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Grandparental Visitation Rights in Oklahoma

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NOTES AND COMMENTS

GRANDPARENTAL VISITATION RIGHTS IN OKLAHOMA

I. INTRODUCTION

Following an increasing legislative trend granting grandparents broader visitation rights to their minor grandchildren, on November 1, 1989, Oklahoma joined the ranks of fourteen states[1] which now allow grandparents the statutory right of visitation under almost any circumstances.[2] The 1989 amendment to Oklahoma's grandparental visitation statute allows the courts to award grandparents reasonable visitation rights if it is in the "best interest of the child" regardless of whether the family is intact.[3]

A grandparental visitation statute which allows courts to intervene into a functional, intact family situation raises serious constitutional concerns. The only guideline an Oklahoma court has in determining

1. CONN. GEN. STAT. § 46b-59 (West 1986); DEL. CODE ANN. tit. 10, § 950(7) (Supp. 1988); IDAHO CODE § 32-1008 (1983); KAN. STAT. ANN. § 60-1616(b) (1983); KY. REV. STAT. ANN. § 405.021 (Michie/Bobbs-Merrill 1984); ME. REV. STAT. ANN. tit. 19, § 752(b) (Supp. 1990); MONT. CODE ANN. § 40-9-102 (1988); N.Y. DOM. REL. LAW § 72 (McKinney Supp. 1990); N.D. CENT. CODE § 14-09-05.1 (Supp. 1987); S.C. CODE ANN. § 20-7-420 (33) (Law. Co-op. 1985); UTAH CODE ANN. § 30-3-5(4) (1989); VT. STAT. ANN. tit. 15, § 1011 (1989); WASH. REV. CODE ANN. § 26.09.240 (West Supp. 1990); WIS. STAT. ANN. § 880.155 (West Supp. 1989).

2. OKLA. STAT. tit. 10, § 5 (Supp. 1989). The 1989 version of Oklahoma's grandparental visitation statute restricts the rights of grandparents in a few specified circumstances. *See infra* note 19.

3. OKLA. STAT. tit. 10, § 5(A)(1) (Supp. 1989) now provides that: "[p]ursuant to the provisions of this section, any grandparent of an unmarried minor child shall have reasonable rights of visitation to the child if the district court deems it to be in the best interest of the child." *Id.* Section 60.16(C) deals with the effect of a final decree of adoption on grandparental visitation rights. That section provides that "[a] grandparent, who is the parent of the child's natural parents, may be given reasonable rights of visitation to the child, pursuant to the provisions of Section 5 of this title." *Id.* § 60.16(C).

These provisions seem to allow judicial intervention into intact families. However, Section 5(B) could create an ambiguity in the statute. This section provides that "[n]otice as ordered by the court shall be given *to the person or parent having custody of said child* and the venue of such action shall be in the county of the residence of such person or parent." *Id.* § 5(B) (emphasis added). This language could be interpreted to limit the language of Section 5(A) so that grandparental visitation would be limited to situations in which there is only one custodial parent. Therefore, the statute might not apply to intact nuclear families.

whether to grant visitation rights is that the visitation be in the child's best interest. The vagueness of the "best interest" standard could lead to unwarranted state interference into parental autonomy and the parents' ability to make decisions regarding the rearing of their children.[4] The United States Supreme Court has recognized a fundamental liberty interest in the right of parents to rear their children as they see fit[5] and to be free of unnecessary state intrusion.[6] Grandparental visitation statutes which guarantee grandparents the right to seek visitation in circumstances where the family is intact and functional preempt the constitutionally recognized liberty interests of the family.

As the Oklahoma grandparental visitation statute seemingly allows state intrusion into an intact family, even in the absence of compelling circumstances,[7] it is open to constitutional attack. In particular, the vagueness of the "best interest of the child standard" allows the state to invoke its *parens patriae* power below the constitutionally required threshold of harm to the child.[8] Absent compelling circumstances, grandparents or other third parties should not have a right to petition for visitation to a minor grandchild when the nuclear family is intact and functional. Oklahoma's grandparental visitation statutes should be amended to allow grandparents or any third party who has an interest in the child a right to seek visitation only when there has been a dissolution of the nuclear family, when the grandparents or third parties have been

4. The state has traditionally held "parens patriae powers" which allow it to protect the welfare of the child. In certain circumstances, the state interest in promoting the welfare of the child may override the parent's interest in maintaining autonomy. However, before the state intervenes into the family to promote or protect the child's welfare, the state must prove the parents are either "unfit, unable, or unwilling to care for the child adequately." *See* Comment, *Developments in the Law: The Constitution and the Family*, 93 HARV. L. REV. 1156, 1201-02 (1980). The state may also proscribe or limit certain activities which are deemed harmful to children, such as child employment. Prince v. Massachusetts, 321 U.S. 158, 166 (1944). *See also* Meyer v. Nebraska, 262 U.S. 390, 402 (1923) (discussing the power of a state to compel school attendance).

5. *See* Stanley v. Illinois, 405 U.S. 645, 649-51 (1972).

6. *See Prince*, 321 U.S. at 166 ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.") (citing Pierce v. Society of Sisters, 268 U.S. 510 (1925)).

7. *See* Comment, *supra* note 4, at 1196 ("That family rights, when their infringement is at its apex, be outweighed only by compelling state interests is consistent with the level of protection afforded other substantive constitutional values protected under the due process clause of the fourteenth amendment, such as freedom of speech or religion.").

8. *See* Bean, *Grandparent Visitation: Can the Parent Refuse?*, 24 J. FAM. L. 393, 422 (1985) (noting that the United States Supreme Court has consistently permitted the state's *parens patriae* power to only be used to prevent harm to the child when its use interferes with parental autonomy). *See generally* Meyer v. Nebraska, 262 U.S. 390 (1923).

legal custodians or de facto parents, or under other compelling circumstances, such as child abuse or child neglect by the parents.

A. *Background*

At common law, grandparents had no visitation rights to their minor grandchildren.[9] The parental duty to allow visitation was based on a moral, not a legal, obligation.[10] A majority of courts refused to allow grandparental visitation with only a few exceptions.[11] Refusal to recognize grandparental rights at common law was based on the rule of parental autonomy.[12] The courts presumed that judicial enforcement of grandparental visitation would prove divisive to the family by undermining parental authority[13] and thus ultimately would not be in the best interest of the child.[14]

The failure of the courts to recognize a common law right of grandparental access to their grandchildren induced grandparents to take their grievances to state legislatures.[15] Recognizing the political clout of these registered voters, legislators responded to grandparents' efforts. As a result, all fifty states now have grandparental visitation statutes.[16] These

9. *See* Succession of Reiss, 46 La. Ann. 347, 15 So. 151 (1894).

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

11. *See* Comment, *Grandparental Visitation Statutes: A Proposal for Uniformity*, 19 J. MARSHALL L. REV. 703 (1986). The author notes that there were three common law exceptions: (1) when parties to a divorce had agreed to the grandparental visitation; (2) when evidence was presented that the custodial parent was unfit; and (3) when the child had been living with the grandparent for a period of time. *Id.* at 712.

12. *See* Mimkon v. Ford, 66 N.J. 426, 431, 332 A.2d 199, 201 (1955). There the court gave five reasons why grandparents should not be granted visitation rights over the objections of the parents:

> (1) Ordinarily the parent's obligation to allow the grandparent to visit the child is moral, and not legal; (2) The judicial enforcement of grandparent visitation rights would divide proper parental authority, thereby hindering [that authority]; (3) The best interests of the child are not furthered by forcing the child into the midst of a conflict of authority and ill feelings between the parent and grandparent; (4) Where there is a conflict as between grandparent and parent, the parent alone should be the judge, without having to account to anyone for the motives in denying the grandparent visitation; (5) The ties of nature are the only efficacious means of restoring normal family relations and not the coercive measures which follow judicial intervention.

Id. at 431, 332 A.2d at 202 (citations omitted). *See also* Foster & Freed, *Grandparent Visitation: Vagaries and Vicissitudes*, 23 ST. LOUIS U.L.J. 643, 645-46 (1979).

13. *See* Commonwealth *ex rel.* McDonald v. Smith, 170 Pa. Super. 254, 258, 85 A.2d 686, 688 (1952) ("[A] contest for the child's affection, . . . can lead only to the detriment of the child.").

14. *See* Segal & George, *State Law on Grandparent Visitation: An Overview of Current Statutes*, ABA GRANDPARENT VISITATION DISPUTES: A LEGAL RESOURCE MANUAL (1989).

15. *Id.* at 5.

