OVER THE HILLS AND THROUGH THE WOODS TO GRANDPARENTS' HOUSE WE GO: OR DO WE, POST-*TROXEL*?

Ellen Marrus*

I. INTRODUCTION

Following a divorce, the mother leaves her child with the maternal grandmother. Three years later she returns and takes the child back in order to receive the child support the father had been paying directly to the grandmother. The mother refuses to allow any contact between the grandmother and grandchild, although a substantial bond exists between the two.

John and Miriam are happily married with one child whom they are raising Jewish. The paternal grandparents are committed Christians and were very disappointed when their son converted to Judaism. The grandparents believe that their grandchild will go to hell if she does not become a Christian. John and Miriam do not want the child visiting with the grandparents, and the grandparents have never seen the child.

The mother and father's parental rights were terminated because of their drug use. The children were adopted by Mr. and Mrs. Smith, their former foster parents. The maternal grandparents had visited with the children prior to the adoption and want to continue the relationship. The Smiths are concerned about

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* Associate Professor of Law and Director, Clinical Legal Education at the University of Houston Law Center; J.D., University of San Francisco School of Law; L.L.M. Georgetown University Law Center. I want to thank my colleagues, Irene Rosenberg and Laura Oren, for their comments on earlier drafts of this Article, as well as my research assistants, Randall Gunther, Mayson Mead, and Ruth Wilson, for their exceptional work on the piece. Very special thanks go to my grandmother and mother, each of whom was a wonderful example of what it takes to be a supportive and nurturing grandmother; and to my daughter and granddaughter, for giving me the opportunity to have a special grandmother/granddaughter relationship. I also wish to thank Brittany Hobson for sharing her own grandparent visitation story with me. Finally I thank the University of Houston Law Foundation for its financial support of this Article.

the confusion that this might cause the children and refuse to allow the grandparents to continue to see them.

Bob and Jane are married with two children. Bob's parents visit their grandchildren on a regular basis. Bob is concerned that the grandparents discipline the children inappropriately. He has asked his parents to refrain from spanking the children. They have refused. Bob and Jane terminate visits between the grandparents and grandchildren.

Sally became a parent at the age of 14. She did not want the responsibility of motherhood and left the infant with an older cousin. The cousin adopted the child, but does not want the biological grandparents to visit. She does not want to tell the child about the adoption and was never close to either set of biological grandparents.

Dorothy met Jerry when her son, Billy, was two months old. Billy's biological father had never spent time with him, and Billy has always thought of Jerry as his father. When Dorothy and Jerry got married, the biological father's rights were terminated, and Jerry adopted Billy. Dorothy and Jerry do not want Billy's biological paternal grandparents to visit.

Tom died when his children were four and two years old. His wife, Jenny, never got along well with her parents, and it was Tom who kept in contact with them. After his death, Jenny would not talk to her parents and would not let the children visit with them.

Sally became pregnant by her high school boyfriend. He went off to college and never returned to their small home town. He never visited the child or paid child support. The paternal grandparents, however, did want to have a relationship with their only grandchild. Sally refused to let the grandparents see her child.

Timmy, a single parent, has been raising Bobby since his wife, Betty, left a year ago when Bobby was four years old. The boy has not seen his mother since she left. Timmy is very bitter and will not have anything to do with Betty's family. The maternal grandparents have tried to call and visit Bobby, but Timmy refuses to allow them any further contact.

Jim is in prison for sexually abusing his daughter. She is living with her mother. The mother refuses to bring her to the prison to see Jim. Jim would like to see his daughter and stay involved in her life. The paternal grandparents, who do not believe that their son is guilty, are seeking visitation in order to bring her with them when they visit Jim in prison.[1]

The grandparents in these cases may find that they lack standing to seek access to their grandchildren. If the grandparents do have standing to seek access to their grandchildren, the court must then decide the substantive issue of whether visitation should be granted against the parents' wishes. This issue forces the court to balance the constitutional right of parents to raise their children without external interference, the child's interest in familial relationships, and the state's interest in its role as *parens patriae* to promote the best interests of the child. *Is* there a remedy for these situations, as well as for other variations on the scenario of grandparents denied standing to petition for and be granted visitation with their grandchildren? *Should* there be such a remedy, one that may promote "the best interests of the child,"[2] but also may threaten to clash with the constitutionally protected right of parents to raise their children without external interference?[3]

After the divorce rate began rising in the 1960s and 1970s, legislatures and courts began to permit court ordered grandparent visitation, albeit under

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1. The above facts are based on actual situations. They are examples of circumstances where a parent may refuse a grandparent visitation and the only recourse available to the grandparent is to seek court ordered visitation. Some of these scenarios are cases in which the clinic at the University of Houston Law Center has been involved. Other examples are stories I have heard from other attorneys who practice family law. In addition, as someone who has taught children in pre-school through high school, I would often hear stories from parents, grandparents, and children regarding the tension that would sometimes arise between family members regarding the relationships between children and adults in the family. Finally, some of these scenarios are based on appellate cases, but often cases of this nature are not appealed because they are very costly, both financially and emotionally. *See, e.g.*, Poe v. Case, 565 S.W.2d 612 (Ark. 1978) (concerning a biological father whose rights were terminated, with the stepfather adopting the child; although the paternal grandmother was granted visitation in the original agreement, the parents refused to honor the visitation requests; the state supreme court found that the lower court lacked the power to award visitation to the paternal family after an adoption proceeding); Hawk v. Hawk, 855 S.W.2d 573 (Tenn. 1993) (involving an ongoing relationship between the grandparents and grandchildren, in the course of which there was constant conflict between the parents and grandparents; the parents disagreed with the methods of discipline used by the grandparents and discontinued the visitation; the state supreme court found the visitation statute unconstitutional as applied).

2. *See generally* JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD (1973) (stating that the child's needs must be paramount).

3. This Article examines grandparent visitation when one or both parents oppose it. It does not address the quite different situation where the grandparents are seeking visitation and the state is denying them access. *See, e.g., In re* K.R., 537 N.W.2d 774 (Iowa 1995) (holding that the juvenile court can order grandparent visitation when the child is placed with court-appointed guardians and the visitation would be in the child's best interests).

limited circumstances.[4] By 1993, every jurisdiction had enacted legislation that authorized grandparent or third-party visitation.[5] The state of Washington had by far the broadest statute. It allowed "any person" at "any time" to petition for visitation.[6] Pursuant to such laws, courts could grant visitation after a hearing in which visitation was determined to be in the best interests of the child, even over the objections of fit parents.[7] Parents who appealed these decisions, however, claimed such court orders interfered with their constitutional right of parental autonomy.[8] This was the context of *Troxel v. Granville*,[9] the United States Supreme Court's recent pronouncement on the issue of grandparents' rights of visitation in a case coming from the state of Washington.

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4. *See* Joan Aldous, *Public Policy and Grandparents: Contrasting Perspectives*, *in* HANDBOOK ON GRANDPARENTHOOD 230, 232 (Maximiliane E. Szinovacz ed., 1998).

5. *See id.*; *see also* ALA. CODE § 30-3-4 (1993); ALASKA STAT. § 25.24.150(a) (Michie 1993); ARIZ. REV. STAT. § 25-337.01 (1993); ARK. CODE ANN. § 9-13-103 (Michie 1993); CAL. FAM. CODE § 4601 (West 1993); COLO. REV. STAT. §§ 19-1-117, 19-1-117.5 (1993); CONN. GEN. STAT. § 46b-59 (1992); DEL. CODE ANN. tit. 10, § 944(7) (1993); FLA. STAT. ANN. § 752.01 (West 1993); GA. CODE ANN. § 19-7-3 (1993); HAW. REV. STAT. § 571-46(7) (1993); IDAHO CODE § 32-1008 (Michie 1993); 750 ILL. COMP. STAT. 5/607 (1993); IND. CODE §§ 31-1-11.7-1 to 31-1-11.7-8 (1993); IOWA CODE § 598.35 (1993); KAN. STAT. ANN. § 38-129 (1993); KY. REV. STAT. ANN. § 405.021 (Michie 1993); LA. REV. STAT. ANN. § 9:344 (West 1993); ME. REV. STAT. ANN. tit. 19, § 1003 (West 1993); MD. CODE ANN., FAM. LAW § 9-102 (1993); MASS. GEN. LAWS ch. 119, § 39d (1993); MICH. COMP. LAWS ANN. § 25.312 (7b) (West 1993); MINN. STAT. § 257.022 (1993); MISS. CODE ANN. § 93-16-3 (1993); MO. REV. STAT. § 452.402 (1993); MONT. CODE ANN. § 40-9-102 (1993); NEB. REV. STAT. § 43-1802 (1993); NEV. REV. STAT. 125A.330 (1993); N.H. REV. STAT. ANN. § 458:17-d (1993); N.J. STAT. ANN. § 9:2-7.1 (West 1993); N.M. STAT. ANN. § 40-9-2 (Michie 1993); N.Y. DOM. REL. LAW § 72 (McKinney 1993); N.C. GEN. STAT. § 50-13.2 (1993); N.D. CENT. CODE § 14-09-05.1 (1993); OHIO REV. CODE ANN. §§ 3109.051, .11-.12 (Anderson 1993); OKLA. STAT. tit. 10, § 5 (1993); OR. REV. STAT. § 109.121 (1991); 23 PA. CONS. STAT. §§ 5311, 5312 (1993); R.I. GEN. LAWS § 15-5-24.1 to -24.3 (1993); S.C. CODE ANN. § 20-7-420 (Law. Co-op. 1993); S.D. CODIFIED LAWS §§ 25-4-52, -54 (Michie 1993); TENN. CODE ANN. § 36-6-301 (1993); TEX. FAM. CODE ANN. § 14.03(e) (Vernon 1993); UTAH CODE ANN. § 30-5-2 (1993); VT. STAT. ANN. tit. 15, §§ 1011-1013 (1993); VA. CODE ANN. § 16.1-241 (Michie 1993); WASH. REV. CODE §§ 26.09.240, 26.10.160(3) (1993); W. VA. CODE §§ 48-2b-1 to -12 (1993); WIS. STAT. § 767.245 (1993); WYO. STAT. ANN. § 20-7-101 (Michie 1993).

6. *See* WASH. REV. CODE ANN. § 26.10.160(3) (West 1993). For further discussion of this statute, see *infra* note 229 and accompanying text.

7. *See* Aldous, *supra* note 4, at 232. Most states impose a best interests standard when determining access and visitation with minor children. *See infra* note 81 and accompanying text.

8. *See infra* notes 171–177 and accompanying text.

9. 530 U.S. 57 (2000). The state supreme court decision is reported as *In re* Custody of Smith, 969 P.2d 21 (Wash. 1998), *cert. granted sub nom.* Troxel v. Granville, 527 U.S. 1069 (1999), and the intermediate Washington appellate court opinion is reported as *In re* Troxel, 940 P.2d 698 (Wash. Ct. App. 1997), *modified*, 971 P.2d 56 (Wash. Ct. App. 1998).

In *Troxel*, the paternal grandparents were seeking to continue to visit their grandchildren even after the death of their son.[10] When the mother refused to permit as much contact as they wanted, the grandparents petitioned for visitation under the Washington statute.[11] The trial court granted the Troxel grandparents visitation rights, albeit not as extensive as they had requested.[12] The state appellate courts, for different reasons, overturned the trial court's decision.[13] The grandparents sought review from the United States Supreme Court,[14] and in a fragmented ruling evoking six opinions, the Court found the Washington visitation statute unconstitutional as applied.[15]

The many voices of *Troxel* clearly do not settle all the issues surrounding grandparent visitation.[16] Justice O'Connor's plurality opinion can be read very narrowly, and indeed she took pains to explain that the ruling did not affect all grandparent visitation laws or variations on the facts and circumstances of different cases.[17] Furthermore, the opinions concurring in the judgment do not provide clear guidance on the future of grandparent visitation.[18] Thus, some existing state statutes may hold up under the *Troxel* decision, while others may not, and different fact patterns may also permit different results.

In Part II, I discuss the psychological and sociological literature dealing with the benefits children may receive from the grandparent/grandchild relationship and review the demographic changes in society that may influence this relationship. I canvass the body of literature that looks at how this relationship aids in the child's cognitive and emotional development. These benefits are what initially prompted many lower courts to grant visitation even absent a state statute, under the rubric of "best interests."[19]

In Part III, I examine the rationales of these lower court opinions and how they influenced the legislatures to enact statutes giving grandparents standing to sue for visitation. I also look at the various categories of grandparent visitation statutes that resulted from this early judicial impetus and at the state court responses to these laws.

In Part IV, I address the *Troxel* state court decisions and the United States Supreme Court determination. First, I consider the Washington appellate court's holding reversing the trial court on the ground that the legislature did not intend

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10. *See Troxel*, 530 U.S. at 60–61.
11. *See id.*
12. *See infra* notes 233–236 and accompanying text.
13. *See infra* notes 240–243 and accompanying text.
14. Troxel v. Granville, 527 U.S. 1069 (1999).
15. *See Troxel*, 530 U.S. at 57; *see also infra* notes 290–341 (describing the Justices' opinions). Although the Court claimed the statute was found to be unconstitutional as applied, it is not so clear from the opinion whether the Court was doing an "as applied" analysis or an "on its face" determination. *See infra* notes 292–298 and accompanying text.
16. *See infra* note 291 and accompanying text.
17. *See infra* notes 298 and 301 and accompanying text.
18. *See infra* notes 303–310 and accompanying text.
19. *See infra* notes 93–94 and accompanying text.

grandparents to have standing under the law in cases where there was no other action pending involving the children, such as a custody proceeding.[20] I then outline the Washington State Supreme Court opinion, which also found that the Troxels were not entitled to visitation, ruling that the grandparents did have standing, but concluding that the statute itself was unconstitutional on its face.[21] Following the state law decisions, I analyze the opinions in the United States Supreme Court case.[22] I conclude that the Court, perhaps unwittingly, conflated the issues of standing and the substantive best interests determination that must be made in visitation proceedings.

In Part V, I explore the decisional law relating to parental and familial rights. I argue that these parental rights do not prevent the states from recognizing the child's right to maintain a relationship with grandparents and other adults, even over parental objections.

In Part VI, I comment on the effect that the *Troxel* decision may have on grandparent visitation statutes. I propose a statutory scheme that would allow grandparents (and some other third parties) to seek visitation with children. I believe the proposed statute would be facially constitutional under *Troxel* and would also allow the children's voices to be heard and considered in these proceedings. I examine the factual circumstances under which courts should permit third parties to petition for visitation (the standing issue), and when such visitation should be awarded as being in the child's best interests (the substantive determination on the merits). I try to predict which of these cases might pass constitutional muster under the various opinions in *Troxel*.

II. THE BOND BETWEEN GRANDCHILDREN AND GRANDPARENTS

> *Every time a child is born, a grandparent is born, too. In the natural order of things the generations emerge telescopically, one out of the other. Genetically, every child is the sum of two parents and four grandparents. The child in the womb already possesses instincts, temperament, and emotions that are not his or hers alone. Psychologically, every child develops not only in the world of its parents but within the larger world of its grandparents, of our "father's fathers" and our "mother's mothers."*[23]

Although we may think that we know what it means to be a grandparent today, and popular images are projected in literature, movies, and television, it is only recently that the research on grandparent/grandchild relationships has focused

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20. *See In re* Troxel, 940 P.2d 698 (Wash. Ct. App. 1997), *modified*, 971 P.2d 56 (Wash. Ct. App. 1998).

21. *See In re* Custody of Smith, 969 P.2d 21 (Wash. 1998), *cert. granted sub nom.* Troxel v. Granville, 527 U.S. 1069 (1999).

22. Troxel v. Granville, 530 U.S. 57 (2000).

23. EDA LESHAN, GRANDPARENTING IN A CHANGING WORLD 93 (1993) (quoting Dr. Arthur Kornhaber, founder of the Foundation for Grandparenting).

on the dynamics, contingencies, and variations in grandparenthood.[24] Images depicted in the media often show loving grandfathers having heart-to-heart talks with their grandsons while fishing or hunting, and grandmothers at home in the kitchen baking cookies or preparing family holiday feasts.[25] These scenarios do not reflect modern realities.[26] Nonetheless, grandchildren and grandparents do have a special relationship,[27] one that may be second only to the parent/child bond.[28]

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24. *See* Maximiliane E. Szinovacz, *Grandparent Research: Past, Present, and Future, in* HANDBOOK ON GRANDPARENTHOOD 1, 5–20 (Maximiliane E. Szinovacz ed., 1998) (summarizing the research available on the grandparent/grandchild relationship and identifying areas for additional review).

25. *See, e.g.*, *The Waltons* (CBS 1972–1981) (telling the story of a family living in the Blue Ridge Mountains of Kentucky beginning during the Depression and going through World War II; the household consists of John and Olivia Walton, their seven children, and John's parents, Jeb and Esther Walton); HEIDI (Disney Home Video 1993) (reciting the classic tale of Heidi, an orphan, who lives with her grandfather in the Swiss Alps). Children's books often also reflect the nurturing role of grandparents. *See, e.g.*, SHARON CREECH, WALK TWO MOONS (1994) (expressing a moving story about a thirteen-year-old American Indian girl, Salamanco, whose mother disappeared, and who traveled from Ohio to Idaho with her eccentric grandparents, hoping to arrive in time for her mother's birthday and bring her mother back); *see also* NAOMI JUDD & DAN ANDREASEN, NAOMI JUDD'S GUARDIAN ANGELS (2000) (telling the story of a young girl who leaves her home on the farm but knows that wherever she goes, her great-grandparents are watching over her).

26. Grandparents today are often younger and very much involved in their own lives. They may be maintaining careers, their own social lives, and possibly even second marriages of their own. *See infra* notes 33–37 and accompanying text. Some media images illustrate the lifestyle of modern grandparents. See, for example, *Judging Amy* (CBS 1999–2001), a story of a recently divorced mother, Amy, who moves back in with her mother, that relates the manner in which the three generations of women manage to live together. The mother and grandmother have professional careers. See also *Family Law* (CBS 1999–2001), in which an attorney grandmother, played by Dixie Carter, whose daughter refused to let her have contact with her granddaughter, gained custody of her three-year-old granddaughter after the child's mother was murdered by her father.

27. *See* Chrystal C. Ramirez Barranti, *The Grandparent/Grandchild Relationship: Family Resource in an Era of Voluntary Bonds*, FAM. REL., July 1985, at 343, 346. Barranti's positive view of the value of grandparents as a resource is an example of the more recent approach, which has superceded an earlier, more negative view. *See generally* Richard B. Miller & Jonathan G. Sandberg, *Clinical Interventions in Intergenerational Relations, in* HANDBOOK ON GRANDPARENTHOOD 217 (Maximiliane E. Szinovacz ed., 1998). Influenced by psychoanalytical writing, the earlier writers talked about "the grandparent syndrome" of meddlesome grandparents. *See id.*

28. *See generally* Vira R. Kivett, *The Grandparent-Grandchild Connection*, 16 MARRIAGE & FAM. REV. 267 (1991). This does not take into consideration the sibling relationship that is often cited as the strongest kinship relationship one may have, even surpassing that of the parent/child. *See generally* Ellen Marrus, *"Where Have You Been, Fran?" The Right of Siblings to Seek Court Access to Override Parental Denial of Visitation*, 66 TENN. L. REV. 977 (1999). Broadly stated, familial relationships are considered important to the development of young children. *See id.* at 980–87. It is from our family members that we first learn about interacting with others and forming relationships. *See id.*

Under normal circumstances the grandparent/grandchild relationship develops with parental permission and encouragement and without outside interference. It is the customary family structure, which typically includes extended family.[29] Grandparents may spend time with their grandchildren alone, or the children's parents may accompany them. In an ideal world such togetherness is unquestioned, and indeed it is recognized that contact with grandparents is beneficial for children.[30] As the opening scenarios reflect, however, this ideal may not always reflect reality. Where disputes arise between parents and grandparents over access to grandchildren, the benefits have to be weighed against the costs of conflict.[31] To do this properly, it is necessary to understand both the demographic changes influencing the grandparent/grandchild relationship in today's world and the variety of grandparent/grandchild relationships that develop in particular contexts.

Recent trends indicate that the role grandparents perform in relation to a child's development has increased.[32] The percentage of the population who are

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29. Children may also develop meaningful relationships with other family members such as siblings, aunts, uncles, cousins, and other blood related relatives. Other relationships with adult role models, such as step-parents, psychological parents, and others, may also be acquired and may be beneficial to the child's development. There may be times when courts need to allow such contact to continue even absent parents' willingness to do so.

30. The benefits of the grandparent/grandchild relationship are becoming systematically recognized in society. More studies are being conducted by social scientists to evaluate the grandparent/grandchild relationship. *See, e.g.*, Barranti, *supra* note 27, at 343; Carolyn Cogswell & Carolyn S. Henry, *Grandchildrens' Perceptions of Grandparental Support in Divorced and Intact Families*, 23 J. DIVORCE & REMARRIAGE 127 (1995); Gary L. Creasey & Gwen Kaliher, *Age Differences in Grandchildren's Perceptions of Relations with Grandparents*, 17 J. ADOLESCENCE 411 (1994); James W. Gladstone, *Perceived Changes in Grandmother-Grandchild Relations Following a Child's Separation or Divorce*, 28 GERONTOLOGIST 66 (1988); Colleen Leahy Johnson, *Active and Latent Functions of Grandparenting During the Divorce Process*, 28 GERONTOLOGIST 185 (1988); Kivett, *supra* note 28, at 267; Karen A. Roberto & Johanna Stroes, *Grandchildren and Grandparents: Roles, Influences, and Relationships*, 34 INT'L J. AGING & HUM. DEV. 227 (1992); Szinovacz, *supra* note 24, at 5–11 (reviewing the stages of research on the grandparent/ grandchild relationship). The analysis of this data can help cultivate additional benefits for families. Some of this research has led to the creation of resources for grandparents including curriculum development for grandparenting classes, books and websites. It is interesting to note there are not as many observational or statistical studies being conducted about grandparents and grandchildren as there have been about other kinship relationships such as parent/child or siblings.

