44. This situation arose when the custodial parent and grandchild resided with the grandparent and the custodial parent subsequently died. The surviving parent would petition for a change of custody and the grandparent would request visitation privileges. See *Brock v. Brock*, 281 Ala. 525, 530, 205 So.2d 903, 907 (1967) (child had resided with grandparents for several years creating ties of affection); *Bookstein v. Bookstein*, 7 Cal. App. 3d 219, 221, 86 Cal. Rptr. 495, 497 (1970) (child resided with grandparents for five years); *Benner v. Benner*, 113 Cal. App. 2d 531, 248 P.2d 425 (1952) (child resided with mother and grandmother for three years).

45. See, e.g., *Temple v. Temple*, 52 Ill. App. 3d 851, 368 N.E.2d 192 (1977) (maternal grandparent visitation allowed); *Boyles v. Boyles*, 14 Ill. App. 3d 602, 603-04, 302 N.E.2d 199, 201 (1973) (grandparent visitation in best interest of child); *Anonymous v. Anonymous*, 50 Misc. 2d 43, 46, 269 N.Y.S.2d 500, 504 (1966) (visitation awarded where best interest of child cried out for grandparental love and affection); But see *Ross v. Powell*, 359 So.2d 803, 807 (Ala. App. 1978) (visitation denied where grandparents emotionally unstable); *Solomon v. Solomon*, 319 Ill. App. 618, 49 N.E.2d 807 (1943) (visitation denied due to emotional instability; case remanded to hear such evidence).

46. See generally Note, *Statutory Visitation Rights of a Grandparent: One Step Closer To The Best Interests of the Child*, 26 *CATH. U. L. REV.* 387, 390-92

tion establishing an independent right of visitation for grandparents.<sup>47</sup> The statutes vary greatly from state to state and differ on such topics as which individuals are granted the right to petition for visitation privileges, and what circumstances trigger the right to petition.<sup>48</sup> Other recurrent problems include the lack of uniformity in the criteria used to determine the "best interests of the child" standard, as well as the trouble resulting from the conflict between state visitation and state adoption statutes.<sup>49</sup> Some state legislatures have been forced to amend their statutes numerous times because incorrect judicial interpretations have served to defeat the legislative purpose.<sup>50</sup> Finally, grandparents may find their precious visitation rights obliterated because the present statutory structure lacks an appropriate procedural mechanism to ensure enforceability.<sup>51</sup> Therefore, the need for uniformity is apparent because many of the statutes create as many problems as they were designed to solve.

Response to the enactment of state grandparental visitation statutes has been overwhelming. At one end of the spectrum, a few courts and commentators have criticized the statutes because they create a cause of action where none existed at common law, thus encouraging court intervention into issues which require private resolution.<sup>52</sup> At the opposite end of the spectrum are grandparents who contend that state statutes are problematic; clarification of their legal rights will only be accomplished through the adoption of a National Grandparent Visitation Act.<sup>53</sup> Choosing a middleground, other

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(1977) (commentary on the recognition of grandparent visitation rights).

47. See *supra* note 10 for listing of state grandparent visitation statutes.

48. See *infra* notes 65-74 and 81-86 for discussion on persons entitled to petition for visitation and circumstances which trigger those rights.

49. See *supra* note 14 and *infra* notes 119-49 and accompanying text discussing the interest standard. See *infra* notes 150-79 and accompanying text discussing the conflict between visitation and adoption statutes.

50. For a discussion of the legislative confusion surrounding the enactment of the Illinois visitation statute which underwent two amendments, see *infra* notes 87-105 and accompanying text. See also *Grandparent Visitation Statutes, supra* note 3, at 750.

51. *Hearings, supra* note 1, at 32 (excerpts from story told by Mr. & Mrs. Kudler, maternal grandparents who had been stripped of their New York visitation rights after their two grandchildren were abducted and taken to Colorado by their natural father). The Kudlers, after spending over \$60,000, were heavily in debt as a result of their attempt to maintain a relationship with their grandchildren. *Id.* Often, in an attempt to frustrate a state award of visitation, the child's custodian removes the child across state lines. To deter such practices, Congress passed the Parental Kidnapping Prevention Act of 1980. See 15 U.S.C. 1073 (Supp. 1985). However, the Justice Department has been reluctant to enforce this Act in cases involving grandparent visitation. *Grandparent Hearings, supra* note 2, at 33. Thus, unilateral removal by the child's custodian will inevitably strip the grandparents of their visitation privileges. *Id.*

52. See Gault, *Statutory Grandchild Visitation*, 5 ST. MARY'S L.J. 474, 485-87 (1973) (discusses jury submission problems inherent in grandparent visitation issue).

53. See *Grandparent Hearings, supra* note 2, at 1 for a discussion advocating the adoption of a Uniform Grandparent Visitation Act.

advocates contend that the diversity of existing statutes should be utilized as an experimental mechanism until adequate sociological research produces a foundation to justify the adoption of a uniform standard.<sup>54</sup> Thus, the present system utilizing diverse state visitation statutes has received, at best, mixed reviews. Although, the minority view approves maintaining the status quo, the majority view calls for a surge toward uniformity.<sup>55</sup>

#### IV. CONGRESSIONAL RESPONSE—A SURGE TOWARD UNIFORMITY

Congressional response to the plight of grandparents and grandchildren has been quite sympathetic, but final decisive action has yet to be reached because of repeated delays.<sup>56</sup> The House of Representatives Subcommittee on Human Services of the Select Committee on Aging has held three hearings to discuss grandparent visitation.<sup>57</sup> These meetings were chaired by Congressman Mario Biaggi (D. N.Y.), one of the leading critics of the present system of state visitation statutes. On April 19, 1983, the House unanimously passed a resolution authored by Congressman Biaggi urging adoption by all fifty states of a Uniform Grandparent Visitation Act to be developed by the National Conference of Commissioners on Uniform State Laws.<sup>58</sup> A similar bill was introduced in the Senate on February 22, 1984.<sup>59</sup> Final Congressional action was not forthcoming and Congressman Biaggi reintroduced this resolution on February 26, 1985.<sup>60</sup> The bill passed by  $\frac{2}{3}$  voice vote in the House on April 22, 1985.<sup>61</sup> To date, no further Senate action has been reported.

Immediate Congressional action is both necessary and justifiable. Congressional Hearings have highlighted the problems and complexities associated with these statutes as viewed from the perspectives of all involved: grandchildren, grandparents, legislative officials, lawyers and psychiatrists.<sup>62</sup> The first state visitation stat-

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54. See Inguilli, *supra* note 2, at 298 for a discussion supporting the present system of state visitation statutes.

55. See *infra* notes 62-64 and accompanying text advocating adoption of a Uniform Grandparent Visitation Act.

56. See *infra* notes 58-61 and accompanying text for history of congressional action in relation to grandparent visitation rights.

57. Representatives from New Jersey, New York, California, and Idaho presented testimony on behalf of their constituents. Lawyers, psychiatrists, and a panel of grandparents also voiced their opinions on the topic of a Uniform Grandparent Visitation Act. See *Grandparent Hearings, supra* note 2, at 2; *Hearings, supra* note 1, at 1.

58. H.R. Con. Res. 45, 98th Cong., 1st Sess., 129 Cong. Rec. 2127 (1983).

59. S. Con. Res. 40, 98th Cong., 1st Sess., 129 Cong. Rec. 2127 (1983).

60. H.R. Con. Res. 67, 99th Cong., 1st Sess., 131 Cong. Rec. H714 (daily ed. Feb. 26, 1985). See *supra* note 17 for a discussion of the components of this resolution.

61. H.R. Rep. 52, 99th Cong., 1st Sess. 2 (1985).

62. See *Grandparent Hearings, supra* note 2 for text of testimony presented by

utes were enacted over twenty years ago.<sup>63</sup> An analysis of the proportion of states which have followed suit leads to the conclusion that grandparent visitation statutes, in whatever form, are firmly rooted. The experimental phase is over and the necessity of awarding grandparents legal rights is clearly established. Thus, the time is ripe to erradicate the four major deficiencies prevalent in the present system by enlisting the help of an experienced and informed congressional body to develop a Uniform Grandparent Visitation Act.<sup>64</sup>

## V. STATUTORY DEFICIENCIES—THE NEED FOR UNIFORMITY

### A. INDIVIDUALS ENTITLED TO PETITION FOR VISITATION PRIVILEGES

The first issue usually addressed in visitation legislation is the category of persons allowed to petition for visitation rights. In addition to authorizing grandparent-grandchild visitation, many state statutes extend visitation to other parties such as great-grandparents,<sup>65</sup> siblings,<sup>66</sup> stepparents,<sup>67</sup> other relatives,<sup>68</sup> or any person inter-

grandchildren, grandparents, legislative officials, lawyers, and psychiatrists.