16. ALA. CODE § 30-3-4 (1989); ALASKA STAT. § 25.24.150 (1989); ARIZ. REV. STAT. ANN. § 25-337.01 (West Supp. 1989); ARK. STAT. ANN. § 9-13-103 (Supp. 1989); CAL. CIV. CODE § 4601 (West Supp. 1990); COLO. REV. STAT. § 19-1-117 (Supp. 1990); CONN. GEN. STAT. ANN. § 46b-59 (West 1986); DEL. CODE ANN. tit. 10, § 950(7) (Supp. 1988); FLA. STAT. § 61.13(2)(b)2.c (West Supp. 1990); GA. CODE ANN. § 19-7-3 (Supp. 1990); HAW. REV. STAT. § 571-46(7) (Supp. 1989);

statutes have not created an absolute right of grandparental visitation, but rather give grandparents the right to petition for court-ordered visitation if visitation is deemed to be in the child's best interest.[17]

B. *Types of Grandparental Visitation Statutes*

The various state statutes are inconsistent in their treatment of grandparental visitation rights and vary widely in scope. The statutes differ according to who is allowed to petition for visitation, under what circumstances they may petition, and what standard a court must use in determining when to grant visitation.[18] Oklahoma's new law is one of the broadest in scope, allowing court-ordered visitation by grandparents whenever the court deems it appropriate.[19] Connecticut's grandparental visitation statute appears to be one of the most liberal, giving standing to seek visitation rights to any interested third party under any circumstances as long as the best interest of the child standard is satisfied.[20]

IDAHO CODE § 32-1008 (1983); ILL. ANN. STAT. ch. 40, para. 607(b)(1) (Smith-Hurd Supp. 1990); IND. CODE ANN. § 31-1-11.7-2 (Burns Supp. 1990); IOWA CODE ANN. § 598.35 (West Supp. 1990); KAN. STAT. ANN. § 60-1616(b) (1983); KY. REV. STAT. ANN. § 405.021 (Michie/Bobbs-Merrill 1984); LA. REV. STAT. ANN. § 9:572 (West Supp. 1990); ME. REV. STAT. ANN. tit. 19, § 752(6) (Supp. 1990); MD. FAM. LAW CODE ANN. § 9-102 (1984); MASS. GEN. LAWS ANN. ch. 119, § 39D (West Supp. 1990); MICH. COMP. LAWS ANN. § 722.27(1)(b) (West Supp. 1990); MINN. STAT. ANN. § 257.022 (West Supp. 1990); MISS. CODE ANN. § 93-16-1 (Supp. 1989); MO. ANN. STAT. § 452.402 (Vernon Supp. 1990); MONT. CODE ANN. § 40-9-102 (1988); NEB. REV. STAT. § 43-1802 (1988); NEV. REV. STAT. §§ 125A 330 to -340 (1987); N.H. REV. STAT. ANN. § 458:17-d (West Supp. 1989); N.J. STAT. ANN. § 9:2-7.1 (West Supp. 1990); N.M. STAT. ANN. § 40-9-2 (1989); N.Y. DOM. REL. LAW § 72 (McKinney Supp. 1990); N.C. GEN. STAT. § 50-13.2(b1) (1987); N.D. CENT. CODE § 14-09-05.1 (Supp. 1987); OHIO REV. CODE ANN. § 3109.05(B) (Baldwin 1988); OKLA. STAT. tit. 10, § 5 (Supp. 1989); OR. REV. STAT. § 109.121 (1989); 23 PA. CONS. STAT. ANN. §§ 5311-5314 (Purdon Supp. 1990); R.I. GEN. LAWS §§ 15-5-24.1- to .3 (1988); S.C. CODE ANN. § 20-7-420(33) (Law. Co-op. 1985); S.D. CODIFIED LAWS ANN. §§ 25-4-52 to -54 (1984); TENN. CODE ANN. § 36-6-301 (Supp. 1990); TEX. FAM. CODE ANN. §§ 14.03 (e) -(g) (Vernon Supp. 1988); UTAH CODE ANN. § 30-3-5(4) (1989); VT. STAT. ANN. tit. 15, § 1011 (1989); VA. CODE ANN. § 20-107.2 (1990); WASH. REV. CODE ANN. § 26.09.240 (West Supp. 1990); W. VA. CODE § 48-2B-1 (1986); WIS. STAT. ANN. § 880.155 (West Supp. 1988); WYO. STAT. § 20-2-113(c) (Supp. 1990).

17. *See* Segal & George, *supra* note 14, at 5.

18. *See* Segal & George, *supra* note 14, at 6.

19. OKLA. STAT. tit. 10, § 5(A)(1) (Supp. 1989). The legislature has listed three exceptions to the general rule. First, Section 5(A)(5) provides that the parents of a father whose child is born out of wedlock shall not have a right of visitation unless the father has been judicially determined to be the father of the child, there has been a previous grandparental relationship with the child, and the visitation is determined to be in the best interest of the child. *Id.* § 5(A)(5)(a)-(c). Second, Section 5(A)(6) also requires the parents of a mother whose child is born out of wedlock to have had a previous relationship with the child and the visitation must be deemed to be in the best interest of the child. *Id.* § 5(A)(6). Finally, Section 5(A)(4) adds the requirement that petitioning grandparents have had a substantial relationship with the grandchild and that visitation be in the best interest of the child, if the parental rights of one or both parents have been terminated. *Id.* § 5(A)(4).

20. CONN. GEN. STAT ANN. § 46b-59 (West 1986) provides that:

> The superior court may grant the right of visitation with respect to any minor child or children to any person, upon an application of such person. Such order shall be according

Texas' statute is very comprehensive, listing numerous situations which trigger the right of a grandparent to petition for visitation.[21] However, most states will allow court-ordered visitation only in specific situations, usually upon the death of a parent or in the case of divorce.[22]

C. *Derivative Rights Theory*

Many early grandparental visitation statutes were based wholly or partially on a derivative rights theory of visitation, but that theory has been largely abandoned.[23] Oklahoma originally based its statute on a derivative rights theory.[24] Under the derivative rights theory, the grandparent derives the right of access to the grandchild through the parents so that the right to association with the child can only be claimed upon the death of the related parent.[25] Grandparents could petition for visitation under a derivative rights statute only when they were the parents of the absent parent.[26] The rationale was that the grandparents stepped into the shoes of their child to represent the absent side of the family.[27] The derivative rights theory has been largely abandoned now that most

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to the court's best judgment upon the facts of the case and subject to such conditions and limitations as it deems equitable. . . . In making, modifying or terminating such an order, the court shall be guided by the best interest of the child, giving consideration to the wishes of such child if he is of sufficient age and capable of forming an intelligent opinion.

Id. However, this section falls under the general heading of dissolution, separation, etc. Although many authors suggest this could be interpreted as an "intact family" statute, the courts could construe the statute as being triggered only by the dissolution or separation of a marriage.

21. TEX. FAM. CODE ANN. § 14.03(e) (Vernon 1990) allows grandparents the right to petition for access to their grandchildren under the following circumstances: (1) incarceration of a parent; (2) the parents have been or are about to divorce and are currently separated; (3) the child has been abused or neglected by the parent; (4) the child has been adjudicated a delinquent; (5) upon termination of parental rights; or (6) the child has lived with the grandparents seeking access for at least six months. *Id.*

22. Segal & George, *supra* note 14, at 9.

23. *See* Foster & Freed, *supra* note 12, at 653-54. *See also* Ingulli, *Grandparent Visitation Rights: Social Policies and Legal Rights*, 87 W. VA. L. REV. 295, 311 (1985) (discussing early state statutes and the derivative rights theory).

24. The original Oklahoma grandparental visitation statute, OKLA. STAT. tit. 10, § 5 (1971), provided in pertinent part that:

when one or both parents are deceased, any grandparent, who is the parent of the child's deceased parent, shall have reasonable rights of visitation to the child, when it is in the best interest of the child. The district courts are vested with jurisdiction to enforce such visitation rights and make orders relative thereto, upon the filing of a verified application for such visitation rights. Notice as ordered by the Court shall be given to the person or parent having custody of said child and the venue of such action shall be in the county of the residence of such preson or parent.

Id.

25. Fernandez, *Grandparent Access: A Model Statute*, 6 YALE L. & POL'Y REV. 109, 118 (1988).

26. *See* Ingulli, *supra* note 23, at 311.

27. *See* Ingulli, *supra* note 23, at 311.

states allow any grandparent the right to visitation when the parents are either deceased or divorced.[28] Including divorce as a situation which triggers the visitation statute indicates that most state legislatures have accepted the theory that emotional support of grandparents can help a child overcome the sense of grief and loss felt when faced with the death of a parent or the dissolution of the family.[29]

D. *Standard to be Applied*

Although statutory language may indicate that states use different standards to determine when visitation is appropriate, the language is often so vague that it is virtually meaningless. The majority of the states, including Oklahoma, use the "best interest of the child" test to determine whether grandparental visitation should be awarded.[30] This standard is very nebulous and has different meanings in different jurisdictions. However, there are a few statutes which do specify factors for the court to consider when using the "best interest of the child" test.[31] Other statutes

28. *See* Segal & George, *supra* note 14, Appendix A at 19-21 (providing a list of states which allow grandparental visitation upon the death or divorce of a parent).

29. *See* Comment, *The Constitutional Constraints on Grandparents' Visitation Statutes*, 86 COLUM. L. REV. 118, 123-24 and n.29 (1986) ("Those children who had extended families, especially grandparents, who were close by or who kept up a continuing interest from a distance were very much helped by this support system.") (quoting J. WALLERSTEIN & J. KELLY, SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE 43-44, 222 (1986)).