31. *See* Miller & Sandbert, *supra* note 27, at 228 (noting that allowing grandparents to go to court to seek visitation may increase acrimony and put children in the middle). There is little research on the effect legal disputes over visitation has on the children. *See* Aldous, *supra* note 4, at 233. Rather the rationale for allowing grandparents the right to sue for visitation and the granting of such visitation is based on factors such as the older generation's supposed transmission of family values; grandparents unconditional love unsullied by the irritations of lengthy, daily contacts; and the ability of grandparents to help reduce stress within the parent-child family. *See id.*

32. *See* Merril Silverstein et al., *Intergenerational Solidarity and the Grandparent Role*, *in* HANDBOOK ON GRANDPARENTHOOD 144, 155–56 (Maximiliane E.

grandparents is growing. People are becoming grandparents at younger ages and about seventy percent of those individuals over the age of 65 are grandparents.[33] As life expectancies for individuals increase, more children are growing up with at least two living grandparents and many have three or four.[34] Additionally, based on longer life expectancy and smaller families, today's children can expect to spend approximately half their own lives as a grandparent.[35] Interestingly, reductions in fertility rates also mean that there are fewer grandchildren to go around. This shortage reduces potential competition for grandparents' attention and support.[36] As these trends continue, more individuals will continue to have long-lasting relationships with their grandparents.[37]

Along with these demographic changes, as more children live through the divorce of their parents, "public interest in both the supportive role that grandparents can play and the rights of grandparents to maintain contact with grandchildren has grown."[38] The "gray population" has organized and become a political force.[39] Through organizations like the American Association of Retired

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Szinovacz ed., 1998) (citing to comparative surveys that refute the declining role theory). *See generally* Peter Uhlenberg & James B. Kirby, *Grandparenthood Over Time: Historical and Demographic Trends*, *in* HANDBOOK ON GRANDPARENTHOOD 23 (Maximiliane E. Szinovacz ed., 1998).

33. *See* Barranti, *supra* note 27, at 343; *see also* Uhlenberg & Kirby, *supra* note 32, at 30 (revealing that there is no real evidence that over the 20th century there has been any major change in the age at which parents become grandparents for the first time, but rather there is a greater change in the age at which a woman has completed childbearing. This happens at a younger age so it is less likely for grandparents to still be raising their children at the time they become grandparents. Thus, there is less overlapping between the role of parent and grandparent).

34. *See* Barranti, *supra* note 27, at 343. According to a study conducted in 1979, "a 10 year old child's chances of having at least two living grandparents has risen from 40 to 50% and the chances of having at least three living grandparents has increased from 10 to 38%." *Id.* (citing Elaine M. Brody, *Aged Parents and Aging Children*, *in* AGING PARENTS 267, 270 (Pauline K. Ragan ed., 1979)). These numbers appear to be even greater at this time. *See* Uhlenberg & Kirby, *supra* note 32, at 25 (providing a table of data for selected years from 1900 to 2000).

35. *See* Barranti, *supra* note 27, at 343.

36. "In past times, when birth and death rates were high, grandparents were in relatively short supply. Today...grandchildren are in short supply." Uhlenberg & Kirby, *supra* note 30, at 23 (quoting ANDREW J. CHERLIN & FRANK F. FURSTENBERG, THE NEW AMERICAN GRANDPARENT 28 (1986)). Uhlenberg and Kirby noted that these studies suggest that changes in fertility patterns have led to three variations to grandparenthood. *See id.* at 26–30. First, a higher percentage of persons entering old age are grandparents. *See id.* Second, grandparents have fewer grandchildren than in the past. *See id.* Third, it is less common for grandparenting to overlap with active parenting of grandparents' own children. *See id.* These changes "have consequences for both grandchildren and grandparents," but may be more likely to be able to help grandchildren. *Id.* at 30–31.

37. *See* Barranti, *supra* note 27, at 343.

38. Uhlenberg & Kirby, *supra* note 32, at 38.

39. *See* Albert B. Crenshaw, *The Impact of AARP*, WASH. POST, Apr. 29, 1992, at R5 (observing that the American Association of Retired Persons (AARP) is a catalyst in national and local politics because of the regular voting patterns of its members, and the members' fervent activism in volunteering that affects outcomes in issues concerning the

Persons (AARP), they have lobbied for legislation that is helpful to them.[40] Judges are also affected by these demographics. They are more likely to be grandparents themselves,[41] and therefore, may look at the grandparent role differently than someone who has not had that experience.

The burgeoning research of the 1980s highlighted the many positive roles that grandparents could play in the lives of their grandchildren.[42] More recent research, however, emphasizes the heterogeneity of grandparent/grandchild relationships and how contingent their quality is on the life experiences of both parts of the dyad.[43]

Grandparents may be important as transmitters of family values, as mediators between parents and children, or as rescuers of families in trouble.[44] One study explained how grandparents help with value development:

> A fundamental task of the family is the transmission of values from one generation to another. Grandparents may play a crucial role in this process by serving as arbitrators between parents and children concerning values that are central to family continuity and individual enhancement....[G]randchildren...perceive[] their grandparents as influential in their value development....[45]

Furthermore, studies have shown that grandparents can have "as much (if not more) influence upon the developing child as the child's own parents."[46] The

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elderly); John Furey, *The Elderly: Soft Voice, Big Stick: AARP's Political Clout Is Growing Rapid*, SAN DIEGO UNION-TRIB., May 28, 1986, at A-1 (propounding that elderly groups, such as AARP, wield an enormous degree of voting power because of their large number of members, active collaboration in political issues involving the elderly, and effective use of influential legislative lobbyists).

40. *Cf.* Aldous, *supra* note 4, at 231–32 (stating that legislators are likely to help the cause of grandparents); Marrus, *supra* note 28, at 1008 n.180.

41. For example, six of the Justices on the Supreme Court are grandparents. *See* Richard Carelli, *Parents' Rights Bolstered*, S.C. POST & COURIER, June 6, 2000, at A1 (noting that Justices O'Connor, Rehnquist, Stevens, Scalia, Kennedy, and Ginsburg are all grandparents, and that Justice Thomas was raised by his grandparents).

42. *See* Szinovacz, *supra* note 24, at 7–9 (reviewing the research done during the 1980s regarding the role of grandparents in the modern family, particularly the support offered to the family during times of crisis).

43. *See id.* at 12–14. Researchers began to recognize the value of studying the grandparent/grandchild relationship in relation to various cultures, societal values, and gender differences.

44. *See infra* notes 69–74 and accompanying text.

45. Roberto & Stroes, *supra* note 30, at 237 (citation omitted) (analyzing data compiled from a study involving 142 college students taking introductory gerontology, and their answers to a questionnaire that included inquiries regarding involvement and activities with grandparents, impact of grandparents on individual belief systems, and personal relationships with grandparents).

46. Creasey & Kaliher, *supra* note 30, at 412 (citation omitted). There are many studies that indicate the importance of grandparents in the transmission of values to children, their ability to act in the role of a "safety valve" within family disturbances, and maintaining family bonds. *See, e.g.*, Gunhild O. Hagestad, *Continuity and Connectedness*,

mediating role that grandparents, particularly grandmothers, often take on between the mother and child can indeed improve the mother/child relationship.[47] In a 1981 study, researchers found that children formed a variety of attachments to their grandparents, and categorized grandparents as falling within one or more of the following roles:

> (a) the grandparent as the nexus of family connections; (b) the grandparent as a constant object in the life of the child—knowing grandparents through personal experience and through stories; (c) grandparents as teachers of basic skills; (d) grandparents as negotiators between child and parent helping one to understand the other; (e) the same sexed grandparents as a role model for adulthood [sic]; (g) grandparents as connections between past and future giving a sense of historical and cultural rootedness; (h) grandparents as determinants of how the young feel about the old in society; and (i) grandparents as "Great Parents" providing a secure and loving adult/child relationship which is next in emotional power only to parents.[48]

As this and other studies indicate, grandparents may have a major influence on the lives of their grandchildren.[49] Indeed, one fundamental role grandparents often play in relation to their grandchildren is that of nurturer.[50] Since grandparents are not typically responsible for the daily parenting of the child, they can indulge the child and themselves, providing their grandchildren unconditional love,[51] something that harried working parents may not be able to give and that must in any event be coupled with discipline. Moreover, in this mentoring capacity, grandparents act as a resource for the entire family unit.[52]

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in GRANDPARENTHOOD 31, 46–47 (Vern L. Bergtson & Joan F. Robertson eds., 1985); C. Johnson, *A Cultural Analysis of the Grandmother*, 5 RES. ON AGING 547 (1983); Kivett, *supra* note 28, at 274 (citing R. Albrecht, *The Parental Responsibilities of Grandparents*, 16 MARRIAGE & FAM. LIVING 201 (1954); Lillian E. Troll, *Grandparents: The Family Watchdogs*, *in* FAMILY RELATIONSHIPS IN LATER LIFE 63, 74 (Timothy H. Brubaker ed., 1983)).

47. *See, e.g.*, Kivett, *supra* note 28, at 275.

48. Barranti, *supra* note 27, at 348 (citing ARTHUR KORNHABER & KENNETH L. WOODWARD, GRANDPARENTS/GRANDCHILDREN: THE VITAL CONNECTION (1981), a comprehensive study conducted in 1981 involving the collection of data from 300 children, ages five to eighteen, and evaluating the emotional attachment between the children and their grandparents).

49. *See id.*; *see also* Cogswell & Henry, *supra* note 30, at 129; Creasy & Kaliher, *supra* note 30, at 421; Andre P. Derdeyn, *Grandparent Visitation Rights: Rendering Family Dissension More Pronounced?*, 55 AM. J. ORTHOPSYCHIATRIC 277, 284 (1985); Kivett, *supra* note 28, at 274–75.

50. *See* Barranti, *supra* note 27, at 346–47.

51. *See id.* at 349. This unconditional love helps the child's emotional development and can help build a child's self-esteem. *See id.*

52. *See id.* at 350. Grandparents allow the children and the parents another outlet for family and community pressures. *See id.* The grandparent can also act as a mediator and confidant. *See* Roberto & Stroes, *supra* note 30, at 236–37. Another role that grandparents

Grandparents may have both direct and indirect effects on grandchildren.[53] Through studies, interviews, and surveys, researchers have found a variety of ways that grandparents directly influence their grandchildren.[54] By being a companion to their grandchildren, grandparents "provid[e] inspiration and encouragement" and grandchildren find themselves taking on the "personal attributes of their elders, such as risk-taking, patience, and tenacity."[55]

Grandparents also influence their grandchildren indirectly.[56] The parenting abilities of grandparents are likely to influence the type of parent their children become.[57] Additionally, grandparents may offer emotional and financial support to the parents that can also be beneficial to the child.[58] Probably the most important indirect influence the grandparent has on the grandchild is in regard to the child's attachment to caregivers. The attachment children build with their caregivers is directly related to the "child's future self-esteem, self-effectiveness, and ability to forge later connections."[59] One study indicated stronger attachments between mother and child when the mother was able to recall her own previous attachment experiences.[60] This was true whether the mother's experiences were favorable or not.[61]

No matter what type of grandparent one may be,[62] grandparents affect the development of their grandchildren.[63] For some children the grandparent is the one

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often play is that of a "wizard." *See* Barranti, *supra* note 27, at 345. By telling their grandchildren both family and fictional stories, grandparents assist in increasing children's imagination and can provide children with the "magic" in their lives. *Id.*

53. *See* Angela M. Tomlin, *Grandparents' Influences on Grandchildren*, *in* HANDBOOK ON GRANDPARENTHOOD 159, 160–61 (Maximiliane E. Szinovacz ed., 1998).

54. *See id.* at 161.

55. *Id.* (citations omitted).

56. *See id.* at 162–63.

57. *See id.* at 163. Young mothers in particular can be affected by the grandmothers' parenting ability. *See id.* When the family lives together as three generations and the grandmother demonstrates good parenting, this can have a positive impact on the type of parent the young mother becomes. *See id.* at 164. However, too much interference by the grandmother can reduce the nurturing role the young mother provides. *See id.*

58. *See id.* at 163. However, the presence of grandparents, particularly ailing grandparents, can also have a negative impact on the child's development. If the parent feels overwhelmed by caring for a debilitated grandparent, such feelings may influence relations with his or her own child. *See id.* at 166.

59. *Id.* at 167.

60. *See id.* at 166–67.

61. *See id.*

62. Grandparents follow different models for their relationships with their grandchildren. When questioned, grandparents self-identified five types of grandparents. *See* Barranti, *supra* note 27, at 344–45 (noting that the authors in B. Neugarten & K. Weinstein, *The Changing American Grandparents*, 26 J. MARRIAGE & FAM. 199 (1964), conducted interviews with 70 grandparent couples who were asked to describe themselves as grandparents, and their answers specified five types of grandparent roles in a family). First, there are the "formal" grandparents. *Id.* They tend to keep to a traditional grandparent role and clearly separate the role of grandparent and parent. *See id.* The grandparents maintain an interest in their grandchild, but do not cross over the grandparent line. *See id.*

constant,[64] giving the grandchildren a sense of stability and continuity. Interaction between a grandchild and grandparent may also affect the cognitive development of children.[65] Some researchers argue that it is the relationship itself that is beneficial to the grandchild, and the lack of such a tie may interfere with the child's fullest development, and indeed cause emotional harm.[66]

Likewise, the entire family may obtain some benefit from the grandparent/grandchild relationship.[67] Grandparent roles change over time and are

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Second is the grandparent as "fun seeker." *Id.* This type tends to be more playful, informal, and more of a friend to the grandchild. *See id.*; *see also* Johnson, *supra* note 30, at 188. The "surrogate parent" is the third variety. Barranti, *supra* note 27, at 345. Here the grandparents take on more of the parenting responsibilities. They see themselves as taking on this job at the initiative of the parent, usually the mother. *See id.* However, they may also do this because they perceive that the grandchild has a need for it. *See* Johnson, *supra* note 30, at 189–90. Just because grandparents (usually grandmothers) may step up to the plate, so to speak, if they believe the grandchild needs additional help, this does not mean they prefer or are comfortable with this role. As one grandmother with full-time responsibility for her 5 - year - old grandson explained,

> I am the only one who sees that he gets his vitamins, that he has a normal life, that he gets to bed on time, that he doesn't run wild. Because of all that, I can never be a grandmother. I can't indulge him like I do my other grandchildren. I have to discipline him, so I can't be fun to be around.

Id. at 190. Fourth is the grandparent as the wise elder, or "reservoir of family wisdom." Barranti, *supra* note 27, at 345. This grandparent believes he or she has special skills and resources to pass on to the younger generation, and keeps the lines between the generations clearly separated. *See id.* The last type is the "distant figure" grandparent. *Id.* Although these grandparents may be caring, the contact between them and their grandchildren is infrequent. *See id.*

63. *See* Kivett, *supra* note 28, at 274 (noting that "no matter how grandparents act, they affect the emotional well-being of their grandchildren, for better or worse, simply because they exist" (citation omitted)).

64. *See id.* The increase in divorce and the changing family structure makes this more common. Children may be facing the stress of divorcing parents, new stepparents, step-siblings, different neighborhoods, and different schools. As other people come in and out of the children's lives, the grandparents remain.

65. *See id.* at 275.

66. *See* Barranti, *supra* note 27, at 346–48. "In the absence of a grandparent/grandchild relationship, it has been suggested that children experience a deprivation of nurturance, support and emotional security." *Id.* at 346–47 (citations omitted). Further it may result in a "lack of cultural and historical sense of self...[and create difficulty in a child's] attempt to resolve the developmental crises of ego identity." *Id.* at 347–48 (citations omitted). Just the fact that the grandparents are around can be important for the child. *See* Silverstein et al., *supra* note 32, at 148.

While we are learning more about the benefits of the grandparent/grandchild relationship, little is known about the costs of permitting legal disputes between grandparents and parents, placing grandchildren in the middle. *See* Aldous, *supra* note 4, at 233. These disputes may be subject to biases that may infect the decision-making process, such as courts being more likely to grant visitation to paternal grandparents when mothers have custody, but according greater deference to the objections of custodial fathers to visits by maternal grandparents. *See id.*

67. *See* Barranti, *supra* note 27, at 350.

contingent on the various stages and crises of family life.[68] Grandparents may give additional support for grandchildren when there is a divorce.[69] One study indicated an increase in contact between grandparents and grandchildren post separation or divorce.[70] Grandparents also often will provide additional financial support.[71] Grandparents are more likely to give advice to their grandchildren as they are going through the emotional turmoil of divorce.[72] Grandparent support can provide a cushion for everyone concerned who is facing family and societal pressures.[73] By being a bridge between the generations, grandparents provide a vision of the future, a knowledge of the past and the stability of continuity within the family and community.[74]

Events such as a divorce in the family shape the grandparent/grandchild relationship,[75] but there are other variables as well. As recent empirical research has shown, it is dangerous to stereotype or overgeneralize.[76] Indeed, grandparents are very heterogeneous and are likely to become more so in the future.[77] There are significant cultural, ethnic, and gender variations.[78]

Grandparent/grandchild relationships are undoubtedly important. Instead of stereotypes and sentimental generalizations, however, a more tailored approach is necessary. One size definitely does not fit all. Whatever the advantages to grandparents and to society, the early cases appropriately focused on whether visitation would benefit the child.[79]

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68. *See* Szinovacz, *supra* note 24, at 15.

69. *See* Gladstone, *supra* note 30, at 71.

70. *See id.* at 67–69. Several factors influenced contact between grandparent and grandchild; one was geographic proximity. *See id.* at 70. The closer they lived to each other, the more they saw each other. *See id.* Additionally, parents of the custodial parent saw their grandchildren more. *See id.* However, there was sometimes an increase in contact between grandparent and grandchild when the child-in-law was custodian. *See id.*

71. *See id.* at 68.

72. *See id.* at 71.

73. *See* Barranti, *supra* note 27, at 350.

74. *See id.* Grandparents also have a stake in this relationship. *See id.* at 349. As we get older, we often experience losses, and the grandparent/grandchild relationship can help grandparents handle this part of their lives. "[G]randparents who participate and identify with the role of grandparent develop an increased sense of well-being and morale in the face of otherwise demoralizing personal, social, and material losses." *Id.* Grandparenthood also helps continue the development of self-identity and social role. *See id.*

75. *See* Tomlin, *supra* note 53, at 164.

76. *See* Szinovacz, *supra* note 24, at 13, 18–20.

77. *See* Szinovacz, *supra* note 24, at 12–14.

78. *See generally* Andrea G. Hunter & Robert J. Taylor, *Grandparenthood in African American Families*, *in* HANDBOOK ON GRANDPARENTHOOD 70 (Maximiliane E. Szinovacz ed., 1998); Yoshinori Kamo, *Asian Grandparents*, *in* HANDBOOK ON GRANDPARENTHOOD 97 (Maximiliane E. Szinovacz ed., 1998); Glenna Spitze & Russell A. Ward, *Gender Variations*, *in* HANDBOOK ON GRANDPARENTHOOD 113 (Maximiliane E. Szinovacz ed., 1998); Norma Williams & Diana J. Torrez, *Grandparenthood among Hispanics*, *in* HANDBOOK ON GRANDPARENTHOOD 87 (Maximiliane E. Szinovacz ed., 1998).

79. *See infra* notes 80–129 and accompanying text.

III. GRANDPARENT VISITATION: PRE-*TROXEL*

*A. Pre-*Troxel *State Court Decisions Regarding Grandparent Visitation Absent a Statute*

State courts have been examining the question of grandparent visitation for decades. In the early part of the twentieth century there were no statutes permitting grandparents to petition for visitation. Nonetheless, courts took four different approaches when deciding questions of grandparent visitation over parental objections. First, if there was a pending action involving the child, the court may have allowed the grandparents standing to pursue visitation, and, in the course of evaluating the particular facts, ordered such visitation. Second, in limited circumstances, courts granted standing and visitation to grandparents even when there was no other matter before the court. Third, some courts granted standing to grandparents to seek visitation with their grandchildren and then conducted a best interests analysis to determine if the visitation was warranted over parental objections.[80] These courts considered a variety of factors in making the substantive determination of whether to grant visitation, although the overriding legal criterion was and is the best interests of the child, a standard that is susceptible to varying interpretations.[81] Lastly, when there was no statute, courts denied grandparents

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80. *See* Geri v. Fanto, 361 N.Y.S.2d 984, 987–89 (N.Y. Fam. Ct. 1974) (concluding that, although paternal grandparents had standing to bring suit requesting visitation, the hostility and enmity between the mother, stepfather, who adopted the children, and the grandparents prompted the court to determine that visitation was not in the best interests of the children); Commonwealth *ex rel.* McDonald v. Smith, 85 A.2d 686, 687–88 (Pa. Super. Ct. 1952) (asserting that visitation requested by paternal grandparents was not in the best interests of the child because the extreme antipathy and lack of cooperation between the parties would incite rivalry between the parties for the child's sympathy and love and cause her harm).

81. The best interests of the child constitute the determining factor for visitation in all states. *See* ALA. CODE §§ 30-3-1, 30-2-40(e) (2000); ALASKA STAT. § 25.24.150(a), (c) (Michie Supp. 2000); ARIZ. REV. STAT. ANN. § 25-403(A) (West 2000); ARK. CODE ANN. § 9-13-101(a)–(b) (Michie 2000); CAL. FAM. CODE § 3040 (Deering 2000); COLO. REV. STAT. § 14-10-124 (Supp. 2001); CONN. GEN. STAT. ANN. § 46b-56b (West 1995); DEL. CODE ANN. tit. 13, § 722 (2000); FLA. STAT. ANN. § 61.13(2)(b), (3) (West 1997 & Supp. 2000); GA. CODE ANN. § 19-9-3(a)(2) (2000); HAW. REV. STAT. ANN. § 571-46(1) (Michie Supp. 2000); IDAHO CODE § 32-717 (Michie Supp. 2000); 750 ILL. COMP. STAT. ANN. 5/602 (West 2000); IND. CODE ANN. § 31-17-2-8 (Michie 2000); IOWA CODE § 598.41(1)(a) (2001); KAN. STAT. ANN. § 60-1610(a)(3) (2000); KY. REV. STAT. ANN. § 403.270 (Michie 2001); LA. CIV. CODE ANN. art. 131 (West 1999); ME. REV. STAT. ANN. tit. 19-A, § 1653.3 (West 1999); MD. CODE ANN., FAM. LAW §§ 5-203, 9-105(b), 9-202 (1999); MASS. GEN. LAWS ANN. ch. 208, § 28 (West 2001); MICH. COMP. LAWS ANN. § 722.23 (West 2001); MINN. STAT. ANN. § 518.17(1)(a) (West 2000); MISS. CODE ANN. § 93-5-24 (2001); MO. ANN. STAT. § 452.375(2) (West 2000); MONT. CODE ANN. § 40-4-212 (2001); NEB. REV. STAT. § 42-364 (2001); NEV. REV. STAT. 125.480 (2001); N.H. REV. STAT. ANN. § 458:17 (2000); N.J. STAT. ANN. § 9:2-4(c) (West 2000); N.M. STAT. ANN. § 40-4-9 (Michie 2001); N.Y. DOM. REL. LAW § 240.1(a) (McKinney 2001); N.C. GEN. STAT. § 50-13.2(a)–(b) (2000); N.D. CENT. CODE § 14-09-06.1 (2001); OHIO REV. CODE ANN. § 3109.04(B)(1) (Anderson 2001); OKLA. STAT. ANN. tit. 43, § 109 (West 2001); OR.

standing to request visitation with their grandchildren and never reached the substantive question of whether or not the visitation was in the child's best interests.[82]

1. Granting Grandparents Standing to Seek Visitation When Another Matter Is Pending Before the Court

Benner v. Benner,[83] a California case, presents a typical scenario of the court granting standing to a grandparent to pursue visitation because the court already has a matter concerning the child before it.[84] In *Benner*, the court in a divorce proceeding originally awarded custody of the child to the mother, but she disappeared, leaving the girl to live with the maternal grandmother for approximately three years.[85] The father then obtained custody, and in that action, based on a stipulation between the parties, the court ordered that the grandmother have visitation.[86] The father apparently changed his mind and appealed the orders.