63. See *supra* note 9 for listing of states at the forefront of the grandparent visitation movement.

64. House Congressional Resolution 67 lists nine reasons supporting the adoption of a Uniform Visitation Act. H.R. 67, 99th Cong., 1st Sess., 131 Cong. Rec. H714 (daily ed. Feb. 26, 1985). These include:

- (1) 75% of all older Americans are grandparents.
- (2) Grandparents play a vital role in millions of American families.
- (3) An estimated one million children a year experience parental divorce.
- (4) Forty-nine States presently provide grandparents with rights to petition state courts for visitation privileges after parental divorce, separation, or death.
- (5) State procedural rights to petition for visitation often do not afford grandparents with opportunities to be fully heard with respect to an award of visitation privileges.
- (6) State best interest standards, the mechanisms used to evaluate the granting of visitation privileges, vary widely among the forty-nine states.
- (7) In determining the best interest of the child after dissolution, courts often fail to analyze the benefits a grandparent may bestow upon a grandchild if their meaningful relationship is allowed to continue.
- (8) The interstate movement of parties involved in visitation proceedings often adversely affects the ability of grandparents to exercise visitation privileges once granted.
- (9) National grandparent organizations have been established in an effort to publicize the visitation issue and promote uniformity.

*Id.*

65. ARIZ. REV. STAT. ANN. § 25-337.01 (West Supp. 1985); CAL. CIV. CODE § 197.5 (West 1982); ILL. REV. STAT. ch. 40, § 607(b) (1983) MINN. STAT. ANN. § 257.022 (West 1982); NEV. STAT. § 123.123 (1979); N.D. CENT. CODE § 14-09-05.1 (Supp. 1985); PA. STAT. ANN. tit. 23, § 1012 (Purdon Supp. 1983-84); WIS. STAT. ANN. § 880.145 (West 1981).

66. ARK. STAT. ANN. § 57-137 (Michie Supp. 1983); CAL. CIV. CODE § 197.5 (West 1982); LA. REV. STAT. ANN. § 9:572 (West Supp. 1986); NEV. REV. STAT. § 123.123 (1979).

67. Some states provide for stepparent visitation rights after divorce by statute. See, e.g., ME. REV. STAT. ANN. tit. 19, § 752 (Supp. 1984-85); PA. STAT. ANN. tit. 23, § 1015 (Purdon 1983); TENN. CODE ANN. ] 36-]6-302 (1984); VA. CODE § 20-107.2 (1983)

ested in the child's welfare.<sup>69</sup> For example, statutes in eight states specifically allow visitation by great grandparents.<sup>70</sup> California, Louisiana, and Nevada allow sibling visitation;<sup>71</sup> Tennessee and Virginia will entertain petitions by stepparents.<sup>72</sup> The scope of the Ohio and Virginia statutes includes other relatives<sup>73</sup> and California, Hawaii, Ohio, and Utah, permit visitation to be awarded to anyone interested in the child's welfare.<sup>74</sup>

The lack of uniformity among states as to the category of persons eligible to petition for visitation rights has given rise to several recurring problems. First, in states which allow visitation rights to parties other than grandparents, the benefits accruing from visitation may be minimal if the child is put on a treadmill of constant visitation.<sup>75</sup> Second, an influx of petitions by parties other than

In addition, a few courts have allowed visitation rights to stepparents in the absence of statutory authority. See *Wills v. Wills*, 399 So.2d 1130, 1132 (Fla. App. 1981); *Collins v. Gilbreath*, 403 N.E.2d 921, 922 (Ind. App. 1980); *Looper v. McManus*, 581 P.2d 487, 488 n.1 (Okla. App. 1978); *Spells v. Spells*, 250 Pa. Super. 168, 173-74 (1977); *Gribble v. Gribble*, 5483 P.2d 64, 65-67 (Utah 1978).

68. OHIO REV. CODE ANN. § 3109.11 (Baldwin 1980) (relative of deceased parent); UTAH CODE ANN. § 30-3-5(1) (1984) (other relatives); VA. CODE § 20-107.2 (1983) (other family members).

69. ALASKA STAT. § 25.24.150 (1983) (other persons); CAL. CIV. CODE § 4601 (West 1983) (anyone interested in the welfare of the child); CONN. GEN. STAT. ANN. § 46b-56 (West Supp. 1984) (any third person); HAWAII REV. STAT. § 571-46(7) (1976 & Supp. 1985) (any person interested in the welfare of the child); ME. REV. STAT. tit. 19, § 214, 581(6), 752 (West Supp. 1985) (any third person); OHIO REV. CODE ANN. § 3109.05(B) (Baldwin Supp. 1984) (anyone interested in the welfare of the child); WASH. REV. CODE ANN. § 26.09.240 (West Supp. 1986) (any person).

70. See *supra* note 65 for state statutes which allow great-grandparent visitation.

71. See *supra* note 66 for state statutes which allow sibling visitation.

72. See *supra* note 67 for state statutes which allow stepparent visitation.

73. See *supra* note 68 for state statutes which allow visitation by other relatives.

74. See *supra* note 69 for state statutes which allow visitation to anyone interested in the child's welfare.

75. An award of visitation should be based on the grandchild's needs not upon the grandparents desire for visitation. Pleasures that grandparents derive from visitation are merely a bonus, albeit a very previous one. See Foster & Freed, *The Child's Right To Visit Grandparent*, 20 TRIAL 38, 45 (1984). Placing a limitation on the amount of time that a child is required to engage in visitation will provide an adequate mechanism to ensure that his best interests are being duly protected. One innovative statute addresses this problem by allowing an award of grandparent visitation privileges only when such visitation privileges do not conflict with the child's education or previously established visitation rights. N.M. STAT. ANN. § 40-9-1 (1983). Furthermore, forcing a child to participate in a constant stream of visitation may disrupt the continuity of a child's daily routine producing feelings of instability and resentment. Thus, in cases where numerous parties are competing for visitation privileges, an assessment of the vital connection between the grandparent and grandchild is justifiable in furtherance of the best interests of the child. *Grandparent Hearings*, *supra* note 2, at 106 (discussion of proposed legislation limiting an award of visitation solely to grandparents and great-grandparents).

Another viewpoint, expressed by Duncan Gault, criticizes an award of visitation to both grandparents and other third parties. Gault conjures images of a noncustodial

grandparents may impose an immense burden on courts.<sup>76</sup> Third, petitions by numerous parties may place an undue burden upon parents forced to respond to numerous lawsuits.<sup>77</sup> Fourth, it seems to be at odds with the notions of fairness and justice that a great-grandparent or sibling in one state is allowed visitation privileges based solely upon his choice of residency while a similarly situated party in another state is not allowed to even petition for visitation privileges.<sup>78</sup>

These problems illustrate the urgent need for uniformity. A Uniform Visitation Act could appropriately define the persons entitled to petition for visitation privileges. It could place a limit on the number of petitions a court would entertain during a given period, or call for consolidation of all petitions after events such as divorce or death of a parent, events which frequently trigger litigation.<sup>79</sup> Likewise this approach could alleviate the problems of parental harassment and overloaded court systems. Most importantly, the child would be ensured of receiving the benefits which emanate from visitation so long as the parameters of the visitation are restricted.<sup>80</sup>

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parent being denied visitation in favor of a third party or a grandparent, of a custodial parent being stripped of authority by numerous awards of visitation, and of the child's being forced to travel constantly from home to home deprived of playtime with friends simply because a court believes that the child's best interests are being duly protected by awarding visitation. Although this critique may contain elements of exaggeration, it illustrates the detrimental effects which may flow from an unending visitation chain. Gault, *Statutory Grandchild Visitation*, 5 ST. MARY'S L.J. 474, 484-87 (1973); Zaharoff, *supra* note 33, at 199. *Contra*, Ingulli, *supra* note 2, at 306 (extension of the category of persons awarded visitation serves as a safeguard against child abuse).

76. In a model visitation statute developed by Zaharoff, he suggests that while numerous parties should be allowed the right to petition for visitation privileges, absent a significant change of circumstances no party should be allowed to petition more than once a year. Zaharoff, *supra* note 33, at 202.

77. Parents have interests in minimizing conflict with a hostile grandparent and in exercising sole authority over children. *Id.* at 192. Limiting the number of petitions allowed a given third party will prevent harassment and minimize the financial and emotional burden imposed upon a parent. *Id.* at 201.

78. A Uniform Visitation Act would solve the problem of diversity in categories of persons allowed to petition for visitation rights. For a discussion of two model statutes, see *Grandparent Hearings*, *supra* note 2, at 106-07 (limits right to petition to grandparents and great-grandparents); Zaharoff, *supra* note 33, at 201-03 (extends right to petition to numerous third parties including grandparents; great-grandparents; other relatives, whether by blood or adoption; any person residing with the child for six months; and any person who has a substantial interest in the child's welfare).

79. Presently, forty-nine states allow grandparents to petition state courts after dissolution which includes divorce, separation or death. H.R. Con. Res. 67, 99th Cong., 1st Sess., 131 Cong. Rec. H714 (daily ed. Feb. 26, 1985).

80. See *supra* note 75 for a discussion of the benefits which will flow if restrictions are placed on the amount of time that a child is required to engage in visitation.