30. Often the lack of parameters in defining "the best interest of the child" allows the judge to rely on individual preconceived notions about the nature of the grandparent-grandchild relationship. In Mimkon v. Ford, 66 N.J. 426, 332 A.2d 199 (1975) the court stated:

> A very special relationship often arises and continues between grandparents and grandchildren. The tensions and conflicts which commonly mar relations between parents and children are often absent between those very same parents and their grandchildren. Visits with a grandparent are often a precious part of a child's experience and there are benefits which devolve upon the grandchild from the relationship with his grandparents which he cannot derive from any other relationship.

Id. at 437, 332 A.2d at 204-05. In some instances, a judge may let his own sentimentality about the nature of grandparent-grandchild relationships impair his objectivity. In Commonwealth *ex rel.* Goodman v. Dratch, 192 Pa. Super. 1, 3, 159 A.2d 70, 71 (1960), the court based its decision on the premise that it would be "almost inhuman to completely isolate a child from the grandparents," in spite of the fact that a psychologist testified that any right of visitation would be detrimental to the child's psychological health.

31. The Vermont grandparental visitation statute lists factors to be considered by the court, including "the love, affection and other emotional ties existing between the grandparents involved and the child," VT. STAT. ANN. tit. 15 § 1013(b)(1) (1989), "the moral fitness of the parties," *id.* at § 1013(b)(4), the reasonable preference of the child, if the court deems the child to be of sufficient age to express a preference." *Id.* at § 1013(b)(6). The Nevada grandparental visitation statute requires the court to consider: the love, affection and other emotional ties existing between the party seeking visitation and the child; the prior relationship between the child and the party seeking visitation; the reasonable preference of the child; and the mental and physical health of the party seeking visitation. NEV. REV. STAT. §§ 125A.330 (1987). A proposed bill in North Dakota, S.B. 2398

use language such as "at the discretion of the court,"[32] and "substantial relationship"[33] to define the parameters of the courts' discretion. All of these standards are vague, as they do little to clarify when a court should award visitation. Finally, some statutes do not specify a standard at all.[34] These major variations among state statutes demonstrate the confusion among legislators when trying to balance the competing interests of the grandparent, the child, and the child's parents.

E. *Child's Rights Theory*

Commentators suggest that providing broader visitation rights to grandparents is a step toward recognizing the rights of the child.[35] Child's rights advocates point to the breakdown of the nuclear family in modern society as one of the major reasons for the need to maintain relationships between children and their relatives, especially grandparents.[36]

(1989 ch. 178) would require evidence of domestic violence to be considered as a factor affecting the best interest and welfare of the child.

32. *See* ALA. CODE § 30-3-4 (1989); N.C. GEN. STAT. § 50-13.2(b1) (1987); OHIO REV. CODE ANN. § 3109.05(B) (Baldwin 1988); UTAH CODE ANN. § 30-3-5(4) (1989) ("the court shall consider the welfare of the child"); W. VA. CODE § 48-2B-1 (1986).

33. IDAHO CODE § 32-1008 (1983);N.C. GEN. STAT. § 50-13.2(b1) (1987).

34. In these jurisdictions, caselaw fills in the gaps for the courts, requiring consideration of such factors as (1) animosity between parents and grandparents, *see* In re Adoption of Bermian, 44 Cal. App. 3d 687, 118 Cal. Rptr. 804 (1975) (the court held that when there was animosity between the grandparent and a parent, it was proper to leave the issue of visitation rights to the discretion of the parents), (2) the mental health and physical well-being of the child, *see* Benner v. Benner, 113 Cal. App. 2d 531, 248 P.2d 425 (1952) (the court allowed visitation because severing the grandparent-grandchild relationship might have caused an emotional disturbance in the child); *see also* Lo Presti v. Lo Presti, 40 N.Y.2d 522, 355 N.E.2d 372, 387 N.Y.S.2d 412 (1976) (the court disallowed grandparental visitation because the visits apparently contributed to the child's hyperactivity), and (3) the child's preference, *see* Commonwealth *ex rel.* Flannery v. Sharp, 151 Pa. 612, 30 A.2d 810 (1943) (the court refused grandparental visitation because of the child's protests).

35. *See* Foster & Freed, *The Child's Right to Visit Grandparents*, 20 TRIAL 38 (March 1984) (the child's need-to-know and associate with grandparents). *See also* Victor, *Grandparent and Stepparent Rights, Assuring Visitation to the Child's Extended Family*, 25 TRIAL 55 (April 1989) ("Children denied access to their grandparents lose the unconditional love that grandparents can offer them."); Morris, *Grandparents, Uncles, Aunts, Cousins, Friends*, 12 FAMILY ADVOCATE 42 (Fall 1989) ("The move toward recognition of third-party rights is a move toward recognition of children's rights to have important relationships protected. It is also another step toward the emancipation of children from the concept that they are the chattels of their parents.").

36. *See* Victor, *supra* note 35, at 59 ("The American family is changing, and the legal system must keep up with its evolution. As the lives of more children are thrown into upheaval by the divorce or remarriage of their parents, they need even more to maintain stable relationships with extended and psychological family members."). *See also* Morris, *supra* note 35, at 42 (arguing that children have been traditionally regarded as chattel of their parents and that the best interests of the child have been ignored when they conflict with parental interests).

These advocates argue that a vital connection exists between grandparents and children[37] and that when this bond is broken, the children suffer emotionally. Therefore, the state has a valid interest in maintaining the bond between grandparent and grandchild and may intervene when that bond is severed; the notion being that the child's needs are paramount.[38]

The child's rights rationale may be attacked from several directions. First, most commentators agree that legislatures have been enacting and revising grandparental visitation statutes due to the lobbying efforts of grandparents.[39] It is doubtful that legislators enacted or revised these statutes solely with the interests of children in mind, but instead reacted to strong lobbying efforts of elderly registered voters. Second, some psychological studies assert that the best interests of the child are not served by a bitter confrontation between parents and grandparents over visitation rights; the theory being that hostility generated in a battle over visitation harms the child more than the deprivation of grandparental visits.[40] Third, commentators suggest that it is in the child's best interests to have a single source of authority making child-rearing decisions.[41] Finally, the majority of states provide only for *grandparental* visitation. If the legislators were truly interested in the emotional well-being of a child, it seems logical that they would allow *any* third party who had formed a significant relationship with the child to petition for visitation. However, it is obvious that grandparental visitation statutes exist mainly for the gratification of grandparents. Through the efforts of lobbying groups, grandparents have obtained a proprietary interest in their

37. *See* Ingulli, *supra* note 23, at 299 (discussing A. KORNHABER & WOODWARD, GRANDPARENTS AND GRANDCHILDREN: THE VITAL CONNECTION (1981)). Ingulli criticizes the authors for making sweeping conclusions which other researchers have been unable to duplicate. *Id.*

38. *See* Foster & Freed, *supra* note 35, at 45. Foster and Freed argue that the child's welfare and right to maintain meaningful associations should be the controlling considerations in visitation disputes.

39. *See* Foster & Freed, *supra* note 35, at 38 ("The senior citizen's lobby has had marked success in this regard [grandparental visitation statutes] even though such legislation involves an intrusion into what formerly was regarded as family autonomy.") *See also* Ingulli, *supra* note 23, at 297 ("demographic changes have strengthened the political clout of older Americans").

40. *See* Thompson & Tinsley, *Grandparents' Visitation Rights; Legalizing the Ties that Bind*, AM. PSYCHOLOGIST 1217, 1219 (Sept. 1989).

41. *See* Comment, *supra* note 29, at 124, n.31 (quoting GOLDSTEIN, FREUD & SOLNIT, BEFORE THE BEST INTEREST OF THE CHILD 25 (1979)). The author asserts that:

> Children . . . react even to temporary infringement of parental autonomy with anxiety, diminishing trust, loosening of emotional ties, or an increasing tendency to be out of control . . . .
>
> At no stage should intrusion in the family be authorized unless probable and sufficient cause for the coercive action has been established in accord with limits prospectively and precisely defined by the legislature.

Id.

grandchildren. It is ironic that this type of proprietary interest of adults in children is exactly what child rights advocates seek to avoid.

II. HISTORY OF GRANDPARENTAL VISITATION IN OKLAHOMA

A. *Common Law and the First Enactment*

Notwithstanding the fact that grandparental visitation rights were limited at common law, Oklahoma legislators have gradually broadened these rights. Under Oklahoma common law, grandparents did not have a legal right to visitation unless they had held a custodial relationship with their grandchild.[42] Beginning with the enactment of Oklahoma's first grandparental visitation statute,[43] any grandparent who was parent to a deceased parent could have been awarded reasonable visitation rights if in the best interest of the child. This statute took effect when either one or both parents were deceased.[44] The legislature subsequently expanded grandparental visitation rights in 1975, when it gave grandparents the statutory right to petition for visitation in cases of divorce.[45]

B. *A Period of Strict Construction and Legislative Confusion*

In 1978 the legislature amended Oklahoma's grandparental visitation statute again in response to the Oklahoma Supreme Court decision in *In re Fox*.[46] The court determined in *Fox* that the policy of the Oklahoma Uniform Adoption Act[47] precluded the application of the

42. Julien v. Gardner, 628 P.2d 1165, 1166 (Okla. 1981). Oklahoma, for the most part, followed the rule announced in Succession of Reiss, 46 La. Ann. 347, 15 So. 151 (1894), that the obligation to allow grandparental visitation was a moral, as opposed to a legal, obligation. *Id.* at 152.