REV. STAT. § 107.137(1)–(2) (1999); 23 PA. CONS. STAT. ANN. § 5303(3)(d) (West 1991 & Supp. 2001); R.I. GEN. LAWS § 15-5-16(d) (2000); S.C. CODE ANN. § 20-3-160 (Law. Co-op. 2001); S.D. CODIFIED LAWS § 25-4-45 (Michie 1999); TENN. CODE ANN. § 36-6-106(a) (2000); TEX. FAM. CODE ANN. § 153.002 (Vernon 1996); UTAH CODE ANN. § 30-3-10(1)–(2) (2000); VT. STAT. ANN. tit. 15, § 665(a)–(b) (1989 & Supp. 2001); VA. CODE ANN. § 20-124.3 (Michie 2000); WASH. REV. CODE ANN. § 26.09.002 (West 1997); W. VA. CODE § 48-11-102 (1999); WIS. STAT. ANN. § 767.24(2)(a) (West 1993 & Supp. 2000); WYO. STAT. ANN. § 20-2-201 (Michie 2001).

82. *See* Odell v. Lutz, 177 P.2d 628, 629 (Cal. Ct. App. 1947) (declaring that the court lacks the power to require parents to permit visitation by grandparents as a grandparent is no different than any other third party when the parents have custody and are fit, despite the fact that the grandparent/grandchild relationship may be valuable); Browning v. Tarwater, 524 P.2d 1135, 1139–40 (Kan. 1974) (declaring that, when the mother's second husband adopted her child, the paternal grandmother has no claim to visitation as the adoption proscribes any such rights because the child has a new legal family which does not include the paternal grandmother); Noll v. Noll, 98 N.Y.S.2d 938, 941 (N.Y. App. Div. 1950) (holding that the trial court had no authority to grant paternal grandparents visitation with their grandchildren when the mother is averse to the visitation); Shriver v. Shriver, 219 N.E.2d 300, 302–03 (Ohio Ct. App. 1966) (declaring that there is no statute allowing the court to grant grandparent visitation with their grandchildren, even when the natural parent is unable to fulfill his rights, as the custodial parent has the singular right to decide on visitation); Green v. Green, 485 S.W.2d 941, 941–42 (Tex. Civ. App. 1972, writ ref'd n.r.e.) (concurring that paternal grandparents may not be awarded visitation rights in the absence of a statute to support the view that visitation should be in the best interests of the child); Smith v. Painter, 408 S.W.2d 785, 786 (Tex. Civ. App. 1966, writ ref'd n.r.e.) (reasoning that, when there is contention between parents and grandparents, the parents exclusively determine any visitation and that, by law, grandparents have no "right of action").

83. 248 P.2d 425 (Ct. App. 1952).

84. *See also* Bookstein v. Bookstein, 86 Cal. Rptr. 495 (Ct. App. 1970).

85. *See Benner*, 248 P.2d at 425.

86. *See id.* The father was fit and entitled to custody, but based on other factors, the court felt the maternal grandmother should have visitation. *See id.* at 426. "[T]he court had the power,...to make an order which from all the facts appeared to be for the best

He claimed that the trial court did not have jurisdiction to grant visitation because the grandmother was not a party to the custody suit.[87] The California appellate court, however, found that the trial court did have jurisdiction over the child and father, and had "the responsibility of determining what was for the best interest of the child."[88] Therefore, the order was legitimate even absent the stipulation because it was based on the child's best interests "without regard to the personal feelings and desires of the father."[89] Thus, although the court was faced with two questions—the threshold issue of whether to allow the grandmother to petition for visitation,[90] and the subsequent substantive issue of what was in the best interests of the child[91]—it never explicitly addressed the standing question, looking only at the child's best interests.

The *Benner* ruling was not broad; there was already a pending action giving the court jurisdiction over the child independent of the visitation request.[92] This may have been the reason that the court did not struggle with the standing matter. As to the substantive issue, the consideration clearly driving the court was the child's close bond with the grandmother and the familiarity of the grandmother's home.[93] The decision relating to visitation was thus based on the particular facts of the case. If the bond between the child and grandmother had not been as strong, the court may not have reached the same substantive conclusion.[94] The court acknowledged that parental unfitness was not demonstrated, but found that not to be an impediment because the claim was for visitation rather than for custody.[95]

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interest and welfare of the child...." *Id.* The child was of a young age (4 ½) and had lived with the grandmother for about three years. *See id.*

87. *See id.*

88. *Id.*

89. *Id.*

90. *See id.*

91. *See id.*

92. *See id.* at 425.

93. *See id.* at 426 (considering, among other things, the absence of the child's mother, the child's age, that the child had lived with the grandmother for approximately three years, and the father's remarriage and home situation).

94. Other courts agreed with this decision. In *Kewish v. Brothers*, 181 So. 2d 900 (Ala. 1966), the court found that the trial court was correct in granting the grandparents visitation as the child had lived with the grandparents for eight years, was of a young age and had a close bond to the grandparents. *See id.* at 902. Although the father was fit and was given custody, the grandparents were entitled to continue visiting with the child as it was in her best interests. *See id.* at 901.

95. *See Benner*, 248 P.2d at 426. Typically courts apply a higher standard when determining questions of custody as compared to visitation issues. *See infra* notes 246–248 and accompanying text.

2. *Courts Grant Grandparents Standing When There Is No Other Matter Regarding the Child Before the Court*

Lucchesi v. Lucchesi,[96] decided by the Illinois courts, is a more avant garde decision. The parents had divorced in 1942, and the mother was granted custody of their daughter.[97] The father was permitted reasonable visitation.[98] Two years later, the father was killed in action in World War II.[99] The paternal grandparents filed a petition in 1946, alleging that the mother had not allowed them to visit with their grandchild since their son's death.[100] The petitioners requested "the privilege of spending some time with [the] child," and agreed not to interfere "with the usual customs, practices and habits of the said child."[101] The mother claimed that granting the petitioners visitation would interfere with her rights as the natural mother and that, in any event, it would not be in the best interests of the child.[102]

Notwithstanding the lack of a statute authorizing grandparents to petition for visitation, the trial court explicitly decided that they had standing, and then proceeded to allow the grandparents to spend time with the child on the ground that it would be in her best interests.[103] The appellate court agreed with the mother that "[d]epriv[ing] worthy parents of their natural right to the custody of their children, where they have not forfeited that right,...undermine[s] the home."[104] Paradoxically, however, the court found that the grandparents should nonetheless be allowed to visit the child, albeit only in the mother's home.[105] The court distinguished this ruling from its earlier decision in *Kulan v. Anderson*,[106] in which it had denied a relative access to a child because of parental objection. In *Lucchesi*, said the court, the grandparents were asking only to *visit* with the child, whereas the aunt in *Kulan* was granted *custody* for specific times to visit with the child

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96. 71 N.E.2d 920 (Ill. App. Ct. 1947).

97. *See id.* at 920.

98. *See id.*

99. *See id.*

100. *See id.*

101. *Id.* at 921 (quoting the grandparents' petition).

102. *See id.*

103. *See id.*; *see also supra* notes 42–78 and accompanying text (discussing the bond between grandparents and grandchildren). However, the court still granted the grandparents limited access, allowing them to pick the child up twice a month, once for church services and once to go to the "public park or theatre or other place of amusement which may cater to minors." *Lucchesi*, 71 N.E.2d at 921.

104. *Lucchesi*, 71 N.E.2d at 922 (quoting Kulan v. Anderson, 20 N.E.2d 987, 991 (Ill. App. Ct. 1939)). The court viewed the limited time the grandparents would have to visit with the child an intrusion on the parent's custody. *See id.* It was not a matter that the grandparents had no right to see the child at all or that only the parent could determine who the child could see, but rather the court viewed ordering visitation between the grandchild and grandparents an interference with the parent's custody of the child. *See id.*

105. *See id.*

106. 20 N.E.2d 987 (Ill. App. Ct. 1939).

outside the father's home.[107] Thus, the *Lucchesi* court separated the issues of what it called custody and visitation, clearly establishing a lower standard for visitation,[108] a distinction that could easily be circumvented by strategic drafting of the complaint.[109]

The *Lucchesi* decision was progressive in another way as well. It granted standing to the grandparents absent any pending action involving the child. It was more common at that time for courts to give grandparents standing to petition for visitation, even absent a statute, if the court had jurisdiction over the child in a pending divorce or custody suit.[110]

3. Grandparents Are Granted Standing To Seek Visitation and the Courts Make a Best Interests Determination

During the quarter of a century following the *Lucchesi* decision in 1947, even though states still had not passed laws permitting grandparents to petition for visitation, a substantial number of courts continued to grant standing and award visitation if the best interests of the child would be served. For example, in *Weichman v. Weichman*,[111] the Wisconsin Supreme Court found that it too had the power to grant standing to grandparents even in the absence of legislation, reasoning as follows:

> There is no statutory or common law rule which forbids a court...from granting visitation rights to...others. The question is not one of the power of the court but of judgment or of judicial

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107. *See Lucchesi*, 71 N.E.2d at 922. The court distinguished the two cases because the aunt in *Kulan* had time with the child separate and apart from the father and outside the home. This is not what is customarily thought of as custody. Rather, courts look at custody as an individual making decisions about the child's well being and having the child for extended periods of time. *See e.g.*, TEX. FAM. CODE ANN. § 152.102 (Vernon 1999) (stating that "legal custody" allows the managing conservator to make decisions regarding the upbringing of the child and "physical custody" is the physical care and supervision of the child, while "visitation" is access to the child).

108. *See Lucchesi*, 71 N.E.2d at 922 (stating that "justice and humanity demand that some differentiation be made between the right of custody and the privilege of visitation"). The court made it very clear it was only granting the grandparents visitation and not any form of custody. *See id.* Since they were ordering visitation only, the court stated the visitation should occur in the home of the mother at reasonable times. *See id.* This could appear to interfere with the mother's right to privacy and her right to decide who her child sees and the length of such interaction.

109. The court viewed the grandparents' request as visitation because in the petition they only asked to spend some time with the child, not necessarily out of the home. *See id.* at 921. In *Kulan*, however, the aunt asked for more time and was granted time outside the home and the father's care. *See id.* at 922. The court at that time viewed the aunt's request as custody and the grandparents' as visitation because it could be ordered in the mother's home and with the mother present. *See id.*

110. This is still true today. Most statutes permit the granting of visitation when a suit concerning the child is pending before the court. *See supra* note 20 and accompanying text.

111. 184 N.W.2d 882 (Wis. 1971).

> discretion.... [I]t is not necessary [that] the grandparents or other relatives be formal parties to the divorce suit. The court is not directly concerned with them but only indirectly in reference to what is the best interest of the child who is before the court.[112]

The wrinkle in Weichman was that the trial court had awarded grandparent visitation simply because the father, who was in the military and unable to see his children, requested it.[113] The mother opposed the visitation.[114] The appellate court concluded that even parents are not automatically granted visitation, and *a fortiori* they cannot pass on that which they do not possess to other parties.[115] The court remanded the matter to the trial judge for a proper hearing on the merits to decide whether the grandparents should be entitled to visit.[116]

> The underlying principle...is...the best interest and welfare of the child.... [V]isitation rights are not dependent upon the fitness or unfitness of the parents but upon whether the welfare of the child requires [him or her] to see and visit members of the family to which [he or she] belongs.[117]

Thus, the trial court was still free to grant visitation, as the father requested, but only if it were "an informed judgment."[118]

Further clarifying the distinction between standing and the substantive issue of the child's best interests, some courts, although granting standing to grandparents to seek visitation with their grandchildren, denied visitation after a hearing on the merits. Thus, in a Pennsylvania decision, *Commonwealth ex rel. Flannery v. Sharp*,[119] the trial court's order granting visitation between the child and the paternal grandparents was reversed. The appellate court found that the visitation would not be in the child's best interests because there was strong conflict between the mother and the paternal grandparents, the child was unwilling to visit with them, and the child manifested several illnesses due to the conflicts among the adults.[120] The court stated that although the grandparents had strong affection for the child, this "cannot be permitted to interfere with [his] best interest and future welfare."[121] Neither the mother nor the court ever questioned the grandparents' right to petition for the visitation, even absent a statute.[122] The court

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112. *Id.* at 884–85.
113. *See id.* at 883.
114. *See id.*
115. *See id.* at 885.
116. *See id.* at 885–86.
117. *Id.* at 884 (citation omitted).
118. *Id.* at 885–86. The court also suggested that a guardian ad litem be appointed for the children. *See id.* at 886. There was animosity between the two families and it was important for the children's interests to be protected. *See id.* at 885–86.
119. 30 A.2d 810, 812 (Pa. Super. Ct. 1943).
120. *See id.*
121. *Id.*
122. *See id.* at 811.

went straight to the substantive issue of whether continued visitation would be in the child's best interests.[123]

4. No Statute, No Standing

On the other hand, absent legislative authorization, some courts were reluctant even to grant standing to grandparents to petition for visitation. In *Ex parte Bronstein*,[124] an Alabama case, the paternal grandparents were seeking visitation with their grandchildren, who were in the custody of the mother.[125] The stepfather had adopted the children, and both he and the mother opposed grandparent visitation.[126] Since the Alabama court had terminated the rights of the biological father in the adoption proceeding, the *Bronstein* supreme court found that the grandparents' rights were also terminated.[127] Additionally, because there was no statute providing that grandparents could ask for visitation and the common law did not permit grandparents access against the parents' wishes,[128] the court explicitly urged the legislature to correct the situation.[129]

Thus, during this period from the 1950s to the 1970s, if there was no statute, the courts were split as to whether to give grandparents standing to petition for visitation even where the court had jurisdiction over the child in an independent proceeding such as divorce or custody. Where there were no such pending proceedings, the majority of courts disallowed standing.[130] Furthermore, even where the courts allowed standing, they sometimes denied visitation on the ground that it was not in the child's best interests.[131] In the few jurisdictions in which statutes had been enacted, the courts, of course, granted standing and would often award visitation even over parental objections.[132] Clearly, therefore, statutory approval was a strong factor in the furtherance of grandparents' rights.

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123. *See id.* at 812.

124. 434 So. 2d 780 (Ala. 1983).

125. *See id.* at 781.

126. *See id.*

127. *See id.* at 782.

128. *See id.* at 783.

129. *See id.* at 784 (Shores, J., concurring). "Precious little remains of the family structure.... It seems unconscionable to allow its further fragmentation." *Id.*

130. *See, e.g.*, Spitz v. Holland, 252 S.E.2d 406 (Ga. 1979) (holding that grandparents had no standing to bring action for visitation when there was no action pending and the grandparents had no existing right to custody). *But see, e.g.*, Lucchesi v. Lucchesi, 71 N.E.2d 920 (Ill. App. Ct. 1947); *see also supra* notes 99–110 and accompanying text.

131. *See, e.g.*, Kay v. Kay, 65 Ohio Law Abs. 472 (Ohio Ct. Com. Pl. 1953) (finding a court may not grant visitation rights to grandparents, or anyone else, unless such visitation is in the best interests of the children and in this case the court held visitation was not in the child's best interests because the child returned from visits "confused and disturbed").

132. *See, e.g.*, Mimkon v. Ford, 332 A.2d 199 (N.J. 1975) (holding that the grandparents had standing to sue for visitation under the grandparent visitation statute and that such visitation had been determined to be in the child's best interests even though the parents opposed such visitation).

B. The Legislatures Respond: Grandparent Visitation Statutes and the Case Law Interpreting These Statutes

Starting in the early 1960s, legislatures began passing statutes that permitted grandparents to seek visitation. Judicial pressure, lobbying from various interest groups, and the changing structure of the family initiated these changes. These statutes set forth standards for determining the substantive issue of whether to grant visitation.[133] By the mid-1990s, every state had a visitation statute, and, expectedly, such legislation varied greatly.[134]

All states gave grandparents standing to petition if there was some interruption in the family unit, such as a pending custody suit or the death of a parent.[135] While others were broader and allowed intervention even if the family was intact and no other suit was pending. Under a few statutes, grandparents were able to bring an action only if they had been refused visitation by the parent.[136]

With respect to the substantive issue, most statutes merely set forth a conclusory "best interests" standard.[137] Others opted to include a list of specific

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133. *See* Aldous, *supra* note 4, at 232.

134. *See id.*

135. *See, e.g.*, ARIZ. REV. STAT. § 25-409 (1993) (stating that the court may grant visitation only if parents are divorced at least three months, a parent of the child is deceased or missing at least three months, or the child is born out-of-wedlock); IND. CODE ANN. § 31-1-11.7-2(a) (Michie 1993) (granting visitation if the child's parents are deceased, the marriage of the parents was dissolved in Indiana, or the child was born out-of-wedlock); KAN. STAT. ANN. § 38-129 (1993) (granting visitation if the child is adopted by the surviving parent's spouse); MICH. STAT. ANN. § 25.312(7b) (Michie 1993) (allowing visitation to biological grandparents in step-parent adoptions); NEB. REV. STAT. § 43-1802 (2001) (granting visitation when the parents are deceased, the marriage is dissolved, or the parents never married but paternity has been established); N.M. STAT. ANN. § 40-9-2(E) (Michie 2001) (allowing visitation in step-parent adoptions to a relative of the grandchild, a person designated in the deceased parent's will, or a person who sponsored the grandchild at a baptism or confirmation conducted by a recognized religious organization).

136. *See, e.g.*, ALA. CODE § 30-3-4(c) (1993) (stating that "[a] grandparent is unreasonably denied visitation with the child for a period exceeding 90 days."); FLA. STAT. ch. 752.01(e) (1993) (granting visitation when the natural parents are still married and either or both have used their parental authority to prohibit a relationship between minor child and grandparent); OR. REV. STAT. § 109.121(1)(a)(B) (1999) (allowing visitation when custodian of child has denied grandparent reasonable opportunity to visit the child).

137. *See* ARK. CODE ANN. § 9-13-103(a)(2) (Michie 2000); CAL. FAM. CODE § 3102(a) (West 2000); COLO. REV. STAT. § 19-1-117(2) (2000); CONN. GEN. STAT. § 46(b)-59 (2000); DEL. CODE ANN. tit. 10, § 1031(7)(a) (1999); GA. CODE ANN. § 19-7-3(c) (2000); HAW. REV. STAT. § 571-46(7) (2000); IDAHO CODE § 32-719 (Michie 2000); 750 ILL. COMP. STAT. 5/607(b)(1) (2000); IOWA CODE § 598.35 (2001); KAN. STAT. ANN. § 38-129(a) (2001); KY. REV. STAT. ANN. § 405.021(1) (Michie 2001); LA. REV. STAT. ANN. § 9:344(A)–(D) (West 2000); MD. CODE ANN., FAM. LAW § 9-102(2) (2001); MASS. ANN. LAWS ch. 119, § 39D (Law. Co-op. 2000); MICH. STAT. ANN. § 25.312(7b)(3) (Michie 2000); MINN. STAT. § 257.022 (2000); MISS. CODE ANN. § 93-16-3(2)(b) (2001); MISS. CODE ANN. 93-16-3(2)(a) (2001) (stating that in addition to best interests the court must also find that there is a "viable relationship" between the grandparent and grandchild and that visitation was unreasonably denied in order to grant visitation, factors which are more

factors to be considered when the court was making the visitation determination.[138] A small minority of states left the decision to the judgment of the trial court with no delineation of factors, without even requiring that visitation be in the child's best interests.[139] Whatever the case, the courts were able to make determinations that often differed from what a fit parent desired. Indeed, none of the statutes made parental unfitness a prerequisite to granting standing or visitation.[140]

Most statutes limited standing to grandparents and great-grandparents.[141] Others included aunts, uncles, siblings, or other blood relatives.[142] Some would allow step-parents or psychological parents to seek visitation.[143] Only one statute,

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likely to be considered in regards to standing rather than the merits); MO. REV. STAT. § 452.402 (2000); MONT. CODE ANN. § 40-9-102(2) (2001); NEB. REV. STAT. § 43-1802(2) (2001); N.H. REV. STAT. ANN. § 458:17-d(II)(a) (2000); N.M. STAT. ANN. § 40-9-2(G)(1) (Michie 2001); N.Y. DOM. REL. LAW § 72 (Consol. 2001); N.D. CENT. CODE § 14-09-05.1 (2001) (visitation rights of grandparents *presumed* to be in best interests of child); OHIO REV. CODE ANN. § 3109.051(1)(c) (Anderson 2001); OKLA. STAT. ANN. tit. 10, § 5(A)(1) (West 1998 & Supp. 2001); OR. REV. STAT. § 109.121(5) (1999); 23 PA. CONS. STAT. ANN. §§ 5311 (when parents deceased), 5312 (when parents' marriage dissolved or parents separated) (West 1991); R.I. GEN. LAWS § 15-5-24.3(a)(2)(i) (2000); S.C. CODE ANN. § 20-7-420(33) (Law. Co-op. 2000); S.D. CODIFIED LAWS § 25-4-52 (Michie 1999 & Supp. 2001); TENN. CODE ANN. § 36-6-302(2)(A) (2000); TEX. FAM. CODE ANN. § 153.433(2) (Vernon 1996 & Supp. 2001); UTAH CODE ANN. § 30-5-2, -3(a) (1995); VT. STAT. ANN. tit. 15, § 1011(a) (1999); W. VA. CODE § 48-2B-5(a) (1999); WIS. STAT. ANN. § 767.245(1) (West 1993 & Supp. 2000); WYO. STAT. ANN. § 20-7-101(a) (Michie 2001).

138. *See* ALASKA STAT. § 25.24.150(c) (Michie 2000); ARIZ. REV. STAT. § 25-409(c) (2000); FLA. STAT. ch. 752.01(1), (2) (2000); ME. REV. STAT. ANN. tit. 19-A, § 1803(3) (West 1999); NEV. REV. STAT. 125C.050(3) (2001); N.J. STAT. ANN. § 9:2-7.1(a) (West 2001); WASH. REV. CODE ANN. § 26.09.240(6) (West 1997) (visitation with grandparents presumed to be in best interests of child)

139. *See* IND. CODE § 31-17-5-1 (2000); N.C. GEN. STAT. § 50-13.2(b)(1) (2000); VA. CODE ANN. § 16.1-241 (Michie 2000 & Supp. 2001).