## B. CIRCUMSTANCES WHICH TRIGGER AN AWARD OF VISITATION PRIVILEGES

Once it is decided who is entitled to petition for visitation rights, the issue of when to grant such rights arises. Forty-seven states now permit a court to grant visitation rights to grandparents in cases of divorce.<sup>81</sup> Once a divorce has occurred most statutes allow petitions by parents of both the custodial and non-custodial parent.<sup>82</sup> Forty-two states permit a grandparent to petition for visitation after the death of one or both the child's parents.<sup>83</sup> These

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81. ALA. CODE § 30-3-4 (1983); ALASKA STAT. § 25.24.150 (1983); ARIZ. REV. STAT. ANN. § 25-337.01 (Supp. 1983-84); ARK. STAT. ANN. § 34.1211.1 (Supp. 1983); CAL. CIV. CODE § 4601 (West 1984); COLO. REV. STAT. § 19-1-116 (Supp. 1983); CONN. GEN. STAT. ANN. § 46b-59 (Supp. 1984); DEL. CODE ANN. tit. 10, § 950(7) (Supp. 1984); FLA. STAT. ANN. § 61.13 (West Supp. 1984); GA. CODE ANN. § 74-112 (Supp. 1985); HAWAII REV. STAT. § 571-46 (1976 & Supp. 1985); IDAHO CODE § 32-1008 (1983); ILL. REV. STAT. ch. 40, § 607 (1983); IND. CODE ANN. § 31-1-11.7-1 (Burns Supp. 1983-84); IOWA CODE ANN. § 598.35 (West 1981); KAN. STAT. ANN. § 38-129 (Supp. 1984); LA. REV. STAT. § 9:572 (West Supp. 1984); ME. REV. STAT. tit. 19, § 752 (Supp. 1984-85); MD. CTS. & JUD. PROC. CODE ANN. § 3-602 (1984); MASS. COMP. LAWS ANN. § 25.312(7) (Supp. 1985); MINN. STAT. ANN. § 257.022 (West 1982); MO. REV. STAT. § 452-400 (Vernon Supp. 1984); MONT. CODE ANN. § 40-9-102 (1983); NEV. REV. STAT. § 123.123 (1979); N.H. REV. STAT. ANN. § 458.17 (1983); N.J. STAT. ANN. § 9:2-7-1 (West 1976); N.M. STAT. ANN. § 40-9-1-4 (1983); N.Y. DOM. REL. § 72 (McKinney 1977); N.C. GEN. STAT. § 50-13.5(j) (1976 & Supp. 1983); N.D. CENT. CODE § 14-09-05.1 (Supp. 1983); OHIO REV. CODE ANN. § 3109.05 (Baldwin 1983); OKLA. STAT. ANN. tit. 10, § 5 (West Supp. 1983-84); OR. REV. STAT. § 109.121 (1983); PA. STAT. ANN. tit. 23, §§ 1013-1014 (Purdon Supp. 1983-84); R.I. GEN. LAWS § 15-5-24.2 (Supp. 1983); S.C. CODE ANN. § 20-7-420 (Law Co-op. Supp. 1983); S.D. CODIFIED LAWS ANN. § 25-4-52-54 (Supp. 1983); TENN. CODE ANN. § 36-6-301 (1984); TEX. FAM. CODE ANN. § 14.03 (Vernon 1975 & Supp. 1984); UTAH CODE ANN. § 30-3-5 (Supp. 1984); VT. STAT. ANN. tit. 15, § 1011-1016 (Supp. 1984); VA. CODE § 21-107.2 (Supp. 1984) & WASH. REV. CODE 26.09.240 (Supp. 1986); W. VA. CODE § 48-2-15 (Supp. 1984); WIS. STAT. § 757.245 (West. Supp. 1981-82); WYO. STAT. ANN. § 20-2-113 (Supp. 1985).

82. The exceptions include ARIZ. REV. STAT. ANN. § 25-337.01 (Supp. 1983-84); R.I. GEN. LAWS § 15-5-24.2 (Supp. 1983); UTAH CODE ANN. § 30-3-5 (Supp. 1984); and W. VA. CODE § 48-2-15 (Supp. 1984). These statutes apply only to the parents of the noncustodial parent and even then, only if the noncustodial parent is unable to visit the child on his own behalf.

83. ALA. CODE § 30-3-4 (1983); ALASKA STAT. § 25.24.150 (1983); ARIZ. REV. STAT. ANN. § 25-337.01 (Supp. 1983); ARK. STAT. ANN. § 34-122.1 (Supp. 1983); CALIF. CIV. CODE § 197.5 (Deering Supp. 1984); § 4601 (West 1984); COLO. REV. STAT. 19-1-116 (Supp. 1983); CONN. GEN. STAT. § 46b-59 (Supp. 1984); DEL. CODE ANN. tit. 10, § 950(7) (Supp. 1984); FLA. STAT. 61.13(2)(c) (1984); GA. CODE ANN. § 74-112 (Supp. 1985); IDAHO CODE § 32-1008 (1983); ILL. REV. STAT. ch. 40, § 607(b), ch. 110 ½, § 11-7.1 (1983); IND. CODE ANN. § 31-1-11.7-1 (Burns Supp. 1985); IOWA CODE § 598.35 (1983); KAN. STAT. ANN. § 38-129 (Supp. 1984); KY. REV. STAT. §§ 403.021, 405.021 (Supp. 1983); LA. REV. STAT. ANN. § 9:572, 9:973 (West Supp. 1984); ME. REV. STAT. ANN. tit. 19, § 102 (Supp. 1984-85); MD. CTS. AND JUD. PROC. ANN. § 3-602(a)(4) (1984); MASS. ANN. LAWS. ch. 119, § 39D (Michie/Law Co-op Supp. 1984); MINN. STAT. ANN. § 257.022 (West 1982); MO. REV. STAT. §§ 452-400(3), 452.402 (Vernon Supp. 1984); MONT. CODE ANN. § 40-9-102 (1983); NEV. REV. STAT. § 123.123 (1979); N.J. STAT. ANN. § 9:2-7.1 (West 1976); N.M. STAT. ANN. § 40-9-1 and 40-9-4 (1983); N.Y. DOM. REL. LAW § 72 (McKinney 1977); N.D. CENT. CODE § 14-09-05.1 (Supp. 1983); OHIO REV. CODE ANN. §§ 3109.05, 3109.11 (Baldwin 1983); OKLA. STAT. ANN. tit. 10, § 5 (Supp. 1983); OR. REV. STAT. § 109.121 (1983); PA. STAT. ANN. tit. 23, §§ 1001-1015 (Purdon

statutes vary greatly in application. The majority grant the right to petition only to the parents of the spouse who has died while the minority apply petition rights equally to both parental and maternal grandparents.<sup>84</sup> Additionally, a few states now allow an award of grandparent visitation in the case of stepparent adoption<sup>85</sup> while eight statutes allow an award of visitation when the child resides with his intact natural family.<sup>86</sup>

In a recent Illinois case, *Towne v. Cole*,<sup>87</sup> the Illinois Appellate Court for the Second District addressed the issue of whether the Illinois visitation statute states a cause of action for visitation privileges when the grandchild is residing within an intact natural family.<sup>88</sup> The court began its analysis by considering the statutory language of Section 607 of the Illinois Marriage and Dissolution of Marriage Act, titled Visitation.<sup>89</sup> The relevant portion of the statute provides:

(b) The court may grant reasonable visitation privileges to a grandparent or great-grandparent of any minor child upon the grandparents' or great-grandparents' petition to the Court . . . if the court determines that it is in the best interests and welfare of the child and may issue any necessary orders to enforce such visitation privileges. Further, the court, pursuant to this subsection, may grant reasonable visitation privileges to a grandparent or great-grandparent whose child has died where the court determines that it is in the best interests and welfare of the child.

A reading of section 607(b) reveals that it is unclear as to whether it

Supp. 1984); R.I. GEN. LAWS § 15-5-24.2 (Supp. 1983); S.C. CODE ANN. § 20-7-120 (Law. Co-op Supp. 1983); S.D. CODIFIED LAWS ANN. § 25-4-52-4 (Supp. 1983); TENN. CODE ANN. § 36-6-301 (1984); TEX. FAM. CODE ANN. § 14.03(d) (Vernon Supp. 1984); UTAH CODE ANN. §§ 30-3-5, 30-5-1-2 (Supp. 1984); VT. STAT. ANN. tit. 15, § 1011-1016 (Supp. 1984); WASH. REV. CODE § 26.09.240 (1983); WIS. STAT. ANN. § 767.245 (West 1981); WYO. STAT. ANN. § 20-2-113 (Supp. 1985).

84. States which permit any grandparent of a child whose parent or parents are deceased the right to petition include: ALASKA STAT. § 25.24.150 (1983); FLA. STAT. § 61.13 (1984); GA. CODE § 74-112 (Supp. 1985); IND. CODE ANN. § 31-1-11.7.2 (Burns Supp. 1984); KY. REV. STAT. § 405.021 (Supp. 1983); MASS. ANN. LAWS ch. 119, § 39D (Michie/Law Co-op 1975 & Supp. 1984); MO. REV. STAT. § 452.402 (Vernon Supp. 1984); N.M. STAT. ANN. § 40-9-2 (1983); VT. STAT. ANN. tit. 15, § 1012 (Supp. 1984).

85. See *supra* note 67 for listing of states statutes which permit stepparent visitation.

86. CONN. GEN. STAT. § 466-59 (Supp. 1984); DEL. CODE ANN. tit. 10, § 950(7) (Supp. 1984); IDAHO CODE § 32-1008 (1983); KAN. STAT. ANN. § 38-129 (Supp. 1984); MONT. CODE ANN. § 40-9-102 (1983); N.Y. DOM. REL. LAW § 72 (McKinney 1977); N.D. CENT. CODE § 14-0-05.1 (Supp. 1983); WASH. REV. CODE § 26.09.240 (Supp. 1986).

87. 133 Ill. App. 3d 380, 478 N.E.2d 895 (1985).