43. OKLA. STAT. tit. 10, § 5 (1971). For the text of the 1971 version of Oklahoma's grandparental visitation statute, see *supra* note 24.

44. In keeping with the derivative rights theory, the grandparents derived their right to visitation through the child's deceased parents. *See supra* notes 23-29 and accompanying text.

45. OKLA. STAT. tit. 10, § 5 (1975) provided that "[w]hen one or both parents are deceased *or if they are divorced*, any grandparent, who is the parent of the child's deceased or divorced parent, shall have reasonable rights of visitation to the child, when it is in the best interest of the child." *Id.*

46. 567 P.2d 985 (Okla. 1977).

47. OKLA. STAT. tit. 10, § 60.16 (1971). The Oklahoma Uniform Adoption Act established the relationship of a natural parent and child upon a final decree of adoption:

> (1) After the final decree of adoption is entered, the relation of parent and child and all the rights, duties and other legal consequences of the natural relation of child and parent shall thereafter exist between such adopted child and the adoptive parents adopting such child and the kindred of the adoptive parents. From the date of the final decree of adoption, the child shall be entitled to inherit real and personal property from and through the adoptive parents in accordance with the statutes of descent and distribution, and the adoptive parents shall be entitled to inherit real and personal property from and through the child in accordance with said statutes. (2) After a final decree of adoption is entered, the natural parents of the adopted child, unless they are the adoptive parents or the spouse of an

grandparental visitation statute. The court held that in cases of adoption, public policy required a severance of all ties to the child's former family. As a result of *Fox*, the legislature amended Oklahoma's grandparental visitation statute to forbid the termination of grandparent's visitation rights after a subsequent adoption by a stepparent if the grandparent was the parent of the deceased parent.[48] Further, the amendment allowed grandparental visitation rights only if both parents were deceased, whereas previously the statute allowed visitation where one or both parents were deceased.[49] However, the third paragraph of the statute prohibited the termination of grandparental visitation rights in cases of stepparent adoption where one natural parent was deceased and the other had subsequently remarried. The language allowing general visitation rights when both parents were deceased was probably the result of sloppy legislative drafting as it led to confusing results. As the statute stood, the grandparents of a deceased parent had no visitation rights unless the surviving parent executed adoption to a blood relative or unless the grandparents had previously gained access to the child before adoption by a stepparent. That the confusing results were unintentional is further demonstrated by the fact that the legislature also amended the Oklahoma Uniform Adoption Act to specifically address grandparental visitation rights in the case of adoption by a blood relative.[50] However, the amendment to the Uniform Adoption Act permitted a right to visitation where *one or both* parents of a child were deceased and an adoption

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adoptive parent, shall be relieved of all parental responsibilities for said child and have no rights over such *adopted child or to his property by descent and distribution.*

Id. (emphasis added).

48. OKLA. STAT. tit. 10, § 5 (Supp. 1978) provided in pertinent part that:

When one natural parent is deceased and the surviving natural parent remarries, any subsequent adoption proceedings shall not terminate any grandparental rights belonging to the parents of the deceased natural parent unless ordered by the court and after opportunity to be heard, provided the district court deems it in the best interest of the child.

Id.

49. OKLA. STAT. tit. 10, § 5 (Supp. 1978). *See supra* note 48. For the pertinent text of the 1975 version, see *supra* note 45.

50. OKLA. STAT. tit. 10, § 60.16(3) (Supp. 1978) provided:

When one or both natural parents of a child are deceased or if they are divorced and a consent to adoption is executed to a blood relative, any grandparent, who is the parent of the child's deceased or divorced natural parents, may be given reasonable rights of visitation to the child, in accordance with the provision of Section 5 of this title. The district courts are vested with jurisdiction to enforce such visitation rights and make orders relative thereto, upon the filing of a verified application for such visitation rights. Notice as ordered by the court shall be given to the person or parent having custody of said child and the venue of such action shall be in the county of the residence of such person or parent, provided, however, that this section shall not apply to children born out of wedlock.

Id.

by a blood relative had taken place.[51]

The legislature realized the resulting incongruity and amended the grandparental visitation statute after the Oklahoma Supreme Court interpreted the statute literally in *Julien v. Gardner*.[52] In *Julien*, the court held that the 1978 version of Oklahoma's grandparental visitation statute no longer sanctioned grandparental visitation when one parent was deceased. Subsequently, the legislature amended the statute back to its 1975 version which provided for visitation when one or both parents were deceased.[53]

The Oklahoma legislature enacted another reactionary amendment after the state supreme court's decision in *In re K.S.*[54] There, the Oklahoma Supreme Court construed the visitation statute very strictly. The court held that grandparents could not request visitation to a grandchild when their child's parental rights had been terminated, as the statutory language did not explicitly provide for visitation privileges under those circumstances.[55] This interpretation by the court led to the amendment of 1984 which allowed the parents of persons whose parental rights had been terminated to have a right to petition for access to their grandchildren.[56]

C. *Liberal Construction and Equitable Powers*

The Oklahoma Supreme Court departed from its tendency of strictly construing the grandparental visitation statute in *In re Cherie Anne Bomgardner*.[57] In *Bomgardner*, the maternal grandparents sought visitation rights to their deceased daughter's child under the 1981 version

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51. OKLA. STAT. tit. 10, § 5 (Supp. 1978). For the text of the 1978 version of Oklahoma's grandparental visitation statute, see *supra* note 48.

52. 628 P.2d 1165 (Okla. 1981).

53. OKLA. STAT. tit. 10, § 5 (1981) read in pertinent part: "[w]hen one or both parents are deceased or if they are divorced, ..."

54. 654 P.2d 1050 (Okla. 1982).

55. *Id.* at 1051.

56. OKLA. STAT. tit. 10, § 5(C) (Supp. 1984) reads:

> If the parental rights of one parent have been terminated and the child is in the custody of the other natural parent, any person who is the parent of the person whose parental rights have been terminated may be given reasonable rights of visitation where the court determines that a previous grandparental relationship has existed between the grandparents and the child and the district court determines it to be in the best interest of the child. Any subsequent adoption proceedings shall not terminate any court-granted grandparental visitation unless the district court determines it to be in the best interest of the child.

Id.

57. 711 P.2d 92 (Okla. 1985).

of Oklahoma's grandparental visitation statute.[58] The child's father asserted that the 1978 version of the statute,[59] which allowed access only when *both* parents were deceased or in cases of divorce, should be applied because that was the statute in effect at the time of the mother's death.[60] The Oklahoma Supreme Court held that the legislative purpose of the grandparental visitation statute would be best served if the 1981 version was retroactively applied to "*situations in existence* at the time of its enactment."[61]

In addition to recognizing a right to visitation under the 1981 version of the statute, the court discussed its equitable powers in granting relief to the grandparents. The court stated that "[e]quity recognizes—independent of statute—the grandparents' claim to the companionship of their grandchild."[62] The court relied on a 1984 appellate court decision,[63] as precedent for invoking its equitable powers. However, the 1984 appellate court, in turn, relied on a 1910 parental visitation case.[64] The 1984 appellate court obviously failed to differentiate parental visitation from grandparental visitation in relying on the 1910 case. Before *Bomgardner*, the Oklahoma Supreme Court had consistently held that grandparents had only a statutory right to seek visitation of their grandchildren.[65] This departure from the court's insistence on a statutory right could have been due to the fact that the court realized that the legislature probably did not intend the language used in the 1978 version. Nonetheless, *Bomgardner* concluded that the grandparents had both equitable and statutory standing to seek visitation.[66]

That the court's reliance on equitable reasons for granting visitation was an anomaly is evidenced by the fact that the court returned to strict

58. OKLA. STAT. tit. 10, § 5 (1981). Recall, this version allowed visitation when one or both parents were deceased.

59. OKLA. STAT. tit. 10, § 5 (Supp. 1978). For the text of the 1978 version of Oklahoma's grandparental visitation statute, see *supra* note 48.

60. *Bomgardner*, 711 P.2d at 94.

61. *Id.* at 96 (emphasis in original).

62. *Id.* at 97.

63. *Id.* (citing Guardianship of Sherle, 683 P.2d 78 (Okla. Ct. App. 1984)).

64. Guardianship of Sherle, 683 P.2d 78, 80 (Okla. Ct. App. 1984) (citing Allison v. Bryan, 26 Okla. 520, 109 P. 934 (1910)).

65. *See* Grover v. Phillips, 681 P.2d 81, 83 (Okla. 1984) ("Grandparents have no constitutional right to custody of or visitation with their grandchildren. Such rights are limited to those conferred by statute."). *See also* Julien v. Gardner, 628 P.2d 1165, 1166 (Okla. 1981) ("Under common law, grandparents did not have the legal right to visit their grandchildren if the parents chose to prohibit the visitation . . . . [a] grandparent, absent a custodial right, is not entitled to an award of visitation privileges in the absence of a statute.").