140. Unfitness only came up when grandparents sought custody. *See* Grandon v. Grandon, 129 N.E.2d 819, 821 (Ohio 1955) (clarifying that a parent, even if not as ideal as the third party to have custody, cannot be denied custody if there is no determination that the mother is not competent to have custody); Ponsford v. Crute, 202 N.W.2d 5, 8 (Wis. 1972) (declaring that precedent and Wisconsin's statute allowing third-parties custody of a minor child depend upon a determination of the parent's unfitness or inability to care for the child).

141. *See, e.g.*, ALA. CODE § 30-3-4 (1993).

142. *See, e.g.*, CAL. FAM. CODE § 3102 (Deering 1994) (allowing for visitation by close relatives where parent of unemancipated minor child is deceased); 750 ILL. COMP. STAT. 5/607(b)(1) (1993) (allowing for visitation to be granted to siblings); LA. REV. STAT. ANN. § 9:344(C) (West 2000) (granting visitation to siblings); MINN. STAT. § 257.022 2b (2000) (governing visitation when child has resided with person other than parent); NEV. REV. STAT. 125C.050 (2001) (allowing visitation for certain relatives, including siblings); N.J. STAT. ANN. § 9:2-7.1 (West 2001) (granting visitation to siblings); N.M. STAT. ANN. § 40-9-2(2) (Michie 2001) (allowing visitation to a relative of the grandchild).

143. *See, e.g.*, CONN. GEN. STAT. § 46b-59 (1995) (allowing "any person" to seek visitation); MINN. STAT. § 257.022 2b (2000) (governing visitation when child has resided with person other than parent); WIS. STAT. ANN. § 767.245 (West 1993 & Supp. 2000) (governing visitation rights of certain persons including step-parents and persons who have maintained a relationship similar to a parent-child relationship with the child).

that of the state of Washington, allowed *anyone* to seek visitation with a child at *any time*.[144]

1. State Courts Interpret Standing Provisions of Grandparent Visitation Statutes

Between the mid-1980s and 2000, when *Troxel* was decided, the state courts responded in a variety of ways to the new legislation. Some courts separated the standing issue from the determination whether visitation should actually be granted because it was in the best interests of the child. For instance, in a recent Arkansas Supreme Court case, *Boothe v. Boothe*,[145] the court found that the grandmother's petition for visitation with her grandchildren should not have been dismissed based on her lack of standing.[146] The statute clearly provided that the grandparent could be awarded visitation if the "marital relationship between the parents of the child has been severed by death, divorce, or legal separation."[147] The grandmother in *Boothe* was the mother of the custodial father, who was denying her visitation.[148] The statute did not limit standing to parents of the noncustodial parent, and it permitted visitation against the parent's wishes.[149] The court remanded the matter for further proceedings in order for the trial court to determine if such visitation would be in the child's best interests, making it clear that standing and the substantive question of best interests of the child were severable issues.[150]

In a similar vein, the case law in Minnesota clearly distinguishes the question of standing from the merits. Minnesota's third-party visitation statute[151] provides a more detailed statutory structure than most state legislation, and it gives considerable guidance to the courts. Thus, in *Olson v. Olson*,[152] the Minnesota Supreme Court overturned the intermediate appellate court's decision denying the grandmother standing, since it was her own daughter who was denying her visitation with the grandchild.[153] The state supreme court noted that the statute

144. *See* WASH. REV. CODE ANN. § 26.10.160(3) (West 1997). Although the Connecticut statute also allowed for anyone to seek visitation with a child, there had to be a matter pending before the request could be made. CONN. GEN. STAT. § 46b-59 (1992). The original Connecticut statute only allowed for grandparents to seek such visitation, but was expanded to include anyone in 1983. 1983 Conn. Pub. Acts 83-95.

145. 17 S.W.3d 464 (Ark. 2000).

146. *See id.* at 467.

147. *Id.* at 466 (citing ARK. CODE ANN. § 9-13-103).

148. *See id.* at 465.

149. *See id.* at 466.

150. *See id.* at 466. The court never discussed the constitutionality of the statute since the issue was not raised in the appeal. The father had initially challenged the grandmother's petition for visitation on the grounds that the statute was unconstitutional, interfering with his parental rights. *See id.* at 465. The trial court dismissed his motion and the father failed to raise the issue again when the matter was heard by the appellate courts. *See id.* at 465.

151. *See* MINN. STAT. ANN. § 257.022(2) (West 1992).

152. 534 N.W.2d 547 (Minn. 1995).

153. *See id.* at 550.

provided a three prong test to be met by the party seeking visitation.[154] The first prong related to the standing issue. The party seeking visitation must be a parent or grandparent of a party to the dissolution of the marriage.[155] The court found that the language was clear and, as in Boothe, did not limit standing only to parents of the noncustodial parent.[156] Therefore, the grandmother had standing.[157]

The second prong was whether the visitation would be in the child's best interests.[158] The court acknowledged that the trial judge has broad discretion in determining the best interests of the child, pointing out that one factor for the court to consider in making this determination was the amount of prior contact between the grandparent and grandchild.[159] In this case, the grandmother and grandchild had previously had ongoing contact, and the grandchild was "distressed about the loss of [the] relationship...and misse[d] her [grandmother]."[160] Therefore, the court concluded that the grandmother also met the second prong.[161]

The final prong was that the visitation should not interfere with the parent/child relationship.[162] Although the court found that the trial judge did not specifically refer to this prong, it determined that there were enough facts in the record to conclude that visitation would not interfere with the parent/child relationship.[163] The state supreme court noted that the father supported the grandmother's visits.[164] Furthermore, the trial judge had ordered that neither party make any negative comments about the other in front of the child.[165]

Other state court decisions interpreting the visitation statutes have not addressed the standing issue separately. Instead, these courts conflate the issues of standing and the merits, and generally ignore the former. For example, the New York Court of Appeals in *Emanuel S. v. Joseph E.*[166] found that the trial court

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154. *See id.* at 549.

155. *See id.* at 549–50.

156. *See id.*

157. *See id.* at 550.

158. *See id.*

159. *See id.*

160. *Id.*

161. *See id.* Making a decision to grant visitation to a third party is different from a custody determination involving a third party. *See In re* Gibson, 573 N.E.2d 1074 (Ohio 1991) (explaining that custody and visitation are separate legal theories; custody dwells in a party obligated to exercise legal and physical control of the child while visitation awards the right to visit the child to a non-custodial party who lacks the ability to make integral judgments in the child's interests).

162. *See Olson*, 534 N.W.2d at 550.

163. *See id.* at 550–51.

164. *See id.* at 550. In fact, the father allowed the grandmother to visit during his visits. *See id.* at 548 n.1.

165. *See id.* at 548 n.2, 550. The court also did not want to remand the case because it felt the child was entitled to finality and remanding it would just prolong the inevitable. *See id.* at 550–51. However, the fact that the judge had to order the parties not to make disparaging remarks about each other could be a warning sign that the conflict between the parties was too great and visitation might not be in the child's best interests.

166. 577 N.E.2d 27 (N.Y. 1991).

should first have determined if the grandparents had standing prior to awarding them visitation.[167] The grandparents petitioned the court under a New York statute which permitted grandparents to sue for visitation when the grandparents' child had died or "where circumstances show that conditions exist which equity would see fit to intervene."[168] By awarding the visitation without considering under what circumstances the equitable clause of the statute would be applied, the trial court collapsed the issues of standing and granting visitation on the merits.[169] The matter was remanded to the trial court for a standing determination.[170]

2. State Courts Determine Constitutionality of Grandparent Visitation Statutes Based on Federal and State Constitutions

Still other pre-*Troxel* cases interpreting state statutes focused on the right of fit parents' to raise their children as they wished, including in some instances that the award of visitation to grandparents was unconstitutional. Thus, in *Hawk v. Hawk*,[171] the Tennessee Supreme Court found that, based on the state constitution, the visitation statute was unconstitutionally applied.[172] The grandparents in this case were refused visitation by parents of an intact marriage.[173] There was disagreement between the parents and grandparents regarding the discipline of the children.[174] The state supreme court stated two rationales for its holding. First, the parents possessed the fundamental right to raise their children as they saw fit.[175] Second, and bearing a close relationship to the first point, was the fact that absent a finding of unfitness, the state could not interfere with the right of parental primacy and could not find that it would be in a child's best interests to overrule the parents' decision regarding visitation with third parties.[176] Additionally, since there would be no harm to the children by refusing the grandparents visitation, the state did not have the right to interfere with a fit parent's decision.[177] The court went on to state that, since a showing of harm to the child must be made to allow the state to remove a child in dependency proceedings or to change custody from the parents, this should also be the standard when allowing third party visitation against parental wishes.[178]

Although the court stated that grandparents should not have the right to sue for visitation when the family was intact,[179] a standing issue, the analysis was based on the substantive question of who should determine what was in the best

167. *See id.* at 30.
168. *Id.* at 28 (citations omitted).
169. *See id.* at 29–30.
170. *See id.* at 30.
171. 855 S.W.2d 573 (Tenn. 1993).
172. *See id.* at 575.
173. *See id.* at 575–76.
174. *See id.* at 575.
175. *See id.* at 577.
176. *See id.* at 579.
177. *See id.*
178. *See id.* at 580.
179. *See id.* at 579.

interests of the child.[180] The trial judge was mistaken when he imposed his own opinion and values over those of the parents.[181] "[W]ithout a substantial danger of harm to the child, a court may not constitutionally impose its own subjective notions of the 'best interests of the child' when an intact, nuclear family with fit, married parents is involved."[182] Thus, the Tennessee court, like the state court in *Emanuel S.*, did not clearly delineate between standing and best interests.

Compare the decision in *Hawk* to *King v. King*,[183] where the Kentucky Supreme Court in a similar fact pattern found the grandparent visitation statute to be constitutional and upheld the award of visitation.[184] The court found that, although the Fourteenth Amendment does provide parents with the right to raise their children as they see fit, this is not an absolute right.[185] To protect the child's welfare, the state as *parens patriae* can interfere with parental autonomy when it is in the child's best interests.[186] The court noted that over the years the legislature had passed statutes "guaranteeing the safety, education, and the physical and emotional welfare of children."[187] Furthermore, the legislature limited third party visitation to grandparents, and the courts had narrowly interpreted the statute to allow visitation only by grandparents and not other third parties.[188]

In other words, the court found that the "statute [sought] to balance the fundamental rights of the parents, grandparents and the child."[189] It is reasonable for a state to pass legislation that will help prevent "a petty dispute between a father and son...[from] depriv[ing] a grandparent and grandchild of the unique relationship that ordinarily exists between those individuals."[190]

The court concluded that the parents' rights were protected because visitation could not be ordered without a hearing finding the visitation to be in the best interests of the child, and that "there were two hearings and a psychological evaluation of all the parties before the trial court entered its decree."[191] The court gave several reasons that visitation was in the best interests of the child including that the grandfather's home was safe, no question was raised regarding the care the grandfather would provide, a relationship had existed between the granddaughter and grandfather, and the father had stated that the grandfather loved the child and could care for her.[192]

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180. *See id.* at 582.
181. *See id.*
182. *Id.* at 579.
183. 828 S.W.2d 630 (Ky. 1992).
184. *See id.* at 632–33.
185. *See id.* at 631–32.
186. *See id.*
187. *Id.* at 631.
188. *See id.* at 632. Previous decision had denied great-grandparents the right to sue for visitation. *See id.*
189. *Id.*
190. *Id.*
191. *Id.* at 632–33.
192. *See id.* at 633.

In the *King* decision, the court bifurcated its analysis. First, it determined that the statute itself was constitutional and that grandparents did have the right to sue for visitation regardless of the parents' wishes.[193] Second, the court evaluated whether visitation, under the facts in this case, was appropriate and in the child's best interests.[194] The court affirmed the trial judge's decision ordering the visitation because it agreed that the visitation specified in the order was in the child's best interests.[195]

Thus, during the 1980s and 1990s a body of state law came into being that interpreted the various grandparent visitation statutes that the legislatures had instituted. Additional decisions were informed by federal and state constitutional concerns relating to parental rights—concerns that were voiced more extensively than in earlier eras. It was in the context of this rather extensive statutory and case law development that the United States Supreme Court agreed to decide *Troxel v. Granville.*[196]

IV. THE *TROXEL* CASE

A. State Court Litigation

Tommie Granville and Brad Troxel entered into an intimate relationship and lived together sporadically from 1988 to 1991.[197] When they began the relationship, Tommie was separated from her husband and was caring for three children from that marriage.[198] Tommie and Brad had two children, Natalie, born November 1989 and Isabelle, born in December 1991.[199] Prior to Isabelle's birth, Tommie and Brad parted,[200] and he moved in with his parents, Jennifer and Gary Troxel.[201] Tommie entered into a parenting plan[202] with Brad that allowed him

193. *See id.* at 632.
194. *See id.* at 632–33.
195. *See id.* at 633.
196. Troxel v. Granville, 530 U.S. 57 (2000), *cert. granted*, 527 U.S. 1069 (1999).
197. *See* Brief for Respondents at 8, Troxel v. Granville, 530 U.S. 57 (2000) (No. 99-138).
198. *See id.*
199. *See id.*
200. *See id.*
201. *See In re* Troxel, 940 P.2d 698, 699 (Wash. Ct. App. 1997); *see also* Brief for Petitioners at 2, Troxel v. Granville, 530 U.S. 57 (2000) (No. 99-138).
202. *See* Brief for Petitioners at 2, *Troxel* (No. 99-138). "A parent seeking a temporary order relating to parenting shall file...a proposed temporary parenting plan..." which the other parent may contest by filing a responsive plan. WASH. REV. CODE ANN. § 26.09.194 (West 1997). The court may either hold a hearing or enter an agreed temporary parenting agreement. *See* § 26.09.194. The temporary parenting plan entered by the court must include (1) a schedule for the child's time with each parent; (2) designation of the child's temporary residence; (3) allocation of decision-making authority; (4) temporary support provisions; and (5) restraining orders, if applicable. *See* § 26.09.194. If the plan does not allocate decision-making authority, neither parent may make decisions other than

regular visitation with his children every other weekend.[203] As Brad was living with his parents, he exercised his visitation rights in their home.[204] In this way, Jennifer and Gary Troxel were able to spend time with their grandchildren[205] and maintained a close relationship with them.[206] In other words, the bond between the Troxels and their grandchildren arose in typical fashion.[207]

In May 1993, Brad Troxel committed suicide.[208] Natalie was four at the time and Isabelle was two.[209] This was obviously a difficult time for all parties. The Troxels had lost one of their children.[210] Isabelle and Natalie had lost their father.[211] Tommie Granville also lost someone she had cared about at one time and who was the father of two of her children.[212] After Brad's suicide, Tommie received help and support from the Troxel family.[213] Brad's siblings helped take care of Natalie and Isabelle,[214] giving everyone some time to adjust to the situation.[215] For a while after Brad's death, the grandparents continued to see their grandchildren on a fairly regular basis.[216] The extra help provided by the extended family at a time of crisis is also characteristic of healthy families.[217]

As time passed, Tommie and the children continued to adjust and resumed a normal pattern of living. Tommie entered into a new relationship with Mr. Kelly Wynn, who had two children from a previous marriage.[218] Tommie and

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203. *See* Brief for Petitioners at 2, *Troxel* (No. 99-138).

204. *See In re Troxel*, 940 P.2d at 699; *see also* Brief for Petitioners at 2, *Troxel* (No. 99-138).

205. *See* Brief for Petitioners at 2, *Troxel* (No. 99-138).

206. *See id.*

207. *See supra* notes 42–78 and accompanying text (discussing the bond that children develop with grandparents and other relatives).

208. *See In re Troxel*, 940 P.2d at 699; *see also* Brief for Petitioners at 2, *Troxel* (No. 99-138).

209. Natalie was born on November 1, 1989 and Isabelle was born on December 24, 1991. *See* Brief for Respondents at 8, *Troxel* (No. 99-138).

210. Brad had three siblings who also have children. *See* Brief for Petitioners at 2 n.1, *Troxel* (No. 99-138). The Troxels have eight additional grandchildren. *See id.*

211. *See id.* at 2.

212. *See id.*

213. *See* Brief for Petitioners at 2, *Troxel* (No. 99-138).

214. *See id.*; *see also* Brief for Respondents at 8–9, *Troxel* (No. 99-138).

215. Ms. Granville claimed the siblings only provided day care once a week while she worked. *See* Brief for Respondents at 8, *Troxel* (No. 99-138). However, this still helped during a stressful time.

216. Although Gary and Jennifer Troxel did not seek separate time with their grandchildren, they did see them on a regular basis while their children were caring for them. *See* Brief for Petitioners at 2, *Troxel* (No. 99-138). Ms. Granville knew of this and actually encouraged the visitation. *See* Brief for Respondents at 9, *Troxel* (No. 99-138). She instructed Brad's sister to inform the Troxels that they "were welcome to visit with Natalie and Isabelle." *Id.* After this, the Troxels continued to see the children, asking for visitation at the "spur of the moment." *Id.*

217. *See supra* notes 69–74 and accompanying text (discussing how grandparents can assist families going through divorce).

218. *See* Brief for Respondents at 9, *Troxel* (No. 99-138).

Kelly lived together and attempted to blend the two families.[219] To help accomplish this, Tommie Granville asked the Troxels to limit their requests for visitation to one weekend day a month.[220] Although Tommie was reducing the amount of time that the grandparents could spend with Natalie and Isabelle, she never sought to deny them visitation totally.[221] Gary and Jennifer Troxel were concerned that they would be isolated from the girls' lives and wanted to maintain their previous level of contact with them.[222] The mother, on the other hand, was attempting to build a new family[223] and was concerned that the Troxels were using the girls to replace Brad.[224] Tommie agreed that visitation between the Troxels and the children was appropriate,[225] but she objected to the length of time the Troxels were requesting.[226] These are the facts that led the Troxels to file a petition in the Superior Court of Skagit County in the State of Washington in December 1993.[227] As a result of the petition, the mother halted all contact between the children and Gary and Jennifer Troxel.[228]

At the time the Troxel's petition was filed, Washington had a complex third party visitation scheme, which included the broadest third party visitation laws in the country.[229] The Troxels filed under section 26.10.160 of the Revised

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219. The new family included Natalie and Isabelle, Ms. Granville's three children from her first marriage, Mr. Wynn's two children from a previous marriage, as well as a new child Ms. Granville and Mr. Wynn were expecting. *See* Brief for Respondents at 9, 10 n.4, *Troxel* (No. 99-138).

220. *See* Brief for Respondents at 9, *Troxel* (No. 99-138).

221. At that time Ms. Granville was not seeking to terminate contact. *See* Brief for Respondents at 9, *Troxel* (No. 99-138). Both parties disagree as to events that occurred later. Ms. Granville claims that she continued to provide unsupervised visitation to the Troxels. *See id.* at 10. The Troxels claim that Ms. Granville would not let them see the children at all, even eliminating phone contact. *See* Brief for Petitioners at 2, *Troxel* (No. 99-138).

222. *See* Brief for Petitioners at 1–2, *Troxel* (No. 99-138).

223. *See* Brief for Respondents at 9, *Troxel* (No. 99-138).

224. *See id.* at 10.

225. *See* Brief for Petitioners at 3, *Troxel* (No. 99-138); *see also* Brief for Respondents at 10, *Troxel* (No. 99-138).

226. *See* Brief for Respondents at 9, *Troxel* (No. 99-138). Ms. Granville continued to claim that contact between the children and their paternal grandparents was important. *See id.* She was reluctant to bring up any negative aspects of the visits as she wanted to encourage ongoing contact. *See id.* at 10.

227. The petition requested visitation between the Troxels and their grandchildren. *See* Brief for Petitioners at 3, *Troxel* (No. 99-138).

228. *See* Brief for Petitioners at 2, *Troxel* (No. 99-138). Both parties cite different reasons for the ending of the visits. *See id.* at 2 n.3. This is an example of the costs involved in litigation of family law matters. The emotional toll on the family and the additional pressures and conflicts that arise can often do more damage to the family than any good that comes from the litigation itself.

229. The Washington statute read as follows: "Any person may petition the court for visitation rights at any time including, but not limited to, custody proceedings. The court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances." WASH. REV. CODE ANN. § 26.10.160(3) (West 1993).

Code of Washington, a law permitting "any person" at "any time" to petition the courts for access to the child.[230]

In April 1994, the trial court ordered a temporary visitation schedule pending trial, allowing the Troxels to visit the girls once a month.[231] At that time, visitation was resumed.[232] The full hearing on the petition was held in December 1994. The trial judge granted the Troxels visitation[233] allowing them to see their grandchildren one weekend a month from 4:30 PM on Saturday to 4:30 PM on Sunday.[234] In addition, they were to have the girls for one week in the summer[235] and for a short time on each of the Troxels' birthdays.[236]

Tommie Granville appealed the case to the Washington Court of Appeals.[237] She challenged the Troxels' right to request visitation on two bases: lack of standing,[238] and the facial unconstitutionality of the broad visitation statute.[239] The Washington Court of Appeals found that the Troxels lacked the necessary standing to file a petition requesting visitation with their grandchildren.[240] The majority concluded that, although the language in the statute

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230. § 26.10.160(3).

231. *See* Brief for Respondents at 10, *Troxel* (No. 99-138).

232. *See In re* Troxel, 940 P.2d 698, 699 (Wash Ct. App. 1997). These visits continued to be unsupervised visits. *See* Brief for Respondents at 10, *Troxel* (No. 99-138).

233. *See In re Troxel*, 940 P.2d at 699 (noting that the trial court issued an oral ruling and entered a visitation decree).

234. *See* Brief for Respondents at 11, *Troxel* (No. 99-138). The mother wanted the grandparents to be allowed to visit for only a couple of hours per month. *See In re* Troxel, 940 P.2d at 699. The grandparents had requested entire weekend visits, from Friday night to Sunday night, every other week. *See id.*

235. The Troxels had asked for two weeks in the summer and Ms. Granville had not wanted the Troxels to have any extended time during the summer. *See In re Troxel*, 940 P.2d at 699.