88. The facts of the case were simple. Petitioner, the paternal grandmother brought suit against her son and his wife for visitation privileges with her two year old granddaughter. *Id.* The grandmother alleged that without provocation, defendants had shown anger and hostility toward her thus depriving the grandchild of a meaningful relationship with her paternal grandmother, all to the detriment of the child's best interests. *Id.* at 381, 478 N.E.2d at 895-96.

89. ILL. REV. STAT. ch. 40, § 607(b) (1983).

allows grandparent visitation in the absence of circumstances such as divorce, adoption, or death of a parent. Due to the ambiguity in the statutory language, the *Towne* court first examined the legislative history.<sup>90</sup>

The history behind the enactment of the Illinois Visitation Statute typifies the legislative disorganization and confusion associated with the enactment of state visitation statutes. The Illinois statute has been amended twice in an attempt to clarify its terms and reduce misconceptions.<sup>91</sup> The statute as originally enacted did not mention grandparent visitation rights. The first amendment added subsection (b) which authorized the court to award grandparent or great grandparent visitation privileges if it was found to be in the best interest and welfare of the child.<sup>92</sup> The second amendment added the final sentence to subsection (b) concerning grandparent visitation after the death of a parent.<sup>93</sup> The *Towne* court's need to examine the legislative history behind the two amendments clearly indicates the degree of legislative uncertainty surrounding the scope of the amendments.<sup>94</sup>

Debate on the first amendment was mixed. Illinois House Rep-

90. The court noted that the cardinal rule of statutory construction is to determine and give effect to the true intent of the legislature. *Towne*, at 133 Ill. App. 3d 383, 478 N.E.2d at 898. In determining legislative intent courts look first to the statutory language. *People v. Boykin*, 94 Ill. 2d 138, 445 N.E.2d 174 (1983). Where the language is ambiguous, an examination of the legislative history is necessary. *Id.*

91. The original statute consisted of subsection (a) and (c) which reads as follows:

a) A parent not granted custody of the child is entitled to reasonable visitation rights unless the court finds, after a hearing, that visitation would endanger seriously the child's physical, mental, moral or emotional health. If the custodian's street address is not identified, pursuant to Section 708, the court shall require the parties to identify reasonable alternative arrangement for visitation by a non-custodial parent, including but not limited to visitation of the minor child at the residence of another person or at a local public or private facility. . . .

(c) The court may modify an order granting or denying visitation rights whenever modification would serve the best interest of the child; but the court shall not restrict a parent's visitation right unless it finds that the visitation would endanger seriously the child's physical, mental, moral, or emotional health.

ILL. REV. STAT. ch. 40, § 607 (1983).

92. The first amendment was made by H.B. 64, 82nd Ill. General Assembly 1st Sess. (1981) (codified as amended at ILL. REV. STAT. ch. 40, 607(b) (1983).

93. The second amendment was made by H.B. 2039, 82nd Ill. General Assembly, 2d Sess. (1982) (codified as amended at ILL. REV. STAT. ch. 40, § 607(b) (1983).

94. For a discussion of the legislative confusion surrounding the enactment of the amendments, see Appellant's Petition For Leave To Appeal at 9-12, *Towne*, 133 Ill. App. 3d 380, 478 N.E.2d 895 (1985). Plaintiff argues that H.B. 64 contained a new section to be inserted into section 607, thus it did not constitute an amendment. Furthermore, the second amendment constituted an addition to section 607(b) which did not alter or change the meaning of the original language. *Id.* Thus there is nothing in the first sentence of 607(b) to substantiate the appellate court's conclusion that visitation privileges are to be awarded only in cases of dissolution or death of a parent. *Id.* at 11-12. For text of the statute, see *supra* page 16 and note 91.

representative Matinevich, who introduced the bill stated: "The legislation will help assure that close grandparent-child relationship will not be severed by divorce."<sup>95</sup> However, representative Brummer viewed the bill as allowing grandparent visitation in cases which did not involve divorce or separation.<sup>96</sup> Thus, these inconsistent interpretations add little insight into the true scope of the amendment. The *Towne* court noted, however, that if section 607(b) did create a general grandparental visitation right, the second amendment allowing an award of visitation after the death of a parent would have been unnecessary.<sup>97</sup> Thus, the court held that a grandparent's request for visitation in the absence of pending dissolution proceedings, adoption, or death of a parent did not state a cause of action under the Illinois Visitation Statute.<sup>98</sup> Retreating to the common law rationale the court stated, "although . . . our conclusion may appear harsh, we believe any obligation which [parents] may have to allow visitation remains a moral obligation not a legal one."<sup>99</sup>

An analysis of the legislative history on the second amendment supports the conclusion reached by the *Towne* court.<sup>100</sup> However, uncertainty surrounding the purpose and the necessity of the amendment is illustrated by legislative debate. Senator George Karis stated: "This amendment clarifies that grandparent visitation

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95. *Towne*, 133 Ill. App. 3d at 383, 478 N.E.2d at 898 citing 82d General Assembly, House of Representatives floor debate on H.B. 64 (transcript of floor debate May 6, 1981 at 146).

96. *Towne*, 133 Ill. App. 3d at 383, 478 N.E.2d at 898, citing 82d General Assembly, House of Representatives floor debate on H.B. 64 (transcript of floor debate May 6, 1981 at 154).

97. *Towne*, 133 Ill. App. 3d at 384, 478 N.E.2d at 898. The court questioned why the legislature would have added the last sentence to section 607(b) granting visitation rights upon the death of a parent if the first sentence was intended to create a general visitation right. The court viewed the enactment of the second amendment as an indication that the legislature intended to expand the category of circumstances which trigger the right to petition to include cases involving the death of a parent as well as cases involving divorce. *Id.* An alternative explanation may be that the first amendment was intended to include cases other than divorce but poor draftsmanship necessitated the enactment of the second amendment to clarify the legislature's desired application of the statute. See *supra* note 91 and accompanying text. See also *In re Marriage of Sponsor*, 123 Ill. App. 3d 31, 462 N.E.2d 724 (1984) (conflicting interpretation of section 607(b)).

98. *Towne*, 133 Ill. App. 3d at 387, 478 N.E.2d at 900.

99. *Id.* The fact that a court states that a grandparent has no legal right to visit a grandchild residing within an intact natural family may be intended as an invitation for legislative action. Surely it does not place a restriction upon the legislature. See Zaharoff, *supra* note 33, at 174 n.36 (1981).

100. The second amendment allowing an award of visitation upon the death of a parent indicates that the legislature is placing a limitation upon the language in the first sentence of section 607(b) which allows the court to grant visitation privileges upon petition by a grandparent or great-grandparent if it finds that such visitation is in the best interests of the child. ILL. REV. STAT. ch. 40, § 607(b) (1983). Thus, this limitation forecloses any interpretation allowing an award of visitation to a child residing within his intact natural family. *Towne*, 133 Ill. App. 3d at 348, 478 N.E.2d at 898.

rights may be granted not only in dissolution of marriage cases . . . but also when a parent dies."<sup>101</sup> In comparison, Representative Brumer, who previously stated that the first amendment allowed visitation even in the absence of divorce or separation, now noted that this section had been construed to apply only in divorce cases solely because of its placement in a family law chapter of the state statute book.<sup>102</sup> Representative Leinenweber conceded that the second amendment should have been put in the Probate Act, but noted that it was inserted into the Marriage and Dissolution of Marriage Act to clarify ambiguities produced by the first amendment.<sup>103</sup> The foregoing suggests that legislative standards concerning the scope of the circumstances activating grandparent visitation rights were vague virtually at the time the Illinois visitation statute was first enacted.<sup>104</sup> Adoption of a uniform standard which clearly delineates the range of circumstances activating grandparent visitation privileges will decrease the unnecessary litigation of issues like the type illustrated in *Towne v. Cole*.<sup>105</sup>

Judicial reluctance to interfere in the intact family is consistent with the narrow construction usually given to statutorily created grandparent visitation privileges.<sup>106</sup> There are statutes in only eight states which permit an award of visitation when the grandchild resides within an intact natural family.<sup>107</sup> In the recent case of *In Re La Russo*,<sup>108</sup> a New York family court judge agreed to hear a petition filed by grandparents requesting visitation with their grandchildren who resided with both natural parents.<sup>109</sup> The New York visita-

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101. *Id.* at 385, 478 N.E.2d at 899.

102. *Id.*

103. *Id.* at 386, 478 N.E.2d at 900.

104. *See supra* notes 91 to 97 for discussion on the enactment of the Illinois visitation statute.

105. 133 Ill. App. 3d 380, 478 N.E.2d 895 (1985).

106. Courts which have denied grandparent visitation when the child resided within an intact natural family include: *Osteryoung v. Lebowitz*, 371 So.2d 1068 (Fla. Dist. Ct. App. 1979) (grant of visitation not awarded under statute in the absence of dissolution proceedings); *Curtis v. Coleman*, 443 N.E.2d 890 (Ind. App. 1983) (visitation denied since statute only provides for such in the case of death or dissolution); *Herron v. Seizak*, 468 A.2d 803 (Pa. Super. Ct. 1983) (court will not interfere in the intact family). *See generally* Ingulli, *supra* note 33, at 308 (discussion of visitation rights concerning children residing within intact families).

107. *See supra* note 86 for listing of state statutes which allow visitation when the child resides in an intact family.

108. 9 FAM. L. REP. (BNA) 2646 (N.Y. Fam. Ct. 1983).