66. *Bomgardner*, 711 P.2d at 97.

statutory construction. In *In re G.D.L.*,[67] a maternal grandmother sought to secure visitation rights to her grandchild who was being adopted by strangers.[68] The grandmother argued that although she had no statutory right to visitation, she did have an equitable right as propounded in *Bomgardner*.[69] The court responded that its statement as to equitable rights of visitation was an interpretation of Oklahoma's 1981 version of the grandparental visitation statute, which was intended by the legislature to prevent the alienation of the grandchild from the grandparents when one parent was deceased.[70] The court reasoned that because the purpose of the statute was to prevent alienation from the grandparents, the court could use its equitable powers to ensure that the purpose of the statute was met. However, the court maintained that in cases of adoption by strangers, the policy was different. "Under these circumstances compassion for the grandparent 'must give way to the new family union which the law has created. The severance by adoption must be complete.' "[71] The court added that it had "consistently refused to extend grandparental rights in adoption cases beyond those specified by the legislature."[72] The grandmother was therefore denied equitable standing to request visitation. The court's intimation in *Bomgardner* that it might use its newly found equitable powers to grant grandparental visitation could have been one of the factors leading to the 1989 amendment of the grandparental visitation statute.

D. *The 1989 Amendments—Infringing upon the Nuclear Family*

The grandparental visitation statute and the Uniform Adoption Act when read together after the 1989 amendments generally give the grandparent a right to petition for visitation under almost any circumstances provided it is in the best interest of the child. The 1989 amendments to Oklahoma's grandparental visitation statute were undoubtedly a response to the court's refusal to give grandparental visitation rights in the situation of an adoption out of the family. Oklahoma's Uniform Adoption Act was amended to simply provide that "[a] grandparent, who is the parent of the child's natural parents, may be given reasonable rights of visitation to the child, pursuant to the provisions of [the grandparental

67. 747 P.2d 282 (Okla. 1987).

68. The grandchild had been born out of wedlock. Thus the grandmother could not have petitioned. *Id.* at 283.

69. *Id.* at 283 (referring to *In re* Cherie Anne Bomgardner, 711 P.2d 92, 97 (Okla. 1985)).

70. *Id.*

71. *Id.* at 285 (quoting *In re* Fox, 567 P.2d 985, 1052 (Okla. 1977)).

72. *Id.* at 284.

visitation statute]. . . ."[73] Previously, the right to petition for grandparental visitation was allowed only when there had been an adoption by a blood relative or an adoption by a stepparent.[74] The grandparental visitation statute was amended to address the rights of a grandparent whose grandchild was born out of wedlock, as in *In re G.D.L.*,[75] and now provides that if a child is born out of wedlock, the parents of the father have no visitation rights unless the "father has been judicially determined to be the father of the child."[76] Presumably then, the parents of a mother whose child is born out of wedlock will be treated no differently than any other grandparents,[77] except in the case of termination of parental rights.[78]

The most controversial aspect of the 1989 amendment is that it allows courts considerable discretion in granting grandparents access to their grandchildren when the nuclear family is intact, provided the visitation is in the best interest of the child. Whether intended or not, the legislature has limited the rights of parents in an ongoing marriage to make basic decisions about how their children should be reared. Under Oklahoma's statutory scheme, the parents' authority to control unwanted grandparental influence is severely limited. Parental judgment about what is best for their child may be undermined by a judge who

73. OKLA. STAT. tit. 10, § 60.16 (1989).

74. OKLA. STAT. tit. 10, § 60.16(3) (Supp. 1978). *See supra* note 50.

75. 747 P.2d 282 (Okla. 1987). *See supra* notes 67-72 and accompanying text.

76. OKLA. STAT. tit. 10, § 5(A)(2) (Supp. 1989) provides that:

> Except as otherwise provided by paragraphs 5 and 6 of this subsection, if a child is born out of wedlock, the parents of the father of such child shall not have the right of visitation authorized by this section unless such father has been judicially determined to be the father of the child.

Id.

77. OKLA. STAT. tit. 10, § 5(A)(6) (Supp. 1989) reads:

> If the child is born out of wedlock and the parental rights of the mother of the child have been terminated, the parents of the mother of such child shall not have a right of visitation authorized by this section to such child unless: (a) the court determines that a previous grandparental relationship existed between the grandparents and the child; and (b) the court determines such visitation rights to be in the best interest of the child.

Id. Paragraph 5 makes the same provision for a parent of a father whose child was born out of wedlock and whose parental rights have been terminated with the additional requirement that the father have been judicially determined to be the father of the child. It seems that in the language of these sections, there is a presumption against grandparental visitation unless the grandparent can prove the existence of the enumerated requisites in the statute.

78. Under these circumstances, the right to visitation is granted to the grandparent who is related to the parent whose parental rights have been terminated, provided that a previous relationship existed and the court determines visitation to be in the best interest of the child.

believes grandparental visits are basically good and can have no detrimental effect on the child. Although the state can constitutionally intervene through its *parens patriae* powers when the child's welfare is at stake, the state should not be allowed to intervene merely under the vague "best interest of the child" standard.

III. CONSTITUTIONAL CONSIDERATIONS

A. Meyer v. Nebraska

The United States Supreme Court has recognized a fundamental liberty interest under the Fourteenth Amendment in the right of parents to rear their children as they see fit.[79] In *Meyer v. Nebraska*,[80] the Court, recognizing this liberty interest, struck down a statute which forbade the teaching of a foreign language to any child below ninth grade. The Court held that because the teaching of a foreign language to a child would not be harmful to the child, the state had no power to interfere with the parents' decision to educate their child in a foreign language. The Court stated, with regard to the Fourteenth Amendment, that:

> While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[81]

This reference to the "privileges long recognized at common law"[82] has become the hook upon which to hang the mantle of familial autonomy. The traditional privilege of parents to make decisions regarding the upbringing of their children was recognized as a constitutional right under the law of this case.[83]

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79. *See generally* Stanley v. Illinois, 405 U.S. 645, 649-51 (1972).

80. 262 U.S. 390 (1923).

81. *Id.* at 399. The Court stated that "[n]o emergency has arisen which renders knowledge by a child of some language other than English so clearly harmful as to justify its inhibition with the consequent infringement of rights long freely enjoyed." *Id.* at 403.

82. *Id.* at 399.

83. Of course, no right is absolute and the Court must weigh competing interests to determine which will prevail. In *Meyer*, the Court used a reasonable or rational relation test to weigh legitimate state interests against parental interests. Modernly, when the Court recognizes a fundamental right, it will apply a stricter standard of scrutiny.

B. *The Liberty Interest of Parents*

Subsequent Supreme Court decisions have further reinforced the notion that parents or custodians have a right to control the upbringing of their children. In *Pierce v. Society of Sisters*,[84] the Court faced another challenge to the rights of parents to educate their children as they saw fit. An Oregon statute required parents to send their children to public primary schools. The Court again held that the statute unreasonably interfered with the liberty interest of parents and guardians to control the upbringing and education of their children.[85] In *Prince v. Massachusetts*,[86] the Court stated that "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."[87] The Court emphasized the importance of the family in *Stanley v. Illinois*,[88] when it stated that "[t]he integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment . . . , the Equal Protection Clause of the Fourteenth Amendment . . . and the Ninth Amendment."[89] Additionally, the Court in *Wisconsin v. Yoder*[90] held that Amish parents had a right to rear their children according to their own religious tenets.[91]

The Supreme Court, however, has never held that the parent's right to rear a child is absolute. The Court has recognized that the state does have a legitimate interest in protecting the welfare of children. In *Prince v. Massachusetts*,[92] the Court rejected the argument of the custodial aunt that, because of her parental rights, she could give permission to her niece to distribute religious material on the street in violation of the state's child labor laws.[93] The Court held that the state's *parens patriae*

84. 268 U.S. 510 (1925).
85. *Id.* at 534-35.
86. 321 U.S. 158 (1944).
87. *Id.* at 166.
88. 405 U.S. 645 (1972).
89. *Id.* at 651.
90. 406 U.S. 205 (1972). Yoder may be considered as primarily a free exercise case involving freedom of religion. However, the Court, in reaching its conclusions, balanced the interests of the state in universal education against the interests of the Yoders in exercising their First Amendment rights and their traditional interests as parents in the religious upbringing of their children. The Court held that when the interests of parenthood are combined with a free exercise claim, the state must determine more than a merely "reasonable relation to some purpose within the competency of the State" to uphold the validity of its objectives. *Id.* at 214. The Court has subsequently treated *Yoder* as a substantive due process case involving parental rights.
91. *Id.* at 233.
92. 321 U.S. 158 (1944).
93. *Id.* at 164.

power could be invoked to protect minors from the:

> crippling effects of child employment . . . and the possible harms arising from other activities subject to all the diverse influences of the street. It is too late now to doubt that legislation appropriately designed to reach such evils is within the state's police power, whether against the parent's claim to control of the child or one that religious scruples dictate contrary action.[94]

Notice that the Court spoke in terms of protection against "evil" to the child. The language indicates that only when there is an "evil" which is threatening the child's welfare will the Court allow the state to invoke its *parens patriae* or police powers.[95]

The Supreme Court clarified its position as to when a state may justify using its *parens patriae* or police power to restrict parental autonomy in *Wisconsin v. Yoder*.[96] In *Yoder*, the Court held that a compulsory state secondary education law was unconstitutional as applied because it restricted the rights of Amish parents to raise their children according to Amish religious principles. The Court rejected the state's *parens patriae* and police power argument by stating that "[t]his case, of course, is not one in which any harm to the physical or mental health of the child or to the public safety, peace, order or welfare has been demonstrated."[97] Thus in *Yoder*, the Court found no threat to the individual child's health or safety and no threat to society by allowing Amish children to leave public schools after the eighth grade. Although *Yoder* and *Prince* are principally first amendment religious freedom cases, they suggest that the state must demonstrate a compelling interest in the child's welfare or in the public welfare in order to justify its intervention into the private realm of the family.

