GRANDPARENT VISITATION CLAIMS: ASSESSING THE MULTIPLE HARMS OF LITIGATION TO FAMILIES AND CHILDREN

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"In fairness, how much confrontation and litigation should a child be expected to bear?"[1]

"I look back on some personal experiences . . . We always spent as kids a week with one set of grandparents and another set of grandparents, [and] it happened to work out in our family that [it] turned out to be an enjoyable experience."[2]

"It wouldn't bother me at all if I never saw my grandmother again . . . All I am to her is a prize on her charm bracelet."[3]

INTRODUCTION

Family law has made significant progress in the last several decades by gradually discarding two models of "family" for legal decision making purposes: the "conventional" family and the "well-functioning" family. In constitutional terms, the conventional family's monopoly on legal rights loosened considerably in 1972 when the Supreme Court, in Stanley v. Illinois,[4] recognized an unwed father's right to maintain custody of his "illegitimate" children when the children's mother died. In *Stanley*, The Court stuck down an Illinois law that presumed the unwed father to be unfit and made his children wards of the state. In subsequent years, a wide array of state decisions conferred family recognition and benefits, in varying degrees, upon families headed by single mothers, gay and lesbian couples, unmarried cohabitants, and others who failed to fit the conventional mold.[5]

Grandparent visitation laws, the subject of this article, provide an example of the law's ill-advised use of the model of well-functioning family relationships. When state legislatures enacted these statutes, some courts interpreted the statutes to

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[1] Gerald D. v. Peggy R., 1980 WL 20452 (Del. Fam. Ct. 1980).

[2] Troxel v. Granville, 530 U.S. 57, 72 (2000) (quoting the trial judge from the Verbatim Report of Proceedings, 220-221).

[3] Child interviewed about his grandmother in ARTHUR KORNHABER AND KENNETH L. WOODWARD, GRANDPARENTS/GRANDCHILDREN: THE VITAL CONNECTION at Fig. 28 (1981).

[4] 405 U.S. 645 (1972).

[5] *See, e.g.*, Marvin v. Marvin, 557 P.2d 106 (Cal. 1976); Baker v. State, 744 A.2d 864 (Vt. 1999).

allow visitation orders overriding the wishes of even conventionally married couples raising children in intact nuclear families.[6] These courts called the statutes "humanitarian" in purpose, implicitly condemning the common law rule–which provided no grandparent visitation rights–as insensitive, hardhearted, and oblivious to the benefits everyone instinctively knew attached to grandparent- grandchild relationships.[7] The New Jersey Supreme Court, in the 1976 case Mimkon v. Ford,[8] rhapsodized about this relationship:

> 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. Neither the Legislature nor this court is blind to human truths which grandparents and grandchildren have always known.9

This nostalgic and stereotypical view of the matter exercised a strong hold on the law during the 1970s and 1980s, when advocates of visitation statutes won legislative enactments in all fifty states.[10] The cheerful stereotype exists because it is not completely unreal. Time spent with grandparents is a pleasurable part of many children's lives. The realm of family law, however, does not serve the ideal family—it concerns itself with families at risk, in conflict, or in disintegration. Family disputes litigated in the nation's courts tend to be bitter whether the battles are over child custody, the spoils of divorce, or the estate of a family patriarch.

In 1992, the Supreme Court drew back from the stereotypical view of the family and recognized the malfunctioning family as the law's primary target for intervention. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[11] the Court invalidated a state requirement that a woman notify her spouse before obtaining an abortion. The decisive joint opinion of Justices O'Connor, Souter, and Kennedy acknowledged that the great majority of women do notify their husbands before ending a pregnancy.[12] The justices focused their attention on families in which there was serious marital discord:

> In well-functioning marriages, spouses discuss important intimate decisions such as whether to bear a child. But there are millions of women in this country who are the victims of regular physical and psychological abuse at the hands of their husbands. Many may have justifiable fears of physical abuse . . . . Many may have a reasonable fear that notifying their husbands will provoke further instances of child abuse . . . . Many may fear devastating forms of psychological abuse from their husbands, including verbal harassment, threats of future violence, the destruction of possessions, physical

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[6] *See, e.g.* Emanuel S. v. Joseph E., 577 N.E.2d 27 (N.Y. 1991).

[7] *Id.*

[8] 332 A.2d 199 (N.J. 1975).

[9] *Id.* at 204-05.

[10] *See Troxel*, 530 U.S. at 71.