109. The children's parents had shut them off from the grandparents for six years claiming that the grandparents were unloving and unconcerned. *Id.* at 2646-47. The grandparents contended that they had been good parents and grandparents and had a right to visit their grandchildren. *Id.* at 2647. Testimony in the case revealed that animosity existed between the parents and the grandparents. However, no testimony was offered that the grandparents had ever behaved inappropriately toward the grandchildren. *Id.* The court noted that the mere fact that animosity exists between parent and grandparent should not preclude an award visitation if the court finds

tion statute provides grandparents an opportunity to petition for visitation upon the death of a parent or where circumstances show that conditions exist which equity would see fit to correct.<sup>110</sup> The issue in *La Russo* presented a conflict between two important interests: first, the child's interest in cultivating a special relationship with grandparents; and second, the parents' interest and fundamental right to raise their children as they desire.<sup>111</sup> Noting that the New York visitation statute was enacted in recognition of growing concerns for the best interests of the child, where those interests do not coincide with those of his or her parents, the court held that this was a case in which circumstances existed which warranted equity's intervention.<sup>112</sup> Although, the children resided within a intact family, the grandparents were allowed to petition for visitation because the facts of the case were illustrated that conditions existed which required an equitable solution.

In comparison, the holding of *Herron v. Seizak*<sup>113</sup> is consistent with that of *Towne v. Cole*.<sup>114</sup> In both cases the court refused to recognize grandparent visitation rights in the context of an intact natural family. Both courts expressed regret that the child would be deprived of the opportunity to establish a strong grandparent-grandchild bond but noted that they were unable to remedy the situation in the absence of statutory authority.<sup>115</sup> Furthermore, the

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that visitation would be in the child's best interests. *Id.* at 2648.

110. See N.Y. DON. REL. LAW. § 72 (McKinney 1977).

111. Neither right is absolute. *La Russo*, 9 Fam. L. Rep. (BNA) at 2647. The court's role as *parents patriae*, protector of the child's best interests, over parental entitlement has been firmly established. However, the New York visitation statute was not intended to give grandparents an automatic right of visitation. *Id.* For a discussion of the state role as "*parens patriae*" versus parental rights to control child's upbringing, see *Prince v. Massachusetts*, 321 U.S. 158, 165-69 (1944).

112. *La Russo* at 2648. As justification for its decision to extend the right to petition for visitation to the intact family situation, the court noted two significant trends. First, with the increased longevity of our population, the role of grandparents as surrogate parents will increase. *Id.* Second, the increase of working mothers will also cause grandparents to become more influential as surrogate parents. *Id.* Thus, social and economic forces may play a role in the future development of visitation statutes.

113. 468 A.2d 803 (Pa. Super. Ct. 1983). In this case the plaintiff brought an action petitioning for the right to visit with her three year old granddaughter who resided with her intact natural family. *Id.* at 804. Plaintiff alleged that the child's best interests would be served by awarding the requested visitation because the child would suffer psychologically if she grew up knowing that her parents forbade her to visit with her maternal grandparents. *Id.* The court noted that it was unfortunate that the parties could not maintain an amicable relationship whereby the child could get to know her grandparents. *Id.* at 805. However, under the Pennsylvania visitation statute, in the absence of dissolution, death of a parent, or circumstances where the child has resided with the grandparents or a period of twelve months or more, the court has no authority to intervene in a family matter. *Id.*

114. 133 Ill. App. 3d 380, 478 N.E.2d 895 (1985).

115. *Herron*, 468 A.2d 803, 805 (Pa. Super. Ct. 1983); *Towne*, 133 Ill. App. 3d 380, 387, 478 N.E.2d 895, 900 (1985).

*Towne* court stated that the sanctity of the parent-child relationship must be the overriding concern.<sup>116</sup> The court clearly noted that "to create new enforceable rights in grandparents could lead to results that would burden rather than enhance the welfare of children."<sup>117</sup> Although this is the majority approach, the standard utilized in *La Russo* deserves favorable consideration. Allowing a grandparent the opportunity to file a petition for visitation when circumstances exist which warrant equity's intervention offers a flexible alternative to the rigidity inherent in many of the present grandparent visitation statutes.

### C. THE BEST INTEREST STANDARD

#### 1. *Problems with vagueness*

A third major deficiency found in various state visitation statutes relates to the issue of the "child's best interest" standard.<sup>118</sup> While most states utilize this standard in awarding visitation, this standard is inferior in many respects. First, the standard is vague.<sup>119</sup> Second, although it purports to protect the child's best interests, in reality it actually overlooks the child in favor of the parents' best interests.<sup>120</sup> Third, this measurement often fails to recognize the vital connection between grandparents and grandchildren.<sup>121</sup> Finally, the application of the "best interest" standard varies from state to

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116. *Towne*, 133 Ill. App. 3d at 387, 478 N.E.2d at 900, citing, *Cox v. Stayton*, 273 Ark. 298, 304, 619 S.W.2d 617, 621 (1981).

117. *Id.* This rationale is incorrect. Several pre-statutory cases in Illinois allowed grandparent visitation under certain circumstances. Subsequent enactment of the grandparent visitation statute is an indication that pre-statutory visitation served to enhance rather than hinder the welfare of the child. See, e.g., *Chodzko v. Chodzko*, 66 Ill. 2d 28, 360 N.E.2d 60 (1976) (grandparents awarded visitation over objection of the custodial parent under special circumstances); *Boyles v. Boyles*, 14 Ill. App. 3d 602, 302 N.E.2d 199 (1973) (award of grandparent visitation after death of the mother was in the child's best interest); *McKinney v. Cox*, 18 Ill. App. 2d 609, 153 N.E.2d 98 (1958) (allowed paternal grandparents to visit child while father was in the military); *Lucchesi v. Lucchesi*, 350 Ill. App. 506, 71 N.E.2d 920 (1947) (visitation awarded to paternal grandparents over mother's objections after father died).

118. For a discussion of the best interest standard, see *supra* note 14.

119. Factors utilized by courts in making a best interest determination vary drastically from state to state. For example, Minnesota and California direct the court to consider the personal contact between the grandparent and grandchild while Idaho requires a substantial relationship with the child. See *Grandparent Hearings*, *supra* note 2, at 8. Although critics find it unnecessary to write such requirements into the statutes, such factors emphasize the importance of the psychological relationship between the child and the person seeking visitation. *Id.* For the text of the Illinois best interest standard, see ILL. REV. STAT. ch. 40, § 602 (1983).

120. See *infra* notes 125 & 127 for discussion on the factors utilized in the operation of the child's best interest standard.

121. For a discussion on the vital connection between grandparent and grandchild, see *supra* note 15.

state and does not afford protection to all children equally.<sup>122</sup>

If ever a doctrine defied precise definition, it is the "best interest of the child" principle. On one hand, there are many factors which may prompt a court to award grandparent visitation privileges. However, there are also numerous theories which deny visitation, for instance, when the parent in custody objects. The latter rationale clearly makes a mockery of the "child's best interest" standard because it gives the parent's best interest precedence.<sup>123</sup> As with any area of law which is not codified but employs a balancing test, the results are often inconsistent and vague.<sup>124</sup>

In awarding a grant of visitation privileges to grandparents, a court usually performs a two step "best interest" analysis. The first step involves an examination and balancing of competing interests.<sup>125</sup> If no one interest is held to be compelling,<sup>126</sup> the second step

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122. Children residing in states which utilize extremely rigorous best interest standards such as those considering both physical and psychological factors will receive more protection. *Grandparent Hearings*, *supra* note 2, at 8. Divorced parents should remember that their wishes and desires are not the issue to be decided in a visitation proceeding. The determination should reflect the welfare of the child who had no control over the tragic circumstance in which he finds himself. *Weichman v. Weichman*, 50 Wis. 2d 731, 736, 184 N.W.2d 882, 885 (1971) (attempt by father to delegate visitation rights to his parents). The fact that children are innocent victims justifies a policy of making their interests predominant in a visitation proceeding. *See, Zaharoff, supra* note 33, at 191.

123. This form of reasoning really begs the question since it allows the parent to be both judge and jury on the question of visitation rights. Thus, a bitter and hostile parent rebounding from a messy divorce proceeding cannot be relied upon to objectively determine his child's best interests. *See Foster & Fried, The Child's Right To Visit Grandparents*, 20 TRIAL 38, 42 (1984).

124. Note, *supra* note 9, at 52.

125. In any judicial determination involving a minor child there are usually several conflicting vested interests. Each entity involved in a visitation proceeding has a given status which may or may not entitle him to special consideration. *Id.* These competing interests include interest of the state in protecting the child, interest of the child to meet and know grandparents, interest of the child's custodian, and interest of the grandparents. *Id.* at 53-59. *See Oakes v. Oakes*, 45 Ill. App. 2d 387, 195 N.E.2d 840 (1964) (interest of the state); *Lucchesi v. Lucchesi*, 330 Ill. App. 506, 71 N.E.2d 920 (1947) (recognizing interest of the child to meet and know grandparents); *Jackson v. Fitzgerald*, 185 A.2d 724, 98 A.L.R. 2d 332 (1962) (interest of a custodial parent in controlling the child); *Commonwealth ex rel. Goodman v. Dratch*, 192 Pa. Super. 1, 159 A.2d 70 (1960) (recognized interest of a grandparent).