C. *Extended Family Rights*

1. Preserving Family Autonomy Beyond the Nuclear Family

The Supreme Court has recognized that the protection given by the

94. *Id.* at 168-69.

95. *See* Comment, *supra* note 4, wherein the author explains that the state may regulate the family either through its police powers or through its parens patriae powers. The police power is the state's inherent power to protect citizens against each other and to promote the general welfare. The parens patriae power is the state's limited paternalistic power to protect or promote the welfare of certain individuals, usually those who are legally incompetent. Parens patriae powers should always be used in the best interest of the incompetent individual. *Id.* at 1202.

96. 406 U.S. 205 (1972).

97. *Id.* at 230. The Court indicated that allowing Amish children to leave the public schools after eighth grade would not burden society by taking jobs away from adults, as the Amish children would return to their parents' farms and be trained in an agricultural vocation. *Id.* at 229-34.

Fourteenth Amendment to family autonomy does not apply merely to nuclear families but also to nontraditional families. For example, in *Prince v. Massachusetts*,[98] the Court indirectly granted parental status to a custodial aunt when it recognized her right to parental control of a child.[99] Furthermore, in *Moore v. City of East Cleveland*[100] the Court held that the Fourteenth Amendment preserved autonomy within the extended family. The Court ruled that an ordinance limiting the occupancy of a dwelling to a single family violated due process rights because it defined "family" in a way which prohibited a grandmother from living with her son and two grandsons.[101] The Court stated that the historical recognition of a family and the tradition of an extended family living together had "roots" which were "equally venerable and equally deserving of constitutional recognition."[102]

The Supreme Court's recognition of the rights of an extended family is not inconsistent with its treatment of the nuclear family; rather the Court has merely expanded the meaning of the word "family." When defining "family," the Court apparently examines the function the family serves and the established relationships between family members.[103] In *Smith v. Organization of Foster Families for Equality and Reform*,[104] the Court considered whether a foster family might have a constitutionally protected liberty interest. Although the Court decided the case without coming to a conclusion on the protected status of a foster family,[105] it did clarify what attributes are necessary for the family to merit constitutional protection.[106] The Court will first look for a biological relationship; but this is not necessarily determinative of the existence of a family.[107] The Court stated rather that "the importance of the familial relationship . . . stems from the emotional attachments that derive from the intimacy of

98. 321 U.S. 158 (1944).

99. *Id.* at 166.

100. 431 U.S. 494 (1977).

101. *Id.* at 499.

102. *Id.* at 504.

103. *See* Comment, *supra* note 4, at 1181-82. The author states that when the Court recognizes a traditional value as a right, it determines what characteristics of that traditional value give it the fundamental constitutional importance and then the Court may apply a functional approach to the right to determine the scope of that right. *Id.*

104. 431 U.S. 816 (1977).

105. The Court stated that it did not have to come to a conclusion as to whether a foster family should be afforded a constitutional liberty interest because even if the foster family did have a substantive liberty interest, the procedural due process afforded them by the state was adequate. *Id.* at 847.

106. *Id.* at 844.

107. *Id.* (quoting Wisconsin v. Yoder, 406 U.S. 205, 231-33 (1972)).

daily association, and from the role it plays in 'promot[ing] a way of life' through the instruction of children . . . as well as from the fact of blood relationship."[108] Thus the Court seems to be adopting at least a functional definition of the family in which those adults who perform parental functions may be given constitutional protection against unnecessary state intrusion into their families.

2. Grandparents—Outside the Court's Functional Extension

Grandparental rights advocates incorrectly use *Moore v. City of East Cleveland*[109] to argue the existence of a constitutionally protected right of grandparents to have access to their grandchildren. The Supreme Court has never recognized a constitutionally protected right of grandparents to have the companionship of their grandchildren against the wishes of the parents. In *Moore*, the Court recognized that "in times of adversity, . . . the broader family . . . [may] come together for mutual sustenance and to maintain or rebuild a secure home life."[110] Here there was a choice among all family members to live together as a family unit to fulfill emotional and economic needs. The Court rejected the state's attempt of "standardizing its children—and its adults—by forcing all to live in certain narrowly defined family patterns."[111]

3. Grandparental Visitation—*In Loco Parentis*

A consensual agreement to live together as a family ought to be distinguished from the situation in which a grandparent petitions a court for visitation rights to a child. When grandparents request access to their grandchildren from the courts, it is usually over one or both parents' objections. There is typically dissension between the caretakers of the child and the grandparent who desires access to the child. In the case of a traditional nuclear family, the parents have already chosen the family's boundaries and wish to exclude the petitioning grandparent. If the grandparents have not had an "*in loco parentis*"[112] relationship with the grandchild, there should be no right of visitation. However, if the grandchild had been living with the grandparents in a familial situation,

108. *Id.*
109. 431 U.S. 494 (1977).
110. *Id.* at 505.
111. *Id.* at 506.
112. The phrase "*in loco parentis*" means in place of the parent and generally refers to a person who performs the functions of a parent. BLACK'S LAW DICTIONARY 787 (6th ed. 1990).

then the grandparents ought to prevail on a constitutional claim for visitation rights legitimately based on the child's welfare.

The grandparents' constitutional claim would arise under the state's *parens patriae* powers which allow the state to intervene in a familial relationship if the welfare of the child is at stake.[113] States have become increasingly responsive to the child's right to both physical and psychological health. It may be presumed that when the grandparents have a custodial or "de facto" parental relationship with the child, that the child will form a substantial psychological bond with the grandparents, just as the child bonds with his or her parents.[114] Psychologists argue that severing this type of bond causes psychological harm to the child.[115] Thus, the forced separation of a child from a parental figure should be treated as a definite threat to the child's welfare and a circumstance compelling enough to override parental autonomy interests.

4. In Cases of a Dysfunctional Family

Grandparental visitation may also be warranted in cases in which the nuclear or custodial family has disintegrated or in clear cases of child abuse or neglect.[116] The meaning of disintegration should be construed to cover a wide range of circumstances in which a parent is absent from the family for a period of time. Although many states allow visitation in the case of death of a parent or divorce,[117] they fail to consider other situations in which a child may be deprived of access to a parent. States should enact statutes such as the recently enacted Texas grandparental visitation statute which allows access when a parent is incarcerated or found to be incompetent, when parental rights are terminated, or in cases of abuse or neglect.[118] State intervention is justified because a child may

113. For a general discussion of the states *parens patriae* powers, see Comment, *supra* note 4 at 1199-1202.

114. *See* GOLDSTEIN, FREUD & SOLNIT, BEFORE THE BEST INTERESTS OF THE CHILD 39-57 (1979). In discussing "psychological parents," the authors note that "[w]hen longtime foster parents . . . return a child's affection and make him feel wanted, looked after and appreciated, crucial bonds usually form between them which cannot be disturbed without harm." *Id.* at 40. *See also* J. WALLERSTEIN & J. KELLY, SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE 43-44 (1980) ("Those children who had extended families, especially grandparents, who were close by or who kept up a continuing interest from a distance were very much helped by this support system."). *Id.* at 222.

115. GOLDSTEIN, FREUD & SOLNIT, *supra* note 114, at 39-57.

116. *See* VT. STAT. ANN. tit. 15, § 1012 (1989) (permitting grandparents of abused or neglected children to petition for visitation); TEX. FAM. CODE ANN. § 14.03(e) (Vernon Supp. 1989) (same).

117. Twenty-eight states specifically allow visitation upon death of a parent or divorce. *See* Segal & George, *supra* note 14, at 9, n.16.

118. TEX. FAM. CODE ANN. § 14.03(e) (Vernon Supp. 1990).

need as much emotional support under these circumstances as he would in cases of a death of a parent and divorce.