236. Neither the mother nor the grandparents indicated any problems with this aspect of the visitation schedule. *See id.* Additionally, the trial judge issued injunctions to protect the interests of the parties. The grandparents were instructed to call Isabelle by her first name, rather than her middle name, which they had been using. *See* Brief for Petitioners at 3, 5, *Troxel* (No. 99-138). All parties were to discuss the manner in which the children would be told of Brad Troxel's death prior to discussing it with the children. *See* Brief for Respondents at 11, *Troxel* (No. 99-138). Neither party was to make any negative comments about the other in front of the children. *See* Brief for Petitioners at 5, *Troxel* (No. 99-138). Ms. Granville was to inform the grandparents about school events. *See* Brief for Respondents at 11, *Troxel* (No. 99-138). The judge had made these rulings after hearing testimony from the Troxels, one of their sons-in-law and two experts that had been retained by Ms. Granville. *See In re Troxel*, 940 P.2d at 699.

237. *In re Troxel*, 940 P.2d at 698.

238. Ms. Granville claimed the Troxels lacked standing due to the fact that there was no custody proceeding being heard at the time of the filing of the petition. *See id.* at 699. In addition, her husband, Kelly Wynn, had adopted the children and Ms. Granville believed this would eliminate the Troxel's rights as grandparents. *See id.* at 701.

239. *See id.*

240. *See id.*

appeared to be clear,[241] the Troxels nonetheless lacked standing because there was no custody action pending at the time of the filing of the petition.[242] Thus, even though the statute did not explicitly require that there be an ongoing action regarding the children, the appellate court determined that no legislator could have meant that anyone could request visitation with any child at any time.[243] Since under a third statute the legislature demanded that some family proceeding be in the courts in order for a third party to seek *custody*, the same would hold true for all *visitation* requests.[244] Because of its resolution of the standing issue, the court of appeals did not have to reach the question of the statute's constitutionality.

The dissenting judge distinguished between custody and visitation. He reasoned that granting a third party custody over parental objection would be a major interference with the parents' fundamental right to bring up their children as they saw fit,[245] and therefore it was understandable that the legislature would limit such cases to situations where there were already independent proceedings before the court involving the child.[246] On the other hand, visitation is a much lesser impingement on the parents' fundamental rights,[247] and consequently the legislature could see fit to permit third parties to petition for visitation regardless of whether there was a pending action regarding the child.[248]

The dissent went on to note that the *Troxel* fact pattern was just the type of scenario that was likely to have been the impetus behind a third party visitation

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241. The statute stated that any person, at any time, could seek visitation with or without custody proceedings currently being heard. *See id.* at 699 (citing WASH. REV. CODE § 26.10.160(3)).

242. *See id.* at 699.

243. The court went as far as citing an example of a constituent being annoyed with his or her legislator and seeking visitation with the legislator's child. *See id.* The statute would give the constituent standing to do so. *See id.*

244. The Washington statute concerning visitation rights with a person other than a parent during the dissolution of marriage was section 26.09.240 of the Revised Code of Washington ("RCW"). *See* WASH. REV. CODE ANN. § 26.09.240 (West 1997). The statute in question in *Troxel*, RCW § 26.10.160, applied to visitation rights in nonparental actions for child custody. *See* WASH. REV. CODE ANN. § 26.10.160 (West 1997). RCW § 26.09.240 was amended in 1996 to limit the circumstances under which a nonparent can petition for visitation. *See In re Troxel*, 940 P.2d at 699. As amended, the nonparent could not petition for visitation unless the child's parents had "commenced an action under this chapter," and such a petition must be dismissed unless the nonparent could demonstrate by clear and convincing evidence that a significant relationship existed with the child. *See id.* at 700 (citing WASH. REV. CODE ANN. § 26.09.240). The court noted that "[i]n 1987, the Legislature enacted virtually identical provisions that have subsequently proceeded on parallel tracks," and that it saw no reason why the Legislature would amend one and not the other. *Id.* Thus, the court assumed that the Legislature failed to amend RCW § 26.10.160 by an unintentional oversight. *See id.* The court concluded that the Legislature intended that a custody proceeding be in effect before third parties could petition for visitation. *See id.* at 700–01.

245. *See In re Troxel*, 940 P.2d at 702.

246. *See id.* at 701.

247. *See id.* at 702.

248. *See id.* at 703.

statute such as this one.[249] If one parent dies, there could not be any custody proceeding in the courts.[250] Without this statute, grandparents could be totally removed from their grandchildren's lives. The statute would permit the grandparents to seek visitation, even if the remaining parent did not want to allow them access.[251] In this way, as long as the visitation was in the best interests of the children, they could maintain a grandparent/grandchild relationship.[252] Based on this construction of the law, the dissent concluded that the case should be remanded for further proceedings so that the trial judge could make appropriate findings that would support a visitation order against parental wishes.[253]

It was then the Troxels' turn to file an appeal.[254] They sought review in the state supreme court.[255] The questions before the court were, one, whether third parties had standing to sue for visitation rights with minor children, [256] and, two, whether the statute was facially valid.[257] The majority held that although third parties such as the Troxels did have standing to sue for visitation under

249. "Many considerations could explain a legislative decision to leave RCW 26.10.160(3) unamended. Grandparent visitation issues come most readily to mind." *Id.*

250. *See id.*

251. *See id.*

252. *See id.* (noting that the current statute has only one policy approach, which is that any person, at any time, may petition for visitation as long as it is in the best interests of the child).

253. *See id.* at 704. Here the court could look at the other standing and visitation statute and pay particular attention to the factors to be considered when determining whether visitation would be in the child's best interests.

254. This is illustrative of the problems that arise regarding litigation of family matters. The matters drag on with no resolution for the children or families for many years. The Troxels began seeking court-ordered visitation in 1993. *See* Troxel v. Granville, 530 U.S. 57, 61 (2000). The matter was not finalized until the United States Supreme Court reached its decision in June 2000. *See id.* at 72. In addition, litigation creates more strife between family members. Parties may often make comments and allegations in the heat of litigation that can be hurtful and untrue. During the *Troxel* trial, the grandparents never indicated the mother was unfit; in fact they stated the opposite. *See* Brief for Petitioners at 3, Troxel v. Granville, 530 U.S. 57 (2000) (No. 99-138). The same holds true for the mother. She never denied that the grandparents' visitation would be harmful to the children. In fact she expressed the opposite. *See id.* As litigation continues, both sides may state things that would be harmful to the children because of their frustrations with litigation. Seeking means other than litigation to resolve family matters is a topic for other law review articles.

255. *In re* Custody of Smith, 969 P.2d 21 (Wash. 1998). The *Troxel* matter was consolidated with two other cases, *Wolcott* and *Smith.* In *Wolcott,* Mr. Clay had lived with Ms. Wolcott and the child for four years and upon separation from Ms. Wolcott he sought visitation with the minor child. *See id.* at 23. The child was not his biological child. *See id.* In *Smith,* the child was born to a married couple and was conceived by artificial insemination. *See id.* at 24. The maternal grandmother and the father shot and killed each other. *See id.* The paternal relatives sued for visitation. *See id.*

256. *See id.*

257. *See id.*

26.10.160,[258] the statute itself was unconstitutional under federal law, because it "impermissibly interfere[d] with a parent's fundamental interest in the 'care, custody and companionship of the child.'"[259]

All the justices agreed that the statutory language clearly allowed third parties to seek visitation at any time.[260] After examining the legislative history of the law, the justices found that the plain language of the statute precluded the courts from interpreting it in such a way as to deny standing to the Troxels.[261] The majority then went on to conclude that the statutory authorization granted to "any person" to bring a judicial action seeking visitation at "any time" was limited only by the requirement that visitation be in the child's best interests.

> We recognize that in certain circumstances where a child has enjoyed a substantial relationship with a third person, arbitrarily depriving the child of the relationship could cause severe psychological harm to the child. The difficulty, however, is that such a standard is not required in [the statute and it] allow[s] "any person" to petition for forced visitation of a child at "any time" with the only requirement being that the visitation serve the best interest of the child. There is no threshold requirement of a finding of harm to the child as a result of the discontinuation of visitation.[262]

Since the court had consolidated three cases, it was reviewing two Washington visitation statutes. The fact that one of the visitation statutes was drafted in reverse logical sequence[263] and the other was not clear in its separation

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258. *See id.* at 26–27 (holding that the plain language of the statutes gave the Troxels and Clay standing to petition for visitation under RCW § 26.10.160(3) and gave the Smiths standing under former RCW § 26.09.240).

259. *Id.* at 31.

260. Although the decision was a 5-4 decision, all the justices concurred on the fact that the statutory language gave third parties the right to seek visitation. *See id.* at 25. Since the language is clear, the court must interpret the language as it is, and assume that the legislature means exactly what it says. *See id.*

261. In tracing the legislative history, the court showed how the Legislature reacted to attempts by the court to change the meaning of the statute. For example, in 1976, the Court of Appeals in *Carlson v. Carlson* found that trial courts were not authorized by the statute to grant visitation rights to third parties without some change of circumstances. *See id.* at 25 (citing Carlson v. Carlson, 558 P.2d 836 (Wash. Ct. App. 1976)). The Legislature amended the statute the following year to correct this by stating: "The court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change in circumstances." *Id.* (citing 1977 WASH. LAWS, 1st Ex. Sess., ch. 271, § 1). In 1987 the Legislature added the language to allow "any person [to] petition the court for visitation rights at any time." *Id.* (citing 1987 WASH. LAWS, ch. 460, § 18). The Legislature's intent is clear. Even if the court believed this may not have been what the legislature intended, the court concluded that it could still not change the meaning of the "plain language" of the statute. *See id.*

262. *See id.* at 30.

263. One of the statutes being reviewed by the courts was WASH. REV. CODE ANN. § 26.09.240 (1993), which stated:

of standing and merits[264] may have influenced the court to collapse its two provisions. The first part of each statute speaks to the substantive issue of when the court can order visitation over parental objection—when it is in the child's best interests.[265] The second part of the statute, allows any person at any time to petition for visitation—a standing provision.[266] The majority of the Washington court concluded that 26.10.160 would permit the Troxels standing on a showing on the merits that visitation was in the best interests of the children.[267] This interpretation conflates two analytically separate but related issues. Finding that a party has standing to petition for visitation does not necessarily mandate the granting of such contact.

The majority found that such interference by any person at any time, based only on a showing of best interests, was unconstitutional based on the line of United States Supreme Court cases that define parents' rights to raise their child as they see fit.[268] The Court viewed this right as fundamental. Therefore, in order for the state to interfere with it, the state must demonstrate both that there is a compelling interest, and that the means were necessary to achieve that objective.[269]

The Washington Supreme Court recognized two grounds permitting the state to intrude on the family. First, the state can act pursuant to its police power to protect citizens from harm.[270] Thus, the state can intervene in the family to protect a child if the parents' actions can cause the child harm. The state also has a *parens patriae* power to infringe on the family to protect a child's best interests.[271] The court interpreted this to mean that the state can only intervene when the child is

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> The court may order visitation rights for a person other than a parent when visitation may serve the best interest of the child whether or not there has been any change of circumstances.A person other than a parent may petition the court for visitation rights at any time.The court may modify an order granting or denying visitation rights whenever modification would serve the best interests of the child.

264. The Troxels had sued under WASH. REV. CODE ANN. § 26.10.160(3) (West 1997). Sections (1) and (2) of the statute laid out the terms under which a parent would be granted visitation. Section (3) of the statute extended visitation rights to any person: "[a]ny person may petition the court for visitation rights at any time including, but not limited to, custody proceedings. The court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances." Since the first part of the statute laid the groundwork for determining parental visitation, it may have been viewed that the same guidelines could be applied to other persons seeking visitation.

265. *See supra* notes 229, 230.

266. *See supra* notes 229, 230.

267. *See In re Custody of Smith*, 969 P.2d at 30–31.

268. *See id.* at 27–31 (citing Santosky v. Kramer, 455 U.S. 745, 753–54 (1982); Stanley v. Illinois, 405 U.S. 645, 651 (1972); Wisconsin v. Yoder, 406 U.S. 205, 235–36 (1972); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925); Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).

269. *See In re Custody of Smith*, 969 P.2d at 28 (citing Roe v. Wade, 410 U.S. 113, 155 (1973)).

270. *See id.*

271. *See id.*

harmed, or where there is a threat of harm to the child,[272] thus collapsing police power and *parens patriae* power under a harm-to-the-child umbrella. By narrowly interpreting the state's *parens patriae* authority as applicable only when necessary to prevent harm, the court implicitly rejected the possibility that a state is allowed to intervene even where there is no harm to the child, if in some way the proposed action will be beneficial to the child.

The state statute, on its face, allows third parties to seek and obtain visitation as long as it is in the best interests of the child,[273] a standard which is presumably less stringent than that of harm to the child.[274] The court, however, held that without a finding of harm, a best interests standard was not sufficient to overcome the parents' fundamental right to determine with whom their child spends time.[275]

The dissent, after agreeing that the Troxels had standing, went on to determine that the statute was constitutional.[276] The dissent argued that "the majority opinion [has] cruel and far-reaching effects on loving relatives, particularly grandparents...depriving them in many instances of any contact with their grandchildren."[277] In the dissent's opinion, the statute was constitutional because "[f]irst, a parent's fundamental right to autonomy in child-rearing decisions [is not absolute],"[278] and second, a finding of harm is not necessary in order for the state to act in the child's best interests.[279] The rights of parents, he argued, must be balanced against the rights of the state and the child— "parental prerogatives...are not absolute and must yield to fundamental rights of the child or important interests of the State."[280] In the balancing of these rights, argued the dissent, the courts must also consider the particular parental right that is being affected, and the degree of intrusion on that right.[281] In this case, parental custody was not being questioned. The Troxels were requesting, and were originally

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272. *See id.* at 30.

273. *See id.*

274. *See* Troxel v. Granville, 530 U.S. 57, 93–101 (2000) (Kennedy, J., dissenting).

275. *See In re Custody of Smith*, 969 P.2d at 30–31.

276. *See id.* at 32.

277. *Id.*

278. *Id.*

279. *See id.*

280. *Id.* at 33. Unfortunately, in the balancing tests the rights of children are often ignored. For example, as this case made its way through the courts, the rights of the children were not often considered. It is not clear that what the children wanted was considered at all—either by the parties, or the courts.

281. *See id.* at 33 (citing a previous Washington Supreme Court case, *Welfare of Sumey*, 621 P.2d 108 (Wash. 1980), in which the balancing test applied by the court considered the "degree of abridgment of parental rights which...residential placement" of the child entailed. *Id.* at 111. The statute at issue in *Sumey* allowed for placement outside the home if the child was a runaway or if remaining in the home posed a danger to the physical safety of the child. The court found that the "requisite balancing called for appropriate justification for the severity of the abridgment of parental rights sought by the State." *Id.*).

granted, limited visitation with the children.[282] This could be considered a minor infringement on a parent's rights.[283]

The dissenting judge also noted that an overwhelming majority of states found statutes permitting grandparent visitation to be constitutional.[284] He concluded that when determining custody or visitation matters, all states use the best interests of the child standard,[285] a criterion that takes various factors into consideration,[286] and thus permits the state to make appropriate and calibrated determinations for the child.[287]

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282. *See In re* Troxel, 940 P.2d 698, 699 (Wash. Ct. App. 1997).

283. Therefore, the dissent opines that the majority was wrong in stating that a showing of harm or unfitness by the parent must be demonstrated before the state can intervene. *See In re* Custody of Smith, 969 P.2d 21, 34 (Wash. 1998) (Talmadge, J., concurring and dissenting). In *Sumey*, the court took into consideration that a temporary placement outside the home was much less of an intrusion on parental rights than termination or permanent removal of the child. *See id.* at 29 (citing *Sumey*, 621 P.2d at 108). "The allowance of visitation [under the existing third-party visitation statutes] is even less intrusive than out-of-home residential placement of a child." *Id.* at 33.

Additionally, citing to dependency cases (where the intrusion by the state is greater than in visitation cases), he claims a showing of parental unfitness is not necessary for the state's initial intervention. Indeed, society has an interest in protecting children from harm, and, therefore, the state can temporarily remove children from the parents' care with a fairly low threshold showing. *See id.* at 34. In *In re Key*, 836 P.2d 200 (Wash. 1992), *cert. denied*, 507 U.S. 927 (1993), the court held that a finding of unfitness was not required in a dependency proceeding. *See In re* Custody of Smith, 969 P.2d at 35. The argument is made that in a dependency proceeding, the parent may face termination of parental rights, and the child can be removed temporarily or permanently from the home. *See id.* In these matters the state greatly intrudes on parental rights, even without a showing of parental unfitness.

Even in custody matters, where the interest of the parent is stronger than in visitation cases, he claims that a showing of unfitness is not always necessary to remove custody from a biological parent. *See id.* (citing *In re* Allen, 626 P.2d 16 (Wash. Ct. App. 1981)). "Each case is unique, save for the overarching principle that the welfare of the child is the paramount concern." *Id.* Therefore, even without a showing of unfitness, custody can be taken from a parent, if it is detrimental to the child. *See id.* (citing *In re Allen*, 626 P.2d at 23).

284. *See In re* Custody of Smith, 969 P.2d at 37 (citing Campbell v. Campbell, 896 P.2d 635, 644 n.18 (Utah Ct. App. 1995)). According to the dissent, since the Washington State Constitution does not provide any rights to its citizens beyond those granted by the United States Constitution, the statute would still be valid, whether viewed under the standards of the state or federal constitution. Some states have found the statutes unconstitutional. *See supra* notes 171–182 and accompanying text.

285. *See In re* Custody of Smith, 969 P.2d at 39.

286. *See id.* at 40 n.6.

287. For example, under the best interests standard, the court might consider the relationship between the child and the person seeking visitation. The court might examine how long the relationship has existed and what type of bond there is between the child and the petitioner. The court could consider the reasons the parent may not want the visitation to occur. Are the petitioner's values so different from the parent's that they might cause conflict between the child and parent? Would facilitating the visitations cause an undue burden on the child and/or parents? As each case for visitation is different and the factors the court needs to consider in determining the best interests of the child may be different, it

> The best interests of the child remain[s] the court's paramount concern. This inquiry is the touchstone by which all other rights are tested and concerns addressed in various contexts dealing with children.... We should reiterate the best interests of the child remain the touchstone by which all other rights are tested and concerns addressed in various contexts dealing with children.... [T]he trial court[] in Troxel...entered specific findings that visitation with the petitioners would be in the...children's best interest.[288]

After losing in the Washington high court, the grandparents then petitioned the United States Supreme Court for a writ of certiorari, and the Court granted the writ.[289]

B. The United States Supreme Court Decision

Justice O' Connor announced the judgment of the Court in an opinion in which three rather unlikely bedfellows, the Chief Justice, and Justices Ginsburg and Breyer, joined.[290] It is a narrow opinion, holding that the Washington statute, as applied, violated the due process right of parents to "care, custody and control of their children."[291]

The plurality was concerned about several factors. First, it viewed the statute as "breathtakingly broad," allowing "any person" to petition for visitation "at any time," and permitting the court to grant visitation whenever it "may serve the best interest of the child."[292] Parental wishes, Justice O'Connor claimed, were afforded no deference, and the statute placed the determination solely in the hands of the court.[293] Second, this decision could be made even though there were no allegations or proof of parental unfitness.[294] Third, the plurality was also disturbed

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has been considered best to leave discretion to the trial court to determine best interests, which is what the dissent concluded. In questions of visitation, and for that matter in most cases affecting children, determining best interests is the standard courts use to decide what action to take on behalf of the child.

288. *In re* Custody of Smith, 969 P.2d at 40–42.

289. *See* Troxel v. Granville, 527 U.S. 1069 (1999).

290. *See* Troxel v. Granville, 530 U.S. 57, 60–75 (2000). Justices Souter and Thomas concurred in the judgment and filed separate opinions. Justices Stevens, Scalia and Kennedy dissented, with each filing separate opinions.

291. *Id.* at 72.

292. *Id.* at 67.

293. *See id. But see id.* at 82. In his dissent, Justice Stevens disagrees with Justice O'Connor's interpretation, "I find no suggestion in the trial court's decision...[of] any presumptions at all in its analysis, much less one in favor of the grandparents." *Id.* He continues by stating that the first statement does not indicate who has the burden of proof, rather just a common sense belief that normally grandparent visitation is in the best interests of the child, and the second statement only indicated to Justice Stevens that the trial judge had listened to all the evidence and came to the conclusion that, in this case, visitation was in the children's best interests. *See id.*

294. *See id.* at 68.

that the trial court gave no "special weight" to the mother's assertion that it would not be in her children's best interests to have more extensive visitation with their paternal grandparents.[295] Indeed, said Justice O'Connor, the trial judge engaged in an opposite presumption, making the parent disprove that visitation was in the children's best interests, and she cited various state statutes that placed the burden of proof instead on the grandparents.[296] Fourth and last in this regard, the plurality also thought it significant that the mother had not sought to cut off visitation with the Troxels entirely, again citing statutes in other jurisdictions making that a factor in the judicial determination.[297] It was this combination of factors that led the plurality to conclude, somewhat ambiguously, that its decision rested "on the sweeping breadth of the...statute and the application of that broad, unlimited power in this case"[298]—seemingly an on the face as well as an as applied determination.