[11] 505 U.S. 833 (1992).

[12] *Id.* at 892-893.

> confinement to the home, the withdrawal of financial support, or the disclosure of the abortion to family and friends.[13]

By rejecting the use of the well-functioning family model to justify lawmaking that would curtail the constitutional rights of all women, *Casey* provides a useful perspective for thinking about the law of grandparent visitation. In the well-functioning extended family, grandparents are a welcome presence in children's lives and parents make special efforts to foster the grandparent-grandchild relationship. Grandparents give parents relief from the constant obligations of child care. Three generations of family members interact in a reasonably harmonious way.

Grandparent visitation laws, however, operate in situations where extended family relationships have fundamentally broken down. Even though some degree of friction normally exists between the generations, grandparents do not ordinarily sue their own adult children or sons- and daughters-in-law in order to gain access to their grandchildren. Only in the context of serious family discord do family members resort to litigation. This reality has profound implications for the interpretation and constitutional application of grandparent visitation laws.

In *Troxel v. Granville*, the Supreme Court declared, in the context of a grandparent visitation claim, that all parents have a fundamental constitutional right to direct the upbringing of their children.[14] The Court did not, however, decide the precise scope of this right. Thus, state courts entertaining grandparent visitation claims will have to do so.

In this article, I will attempt to advance the *Troxel* analysis by providing a detailed appraisal of the negative consequences of intergenerational litigation and the harms caused by state-coerced grandparent visitation in the context of the malfunctioning extended family. I will argue that the special weight afforded a fit parent's decision should be very substantial and should be dispositive of the case unless the grandparent can produce convincing evidence showing that extraordinary circumstances, involving clear harm to the child, justify court-ordered visitation. This high degree of deference to parents derives from two features of grandparent visitation cases that deserve more attention than they have received so far in the reported cases. First, the litigation itself is much more damaging to the well-being of children than the cases have articulated. If it is to be permitted at all, this litigation must be strictly limited so as not to place undue burdens on the parent-child relationship. Second, the "best interest of the child" standard used in these cases is fundamentally flawed, giving judges free rein to impose their subjective views of childrearing upon parents. It is only in extreme circumstances that the "best interests" test can be used to justify court-ordered visitation against a parent's wishes.

In view of the many significant, negative consequences for parents and children, states must recognize that it is the rare case in which a fit custodial parent's decision to curtail grandparent access to a child should be superseded by a court. I

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[13] *Id.*

[14] *Troxel*, 530 U.S. at 65.

will suggest standards and litigation procedures for restricting this litigation so as to protect the best interests of children and the constitutional childrearing rights of parents.

TROXEL V. GRANVILLE: CONSTITUTIONAL LIMITS ON GRANDPARENT VISITATION CLAIMS

In *Troxel*, the Supreme Court confronted one of the most sweeping visitation statutes in the nation. The Washington state statute allowed "any person" to seek visitation with a child "at any time" if visits would "serve the best interest of the child."[15] Tommie Granville and Brad Troxel lived together and had two children.[16] They separated in 1991, and two years later Brad committed suicide.[17] At first, Tommie allowed Brad's parents to continue seeing the children following the suicide, but five months later she decided to adjust the visitation schedule, limiting the Troxels to one visit per month.[18] Two months afterward, the Troxels sued Tommie for increased visitation, pursuing their claim through six and a half years of litigation to the United States Supreme Court.[19]

The case generated six opinions from the Supreme Court. Despite the controversial nature of the substantive due process doctrine, a clear majority of the justices agreed that parents possess a due process liberty right to the care, custody, and control of their own children.[20] From the opinions, it appears that only Justice Scalia would deny the existence of such a right.[21] A four-justice plurality found the Washington statute, as applied, violated the mother's constitutional rights.[22] A fifth justice, David Souter, would have gone further and declared the statute unconstitutional on its face, effectively making the plurality opinion the operative constitutional ruling.[23] Justice Thomas agreed that the Court's recognition of parents' fundamental right to direct the upbringing of their children resolved the case.[24] Justices Stevens and Kennedy, though dissenting, also acknowledged the existence of the right to parent.[25]

The plurality started its analysis by noting that the conventional family is only one of many modern family forms. "While many children may have two married parents and grandparents who visit regularly, many other children are raised in single-parent households."[26] According to cited census figures, some four million