Some psychological studies affirm a need for grandparental support when the family has been disrupted and becomes dysfunctional.[119] There are a number of studies that link the loss of a parent to later psychological problems, such as depression.[120] Psychological harm may be minimized if the child receives support from other familial members.[121] This is not to say, however, that grandparents should be given an automatic right to access under these circumstances. In some cases, hostility between the custodial parent and the petitioning grandparent could cause more psychological harm than good to the child,[122] and thus visitation should not be granted. The deprivation of a parent or of a custodian should be regarded as a triggering mechanism which allows the state and grandparents to constitutionally intervene, because at such point there reasonably *may* be psychological harm to a child which *may* be assuaged by a grandparent or by another third party. The court must consider the individual circumstances of each case when determining what is in the best interest of the child.

IV. GRANDPARENTAL VISITATION IN INTACT FAMILIES

A. *Familial Autonomy at the Apex*

When the family is intact and functional, the interests of the state, parents or custodians, and the child are all aligned and the right to familial autonomy, for several reasons, is at its apex. First, as an "impersonal political institution"[123] the state is ill-equipped to provide the love and emotional support needed for a child's healthy development.[124] Only

119. A family is dysfunctional when it does not meet the child's basic physical and/or psychological needs. *See* J. WALLERSTEIN & J. KELLY, *supra* note 114, at 43-44. *See also* Thompson & Tinsley, *supra* note 40, at 1217. Grandparents may serve as role models for grandchildren and this role might take an added significance when parents divorce, due to the divisive effect of divorce on the parent-child relationship. However, Thompson and Tinsley argue that there have not been enough psychological studies done to justify the presumption that children will benefit from grandparental visitation over the objections of custodial parents. Thompson & Tinsley, *supra* note 40, at 1220.

120. Ingulli, *supra* note 23, at 311, n.103.

121. *See generally* Derdeyn, *Grandparent Visitation Rights: Rendering Family Dissension More Pronounced?*, 55 AM. J. ORTHOPSYCHIATRY 77 (1985). *See also* Thompson & Tinsley, *supra* note 40, at 1220. The authors note that a child experiences loyalty conflicts in a divorce proceeding between his parents, so it is unlikely that an additional legal conflict between family members will assist the child in coping.

122. Thompson & Tinsley, *supra* note 40, at 1220.

123. Bellotti v. Baird, 443 U.S. 622, 638 (1979).

124. Comment, *supra* note 4, at 1214-16.

parents who have a continuous relationship with their child are capable of caring for and nurturing the child, and making important decisions regarding the child's welfare.[125] Second, the family serves as a primary unit of socialization for the state. The family instills societal values in the child and prepares the child to become a self-reliant citizen.[126] Third, family autonomy fosters social pluralism.[127] The Supreme Court has repeatedly recognized the desirability of a heterogenous society which helps impede the state's tendency to standardize its citizens.[128] Thus, it is in the best interest of the state to presume that parents are acting in the best interest of their children.

Because the state benefits from the autonomous family, it should not be allowed to intervene absent a compelling reason. State intrusion should be kept to a minimum when the family is intact. The state's intervention into a family is legitimate only when the child's welfare is threatened,[129] because then and only then do state interests align with the child's interest to overcome parental autonomy. However, because familial autonomy is of paramount importance, the state should intervene only when there can be a reasonable presumption of harm to the child.

A grandparental visitation statute which allows visitation under any circumstances is a significant infringement upon the right of parental decision-making. The Supreme Court has held that when significant infringement of a fundamental right is at issue, the state must have a compelling interest to justify that infringement.[130] Nothing is more fundamental in rearing a child than deciding with whom the child should

125. Comment, *supra* note 4, at 1214.

126. Comment, *supra* note 4, at 1215.

127. Comment, *supra* note 4, at 1215.

128. Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925) (the state may not "standardize its children by forcing them to accept instruction from public teachers only"); *see also* Meyer v. Nebraska, 262 U.S. 390, 402 (1923) (The state may not "foster a homogenous people.").

129. *See generally* Bean, *supra* note 8, at 403-405.

130. Roe v. Wade, 410 U.S. 113, 155 (1973); Griswold v. Connecticut, 381 U.S. 479, 497 (1965) (Goldberg, J. concurring); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942). There is some controversy as to whether all substantive due process cases require strict scrutiny analysis. For example:

> In due process analysis no threshold marks the passage from the most minimal to the most exacting scrutiny. . . . As an intrusion becomes more destructive of a right, it may be outweighed only by increasingly substantial state interests, and the degree of fit demanded between the means and ends will increase as well.

Comment, *supra* note 4, at 1195 (footnotes omitted). That author further notes that:

> Even given a balancing approach, the Court's use of strict scrutiny language in substantive due process cases might not be wholly inappropriate. Precedent suggests that the compelling interest test accurately reflects the level of justification which the state must supply when its infringement of the right is at its apex.

Id. at 1196. Some courts see court-enforced grandparental visitation as a minimal intrusion upon the family, and therefore feel the state may intervene without demonstrating a compelling interest.

associate. Even though grandparents are usually deemed to be benign influences upon the child, they may have beliefs which are directly antithetical to the parents' beliefs. They may not agree as to the best way to rear a child, how to educate that child, or what religious beliefs the child should hold. A court which orders visitation in the grandparent's home is taking substantial control away from the parent and placing that control in the hands of the grandparent; thus, elevating the grandparent to parental status. Surely, allowing parties outside the defined family to interfere in parental control, absent any harm to the child, is a gross infringement on the parents' rights to rear their child as they see fit.

B. *Lower Court Treatment of "Intact Family" Statutes*

The majority of lower courts of those states which have "intact family" visitation statutes have generally upheld the constitutionality of those statutes when challenged. In *Spradling v. Harris*,[131] a Kansas appellate court determined that the Kansas grandparental visitation statute was constitutional.[132] The court, in considering the constitutionality of the statute, referred to a previous Kansas Supreme Court case which held that "[t]he parents' rights are subordinate to the State's parens patriae powers and must yield when adverse to the best intersts of the child."[133] The Kansas court also stated that although the United States Supreme Court has found certain rights to exist which are not explicitly enumerated in the Constitution, "the right to limit grandparental visitation has not been recognized."[134] In addition, a New York Family Court has upheld as constitutional New York's grandparental visitation statute.[135] In *Frances E. v. Peter E.*[136] the court reasoned that because the

Courts with this attitude generally apply the "best interest of the child" standard and may award visitation simply because the parents cannot prove it would be detrimental to the child's emotional or physical health. Little consideration is given to the parents' rights since the intrusion is considered to be so minor. For a discussion of such cases, see Bean, *supra* note 9, at 403-405.

131. 13 Kan. App. 2d 595, 778 P.2d 365 (1989).

132. The case involved a grandmother who was requesting access to her daughter's two children by a previous marriage, with whom she said she had developed a "substantial bond" and to another child born out of her daughter's present marriage, with whom she had barely had any contact. The court granted her access to all these children under a statute which allowed grandparental visitation when the child's best interests were served and when "a substantial relationship" existed between the child and the grandparent. *Id.* at 596, 778 P.2d at 366 (citing KAN. STAT. ANN. § 38-129(a) (Supp. 1987)).

133. *Id.* at 597, 778 P.2d at 367 (quoting *In re* Cooper, 230 Kan. 57, 62, 631 P.2d 632, 637 (1981)).

134. *Id.* at 598, 778 P.2d at 368.

135. N.Y. DOM. REL. LAW § 72 (McKinney Supp. 1990) provides for grandparental visitation "where circumstances show that conditions exist which equity would see fit to intervene." *Id.*

136. 125 Misc. 2d 164, 479 N.Y.S.2d 319 (Fam. Ct. 1984).

state had traditionally been permitted to grant visitation when the parent was widowed, divorced, remarried or unmarried, it would be giving married parents greater constitutional protection if they were able to block visitation merely because they were married.[137] The court concluded that it could entertain a visitation petition against an "intact family," even though there was an absence of extraordinary circumstances, because that was what the legislature intended.[138] A later New York Family Court concurred with the *Frances E.* decision. The court in *Eda C.M. v. Mary K.*[139] found that New York's broad grant of authority to protect the child's best interest was a proper use of the state's "police power," noting that the statute had been found constitutional "in every case that had been reported."[140]

Although no cases were found in which a state court ruled its "intact family" statute to be unconstitutional, a few cases do support the contention that courts should severely limit intervention into intact families. In *Theodore R. v. Loretta J.*,[141] the New York Family Court, contrary to previous decisions by the same court, chose to limit its authority to award third-party visitation when dealing with an intact family. The court stated that the parent's right to make decisions as to whether their

137. *Id.* at 168, 479 N.Y.S.2d at 322.

138. *Id.* at 169, 479 N.Y.S.2d at 323.