Justice O'Connor explicitly refrained from passing on the broader question of whether due process requires a showing of harm before non-parental visitation is ordered.[299] "We do not, and need not, define today the precise scope of the parental due process right in the visitation context."[300] She also agreed with Justice Kennedy that much will depend on the facts and circumstances of each suit.[301] Finally, the plurality refused to remand the case for further findings, citing the litigation costs and burden on the mother's parental rights.[302]

Justice Souter concurred only in the judgment, arguing that, since the state supreme court had invalidated the statute based only on its text, and not on the facts of the case, he "would say no more."[303] He noted that the Washington court rested its decision on "two independently sufficient grounds:" the lack of a requirement that there must be harm before visitation is ordered, and the broad "any person, at any time" and "best interests" language.[304] Justice Souter thought the second reason was sufficient to invalidate the statute on its face and therefore found it unnecessary to examine whether a showing of harm is required.[305] "Since I do not question the power of a State's highest court to construe its domestic statute and to apply a demanding standard when ruling on its facial constitutionality...this is for me the end of the case."[306]

Justice Thomas also concurred in the judgment, carefully noting that, since neither party had raised the issue of whether the substantive due process

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295. *Id.* at 69.
296. *See id.* at 69–70.
297. *See id.* at 71–72.
298. *Id.* at 73.
299. *See id.*
300. *Id.*
301. *See id.*
302. *See id.* at 75.
303. *Id.* at 75 (Souter, J., concurring).
304. *Id.* at 76.
305. *See id.* at 76–77.
306. *Id.* at 79 (citing *Chicago v. Morales*, 527 U.S. 41, 55 n.22 (1999), which held that vagueness must permeate the law for a facial challenge to be appropriate).

familial rights cases, which allowed the Court to enforce unenumerated constitutional rights, were erroneously decided, he was expressing no view on the merits of that question.[307] He therefore agreed with the plurality that the substantive due process cases involving parental prerogatives were sufficient to resolve the case.[308] He chastised the plurality, as well as Justices Kennedy and Souter, for failing to articulate the appropriate standard of review, even though they recognized the right of parents to rear their children as they see fit.[309] Justice Thomas announced that he would apply strict scrutiny to infringements of fundamental rights, concluding that the state had not shown even a legitimate interest "in second-guessing a fit parents' decision regarding visitation with third parties."[310]

Justice Stevens dissented, arguing that the Court should not have reviewed the case, "given the problematic character of the trial court's decision and the uniqueness of the Washington statute."[311] Since, however, the Court had granted certiorari, Justice Stevens thought that it should directly confront the federal constitutional issues presented.[312] He believed that the Washington law was not facially invalid simply because it granted a 'broad class of individuals the procedural right to seek visitation,[313] or because a person could win visitation on the merits without having to demonstrate that otherwise the child would suffer serious harm.[314]

Since the Washington court had invalidated the law on its face, Justice Stevens concluded that Justice O'Connor could not hold that the statute violated due process as applied.[315] The resolution of an as-applied attack rested instead with the state courts, a determination that had not been made in the case because of the facial invalidation by the state supreme court.[316]

> We are thus presented with the unconstrued terms of a state statute and a State Supreme Court opinion that, in my view, significantly misstates the effect of the Federal Constitution upon any construction of that statute. Given that posture, I believe the Court

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307. *See id.* at 80 (Thomas, J., concurring).
308. *See id.*
309. *See id.*
310. *Id.*
311. *Id.* at 80 (Stevens, J., dissenting).
312. *See id.* at 81.
313. *See id.* at 91.

> [T]he Washington law merely gives an individual—with whom a child may have an established relationship—the procedural right to ask the State to act as arbiter...between the parent's protected interests and the child's...[and] leaves room for the States to consider the impact on a child of possibly arbitrary parental decisions that neither serve nor are motivated by the best interests of the child.

Id.

314. *See id.*
315. *See id.*
316. *See id.* at 81–82.

> should identify and correct the two flaws in the reasoning of the state court's majority opinion, and remand for further review of the trial court's disposition of this specific case.[317]

Justice Stevens asserted that the Washington Supreme Court's facial invalidation of the visitation law was erroneous because the "any person" language encompassed factual scenarios in which an award of visitation would be constitutionally permissible.[318] Secondly, in his view, the Court had "never held that the parents' liberty interest...is so inflexible as to...[protect even] arbitrary parental decision[s] from any challenge absent a threshold finding of harm."[319] According to Justice Stevens, the struggle was not merely between the state and the parents, it also included the child.[320]

Justice Stevens recognized that Court precedent protected parents' fundamental liberty interest in raising their children without undue interference, either from the state or others.[321] He noted, however, that this right was not unlimited, citing cases in which the Court denied a parent the right to maintain a relationship with his or her biological children.[322] Justice Stevens read these cases as requiring a "developed relationship" with the child, and as "tied to the presence or absence of some embodiment of family."[323] In addition, in his opinion, these limitations on parental rights stemmed not from the "definition of parenthood," but because such parental rights had to be balanced against the state's *parens patriae* power and the child's own interest "in preserving relationships that serve [his or] her welfare and protection."[324] There were various instances in which a child's welfare or best interests could be impaired without the visitation, even though it would not cause him or her serious harm.[325] Justice Stevens asserted that it was initially the state's job to do this balancing.[326] Thus, Justice Stevens' dissent separates procedure from substance, using the "well-known best-interests standard," for determinations on the merits.[327]

Echoing his earlier stands, Justice Scalia's dissent emphasized the dangers of the Court being sucked into the quagmire of substantive due process.[328] This whole area of family law was one that he believed should be addressed at the state level.[329] He was especially reluctant to expand "unenumerated" parental rights, in

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317. *Id.* at 84–85.
318. *See id.* at 85.
319. *Id.* at 86.
320. *See id.* at 88–89 (stating that "[t]his Court has on numerous occasions acknowledged that children are in many circumstances possessed of constitutionally protected rights and liberties").
321. *See id.* at 86–87.
322. *See id.* at 87–88.
323. *Id.* at 88.
324. *Id.*
325. *See id.* at 90.
326. *See id.*
327. *Id.* at 91.
328. *See id.* at 92 (Scalia, J., dissenting).
329. *See id.* at 93.

light of the fact that no one on the Court believed that parental rights were absolute.[330]

Justice Kennedy also dissented, arguing that the case should be remanded to the state courts for further proceedings, solely because the state supreme court ruling regarding the requirement of harm to the child was erroneous.[331] Although Justice Kennedy noted that the state's highest court also invalidated the law because it gave standing to "any person" at "any time," he focused almost entirely on the substantive issue and under what circumstances a party should be granted visitation.[332]

Justice Kennedy did an historical analysis of visitation rights and found that court ordered visits for relatives such as grandparents was a 20th century creation.[333] However, he did not view the absence of traditional grandparental rights as creating an implicit parental right to prevent visitation without a showing of actual harm to the child.[334] He did not read Supreme Court precedent as supporting such an absolutist stance.[335] He cited cases in which a third party, such as one with a pre-existing relationship, was permitted to override the parental veto.[336] Justice Kennedy objected to the state court's rejection of the best interests standard, observing that almost all states use that criterion for visitation, and also at the same time use various mechanisms that give deference to parental wishes.[337] He urged caution.[338] The states, Justice Kennedy asserted, should be allowed initially, case-by-case, to provide input into the ultimate contours of the federal constitutional right of parental primacy.[339]

Turning to standing, Justice Kennedy acknowledged that even just permitting third parties to petition for visitation could infringe parental rights, noting the financial and emotional costs it could inflict on the family.[340] Nonetheless, he concluded that in this case it was important for the state courts to address these issues first.[341]

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330. *Id.* at 92–93.
331. *See id.* at 94 (Kennedy, J., dissenting).
332. *See id.* at 93–101.
333. *See id.* at 96–97.
334. *See id.* at 97.
335. *See id.* at 97–98.
336. *See id.* at 98–99.
337. *See id.* at 99–100.
338. *See id.* at 101.
339. *See id.*
340. *See id.*
341. *See id.*

V. VIEWING *TROXEL* WITHIN THE CONTOURS OF THE FEDERAL CONSTITUTIONAL RIGHT TO PARENTAL PRIMACY IN CHILD REARING

The grant of certiorari in *Troxel*[342] raised expectations that the Justices would provide clear guidance on how and when states could or could not interfere with the parent's decisions regarding visitation between the child and third parties.[343] Yet, as we have seen, the *Troxel* decision is very limited, applying only to the exceedingly broad Washington statute and addressing only the facts and circumstances of the particular case.[344]

Although the Justices cite to the line of Supreme Court cases that define parental rights, the various *Troxel* opinions do not explore the ramifications of these decisions. Instead of analysis, the Court merely states parental rights are not absolute.[345] Such a conclusory statement of the law, which was already well known, in no way helps lower courts to make reasoned decisions.[346] Thus, on the one hand, the *Troxel* plurality's fact specific approach resulted in a strangling particularity that made the opinion largely irrelevant. At the same time, the vague parental rights are not absolute assertion was a "glittering generalit[y]"[347] that also diminished the precedential value of the opinion. In my view, an analysis of the parental rights cases strongly supports the position that a balancing of interests may, in many cases, result in court coerced grandparent-grandchild visitation.

However, substantive due process is a right that, for historical and conceptual reasons, has created dilemmas for and divisions on the Court.[348] The

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342. Troxel v. Granville, 527 U.S. 1069 (1999).

343. *See* Cliff Collins, *Family Law Practitioners Await Clarification of Nonparental Rights*, 60 MAY OR. ST. B. BULL. 9 (2000); Linda Greenhouse, *Case on Visitation Rights Hinges on Defining Family*, N.Y. TIMES, Jan. 4, 2000 at A14.

344. *See supra* notes 291–310 and accompanying text.

345. *See* Troxel v. Granville, 530 U.S. at 88, 93, 98 (2000).

346. A similar approach was used in *Bowers v. Hardwick*, 478 U.S. 186 (1986), which held that homosexual sodomy is not a fundamental right that requires strict scrutiny. The majority opinion merely cites to various cases and concludes summarily that homosexual sodomy is different. *See id.* at 190.

347. Green v. United States, 365 U.S. 301, 311 (1961).

348. In a procedural due process claim, the focus is not on the protected interest but on the "procedural safeguards built into the statutes or administrative procedure of effecting the deprivation, and any remedies for erroneous deprivations provided by statute or tort law." Zinermon v. Burch, 494 U.S. 113, 125–26 (1990). However, the court disagrees on whether predeprivation hearings, policies, and precautions effectively constrict indiscriminate denials of procedural due process. *See id.* at 126. Substantive due process concentrates on forbidding certain governmental conduct despite employing fair procedures in order to protect people from capricious deprivations of life, liberty and property for illicit government purposes. *See* County of Sacramento v. Lewis, 523 U.S. 833, 845 (1998). Nonetheless, Justice Scalia noted that the court has wavered in its method of analyzing substantive due process between one approach that considers whether a fundamental right was deprived and particularly described, and another strategy, promulgated by Justice Souter, that inquires whether the deprivation was "arbitrary" and "at odds" with the Due Process Clause. *Id.* at 860–62.

line of parental rights cases is no different. As noted above, the Court has never taken the position that parental rights are absolute.[349] Instead, in each of these decisions the Court has balanced this parental interest against other interests—of the state, of the child, and of other family members.[350]

The Court first recognized the existence of the substantive due process right of parental authority in child rearing in its 1923 decision in *Meyer v. Nebraska*,[351] which was also the first of the modern substantive due process decisions in the non-economic arena.[352] The *Meyer* Court invalidated a state law prohibiting the teaching of modern foreign languages to young children,[353] reading liberty broadly to encompass "the right of the individual...to marry, establish a home and bring up children...."[354] That aspect of liberty, however, belonged to the adult parent, not to the child. The child's interest in this context was the "opportunity of pupils to acquire knowledge."[355] In *Meyer*, the parents' rights were balanced against state interests in education.[356] Similarly, two years later, in *Pierce v. Society of Sisters*,[357] a law requiring all children to attend public schools was held unconstitutional because it interfered with

> the liberty of parents and guardians to direct the upbringing and education of children under their control.... The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.[358]

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349. *See Troxel*, 530 U.S. at 88, 93 (2000).

350. *See, e.g.*, Moore v. City of E. Cleveland, 431 U.S. 494 (1977); Wisconsin v. Yoder, 406 U.S. 205 (1972); Stanley v. Illinois, 405 U.S. 645 (1972); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

351. 262 U.S. 390 (1923).

352. In *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965), Justice Douglas reinterpreted *Meyer* and *Pierce* as First Amendment cases.

353. *See Meyer*, 262 U.S. at 402–03.

354. *Id.* at 399.

355. *Id.* at 401. This right was connected to a parent's right to "control" her child's education and the right of teachers to teach. *See id.* It is not clear whether the Court would uphold a child's right to determine the course of her education if it was in opposition to the parent's choices. Indeed, in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Court supported the right of parents to make decisions regarding their children's education but did not inquire of the children their wishes. *See infra* notes 366–367 and accompanying text.

356. *See Meyer*, 262 U.S. at 401.

357. 268 U.S. 510 (1925).

358. *Id.* at 534–35. In both of these early cases the Court used language indicating that the implicated rights were fundamental and that the state had not presented sufficient justifications for such intrusive laws. In *Meyer*, the Court noted that "the individual has certain fundamental rights which must be respected" and that the state had not demonstrated "adequate foundation" to override that right. *Meyer*, 262 U.S. at 401–03. Similarly, in *Pierce*, the Justices stated "that parents and guardians, as part of their liberty, might direct the education of children" and could be assured "protection against arbitrary, unreasonable, and unlawful interference." *Pierce*, 269 U.S. at 534–36. On the other hand, the Court also stated that these laws were "without reasonable relation to some purpose within the

Almost a half century later, in *Stanley v. Illinois*,[359] the Justices determined that the state's interest also did not outweigh "the integrity of the family unit."[360] The Court found that an unwed father who lived with his children had an interest in retaining custodial rights that was "cognizable and substantial,"[361] entitling him to significant procedural protection.[362] The Court ruled that "as a matter of due process of law [he] was entitled to a hearing on his fitness as a parent before his children were taken from him."[363] The state's interest was in "presuming rather than proving Stanley's unfitness solely because it is more convenient to presume than to prove. Under the Due Process Clause that advantage is insufficient to justify refusing a father a hearing when the issue at stake is the dismemberment of his family."[364] Relying on *Meyer*, *Pierce*, and other cases, the Court emphasized the importance of the family, concluding that Stanley's interest in his family was such that "[t]he private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection."[365]

The Court gave parental primacy in child rearing a further boost, albeit on First Amendment grounds, in *Wisconsin v. Yoder*.[366] The Justices weighed the right of Amish parents to remove their children from school after the eighth grade against the state's interest in educating its citizenry, finding that under these facts and circumstances the parents' rights prevailed.[367] Of course, parental authority over offspring is not absolute, even within a religious context. In its earlier ruling in *Prince v. Massachusetts*,[368] the Court upheld the application of a child labor law to a guardian who permitted her niece to sell religious magazines on the streets in the evening.[369]

Similarly, the Justices have found that parental discipline can go only so far, and they have recognized the state's compelling interest in protecting child victims of parental abuse and its authority to remove such children from the

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competency of the state," indicating that the laws failed even under a more relaxed rational relationship standard. *Id.* at 535.

359. 405 U.S. 645 (1972).

360. *Id.* at 651.

361. *Id.* at 652.

362. *See id.* at 652. Stanley was complaining he was denied equal protection because married fathers were entitled to a hearing prior to the state removing his children, but as an unmarried father he was not. *See id.* at 645, 649. Justices Burger and Blackmun dissented, objecting to the Court's use of a due process analysis, which they claimed had not been raised below. *See id.* at 659. They would have confined themselves to equal protection and found no violation. *See id.* at 663.

363. *Id.* at 649.

364. *Id.* at 658.

365. *Id.* at 651.

366. 406 U.S. 205 (1972).

367. *See id.* at 207.

368. 321 U.S. 158 (1944).

369. *See id.* at 159–60. Mrs. Prince was the mother of two young sons and the legal guardian of Betty Simmons, age nine. The family members were Jehovah's Witnesses and Mrs. Prince and Betty were ordained ministers. *Id.* at 161.

home.[370] Even in this situation, however, the Court has acknowledged that the state must be careful not to impinge unduly on parental authority. Indeed, in *DeShaney v. Winnebago Department of Social Services*,[371] the Court was reluctant to impose a constitutional duty on the state to protect a child from his father's abuse, even though the Department of Social Services, which was charged with protecting children, had full knowledge of the abuse.[372] According to the majority, this reticence stemmed, at least in part, from the need of the state to tread carefully because of the constitutional protection of the parents' right to direct the upbringing of their children.[373]

In all of the above cases, the challenge to parental rights came from the state. It is the state that tried to impose particular educational standards or even sought to remove a child from a fit parent. Although none of the *Troxel* decisions in the United States Supreme Court focus on this distinction, surely it might make a difference. Grandparent cases do not set the state against parental autonomy so starkly. Even where the Court has acknowledged that children themselves possess rights, the cases continue to emphasize the significance of parental authority.

At the time of *Meyer* and *Pierce*, the courts did not view children as independent holders of liberty interests. That recognition came much later in the twentieth century,[374] in Supreme Court decisions granting alleged juvenile delinquents procedural guarantees,[375] and recognizing that students enjoy First

370. *See* Moore v. Sims, 442 U.S. 415, 435 (1979) (stating that "[f]amily relations are a traditional area of state concern," which was recognized by the federal district court when it noted the state's compelling interest in removing the victims of child abuse from their home).

371. 489 U.S. 189 (1989).

372. *See id.* at 191.

373. *See id.* at 203.

374. For a survey of the development of children's rights, see Theresa Glennon & Robert G. Schwartz, *Looking Back, Looking Ahead: The Evolution of Children's Rights*, 68 TEMP. L. REV. 1557 (1995); Rochelle D. Jackson, *The War Over Children's Rights: And Justice for All? Equalizing the Rights of Children*, 5 BUFF. HUM. RTS. L. REV. 223 (1999); Janet Leach Richards, *Redefining Parenthood: Parental Rights Versus Child Rights*, 40 WAYNE L. REV. 1227 (1994); *Special Symposium Issue of the Rights of Children*, 27 FAM. L.Q. 301 (1993); Erin E. Wynne, *Children's Rights and the Biological Bias: A Comparison Between the United States and Canada in Biological Parent Versus Third-Party Custody Disputes*, 11 CONN. J. INT'L L. 367 (1996).

375. *See In re* Gault, 387 U.S. 1, 31–57 (1967) (granting children the right to notice of charges, the right to counsel, the right to confront and cross-examine witnesses, and the privilege against self-incrimination in juvenile delinquency proceedings). *See also* New Jersey v. T.L.O., 469 U.S. 325 (1985) (granting students in public schools limited protection under the Fourth Amendment); Breed v. Jones, 421 U.S. 519 (1975) (holding that the prohibition against double jeopardy applies in juvenile proceedings); *In re* Winship, 397 U.S. 358 (1970) (holding that the reasonable doubt standard applies in juvenile proceedings). *But see* McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (holding that juveniles are not constitutionally entitled to jury trials in delinquency proceedings). Although the Court in *T.L.O.* held that public school students have Fourth Amendment protection, the content of that right was not coexistent with an adult's. *See T.L.O.*, 469 U.S.

Amendment[376] and due process protection.[377] Even at this later date, however, it is not entirely clear that children have rights separate from, and independent of, their parents.[378] As Chief Justice Burger asserted in *Parham v. J.R.*,[379] which upheld the right of parents to commit their children to state mental hospitals without a prior due process hearing, it is only through the parents that the child's rights can be protected.[380] On the other hand, the Court did acknowledge in *Parham* that children possess a liberty interest entitling them to some kind of due process protection.[381] While the *Parham* majority held that a judicial hearing was not necessary under these circumstances, it further ruled that parents could not commit their child without review by a neutral fact finder, such as a psychiatrist who was obligated to interview the child personally and exercise independent medical judgment.[382] Upholding the statute on its face, the Court nevertheless remanded the case to determine if any of the child's rights were violated as applied.[383]

In addition, although the Justices have granted parents a say in whether their minor daughters may have an abortion, they have not permitted parents to exercise an exclusive veto power in this matter.[384] The state must at least provide

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at 339. In *Acton*, the Court upheld random urinalysis of public school students involved in intramural sports. *See* Vernonia Sch. Dist. v. Acton, 515 U.S. 646 (1995).

376. *See* Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 511 (1969) (extending free speech rights under the First Amendment to school children, who "are 'persons' under our Constitution...possessed of fundamental rights" when they are "in school as well as out of school").

377. *See* Goss v. Lopez, 419 U.S. 565, 574 (1975) (holding that when a student faces suspension from school, he is entitled to notice of the charges as well as an opportunity to present his side of the story because the suspension will necessarily result in the deprivation of the student's protected property and liberty, which are his interests in educational benefits and his "good name, reputation [and] honor" respectively).

378. *See* Eric G. Anderson, *Children, Parents and Nonparents: Protected Interests and Legal Standards*, 1998 BYU L. REV. 935 (1998); Susan L. Brooks, *A Family Systems Paradigm for Legal Decision Making Affecting Child Custody*, 6 CORNELL J.L. & PUB. POL'Y 1, 10 (1996); Barbara Jones, *Do Siblings Possess Constitutional Rights?*, 78 CORNELL L. REV. 1187, 1217 (1993); Ilse Nehring, *"Throwaway Rights": Empowering a Forgotten Minority*, 18 WHITTIER L. REV. 767, 796 (1997); James G. O'Keefe, *The Need to Consider Children's Rights in Biological Parents v. Third Party Custody Disputes*, 67 CHI.-KENT L. REV. 1077 (1991); Melinda A. Roberts, *Parent and Child Conflict: Between Liberty and Responsibility*, 10 N.D. J.L. ETHICS & PUB. POL'Y 485, 492 (1996); Catherine J. Ross, *An Emerging Right for Mature Minors to Receive Information*, 2 U. PA. J. CONST. L. 223, 239 (1999); Justin Witkin, *A Time for Change: Reevaluating the Constitutional Status of Minors*, 47 FLA. L. REV. 113, 116 (1995); Barbara Bennett Woodhouse, *"Who Owns the Child?":* Meyer *and* Pierce *and the Child as Property*, 33 WM. & MARY L. REV. 995 (1992).

379. 442 U.S. 584 (1979).

380. *See id.* at 600.

381. *See id.*

382. *See id.* at 606–13.

383. *See id.* at 616–17.

384. *See* Planned Parenthood v. Danforth, 428 U.S. 52, 75 (1976).

the child with access to the courts, so that a parent's arbitrary decision may be overridden.[385]

Although some of the above cases appear to be affirming parental power over children, on closer inspection these rulings aggrandize state power rather than parental authority. In the *Parham* case, as noted above, the Court upheld the parents' right to commit their children to a state mental hospital without a pre-commitment judicial due process hearing.[386] Part of the Court's rationale rested on the notion that parents' natural love and concern for their children would prevent arbitrary institutionalization.[387] On the other hand, the Justices made clear that a state was not required to give parents such authority, and that it could instead require a formal due process hearing prior to incarceration of the child.[388] Thus, it is the state's decision to side with either the parent or the child that appears to determine the law's constitutionality.[389] Indeed, the state standing alone can defeat both a parent's interest in not having her child subjected to corporal punishment in the schools and the child's interest in bodily integrity.[390]

Underscoring governmental primacy is the Court's decision in *Michael H. v. Gerald D.*,[391] allowing the state to choose which side to favor—the married couple, the biological father, or the child. In that case, which, like *Troxel*, was a visitation decision, a plurality held that a natural father had no substantive due process right to maintain his longstanding relationship with his child, born to a woman married to another man.[392] The California law denied him a hearing to rebut the presumption that a child born during the marriage was of the marriage.[393] The plurality refused to grant the relationship of natural parent to child any meaningful status.[394] The state was free to choose to support either the marital couple or the natural father.[395] The dissent disagreed, claiming that, as a matter of procedure, the natural father had a right to a hearing on the issue of visitation.

> [His] challenge in this Court does not depend on his ability ultimately to obtain visitation rights; it would be strange indeed if,

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385. *See* Bellotti v. Baird, 443 U.S. 622, 647 (1979) (stating that "every minor must have the opportunity—if she so desires—to go directly to a court without first consulting or notifying her parents" because parents may have such "strong views on the subject of abortion" that they might attempt to prevent their daughter not only from having an abortion but from having access to the courts as well).