Under the traditional view, if the child's custodian was a parent his interest was often held to be compelling. This would foreclose any further analysis by the court and the request for grandparent visitation would automatically be denied if the custodial parent objected. *See Odell v. Lutz*, 78 Cal. App. 2d 104, 177 P.2d 628 (1947) (visitation denied—custodial parent objected); *Jackson v. Fitzgerald*, 185 A.2d 724, 98 A.L.R. 2d 322 (1962) (visitation denied, right to visitation is derived from the right to custody); *Browning v. Tarwater*, 215 Kan. 501, 524 P.2d 1135 (1974) (visitation denied—fit parent objected to visitation). The rationale underlying this theory suggests that a custodial parent retains absolute discretion concerning his child's upbringing and always prevails over an outside influence. *Commonwealth ex rel. Rogole v. Chery*, 196 Pa. Super. 46, 173 A.2d 650 (1961). Thus, the parental interest was always held to be compelling and this foreclosed the necessity for further analysis. This approach is unsatisfactory because it automatically favors the best interests of the parents over



of the analysis involves an evaluation of factors which compose the surrounding circumstances in the case.<sup>127</sup> Courts are generally reluctant to find that an abstract interest in the first category automatically guarantees the fulfillment of the child's best interests.<sup>128</sup> Therefore, grandparents are afforded an opportunity to demonstrate that visitation is justifiable in light of the particular facts in the case.<sup>129</sup> This methodology ensures that a proper balancing process is performed by weighing the presence or absence of various factors peculiar to the facts of each case.<sup>130</sup> Accordingly, the judicial determination will reflect the best interests of the child.

Although visitation statutes outline the circumstances upon which a grandparent may petition for visitation privileges the final decision to grant such rights is left solely to the discretion of the judge.<sup>131</sup> The judge's conclusion must rest upon a determination that visitation is in the best interests of the child.<sup>132</sup> A limited number of states offer guidance to the court by enumerating a number of factors to be evaluated while performing a "best interest" analysis.<sup>133</sup> Often, different courts will allude to the same factors in reaching

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the best interest of the child. Subsequent to the enactment of grandparent visitation statutes, judicial utilization of this theory has decreased. Parental objections are now viewed as one factor to be weighed in the balancing process to determine the best interests of the child. Note, *supra* note 9, at 57.

126. See *supra* note 125 for discussion on compelling interests.

127. The list includes: animosity existing between the parent and grandparent and its resultant effect on the child; health of the child; prior residency with a grandparent; biological relationship between child and grandparent; duration and frequency of requested visitation; death; divorce; and stepparent adoption. Note, *supra* note 9, at 59-73. Subsequent to statutory enactment of visitation privileges, animosity between parent and grandparent is no longer enough, in itself, to preclude an award of visitation. *Lo Presti v. Lo Presti*, 40 N.Y.2d 522, 355 N.E.2d 372, 387 N.Y.S.2d 412 (1976). This deviation from the common law rule is justifiable because a custodian, bitter and hostile after a divorce, may use the child as a weapon to retaliate against former in-laws thus ignoring the child's best interests. *Id.* Furthermore, another break from the common law tradition includes a trend toward emphasizing the child's desires regarding grandparent visitation. See *Commonwealth ex rel. Flannery v. Sharp*, 151 Pa. Super. 612, 30 A.2d 810 (1943) (child unwilling to visit grandparents). *But see Ehrlich v. Ressler*, 55 A.2d 953, 391 N.Y.S.2d 152 (1977) (visitation rights determined without emphasis on child's wishes). However the child's desires should not be used as the sole deciding factor in a visitation suit because the child's attitude may be a result of parental prejudice or brainwashing, Foster & Freed, *The Child's Right to Visit Grandparents*, 20 TRIAL 38, 42 (1984). The proper approach consists of performing a balancing of all relevant factors in a particular case.

128. Note, *supra* note 9, at 59-60.

129. *Id.*

130. *Id.* at 60.

131. Ingulli, *supra* note 2, at 326 (discussion on the necessity for state legislation which articulates standards to be utilized in determining visitation should be awarded).

132. See *supra* notes 14, 119, 122, 125 & 127 for a discussion on the best interest standard.

133. Vermont became the first state to spell out a list of factors to be considered in actions requesting grandparent visitation privileges. VT. STAT. ANN. tit. 15, § 1013 (Supp. 1984).

contradictory conclusions. Enactment of a uniform standard concerning the "best interest" principle would serve three purposes. First, it would serve as an aid to judicial analysis by restricting a judge's rather uncurtailed discretion.<sup>134</sup> Second, a clear articulation of standards will assure that all visitation determinations do in fact serve the child's best interests.<sup>135</sup> Finally, litigation may decrease if parents and grandparents can predict with reasonable certainty when visitation will or will not be ordered.<sup>136</sup>

## 2. Best Interest Standard—Failure to Recognize the Vital Connection Between Grandparent and Grandchild

Aside from vagueness, a second major deficiency with the "best interest" standard is that it often fails to recognize the vital connection<sup>137</sup> between grandparents and their grandchildren. "Every time a child is born, a grandparent is born too."<sup>138</sup> Grandparenting is a natural instinct deeply rooted within our biological makeup.<sup>139</sup> When new grandparents are afforded the opportunity to share in the child's early life, the underpinnings of an enduring emotional bond are formed.<sup>140</sup> Time and emotional commitment transform this bond into a vital connection.<sup>141</sup> Children and grandparents both benefit immensely from this vital connection. Grandparents serve as role models providing children with a living link to the past.<sup>142</sup> Interac-

134. Clearly articulated standards concerning an award of visitation rights would result in greater continuity in decisions reached by various courts within the same state, thus reducing the possibility that any given judge would abuse his discretion in choosing to award or deny visitation. State custody statutes reflect this trend and list a variety of factors to be considered in making a judicial determination. See, e.g., WIS. STAT. ANN. § 767.24 (West 1981).

135. Articulated standards would curb judicial abuse. See *Grandparent Hearings*, *supra* note 2, at 73 (statement of Professor Judith Arren advocating legal presumptions as a way of restricting judicial discretion in visitation cases).

136. This may produce settlement by negotiation, thereby reducing the necessity for judicial intervention into family affairs. See *Grandparent Hearings*, *supra* note 2, at 74 (recommendation of Professor Judith Arren that state legislation provide for mediation process).

137. See *supra* note 15 for a discussion of the vital connection between grandparent and grandchild.

138. *Grandparent Hearings*, *supra* note 2, at 55; A. KORNHABER & K. WOODWARD. *supra* note 2, at 55.

139. *Grandparent Hearings*, *supra* note 2, at 56 (results of seven year study performed by Dr. Kornhaber).

140. *Id.*

141. *Id.* "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." Minkon v. Ford, 66 N.J. 426, 437, 332 A.2d 199, 204-05 (1975).

142. *Grandparent Hearings*, *supra* note 2, at 52. Grandparents serve as role models for the future and therefore children learn to respect rather than fear old age. Children with vital connections have a sense of social immunity, a place to go apart from their parents and peer group when they have problems. *Id.* at 57.

tion with grandchildren provide grandparents with the emotional staples of love and respect; assuming the role of mentor produces a sense of emotional fulfillment for the grandparent.<sup>143</sup> Therefore, the vital connection between grandparent and grandchild should be given greater consideration in any analysis of the "best interest" standard.

A few states have already recognized the validity of this vital connection by incorporating this idea into their "best interest" standards.<sup>144</sup> Factors such as the child's desires, the health of the child, the health of the grandparent, and previous residence with the grandparent all take into account the strength of the grandparent-grandchild bond.<sup>145</sup> Adequate protection of the best interest of the child requires an analysis of the grandparent-grandchild bond. In *Lucchesi v. Lucchesi*,<sup>146</sup> a pre-statutory Illinois case, the court utilized a novel method of analysis. In the interests of fairness and justice, the court made a distinction between the right to custody and the privilege of visitation.<sup>147</sup> In a case concerning visitation, the child's right to meet and know his or her grandparents should be addressed.<sup>148</sup> Analytically addressing the vital connection between grandparent and grandchild may expose strong justification for an award of visitation.<sup>149</sup> Recognition of the vital connection between

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143. Grandparents ordinarily play a different role in a child's life. They are not authority figures and do not ordinarily make parental decisions. "At best they are generous sources of unconditional love and acceptance. . . ." *Mimkon*, 66 N.J. at 437, 332 A.2d at 204 (1975).

144. See IDAHO CODE § 32-1008 (1983); MINN. STAT. ANN. § 257.022 (West 1982); NEV. REV. STAT. § 123.123 (1979); N.M. STAT. ANN. § 40-9-1 (1983); N.D. CENT. CODE § 14-09-05.1 (Supp. 1985); PA. STAT. ANN. tit. 23, §§ 1012-1014 (Purdon Supp. 1984). These statutes consider the relationship between the child and petitioner and the resultant effect visitation will have upon the child.

145. The child's best interests can often be served by maintaining contacts with loving grandparents. See *Benner v. Benner*, 113 Cal. App. 2d 531, 248 P.2d 425 (1952) (after child had resided with mother and maternal grandparent for three years—denial of visitation could endanger the emotional health of the child).

146. 330 Ill. App. 506, 71 N.E.2d 920 (1947).

147. The case involved a divorce decree whereby the mother was granted custody of the child. *Id.* at 507, 71 N.E.2d at 920. After the father died, his parents petitioned seeking a right to visit the child. *Id.* at 507-08, 71 N.E.2d at 920-21. The parents were the trustees of a trust fund created by their deceased son whereby they made a monthly payment to the mother for the use and benefit of the child. *Id.* at 508, 71 N.E.2d at 922. The court noted that in view of the particular facts of the case, justice and humanity demanded that a distinction be made between custody and visitation. *Id.* at 511, 71 N.E.2d at 922.