139. 14 FAM. L.R. 1488 (BNA 1988). Prior to this case, in New York, the same family court came to divergent conclusions when it considered the constitutionality of its state statute in two different cases. Both cases involved grandparents seeking visitation rights to grandchildren whose families were intact. N.Y. DOM. REL. LAW §§ 72 (McKinney 1990) provides for grandparental visitation "where circumstances show that conditions exist in which equity would intervene." *Id.* In the first case, *Theodore R. v. Loretta J.*, 124 Misc. 2d 546, 547, 476 N.Y.S.2d 720, 721 (Fam. Ct. 1984), the court determined that in order for the visitation statute to be constitutionally valid, the phrase "where circumstances show that equity sees fit to intervene," must be interpreted to mean that only in extreme circumstances can there be state or third party intervention. The court stated that "[m]ere protestations of love and affection between a grandparent and grandchild are insufficient to warrant the intervention of the Court." *Id.* at 548, 476 N.Y.S.2d at 721. Ironically, the same court, with a different judge presiding, held that the statute was constitutional as applied to intact families. In *Frances E. v. Peter E.*, 125 Misc. 2d 164, 479 N.Y.S.2d 319 (Fam. Ct. 1984), the court reasoned that, because the state has traditionally been permitted to grant visitation over a parent's wishes when that parent is widowed, divorced, remarried or unmarried, it would be giving married parents greater constitutional protection if they were able to block visitation merely because they were married. *Id.* at 168, 479 N.Y.S.2d at 322. The court, contrary to the *Theodore R.* decision, held that it could entertain a visitation petition against an "intact family" even in the absence of extraordinary circumstances, because that was the intention of the legislature. *Id.* at 170, 479 N.Y.S.2d at 323.

140. 14 FAM. L.R. 1488 (BNA 1988).

141. 124 Misc. 2d 546, 476 N.Y.S.2d 720 (Fam. Ct. 1984).

children should have contact with third-parties must be given "paramount consideration" and court intervention must be limited to "extreme situations."[142] In *Ward v. Ward*,[143] a Delaware family court faced a constitutional challenge to the state's grandparental visitation statute which prevented visitation when "the natural or adoptive parents of the child are cohabiting as husband and wife" and both parents object.[144] The grandparents argued that the statute deprived them of their due process rights.[145] The court concluded that grandparents have a constitutionally protected interest only if they had held a prior custodial relationship with the child.[146] The court went on to state, *arguendo*, that even if the grandparents did have a liberty interest, the interest would become "substantially attenuated" when the interests of the child's parents conflict with the grandparents' interests.[147]

Although the most recent decision[148] dealing with Connecticut's "intact family" grandparental visitation statute[149] failed to decide the statute's constitutional validity, the Supreme Court of Connecticut discussed which factors it considered relevant in deciding whether a grandparent should receive visitation rights.[150] The court spoke of harm to the child as a reason to grant visitation, but went on to state that "[e]ven absent child abuse, there is no compelling constitutional requirement that the legislature must defer . . . to the child-rearing preferences of the nuclear family."[151] The court gave deference to the legislature, explaining that the legislature could choose to recognize a public interest in giving a child access to people outside the nuclear family who show concern for the child's growth and development.[152] Thus, the court indicated its

142. *Id.* at 547, 476 N.Y.S.2d at 721.

143. 537 A.2d 1063 (Del. Fam. Ct. 1987).

144. DEL. CODE ANN. tit. 10, § 950(7) (Supp. 1988) provides that the court may:

> Upon petition thereto, grant grandparents reasonable visitation rights as the Court shall determine with respect to the grandchild, regardless of marital status of the parents of the child or the relationship of the grandparents to the person having custody of the child; provided, however, that when the natural or adoptive parents of the child are cohabiting as husband and wife, grandparent visitation shall not be granted over both parents' objection.

Id.

145. *Ward*, 537 A.2d at 1066.

146. *Id.* at 1067.

147. *Id.* at 1067-68.

148. Lehrer v. Davis, 214 Conn. 232, 571 A.2d 691 (1990).

149. CONN. GEN. STAT. § 46b-59 (West 1986) provides, in pertinent part, that the "[c]ourt may grant the right of visitation . . . to any person . . . . Such order shall be according to the court's best judgment upon the facts of the case and subject to such conditions and limitations as it deems equitable . . . ." *Id.*

150. *Lehrer*, 214 Conn. 232, 571 A.2d 691 (1990).

151. *Id.* at 238, 571 A.2d at 694-95.

152. *Id.* at 239, 571 A.2d at 695.

scales would tip in favor of state intervention as opposed to parental autonomy.

In summary, state courts tend to uphold as constitutional the broad grant of authority given them by legislatures to intervene into visitation disputes. Only in *Theodore R.* did the court choose to limit its authority to intervene. In *Ward v. Ward*, the visitation statute forbidding third party visitation when both parents objected was upheld because of the constitutional imperative of deference to parental authority.[153] In the remaining cases, the courts indicated that they would tolerate a low threshold of state intervention.[154] The court in *Spradling* went so far as to disregard expert psychological testimony that grandparental visits against the mother's wishes could cause actual harm to the child and awarded visitation based on the alleged mutual affection between the grandparent and grandchild.[155] Clearly, parental autonomy has been severely eroded by the states' expansion of their *parens patriae* powers.

C. *Predicting the Reaction of the Oklahoma Supreme Court*

The Oklahoma Supreme Court will probably follow the trend initiated by other jurisdictions if confronted by a constitutional challenge to the state's grandparental visitation statute. A review of previous decisions addressing grandparental visitation provides clues as to how the court might resolve the issue. The Oklahoma Supreme Court has held that grandparents have no constitutional right to custody or visitation with their grandchildren, but these rights may be conferred from statute or derived through custody in the absence of a statute.[156] However, the court in *Bomgardner*[157] held that equity recognized, independent of statute, a grandparent's claim to associate with their grandchild. This might have been an anomaly, as the court realized that the legislature had merely made a mistake in drafting the language of the amendment.[158] In *In re K.S.*,[159] the court seemed to defer to parental autonomy when it recognized that " '[t]he right of a parent to the companionship, care, custody and management of his/her child is a basic fundamental right protected by the United States and Oklahoma Constitutions.' "[160] However,

153. *Ward*, 537 A.2d at 1069.
154. *See supra* notes 131-152 and accompanying text.
155. Spradling v. Harris, 13 Kan. App. 2d 595, 600, 778 P.2d 365, 369 (1989).
156. Julien v. Gardner, 628 P.2d 1165, 1166 (Okla. 1981).
157. 711 P.2d 92 (Okla. 1985).
158. *See In re* G.D.L., 747 P.2d 282, 283 (Okla. 1987).
159. 654 P.2d 1050 (Okla. 1982).
160. *Id.* at 1052 (quoting Leake v. Grissom, 614 P.2d 1107, 1110 (Okla. 1980)).

the court also stated that " '[t]his court is not insensitive to the yearning of grandparents for the company of their grandchildren. However, this longing may not be translated into a legal right in the absence of a statute dictating visitation.' "[161] The court's insistence that there be statutory authority for its actions implies that the court will accept whatever the legislature deems appropriate regarding its authority to grant grandparental visitation.

There is still the question of how the court will interpret the "best interest of the child" standard. In *Davis v. Davis*,[162] the Oklahoma Supreme Court stated that "[s]tatutes that abrogate the common law are to be liberally construed—but only within the parameters of the legislative objective."[163] With no legislative history in Oklahoma, it is difficult to construe legislative objectives. But the court had previously stated that the purpose of the grandparental visitation statute was to prevent the alienation of a child from his grandparents. When the court invoked its equitable powers to recognize grandparental visitation, the court spoke of the "grandparents' claim to the companionship of their grandchild."[164] In another case, the court spoke of compassion for the grandparent.[165] Thus, the court indicated that sympathy for the grandparents will play a role in the decision of whether to award visitation. Courts which consider grandparental feelings tend to tolerate a very low threshold of intervention and award visitation on the sentimental notion that grandparental visits are good for the child.

VI. CONCLUSION

The Oklahoma grandparental visitation statute is an infringement upon the constitutional rights of parents to control and manage their children. The only legislative directive given to guide the court is the "best interest of the child" standard. This standard, when unattached to any triggering mechanism, gives the court free reign in determining when grandparental visitation should be granted. It effectively substitutes the court's opinion regarding what is best for the child for the parents' opinion. In the absence of harm to the child, there is no justifiable reason for the state to order grandparental visitation over the parents' objections. Parents of an intact, functional family should be able to decide that a

161. *Id.* at 1052 (quoting Leake v. Grissom, 614 P.2d 1107, 1110 (Okla. 1980)).
162. 708 P.2d 1102 (Okla. 1985).
163. *Id.* at 1111.
164. *Bomgardner*, 711 P.2d at 97.
165. *In re* G.D.L., 747 P.2d 282, 285 (Okla. 1987).

relationship with grandparents is contrary to the best interest of the child. It should be the parents' constitutional right to limit or deny any third-party visitation without judicial scrutiny.

State statutes should be drafted so that only specific situations allow grandparents or other interested third parties access to a minor child. These situations should be enumerated within the statutes so that risk of unwarranted state intrusion into familial decisions will be minimized. Such situations should include death of a parent, divorce, incarceration of a parent, a finding that the parents are unfit, upon termination of parental rights, in cases of child abuse or neglect, upon placing the child in a foster home, upon any prolonged absence of a parent, or upon finding that a third party has had a custodial relationship with the child. Only when a specific familial situation exists in which it is likely that the child will be harmed, either physically or psychologically, should a third party be allowed to petition the court for access to the child. A statute which limits state intervention to situations in which there is potential harm to the child will help preserve familial autonomy without sacrificing the right of the child to be both psychologically and physically healthy.

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