386. *See Parham*, 442 U.S. at 616–17.

387. *See id.* at 602.

388. *See id.* at 610.

389. *See* Irene M. Rosenberg, *Juvenile Status Offenders–New Perspectives on an Old Problem*, 16 U.C. DAVIS L. REV. 283 (1983).

390. *See* Ingraham v. Wright, 430 U.S. 651, 676 (1977) (observing that corporal punishment balances a child's interest in his bodily dignity and punishment essential for the child's education, and that no child's rights are deprived if the punishment is within the "limits of the common-law privilege" rooted in the history and tradition of this country).

391. 491 U.S. 110 (1989).

392. *See id.* at 130.

393. *See id.* at 116, 119.

394. *See id.* at 130.

395. *See id.*

> before one could be granted a hearing, one were required to prove that one would prevail on the merits. The point of procedural due process is to give the litigant a fair chance at prevailing, not to ensure a particular substantive outcome.[396]

Although the decisions thus accord great weight to the governmental interest, the Court's overarching methodology is a balancing of competing parental rights, state's rights and the interests of children. However, it is not only parents who have a right to familial integrity and constitutional protection. Indeed, the case law makes it clear that such a right is not restricted to the parent-child nuclear family. For example, in *Moore v. City of East Cleveland*,[397] the Court invalidated an ordinance limiting occupancy in a dwelling to certain members of a family unit as it applied to a grandmother living in her home with her two grandsons, who were cousins and not siblings.[398] In his plurality opinion, Justice Powell argued that the *Yoder*, *Meyer*, and *Pierce* line of cases applied to extended family relationships, even though those decisions had not involved such associations.[399] Extolling the virtues of the extended family, Justice Powell stated:

> [M]illions of our citizens have grown up in just such an environment, and most, surely, have profited from it. Even...a decline in extended family households,...[has] not erased the accumulated wisdom of civilization, gained over the centuries and honored throughout our history, that supports a larger conception of the family. Out of choice, necessity, or a sense of family responsibility, it has been common for close relatives to draw together and participate in the duties and the satisfactions of a common home.... Especially in times of adversity, such as the death of a spouse or economic need, the broader family has tended to come together for mutual sustenance and to maintain or rebuild a secure home life.[400]

In *Moore*, the reason given for affording protection to the family was that the "institution of the family is deeply rooted in this Nation's history and tradition."[401] In fact, the Court distinguished an earlier decision, *Village of Belle Terre v. Boraas*,[402] the "hippie commune" case, upholding the constitutionality of a zoning ordinance that prohibited unrelated persons from residing together in a home, on the ground that it applied only to unrelated individuals, whereas those "related by blood, adoption and marriage"[403] were not prohibited from living together.[404] The East Cleveland ordinance, however, was invalid as applied,

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396. *Id.* at 145 (Brennan, J., dissenting).
397. 431 U.S. 494 (1977).
398. *See id.* at 505–06.
399. *See id.*
400. *Id.* at 504–05 (citations omitted).
401. *Id.* at 503.
402. 416 U.S. 1 (1974).
403. *Id.* at 2.
404. *See id.*

because it selected certain "categories of relatives that may live together and...others [that] may not."[405] At the same time, though, it must be acknowledged that, unlike the grandparent visitation cases that are the subject of this Article, *Moore* does not involve a parent objecting to the living arrangements. Rather, it is the state and the family who are adversaries.

What makes familial relationships so significant? Although the Court has stressed that biological relationships are important to the right to familial integrity, it has also recognized that they are not the only determinant.[406] As the Justices observed in *Smith v. Organization of Foster Families for Equality and Reform*,[407] "the importance of the familial relationship, to the individuals involved and to society, stems from the emotional attachments that derive from the intimacy of daily association...."[408]

Again, however, there is a counterpoint. Consider that intimacy alone did not prevail in *Bowers v. Hardwick*,[409] in which the majority read the substantive due process cases narrowly and found that homosexual sodomy was not a

405. *Moore*, 431 U.S. at 498–99.

406. *See id.* at 536–540 (Stewart, J. & Rehnquist, C.J., dissenting).

407. 431 U.S. 816 (1977). A civil rights class action suit seeking a declaratory judgment and injunctive relief was brought by foster parents on their own behalf and on behalf of foster children. *See id.* The Court examined the constitutionality of procedures for removing foster children from foster homes. *See id.* The class included Madeleine Smith, with whom Eric and Danielle Gandy had been placed since 1970. *See id.* at 821. The agency wanted to remove the children because of Mrs. Smith's arthritis. *See id.* The district court, through the procedures in place, determined that foster care be continued and contemplated that the children should stay with Mrs. Smith. *See id.* Additional appellees included the Goldbergs, who had fourteen-year-old Rafael Serrano in their home since 1969. *See id.* Mrs. Goldberg left her husband, taking their own child and leaving Rafael. *See id.* Rafeal was placed in a residential treatment facility where Mr. Goldberg continued to visit him. *See id.* The Lhotans were foster parents who had taken care of four sisters since 1970. *See id.* The agency returned the two younger girls to their home in 1974. *See id.* The agency then decided to move the two older girls to another foster home because their attachment to the foster parents was counterproductive to the goal of returning all of the children to their biological home. *See id.*

408. *Id.* at 844. However, in *Smith* the associational interest was not enough where the competing interest was the reunification of the family. *See id.* at 846–47; *see also* Roberts v. U.S. Jaycees, 468 U.S. 609 (1984) (involving a local chapter of the Jaycees that was admitting women into its organization as regular members against the regulations of the national organization, which permitted only men, ages eighteen to thirty-five, to be regular members). When the national organization began imposing sanctions against the local chapter, a suit was instituted alleging that the policy was discriminatory under Minnesota civil rights law. *See id.* at 612–17. The majority noted the need to protect "highly personal relationships," which reflects the fact that people "draw much of their emotional enrichment from close ties with others." *Id.* at 618–19. Justice Brennan mentioned, as deserving of such protection, the right to "cohabitation with one's relatives." *Id.*

409. 478 U.S. 186 (1986).

fundamental right triggering strict scrutiny.[410] As Justice Blackmun pointed out, however, in his dissenting opinion:

> The Court concludes today that none of our prior cases dealing with various decisions that individuals are entitled to make free of governmental interference "bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case." While it is true that these cases may be characterized by their connection to protection of the family, the Court's conclusion that they extend no further than this boundary ignores the warning in [Moore] against "clos[ing] our eyes to the basic reasons why certain rights associated with the familly have been accorded shelter under [due process]." We protect those rights not because they contribute, in some direct and material way, to the general public welfare, but because they form so central a part of an individual's life.... [The] Court claims that its decision today merely refuses to recognize a fundamental right to engage in homosexual sodomy; what the Court really has refused to recognize is the fundamental interest all individuals have in controlling the nature of their intimate associations with others.[411]

What does this wavering line of substantive and procedural due process cases suggest? First, it is clear that the right of parental decision-making is constitutionally protected to a significant degree. It is equally clear, however, that the Court has never taken an absolutist stand, rather, in a variety of contexts, other interests have been taken into account as well, particularly those of the state. Furthermore, the Justices also have acknowledged the constitutional significance of other kinds of close and intimate family-type relationships. These cases, with their emphasis on the importance of family and personal associations, provide at least some support for the view that a child has a due process right to maintain relationships with individuals other than his or her parents. As we saw earlier, refusing to allow a child to see other relatives, or indeed even non-family adult figures who are important to them, deeply affects the child's emotional growth and development and can have a permanent impact on his or her social and family relationships.[412] While arguably not as intense or searing as the abortion decision in terms of long term consequences, the destruction of familial relationships is of enduring importance and may inflict enduring injury.

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410. *See id.* at 192, 196.

411. *Id.* at 204–06. (Blackmun J., dissenting) (citations omitted). *See also* Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980). The viability of *Bowers* is in doubt as a result of *Romer v. Evans*, 517 U.S. 620 (1995), invalidating on equal protection grounds a state constitutional provision that prohibited legislation to protect homosexuals.

412. *See supra* notes 27–31, 65–66 and accompanying text.

While there may not be a specific tradition[413] in favor of these relationships,[414] historically the underlying principles of family unity would militate in favor of such a right. Furthermore, the alternate test for determining whether there is a fundamental due process right triggering strict scrutiny is whether it involves a right implicit in the concept of ordered liberty.[415] Here, too, one can argue that the notion of ordered liberty includes within it a just and moral world in which children must be allowed to maintain relationships with more than their immediate family unless there is contraindicating evidence. Moreover, just as in *Parham*[416] and the abortion decisions, it can be asserted that the state must, or at least may, give third parties, such as grandparents, a right to review by a neutral fact finder before parents can unilaterally limit or eliminate such contact between their children and such third parties. Similarly, one might contend that where a state sides with a child and permits third parties standing and visitation in the child's best interests, even over parental objection, the confluence of state and child can overcome the parent's constitutionally protected interest in child rearing.

VI. THE EFFECT OF *TROXEL* AND THE SUPREME COURT'S OTHER FAMILY LAW DUE PROCESS DECISIONS ON STATE THIRD PARTY VISITATION STATUTES

Given the diverse viewpoints expressed by the Justices in *Troxel*, and given the less than clear cut, if not opaque, body of other family law substantive and procedural due process cases, where does this leave state third party visitation laws that are less sweeping and open-ended than the Washington legislation reviewed by the Court in *Troxel*? Analytically, it makes sense first to consider whether these laws pass muster with respect to the issue of standing and then to examine separately the issue presented on the merits—whether visitation rights may be awarded grandparents or other parties solely because to do so would be in the best interests of the child, or whether instead there must be a showing of harm to the child, or some variant thereof, absent third party visitation. To that end, I propose the following model statute for third party visitation. I believe this statute would pass constitutional muster and any objections to allowing third party visitation over parental objection after *Troxel*.

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413. This is only required by a minority of the Court. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110 (1989).

414. *See, e.g.*, Moore v. City of E. Cleveland, 431 U.S. 494 (1977) (Brennan, J., concurring) (noting that the "nuclear family" of today is what is found most often in white suburbia, but that "the Constitution cannot be interpreted...to tolerate the imposition by government upon the rest of us of white suburbia's preference in patterns of family living." *Id.* at 508. However, the "extended family" that provided economic and emotional support for early Americans is still a pervasive living pattern and provides services and emotional support not always found in nuclear families. *See id.* at 508–09.). See also the debate between Justice Scalia, writing the plurality opinion, and Justice Brennan, in his dissent, concerning the concept of "family" in *Michael H.*, 491 U.S. 110 (1989).

415. *See Bowers*, 478 U.S. at 191–92.

416. 442 U.S. 584 (1978).

A. A Model Statute

Legislative Intent:

The legislature recognizes that children can benefit from visitation and contact with individuals who are not their parents. To that end, depending on the facts and circumstances, grandparents, relatives, and unrelated third parties should be able to petition for standing, even if the fit parent or parents are in opposition to such visitation. To accommodate the proper balancing of all interests, different categories of third parties must meet different standards under the statute. For this reason, a separate balancing is required at the standing and merits hearings.

I. Standing:

A. Grandparents, and other persons related by blood or law, including, but not limited to, aunts, uncles, siblings, half-siblings, and step-parents, who can establish by a preponderance of the evidence that they have had an ongoing and meaningful relationship with a child for at least one year, have standing to petition for visitation notwithstanding any parental objections.

B. In cases in which grandparents and other persons related by blood or law have had either no relationship with the child or a relationship for less than a year, and the parent articulates a legally sufficient reason for preventing visitation, there is a rebuttable presumption that the parent's objection is controlling. The presumption can be rebutted if the petitioning relative proves by clear and convincing evidence that the parent's objection is untrue or invalid.

C. In order for unrelated third parties to have standing to petition for visitation, they must have had an ongoing and meaningful relationship with a child for at least eighteen months, which has been significantly curtailed or eliminated by the parent. Standing will be granted if this is proven by clear and convincing evidence and the parent cannot articulate a legally sufficient reason[417] for significantly curtailing or eliminating the visitation. If the parent offers a legally sufficient objection to the visitation, absent compelling or extraordinary circumstances, standing should be denied.

D. Prior to the filing of any petition, the individual must seek and be denied permission to initiate visitation with the child or maintain the same level of visitation from the parent who has custody of the child. The refusal for visitation must be of a permanent nature.

II. Appointment of Attorney:

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417. The reason given by the parent must be of such significant magnitude that the court believes there would be no reason to give a third party even standing to seek visitation. As with other statutory language, the courts will be responsible for interpreting this language more fully.

In all proceedings, including hearings to determine standing, the court must appoint an attorney experienced and skilled in representing children to represent the child under this statute.

III. Mediation:

A. If persons related by blood or law or an unrelated third party is granted standing to petition for visitation, all the parties, including the child, must try to resolve the matter through mediation prior to any hearing on the merits. The child may be present for the mediation or may be represented by his or her attorney.

B. If the parties cannot afford mediation, the court will assist the parties in locating a mediator or agency that will provide mediation on a sliding fee scale.

IV. Hearing on the Merits:

A. If a petition for visitation is filed because the custodial parent opposes the visitation requested, and the petitioner has been granted standing, the petitioner's burden of proof at the hearing on the merits is clear and convincing evidence that the requested visitation is in the best interests of the child. The court will make its decision whether visitation is in the best interests of the child, taking into account all relevant factors, including, but not limited to, the following:

1. the nature of the relationship between the child and the person requesting visitation, including the length of time the relationship existed and the length and quality of previous visits;
2. the reasons the parent or parents oppose such visitation;
3. the child's wishes;
4. the age and maturity of the child;
5. the emotional and physical health of the parties;
6. the effect on the stability of the child's life;
7. whether the visitation will improve the child's emotional, physical and/or cognitive development;
8. and any other factors that may be relevant in deciding what is in the child's best interests.

B. The court shall order psychological and psychiatric evaluation and testing of all parties, including the child.

B. The Standing Hearing

Since every Justice on the Court assumes that parental prerogatives are not absolute,[418] the question becomes when that parental right must yield. As we have seen, the *Troxel* Court conflated the procedural issue of standing and the substantive issue of granting the visitation on the merits.[419] There are, however, strong reasons that support discrete consideration of the two issues. As some Justices have observed in the past, however, the distinction between procedure and substance may make a critical constitutional difference. For example, in his dissenting opinion in *Michael H.*, Justice Brennan contended that the Court had improperly characterized the natural father's procedural claim as substantive,[420] thereby fatally confusing the constitutional analysis. In the dissent's view, the question of the nature of the implicated liberty interest should have been distinguished from the issue of whether Michael H. was entitled to some kind of a hearing on his visitation request.[421]

The differing interests implicated in the standing issue and the issue on the merits also mandate separate consideration of these two questions. Parental rights cases will ultimately rest on a sensitive balancing of the particular facts and circumstances of each situation.[422] I also recognize, as did Justice Kennedy and the plurality, that granting third parties standing can, in and of itself, be a serious impingement on parental rights.[423] In my view, those rights can be adequately protected if grandparents or other blood or legally related relatives are required to make a showing, by a preponderance of the evidence,[424] that they have had an ongoing and meaningful relationship with the child that has endured for more than a year,[425] and that the custodial parent has diminished or eliminated contact between the petitioning parties and the child.[426]

What other evidence would be admissible at the standing hearing? First of all, parental objections would be irrelevant at this stage,[427] although of course they would be highly relevant at the hearing on the merits to determine the child's best

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418. *See* Troxel v. Granville, 530 U.S. at 88, 93, 98.

419. *See supra* notes 290–302 and accompanying text.

420. *See* Michael H. v. Gerald D., 491 U.S. at 145 (1989) (Brennan, J., dissenting).

421. *See id.* at 153 (citing to *Stanley v. Illinois*, 405 U.S. 645 (1972) as a procedural due process case, and commenting that the plurality was incorrect in stating that it was not).

422. *See supra* Part V.

423. *See Troxel*, 530 U.S. at 101.

424. *See supra*, Model Statute § I.A.

425. *See id.* I am suggesting a relationship of at least one year in recognition of the importance of the parent's right to make decisions regarding his or her child's upbringing. States have statutes that have a time period requirement of one year for several issues. For example, in Texas, a parent's right to custody is rebutted if the parent has voluntarily relinquished custody to a third party for at least a year. *See* TEX. FAM. CODE ANN. § 153.373 (Vernon 1996).

426. *See supra*, Model Statute § I.D.

427. *See supra*, Model Statute § I.A.

interests.[428] There are scenarios in which this failure to take parental wishes into account at the standing hearing seems unfair. For example, suppose a grandparent has maintained a relationship with his granddaughter for several years. The mother, believing that her daughter has been sexually molested by the grandfather, paternal or maternal, cuts off contact. The grandfather sues for visitation. According to my model, the mother's reasons for eliminating visitation would not be considered at the standing proceeding. Therefore, the parties would go on to the best interests hearing where her voice would carry great weight and where the grandfather would have to meet a clear and convincing standard of proof. Thus, if there is some evidence to support the mother's claim, the grandfather would be denied visitation.[429]

It is true that the mother has been put to expense and subjected to emotional turmoil in fighting the grandfather's petition for visitation. In view, however, of this long ongoing relationship between the grandparent and the child, I believe that, on balance, the intrusion by the grandfather into the mother's life is less harmful than the possibility of arbitrarily cutting off a relationship that may benefit both child and grandfather.

My proposed framework means that in cases where relatives have never had a relationship with the child, they would have no standing. In my view, that would be an acceptable trade off because I do not think that the state should ordinarily be empowered to *create* relationships. As a philosophical matter, the creation of relationships should be between private individuals. Once that is created, however, then the state has a role in assuring that beneficial ties not be arbitrarily destroyed.[430]

Nonetheless, recognizing that a child may suffer from lack of contact with the older generation, in cases where the parent has arbitrarily prohibited the creation of such a relationship, I believe that the grandparents and other family members should be able to petition for visitation.[431] As to such claimants, however, the evidentiary burden to establish standing should be higher, such as clear and convincing proof;[432] moreover, if the parent articulates a valid reason for not permitting such persons to visit with the child, the parent's objection should be accorded great weight in the determination of whether to grant standing.[433]

For example, turning the prior scenario around, suppose the mother, to exact revenge from her father for unrelated reasons, falsely claims that he sexually molested her as a child and from birth refuses to let him see her daughter. Her

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428. *See supra*, Model Statute § IV.A.

429. For the purposes of this Article I took the less complex scenario of what might actually happen. It could be more complicated if the grandmother actually knew of the abuse and did not do anything to protect the child or denied that the abuse had actually occurred.

430. *See* Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816, 845 (1977).

431. *See supra*, Model Statute § I.B.

432. *See id.*

433. *See id.*

father, who wants to create a relationship with his granddaughter, petitions for visitation, and the mother falsely gives as an objection the father's supposed incest.

There are two possible solutions to this problem. One is to determine the accuracy of the mother's objection as part of the standing hearing. The downside is that some of the evidence presented at the standing hearing on that issue would also be presented at the hearing on the merits. Furthermore, such a hearing is more intrusive and costly for the parent than an ordinary proceeding to decide the standing issue. The upside, of course, is that the mother's lie will not prevent the creation of the grandparent/grandchild relationship, which I consider very important.

Second, one could take the position that as long as the mother articulates a legally sufficient objection, that should be dispositive, and the grandparent's petition should be dismissed without a hearing on the merits. This alternative permits little intrusion on parental rights and will be less costly to the parent than an evidentiary hearing on the accuracy of the mother's objection. On the other hand, it effectively permits a parent arbitrarily to deprive his or her child of a relationship with the previous generation that could be of great benefit to the child.

Either position is arguable, but ultimately rests on a value choice between the primacy of parental rights and the welfare of the child. Because the welfare of the child is my primary focus and policy concern, I opt for the first alternative, which requires an inquiry into the accuracy of the mother's objection at the standing hearing.

In addition to grandparents and other relatives, the third category of potential parties is unrelated persons seeking visitation. Such individuals should be required to have had an ongoing important relationship with the child for more than eighteen months, following which the parent must have curtailed or eliminated contact between the petitioner and the child.[434] To establish standing, these unrelated parties will have to satisfy the "clear and convincing" standard of proof.[435] If the parent cannot articulate a valid reason for cutting off visitation, the petitioner will be granted standing and a hearing on the merits.[436] If, on the other hand, the mother's objection is a legally sufficient one, whether true or not, it is, absent compelling and extraordinary circumstances, dispositive, and the plaintiff would be denied standing. I choose this outcome even though it means that, by lying, a parent can disrupt an ongoing meaningful relationship of the child, at least in the absence of an extraordinary rebuttable presentation. Here, however, I believe parental primacy should win out, except in such very narrow and limited circumstances.

Suppose, for example, that a woman has a son, but she and the boy's father were never married, and further assume that, as soon as he learns she is pregnant, he leaves. The mother then enters into a relationship with another man

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434. *See supra*, Model Statute § I.C.
435. *See id.*
436. *Id.*

who lives with her and the child. He becomes, in effect, a psychological parent. Seven years later, he and the mother have a falling out, and he leaves their residence. He wants to have visitation rights with the boy, but the mother, who has since entered into yet another relationship, refuses because she believes it would be confusing for the child. In this case, the mother's objection is probably legally sufficient, and ordinarily my model would result in dismissal of the petition. The petitioner may try to establish compelling circumstances by showing that he is the psychological father, that there is no other father in the picture, and that there is no more serious objection other than the belief that his visits would be confusing.

Consider the following example of less compelling circumstances: A mother has a child and has to work. The biological father has disappeared. She has no close relatives nearby, and an elderly, retired neighbor watches the child after school and often on the weekends. The child and neighbor develop a close relationship. The mother marries, and she decides that it would be too confusing if the boy and the neighbor continued to see each other. The neighbor, who is very attached to the child, petitions for visitation. In my view, the neighbor should not be granted standing because the objection is legally sufficient, and this scenario is not compelling enough to require a hearing on the merits. The neighbor is neither a psychological father nor a legal or blood relative. All of us have people coming in and out of our lives on a regular basis, and a child has to learn to cope with that reality of life. Thus, even though a hearing on the merits might show that the relationship is beneficial for the child, the intrusion on parental autonomy is too costly.