148. The court noted that a decent regard for the wishes of the dead, the natural feelings of the grandparents, and the right of the child to meet and know grandparents should have caused the mother to allow visitation without court intervention. *Id.* at 512, 71 N.E.2d at 922. Accordingly, the court awarded visitation rights to the grandparents. *Id.*

149. See Foster & Freed, *The Child's Right to Visit Grandparents*, 20 TRIAL, March 1984, at 38, 45 (where the child expresses a positive desire to see and be with the party seeking visitation, that expression should carry great weight).

grandparent and grandchild will only serve to ensure that the grant or denial of grandparental visitation privileges truly reflects the child's best interests.

#### D. CONFLICT BETWEEN STATE ADOPTION AND VISITATION STATUTES

The greatest barrier encountered by the grandparent visitation statutes are pre-existing adoption statutes which sever an adoptee's relationship with his natural family.<sup>150</sup> Adoption and visitation statutes are often diametrically opposed although they share the common goal of protecting the best interest of the child.<sup>151</sup> A major deficiency in state visitation statutes is that they are often silent on the topic of adoptee visitation. Utilizing strict statutory construction, many courts hold that the terms of an adoption statute, by their nature, automatically preclude any type of visitation.<sup>152</sup> This analysis is deficient because an automatic denial of visitation rights fails to adequately consider the "best interests of the child."

Presently, only twenty-two statutes specify the effect of a child's adoption on natural grandparent visitation rights.<sup>153</sup> Most allow visitation if the child is adopted by a stepparent or natural rela-

150. For a discussion on the conflict between adoption and visitation laws, see Comment, *Visitation After Adoption: In The Best Interest of The Child*, 59 N.Y.U. L. REV. 633 (1984) (visitation after adoption is often in the child's best interests); Comment, *What Are the Child's Best Interests? A Logical Extension of Natural Grandparents' Rights to Visit Adopted Grandchildren*, 12 W. ST. U.L. REV. 205 (1984) (emphasizes trend toward allowing grandparent visitation after adoption); Note, *Adoption: Visitation Rights of Natural Grandparents*, 32 OKLA. L. REV. 564 (1979) (adoption statute should not automatically supersede visitation statute).

151. Both adoption and visitation statutes requires that either action be in the child's best interests. See, e.g., ILL. REV. STAT. ch. 40, § 607(b)(1983) (visitation must be in the best interest of the child); R.I. GEN. LAWS § 15-7-18 (1981) (adoption must be in the best interests of the child). Adoption laws, however, generally provide that upon adoption the rights and responsibilities of the child's natural family are terminated. See, e.g., ARK. STAT. ANN. § 56-215(a)(1) (Supp. 1985); OR. REV. STAT. § 109.041 (1981).

152. The underlying rationale presupposes that the policy behind adoption statutes, assimilation of the child into a new family, necessitates the severing of all previous family ties. Thus, the policy of maintaining family contact enunciated in the visitation statutes is automatically overridden. Cases terminating grandparent visitation in a situation involving stepparent adoption include: *Wilson v. Wallace*, 274 Ark. 48, 622 S.W.2d 164 (1981); *Sachs v. Walzer*, 242 Ga. 742, 251 S.E.2d 302 (1978); *In re Adoption of Schumacher*, 120 Ill. App. 3d 50, 458 N.E.2d 94 (1983); *Matter of Adoption of Gardiner*, 287 N.W.2d 555 (Iowa 1980); *Browning v. Tarwater*, 215 Kan. 501, 524 P.2d 1135 (1974); *Bikos v. Nobliski*, 88 Mich. App. 157, 276 N.W.2d 541 (1979).

153. The states having such statutes are Arizona, California, Colorado, Connecticut, Florida, Georgia, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nevada, New Mexico, North Dakota, Oklahoma, Pennsylvania, South Dakota, Tennessee, Texas, and Wyoming. See *supra* note 10 for listing of statutes. In Illinois, a section of the Probate Act allows an award of grandparent visitation prior to adoption in the event of death of both parents. ILL. REV. STAT. ch. 110 ½, § 11-7.1 (1983). However, the grandparent visitation statute is silent upon the topic of adoption. ILL. REV. STAT. ch. 40, § 607 (1983).

tive. A few terminate all visitation rights upon adoption and only one enlightened state maintains that adoption does not automatically terminate visitation rights.<sup>154</sup> A uniform act specifically addressing the topic of grandparent visitation could easily alleviate this impediment.

A recent Illinois appellate court decision illustrates a realistic approach to this problem by making a distinction between cases of adoption by stepparents and cases of adoption by strangers. In *Lingwall v. Hoener*,<sup>155</sup> the Illinois Appellate Court for the Fourth District granted visitation rights to a parental grandmother despite the fact that her son's paternal rights had been terminated due to the subsequent adoption of his child by the mother's second husband.<sup>156</sup> In addressing the grandparent visitation issue, the court undertook a comparison of section 11-7.1 of the Illinois Probate Act, entitled "Visitation Rights,"<sup>157</sup> and section 607(b) of the Marriage and Dissolution of Marriage Act, entitled "Visitation."<sup>158</sup> Section 11-7.1 provides for grandparent visitation when both natural or adoptive parents are deceased.<sup>159</sup> It specifically excludes application of that provision in situations where the child is subsequently adopted. In comparison, section 607(b) is silent on the topic of subsequent adoption. The *Lingwall* court interpreted the silence in 607(b) as an indication that subsequent adoption should not preclude an award of grandparent visitation.<sup>160</sup>

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154. These five states provide for visitation if the child is adopted by a stepparent or grandparent *see* CAL. CIV. CODE § 197.5(c) (West 1983); LA. REV. STAT. ANN. § 9:572(b) (West Supp. 1984); MASS. GEN. LAWS ANN. ch. 119, § 39(D) (West Supp. 1983-84); N.J. STAT. ANN. § 9:2-7 (West 1976); OKLA. STAT. tit. 10, § 60.16(3) (Supp. 1982). Although the Illinois visitation statute is silent on the topic of stepparent adoption, a recent case held that stepparent adoption does automatically terminate grandparent visitation privileges. *See Lingwall v. Hoener*, 124 Ill. App. 3d 986, 464 N.E.2d 1248 (1984). In contrast, Arizona and Montana provide for automatic termination of visitation rights upon adoption. The Connecticut statute states that adoption does not automatically terminate visitation rights, CON. GEN. STAT. ANN. § 46(b)-59 (West Supp. 1983) and Wyoming allows grandparent visitation in the case of remarriages. WYO. STAT. § 20-2-113 (Supp. 1985).

155. 124 Ill. App. 3d 986, 464 N.E.2d 1248 (1984).

156. The court placed restrictions upon the visitation rights. Visits were limited to two per month in the presence of a reverend. The parties were required to file written reports with the court describing the visits and the court retained the power to modify the visitation privileges. Also, the natural father was not permitted to be present during the visitation sessions. *Id.* at 987, 464 N.E.2d at 1248-49.

157. The statute provides: "Whenever both natural or adoptive parents of a minor are deceased and the minor has not been subsequently adopted, visitation rights shall be granted to the grandparents of the minor. . . ." ILL. REV. STAT. ch. 110 ½, § 11-7.1 (1983).

158. *See supra* note 89 and accompanying text for text of statute.

159. *See supra* note 157 for text of statute. *See also In re Adoption of Schumacher*, 120 Ill. App. 3d 50, 458 N.E.2d 94 (1983) (adoption decree which terminates parental rights prevents an award of grandparent visitation).

160. The *Lingwall* court stated that section 607(b) of the Illinois Marriage and Dissolution of Marriage Act, ILL. REV. STAT. ch. 40, § 607(b) (1983), was not a continu-

The *Lingwall* decision sharply contrasts with the Illinois Appellate Court decision of *In Re Adoption of Schumacher*.<sup>161</sup> The facts of the two cases are virtually identical.<sup>162</sup> The *Schumacher* court held that grandparent visitation provisions should be construed as subject to adoption law, such that a completed adoption proceeding supersedes any rights which could have been obtained pursuant to section 607(b). The *Schumacher* majority interpreted the legislative silence in 607(b) on subsequent adoption as an indication that adoption laws control the matter.<sup>163</sup> The court reasoned that section 11-7.1 evidenced a policy that termination of parental rights by adoption also extinguishes any grandparental rights since a grandparent's status truly derives from the relationship between the child and his natural parent.<sup>164</sup> The court noted that an allowance of visitation to grandparents would defeat the basic premise behind the adoption statute: a complete severance of ties between the child and the natural family.<sup>165</sup>

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ation of the policy announced in Section 11-7.1 of the Probate Act. *Lingwall*, at 989, 464 N.E.2d at 1250. Section 607(b) was enacted five years after section 11-7.1. *Id.* The court reasoned that since section 11-7.1 that grandparent visitation may be awarded where the child is subsequently adopted, the legislative silence on the matter in section 607(b) indicated that subsequent stepparent adoption should not preclude an award of visitation pursuant to that section. *Id.*

161. 120 Ill. App. 3d 50, 458 N.E.2d 94 (1983).

162. In both cases the child's natural mother and father were divorced and custody was awarded to the mother. The mother remarried and the stepfather adopted the children. The only factual difference between the cases is that the visitation petitions were filed at different times. *Lingwall*, 124 Ill. App. 3d 986, 987, 464 N.E.2d 1248 (1984); *Schumacher*, 120 Ill. App. 3d 50, 51, 458 N.E.2d 94, 96 (1983).

163. The court restated the majority view which holds that adoption automatically terminates grandparent visitation rights despite the existence of statutory provisions explicitly authorizing grandparent visitation. *Schumacher*, 120 Ill. App. 3d at 53, 458 N.E.2d at 97. For a list of cases supporting this position, see *supra* note 152. *But see* *Reeves v. Bailey*, 53 Cal. App. 3d 1019, 126 Cal. Rptr. 51 (1975); *Mimkon v. Ford*, 66 N.J. 426, 332 A.2d 199 (1975).

164. The *Schumacher* court noted that when a parent's natural rights are terminated by adoption, a grandparent's statutory right to visitation is also extinguished. 120 Ill. App. 3d at 55, 458 N.E.2d at 97. This rationale is incorrect because it fails to make a distinction between cases of adoption by strangers and cases involving stepparent adoption. In the case of adoption by strangers, grandparent visitation would seldom be in the "best interests and welfare of the child." *Lingwall*, 124 Ill. App. 3d at 990, 464 N.E.2d at 1250 (1984) (quoting ILL. REV. STAT. ch. 40, § 607(b) (1983)). Allowing the child to retain a relationship with his natural grandparents might pose an impediment to the assimilation of the child into his new family, thereby frustrating the purpose of the adoption statute. *Schumacher*, 120 Ill. App. 3d at 53, 458 N.E.2d at 98. However, the basic premise of the adoption statute, complete severance of ties between the child and his natural family, would not be defeated by allowing grandparent visitation in the case of stepparent adoption. *Lingwall*, 124 Ill. App. 3d at 990, 464 N.E.2d at 1250. Stepparent adoption does not usually produce a major upheaval in a child's life because it does not require assimilation into a whole new family unit. Therefore, in determining the effect of adoption upon visitation rights, it is appropriate to make a distinction between cases involving adoption by strangers and cases involving stepparent adoption. *Id.*

165. *Schumacher*, 120 Ill. App. 3d at 53, 458 N.E.2d at 97 (1983).

The conflicting opinions in *Lingwall* and *Schumacher* illustrate a major deficiency in the Illinois Visitation Statute: silence on the topic of subsequent adoption. The cases exemplify the numerous interpretative problems resulting from legislative silence.<sup>166</sup> In Illinois as well as many other states, visitation statutes present a complex puzzle to grandparents and courts alike. Conflict between adoption statutes and visitation statutes often lead courts to strip grandparents of their precious visitation rights regardless of whether the legislature intended that result.<sup>167</sup> A Uniform Grandparent Visitation Act could effectively eradicate the conflict between adoption and visitation laws by utilizing the approach outlined in *Lingwall*, allowing grandparent visitation in the case of stepparent adoption.

In comparing the alternative approaches taken by the *Lingwall* and *Schumacher* courts, the *Lingwall* method of allowing grandparent visitation in stepparent adoption cases is superior. The Illinois Supreme Court recently affirmed the *Lingwall* decision during its September, 1985 Term.<sup>168</sup> Several other courts have reached the same conclusion in accordance with the trend toward awarding visitation privileges to grandparents on a broader scale.<sup>169</sup> In *Reeves v. Bailey*,<sup>170</sup> a California Court of Appeals held that pre-existing visitation rights awarded to paternal grandparents were not automatically terminated upon the child's subsequent adoption by his maternal grandparents.<sup>171</sup> The decision rested solely upon the child's best interests.<sup>172</sup> In the landmark case *Minkon v. Ford*,<sup>173</sup> the New Jersey Supreme Court determined that both the state adoption and visitation statutes were designed to facilitate the child's "best inter-

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166. See *Lingwall v. Hoener*, 124 Ill. App. 3d 986, 464 N.E.2d 1248 (1984); *In re Adoption of Schumacher*, 120 Ill. App. 3d 50, 458 N.E.2d 94 (1983).

167. Concurrent Resolution 67 recognizes that adoption often takes place when parents remarry and seeks to insure that grandparents will not be stripped of their precious visitation rights upon stepparent adoption. See H.R. Con. Res. 67, 99th Cong., 1st Sess., 131 Cong. Rec. H714 (daily ed. Feb. 26, 1985). See also *Lingwall v. Hoener*, 708 Ill. 2d 206, 483 N.E.2d 512 (1985).

168. See *supra* note 46 for material advocating visitation in the case of stepparent adoption.

169. See *infra* text accompanying notes 170-177.

170. 53 Cal. App. 3d 1019, 126 Cal. Rptr. 51 (1975).

171. *Id.* at 1026, 126 Cal. Rptr. at 56.

172. The court rejected the theory that visitation is a parental right in lieu of custody which is extinguished at the time of adoption. *Id.* at 1025, 126 Cal. Rptr. at 55-56. Instead, it followed the rationale offered in *Roquemore v. Roquemore*, 275 Cal. App. 2d 912, 80 Cal. Rptr. 432 (1969). In that case, the court noted that if affection remains between a child and his natural family, the law should not attempt to extinguish the expression of these feelings when they pose no hindrance to the adoptive relationship. *Id.* at 915, 80 Cal. Rptr. at 434. See also *Estate of Zook*, 62 Cal. 2d 492, 399 P.2d 53, 42 Cal. Rptr. 597 (1965). Therefore, in the case of stepparent adoption, the child's best interests may be served by allowing visitation. *Reeves v. Bailey*, 53 Cal. App. 3d 1019, 1025-26, 126 Cal. Rptr. 51, 56 (1975).

173. 66 N.J. 426, 332 A.2d 199 (1975).

ests."<sup>174</sup> Since both statutes display an identical purpose, the court assumed that the legislature had considered the effect of the adoption statute upon the visitation statute.<sup>175</sup> Thus, the visitation statute prevailed, since it was enacted subsequent to the adoption law.<sup>176</sup>

Alternatively, another rationale encouraging the expansion of grandparent visitation rights is illustrated in *Scranton v. Hunter*.<sup>177</sup> In this case, the New York Court of Appeals noted that adoption is common today in situations where both parents are divorced or deceased.<sup>178</sup> Therefore, the court reasoned that the purpose of the New York visitation statute would be defeated if natural grandparents were not allowed to petition for visitation privileges.<sup>179</sup> The time and expense expended in litigation could easily be avoided by the adoption of a Uniform Grandparent Visitation Act. Enactment of a uniform standard specifying the effect of adoption upon pre-existing visitation privileges would provide a workable solution to the problem.

#### CONCLUSION

A strong grandparent-grandchild bond plays a vital role in a child's psychological and social development. In light of the increasing breakdown of the traditional family structure, the child's right to know and associate with grandparents has gained increased importance. Today, the rate of divorce and stepparent adoption has produced chaotic alterations in American family life. Aside from providing unconditional love, a grandparent may be the only source

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174. *Id.* at 438, 332 A.2d at 205.

175. The court noted that since the aim of both statutes was identical, they should be read in *pari materia*. *Id.* at 433, 332 A.2d at 202. This approach presumes that the legislature considers the effect of prior legislation when enacting new laws. *Id.* Both statutes seek to provide substitute parental relationships for children who have been deprived of a relationship with one of both of their natural parents. *Id.*

176. The court noted that the New Jersey adoption statute was primarily concerned with adoption by strangers as opposed to stepparent adoption, the issue in the present case. *Id.* at 434, 332 A.2d at 203. Furthermore, grandparent visitation poses less of a threat to the child's adjustment into an adoption situation than might continued visitation by a parent. *Id.* at 435-36, 332 A.2d at 204. Grandparents, as opposed to parents, do not generally act as authority figures tending to usurp the authority of adoptive parents. *Id.* To this extent, grandparent visitation in the case of stepparent adoption does not clash with policies embodied in the adoption statute. *Id.* After divorce or death of a parent, continuation of grandparental love and affection may help ease a painful transition for the child. *Id.* at 437, 332 A.2d at 205. Therefore, in the case of stepparent adoption, certain circumstances may call for an award of visitation privileges even over the objections of the adoptive parents. *Id.*

177. 40 A.D.2d 296, 339 N.Y.S.2d 708 (1973).

178. See *Grandparent Visitation Statutes*, 67 MARQ. L. REV. 730, 754 (1984).

179. The court stated its belief that if it were the intent of the legislature to exempt cases of stepparent adoption from the provisions of the visitation statute, the legislature would have affirmatively expressed this intent. *Id.*



of security and stability prevalent in a child's small world.

The enactment of grandparent visitation statutes by forty-nine states has been a major first step toward protecting a child's precious right to know and associate with grandparents. However, structural deficiencies in and between many state statutes render them virtually ineffective. Thus, the adoption of a Uniform Grandparent Visitation Act is imperative. A uniform standard would correct deficiencies found in the current system while ensuring that the rights of children are afforded maximum protection. Uniform specifications on topics such as persons entitled to petition, circumstances triggering the right to petition, the "best interest" standard, and the effect of adoption upon pre-existing visitation rights would alleviate the major problems inherent in the present system. Adoption of a Uniform Grandparent Visitation Act will ensure that all grandparent visitation determinations, whether awarding or denying visitation, will truly reflect the best interests of the child.

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