In the hypotheticals given above, there is only one parent or only one parent objecting. What would happen if both parents were living together, and both objected to the visitation? Many courts and statutes make it extremely difficult, if not impossible, for grandparents and other third parties to secure standing if the family is intact.[437] This view presumably stems from either a belief that if both parents conclude that visitation is inappropriate, the intrusion into parental autonomy is necessarily greater; or that this united front makes it more likely that the parents' objection is valid; or that the value of a grandparent/grandchild relationship is not as important in an intact family. Because these reasons either do not relate to, or are only tangentially related to, the child's best interests, in my model that factor is only of evidentiary value and admissible only at the merits hearing.[438]

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437. *See The Supreme Court 1999, Term Leading Cases*, 114 HARV. L. REV. 219, 234–35 (2000) (stating that some state statutes allowed grandparent visitation only after a "disruptive event" in the family).

438. *But see* GOLDSTEIN ET AL., *supra* note 2, at 38–39, 116–119. The authors, who advocated one primary caretaker (the custodial parent) to make all decisions regarding visitation, would consequently disagree with this position. The authors felt it important that the child recognize one adult as being in control and making those decisions with the child's best interests at heart. The authors state that positive visits can only occur if both parties work together to make this happen. Although they are discussing custodial and noncustodial parents, this rationale could also be applied to visitation requests from third

Would my models for standing be constitutional under *Troxel*? As noted above, the plurality opinion collapsed the standing and merits issues, thus not making it clear whether the plurality would permit different standards for each or what standards would be appropriate.[439] Justice O'Connor was, however, quite emphatic that the case not be remanded for further proceedings because of the cost and anxiety to the mother.[440] Although her position may be based on the particular facts of this case—by the time *Troxel* reached the Supreme Court, the parties had already had three hearings in state courts, and perhaps, in her view, enough was enough—or, on the other hand, it may be that Justice O'Connor would not distinguish between the standing and merits hearings, viewing both as an unconstitutional intrusion.

Justice O'Connor also found the broad language of "any person" at "any time" problematic.[441] She might, therefore, disapprove of my third category dealing with unrelated parties. On the other hand, my model makes it almost impossible for unrelated parties, with the possible exception of psychological parents, to win standing if the parent cites a legally sufficient reason. This effectively narrows the "any person" "any time" language that she found objectionable.

Furthermore, Justice O'Connor was troubled by the lack of deference to the mother's objection.[442] My model views the mother's opposition as a very significant factor both at the standing hearing (for other than relatives by blood or law with long established relationships), and even more so at the hearing on the merits.

Justice Kennedy might well embrace my models. His opinion was not as adamant as the plurality with respect to standing, and he would have remanded the case for further proceedings, notwithstanding the impingement on the mother's rights.[443] Moreover, his analysis regarding the substantive best interests issue[444] indicates that he might permit at least those with pre-existing relationships to trump a parent's veto. Therefore, if Justice Kennedy does not consider parental objection to be a complete bar on the merits, presumably he would be satisfied with my resolution of parental objections and the relationships of various third parties with the child at the standing hearing.

My proposed models are clearly consistent with the approach taken by Justice Stevens in his dissenting opinion, since he took the position that the federal constitution would permit visitation over parental objections at least in certain

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parties. In an ideal world, this would be a very good way to view visitation decisions. Our family law system, however, does not allow for the custodial parent to make these determinations in regard to the noncustodial parent. Rather, it is the judge who does so. Therefore, it would make sense to have the judge render the decision in regard to third party visitation as well.

439. *See supra* notes 292–310 and accompanying text.
440. *See* Troxel v. Granville, 530 U.S. 57, 75 (2000).
441. *See id* at 67.
442. *See id* at 69.
443. *See id* at 94–95.
444. *See id* at 96–102.

circumstances.[445] Even Justice Scalia might approve the recommended laws in light of his observation that parental rights are not absolute.[446] Justice Thomas is another matter. My proposal, or indeed any proposals that would deny a fit parent's veto over visitation, would presumably conflict with his emphasis on the primacy of parental rights and a strict standard of review.[447]

C. The Hearing on the Merits

If a party satisfies the standing requirement, he or she would then ordinarily be entitled to a hearing on the merits, which is, without doubt, expensive and intrusive, at least as I believe such hearings should be conducted. Because of this factor, the court should have the power to order mediation.[448] At this stage, after the granting of standing, both sides have an incentive to try to reach an agreement outside of court and both have a better understanding of the strengths and weaknesses of their cases. This is not a novel idea; a large majority of states use mandatory mediation in many family law disputes.[449] If the parties cannot afford mediation, the court will assist them in locating a mediator or agency that will provide mediation on a sliding fee scale.[450]

Suppose, however, that mediation fails. There is then a hearing on the merits. At this hearing, I envision a lawyer for the child,[451] separate and apart from the disputants; psychiatric and psychological testing for everyone;[452] expert testimony;[453] home visits; school reports; medical reports; testimony of friends and

445. *See id* at 86–89.

446. *See id* at 92–93.

447. *See id* at 80.

448. *See supra*, Model Statute § III.A.

449. *See* ALA. CODE § 6-6-20 (2001) (encouraging courts to order mediation prior to trial in custody or visitation disputes except if domestic violence is asserted); CAL. FAM. CODE § 3170 (West 1994 & Supp. 2001) (requiring that the court order mediation between the parties if pleadings indicate the subject matter concerns custody or visitation); NEV. REV. STAT. ANN. 3.500 (Michie 2001) (requiring mandatory mediation in cases involving custody or visitation of a child in counties with a substantial population); R.I. GEN. LAWS § 15-5-29 (2000) (supporting court ordered mediation in disputes involving custody or visitation to help reconcile the conflict); TEX. FAM. CODE ANN. § 153.0071 (Vernon 1996 & Supp. 2001) (transferring any suit involving the parent-child relationship to mediation upon written assent of the parties).

450. *See supra*, Model Statute § III.B.

451. *See supra*, Model Statute § II.A.

452. *See supra*, Model Statute § IV.B.

453. *See supra*, Model Statute § IV.A, B. *But see* Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 746–753 (1988) (disparaging the intrusion of the "helping professions" in divorce and custody disputes as changing the controversies into a process of resolving an "emotional crisis" instead of a legal procedure, and the "helping professions" object to the presence of attorneys as a hindrance to the process that places an emphasis on the legal process rather than helping the parties resolve the emotional issues).

relatives;[454] and any other source of information that may be useful in resolving the matter and determining what is in the child's best interests.[455]

First, regarding the burden of proof at the merits hearing, I believe that where fit parents object to visitation, grandparents, relatives, and third parties should, across the board, be required to establish by clear and convincing evidence that it would nevertheless be in the best interests of the child.[456] If that burden of proof is met, in order to accommodate the parent's concern, visitation would be ordered, but only under terms and conditions that would render it as unintrusive as possible.

I do not believe that harm to the child should be the prevailing standard at this hearing. Harm is presumably a stricter requirement than best interests,[457] although one might argue that if something is in the best interests of the child, failure to provide it would cause harm. Every state uses the best interests standard in visitation disputes, thereby establishing an informed judgment that such a standard works best in such situations.[458] Indeed, the Court itself has noted the state's "substantial" concern, at least in custody matters, in assuring the best interests of the child.[459]

Justice O'Connor voiced concern about the best interests criterion.[460] Since, however, she also was perturbed about various other factors, it is unclear whether she would accept the use of the best interests standard if her other objections were satisfied. For example, Justice O'Connor disapproved of the lack of consideration given to the parent's objections.[461] Since, in my model, parental wishes would be accorded great, but not dispositive, weight and the standard of proof would be higher, it may be that the plurality would go along with the best interests standard. Since Justice Kennedy believed that the state supreme court's

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454. *See supra*, Model Statute § IV.A, B.

455. *See supra*, Model Statute § IV.A.8.

456. *See supra*, Model Statute § IV.A.

457. *See* Troxel v. Granville, 530 U.S. 57, 93–101 (2000) (Kennedy, J., dissenting).

458. *See supra* note 81.

459. *See* Palmore v. Sidoti, 466 U.S. 429, 433 (1984).

> The goal of granting custody based on the best interests of the child is indisputably a substantial governmental interest for purposes of [equal protection]. It would ignore reality to suggest that racial and ethnic prejudices do not exit or that all manifestations of those prejudices have been eliminated. There is a risk that a child living with a step-parent of a different race may be subject to a variety of pressures and stresses not present if the child were living with parents of the same racial or ethnic origin. The question, however, is whether the reality of private biases and the possible injury they might inflict are permissible considerations for removal of an infant child from the custody of its natural mother. We have little difficulty concluding that they are not.

Id.

460. *See Troxel*, 530 U.S. at 69.

461. *See id* at 69–70.

rejection of the best interests standard was erroneous,[462] presumably he would not be opposed to my resolutions regarding the hearing on the merits.

The clear and convincing burden of proof should be sufficient to protect parental interests. Although parental primacy is a fundamental right,[463] as everyone agrees, it is not absolute.[464] Requiring such clear evidence would prevent unnecessary impingement on parental autonomy. The right to be free from bodily restraint is also a fundamental right.[465] Yet one can be committed to a state mental hospital if clear and convincing evidence is provided to show that it is necessary.[466] Furthermore, parental rights can be terminated upon such a quantum of proof.[467] State courts almost uniformly will permit removal of a child from its home based only on either reasonable suspicion or preponderance of the evidence.[468] Visitation disputes are usually governed either by a preponderance or clear and convincing evidence standard.[469] Thus, the use of such a heightened burden of proof is in the mainstream of family law jurisprudence and works well to prevent unnecessary intrusion into the parental domain, while at the same time protecting the child's welfare.

With respect to separate legal representation for the child, my model would make that mandatory.[470] Most states authorize the trial court in its discretion either to appoint an attorney or a guardian ad litem for the child.[471] Some states, such as Washington, say nothing about this problem. The matter of visitation for a child is of utmost importance to the child's mental and emotional development. For the child's voice not to be heard in such a proceeding is to stifle what may be the most relevant evidence on the ultimate issue. Some experts believe that allowing the child to testify would be harmful, because it puts the child in the middle of two warring parties in a case where he or she may have loyalties to

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462. *See id* at 94–95.

463. *See supra* notes 351–369, 371–373 and accompanying text.

464. *See supra* notes 330, 345, 370, and accompanying text.

465. *See* Youngberg v. Romeo, 457 U.S. 307 (1982).

466. *See* Parham v. J.R., 442 U.S. 584, 616–17 (1979).

467. *See* Santosky v. Kramer, 455 U.S. 745, 756–70 (1982).

468. The following states are examples where a child may be removed from the parent's home by a showing of a preponderance of the evidence: ALASKA STAT. § 47.10.011 (Michie 2000); COLO. REV. STAT. § 19-3-505(1) (1999); LA. CHILDREN'S CODE Art. 675 (West 2001); N.Y. FAM. CT § 1046(b)(1) (McKinney 2000); S.C. CODE ANN. § 20-7-736(B) (Law. Co-op. 1976). Arizona, Kansas, Michigan, Montana, and New Jersey require probable cause for removal. *See* ARIZ. ST. JUV. CT. RULE 51 (B) (West 2000); KAN. STAT. ANN. § 38-1542(b)(1) (2000); MICH. R. PROB. M.C.R. § 5.965 (B)(9) (2001); MONT. CODE ANN. § 41-3-406(5) (2001); N.J. STAT. ANN. § 2A:4A-89 (West 2001).

469. *See, e.g.*, TEX. FAM. CODE § 105.005 (Vernon 1996) (stating that the court will make all findings in suits affecting the parent-child relationship by a preponderance of the evidence, unless indicated otherwise by statute).

470. *See supra*, Model Statute § II.A.

471. *See, e.g.*, ALASKA STAT. § 25.24.310 (2001) (giving the judge discretion to appoint an attorney or guardian ad litem in an action involving custody or visitation in order to protect the best interests of the child).

both.[472] This can be overcome by the appointment of skilled attorneys for children who can ascertain the child's wishes and advocate that position in court.

It must be remembered that visitation, or the denial thereof, is not ordered to satisfy the desires of adults, but to benefit the child.[473] Therefore, parental objections based on the parent's conflict with the third parties, rather than the child's best interests, cannot be controlling. Nonetheless, courts must give deference to parental wishes, particularly where the evidence is not so clear that visitation would be in the child's best interests. I acknowledge that this is a fuzzy standard, but it is one that trial courts, who hear the evidence, know how to apply on a case-by-case basis. There is, of course, always the possibility of erroneous rulings. That, however, is a problem that cuts across all of the law. Even with the reasonable doubt standard in criminal cases, innocent defendants are convicted.[474]

Finally, I would like to address the problem of rich grandparents and third parties versus poor parents. A visitation action is not inexpensive, and wealthy grandparents or third parties can outspend and "out-lawyer" lower income parents. One way to deal with this issue is for the states to allow the recovery of the parent's attorney's fees and litigation costs if the petitioning party loses. This approach is used elsewhere in family law disputes,[475] and is one that should protect parents from overbearing grandparents who want to maintain control over their children and do so by demanding visitation.

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472. *See* Douglass Darnall, *Parental Alienation: Not in the Best Interests of the Children*, 75 N.D. L. REV. 323, 333 (1999).

473. *See supra* note 7.

474. *See generally* BARRY SCHECK ET AL., ACTUAL INNOCENCE (2000).

475. *See* Handley v. Handley, 460 So.2d 167, 169–70 (Ala. 1984) (recognizing that, when the mother successfully defended the custody of her children against the paternal grandparents, she was compelled to hire counsel to assist her and, in equity, a court accepting jurisdiction may grant attorney's fees to the mother). In California, by statute, attorney's fees are awarded in marriage dissolution proceedings by the judge in his or her sole judgment after analyzing the needs of the parties in order to ensure that each party is able to be represented by counsel properly. *See In re* Harrison, 179 Cal. App. 3d 1216, 1231 (Ct. App. 1986). In *Harrison*, the court awarded attorney's fees and costs to the wife because her only income was spousal support while the husband had a generous monthly income. *See id.* at 1232. Although this statute was later repealed, *see* CAL. CIV. CODE § 4370 (West 1991) (repealed 1994), California's current code allows attorney's fees and costs to be awarded to the "prevailing party" in any order "modifying, terminating, or setting aside a support order." CAL. FAM. CODE § 3652 (West 1994 & Supp. 2001). In Maryland, the Family Law Code authorizes attorney's fees to be awarded to parties upon the discretion of the trial court based on financial status, needs of the parties, and considerable basis for "bringing, maintaining or defending the proceeding." MD. CODE ANN., FAM. LAW § 12-103(a)–(b) (2001). *See also* Tanis v. Crocker, 678 A.2d 88, 96 (Md. Ct. Spec. App. 1996). In Pennsylvania, attorney's fees were awarded to a father who filed a contempt proceeding against the mother of his child for refusing to allow visitation. *See* DiFilippo v. DiFilippo, 24 Pa. D. & C.4th 14, 16–18 (Pa. Com. Pl. 1995). The court found that attorney's fees were the mother's penalty for her actions, and that the amount awarded was within the court's discretion. *See id.* at 22–23.

It is true that sometimes the grandparents are poor and the parents well-to-do. That could be addressed by an even stronger statute requiring any losing party to pay litigation costs and attorney's fees, which would include the parents. In practice, however, I doubt that poor grandparents would be able to retain counsel on the mere possibility that they would prevail in the visitation suit. I concede that if one of the parties is very wealthy, such a penalty would not deter them from trying to gain or eliminate visitation.

Because of my value choice, the welfare of the child, I end up permitting more intrusions than others whose value choice is the primacy of parental rights. I believe, however, that my framework constitutes a reasonable and constitutional approach, using a more or less fine tuned model that permits a proper balancing of parental rights and the welfare of the child. It is not a perfect model, but it avoids extremes and conserves judicial resources.

D. Applying My Model to Typical Visitation Disputes

How would various scenarios play out under my model? The fact patterns in the introduction are typical of visitation disputes. Let us use some of them to see if the model provides the proper balance between parental rights and the welfare of the child.

For example, in the first scenario where a mother and father are divorced and the mother, who has custody, leaves her four year old daughter with the maternal grandmother for three years. During this period, the grandmother has been providing emotionally and financially for the child, with assistance from the father in the form of child support payments. The mother, who has financial difficulties, returns home, reclaims custody of the child, and resumes receiving the child support payments from the father. The mother refuses to allow the grandmother and the child to have any contact. The grandmother files a petition for visitation. Under these facts, the grandmother would have standing because she could easily meet the preponderance of the evidence standard of showing an ongoing relationship with the child that has been terminated by the mother. The mother's reasons for eliminating visitation would be irrelevant at this point.[476]

At the merits hearing, the mother claims that allowing the relationship between her daughter and her mother to continue would confuse the child and prevent a proper parent/child relationship from developing. This concern may be valid and relates to the child's needs rather than the mother's desire. Expert testimony would be needed to establish whether such a separation is beneficial or harmful to the child, and the decision could easily go either way. Evidence as to the mother's lifestyle during the separation and her interests in the support payments should be factored in. The clear and convincing evidentiary standard, however, might permit the mother to prevail, unless there is strong expert

476. In each of these scenarios in which standing is met, it is assumed that the judge referred the parties to mediation to attempt resolution of the dispute. Although the parties may have had incentive to settle, they failed to do so, and each case went on for a hearing on the merits.

testimony that cutting off such a relationship would be detrimental to the child. The child's wishes should be given strong weight if the evidence also supports the child's preference. Moreover, if visitation is awarded over the mother's objections, the trial court can require the grandmother not to denigrate the mother and to make clear to the child that the mother is the sole authority figure, and may even order visitation, at least initially, in the mother's home or a neutral place.

The next example is the religious conflict between Jewish parents and Christian grandparents. In this case the grandparents have no relationship with the child and therefore would have to present clear and convincing evidence to obtain standing. Furthermore, the parents have a legally sufficient objection to visitation, and thus the court would probably deny standing. Although this result may seem harsh, it protects the most fundamental parental autonomy right, and the denial of visitation may well reflect an understanding of how deeply the grandparents feel about the religious issue, making it difficult to set any limits regarding the grandparent's behavior if visitation were awarded. Additionally, the emotional harm that the child might face if he or she were placed in the middle of the religious differences between the parties could also outweigh any benefits received from the grandparent/grandchild relationship.

The third case involves grandparents whose children have had their parental rights terminated; thereafter the adoptive parents refuse them visitation with the children, who are four and six years old. The grandparents have had an ongoing relationship with the children, and therefore the adoptive parents' objection is irrelevant at the standing hearing.

At the merits hearing, the basis for the adoptive parents' objection, that allowing the biological grandparents to visit would cause confusion for the children who also visit with their adoptive grandparents, would be highly relevant. The older child presumably knows he is adopted, and his wishes about visitation should carry a lot of weight. Here, too, expert testimony would be critical to evaluate whether the adoptive mother's valid concern that the children would be confused should overcome the benefits that the children would receive from continuing visitation with their biological grandparents. Much would also depend on the depth and extent of the grandparent/grandchild relationship. If visitations were ordered, appropriate limits could be applied to assure that the biological parents would not be allowed to see the children when the latter visit with their biological grandparents.

I view this as a complex case in which it is difficult to predict the outcome. Giving the grandparents standing insures an evidentiary hearing on the merits, where the children's best interests would be properly evaluated. It would, of course, be an expensive hearing because of the critical need for expert evaluation of the situation. Furthermore, the experts are divided in this matter, as they often are regarding other familial situations.

The difficulty is compounded in this case because permitting such evidentiary hearings might well discourage people from adopting children who have had an ongoing relationship with their biological relatives. On the other hand,

people who adopt older children must expect these kinds of ties. The older children do not come unencumbered of a past and family. Much depends on the adoptive parent's view of adoption; some prefer complete severing of prior relationships, while others think it beneficial for the child to have two families, which can be an enriching experience.

In the final case noted in the introduction, the grandparent's reason to obtain visitation to take the child to see her abusive father in prison, most would agree, would be contrary to the child's best interests. Most experts believe that forcing a child to visit with a sexual abuser, even a parent, is contraindicated and might well impede recovery.[477] Since the grandparents have had a longstanding relationship, the mother's objection is irrelevant for purposes of standing. At the merits hearing, however, the mother's concern would carry great, if not overwhelming, weight. Furthermore, the grandparents' high burden of proof would undoubtedly shift the balance to the mother. Here, again, the child's feelings are particularly important, and if she does not want to visit with the grandparents, she should not be forced to do so. To be sure, the visitation order can limit the grandparent's access by directing that visitation take place in the mother's home and even with the mother present. Even such restrictions, however, should not override the child's objection. Depending on the child's age, she may simply view the grandparents as an extension of the father who abused her, and seeing them in any environment might be frightening. Furthermore, the grandparents' refusal to accept their son's culpability, which might then be transmitted to the child, may well undermine her recovery. Here, too, expert testimony is important. On balance, however, the mother would and should prevail. This is a good example of a case in which the mother should be able to recoup litigation costs and attorney's fees.

This analysis demonstrates that my model permits proper balancing between parent, child, and grandparents and other third parties. In my view, it meets the constitutional objections raised by the Court in *Troxel*.

VII. CONCLUSION

I am not unmindful of the risks that are run when the state is invited into family life. In an ideal world we would be able to avoid such a dangerous encounter. Adults would behave in a responsible and mature manner, looking only to protect and nurture children. Unfortunately, we live in a less than ideal world in which people's emotions and conflicts often interfere with rational decision making regarding children.

Children depend on the adults in their lives for love and protection; when, for a variety of reasons, they are not forthcoming, the state must step in. In such

477. *See* Irwin Sandler, *Quality and Ecology of Adversity as Common Mechanisms of Risk and Resilience*, 29 AM. J. COMMUNITY PSYCHOL. 1, 31-32 (2001) (having a sense of control is linked to a child's coping mechanisms and a child who has faced adversity through being a victim of sexual abuse has suffered a loss of control which can cause higher incidents of adulthood depression and other mental health disorders).

cases, we must devise rules that permit government intervention only to the extent that is necessary to assure that the child's welfare is protected.

The *Troxel* case provides little guidance to the states in drafting and applying third party visitation statutes. It is a narrow and fragmented decision, in which individual justices are concerned with a variety of factors that arise in visitation disputes.[478]

My model distinguishes between the two related but analytically severable issues of standing to petition for visitation and the decision on the merits of whether it is in the child's best interests to award visitation over a fit parent's objection. This distinction between standing and the merits, which the *Troxel* Court collapsed,[479] provides a framework to protect parents' rights to primacy in child rearing, while at the same time making it more likely that children are not irrationally deprived of important relationships with other adults, both related and unrelated. The model statute that I have proposed should withstand constitutional scrutiny both on its face and as applied in various factual situations.

Perhaps most importantly, I have tried to focus on the child's welfare, insisting that the child's interests should strongly influence the decisions by adults that impact so heavily on his or her well-being and capacity to develop optimally. Visitation with others is such a decision, and therefore we must pay heed to the child's voice when making that determination.

478. *See supra* notes 290–341 and accompanying text.
479. *See supra* notes 290–302 and accompanying text.

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