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[15] *Troxel*, 530 U.S. at 60.
[16] *Id.*
[17] *Id.*
[18] *Id.* at 61.
[19] *Id.*
[20] *Troxel*, 530 U.S. at 58.
[21] *Id.*
[22] *Id.* at 75.
[23] *Id.* at 79; Marks v. U.S., 430 US 188, 193 (1977).
[24] *Troxel*, 530 U.S. at 80.
[25] *Id.* at 86, 95.
[26] *Id.* at 63-64.

children reside in the household of grandparents, and a substantial minority of grandparents act in a parental role, assisting single parents in performing the "everyday tasks of child rearing."[27]

The opinion also made clear that it would not rely upon an idealized version of family relationships:

> In an ideal world, parents might always seek to cultivate the bonds between grandparents and their grandchildren. Needless to say, however, our world is far from perfect, and in it the decision whether such an intergenerational relationship would be beneficial in any specific case is for the parent to make in the first instance.[28]

Tactfully, but unfortunately, the justices did not identify the realities that contradict the classic stereotype of the well-functioning grandparent in the family life of children. A more realistic picture of these grandparent visitation cases would have emerged had the opinion acknowledged some of the ways in which stereotypes involving grandparents sometimes fail. A mention, for example, of situations in which grandparents are not doting, loving and helpful, but abusive, demeaning, controlling, meddlesome or belligerent, would have placed these cases in a more realistic light. In fact, the cases in the nation's family courts regularly feature such untraditional grandparents.[29] The only hint of such realities in the *Troxel* plurality opinion is a possible inference from the Court's observation that "recognition of an independent third-party interest in a child can place a substantial burden on the traditional parent-child relationship."[30]

In choosing *Troxel* for review, the Court selected a case with constitutionally objectionable features. The Washington statute in question gave extensive power to the state courts to supersede a parent's child rearing decisions without any clear guidance on how to use that power.[31] In applying this "breathtakingly broad" statute,[32] the *Troxel* trial judge indulged his own belief that grandparent contact was generally positive, and thereafter placed the burden on the parents to show otherwise. His findings regarding the best interests of the children in the case were sparse—the only benefits he cited were that the Troxels were "part of a large, central, loving family" and that they could "provide opportunities in the area of cousins and music."[33] Finally, the mother was deemed a fit parent, and had agreed to allow meaningful visitation, although not as much as the grandparents wanted.[34]

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[27] *Id.* at 64.

[28] *Id.* at 70.

[29] One appellate judge noted: "At first blush, the Grandparents Visitation Act evokes images of Norman Rockwell's America: what some believe were better, simpler family times. The harsh reality of this law in application is closer to Orwell than Rockwell." Rideout v. Riendeau, 761 A.2d 291, 309 (Me. 2000) (Alexander, J. dissenting).

[30] *Troxel*, 530 U.S. at 64.

[31] *Id.* at 67.

[32] *Id.*

[33] *Id.* at 62.

[34] *Id.* at 61.

This parent had been forced to endure the rigors of litigation over the course of several years. With all of these factors at play, six members of the Supreme Court found a violation of the mother's fundamental right to make the decision concerning who would have access to her child.[35]

While the *Troxel* plurality did not determine the precise scope of the parental right, it declared that states must presume that parents are acting in the best interests of their children and thus, must give parental decisions "special weight."[36] The decision made clear that a state cannot wrest the grandparent visitation decision away from the parent simply because a judicial officer concludes that a better decision could be made by the court. The Court, however, did not declare the Washington statute unconstitutional *per se*, but permitted the states to comply with its decision by incorporating the "special weight" directive into applications of their state grandparent statutes.[37]

Precisely what a state must do to comply with *Troxel* is not clear. The *Troxel* decision left unanswered several crucial questions. Just how strong does the presumption favoring parental decision making have to be? What sort of evidence would suffice to overcome that presumption? While the plurality noted that the Supreme Court of Washington had decided that parental decisions could be superseded by a judge only to prevent significant harm to the child, it expressly left that issue for another day.[38]

A. The burdens of grandparent visitation litigation

In his dissent in *Troxel*, Justice Kennedy offered this brief but key insight, which was adopted by the four-justice plurality:

> It must be recognized . . . that a domestic relations proceeding in and of itself can constitute state intervention that is so disruptive of the parent-child relationship that the constitutional right of a custodial parent to make certain basic determinations for the child's welfare becomes implicated. The best interests of the child standard has at times been criticized as indeterminate, leading to unpredictable results. If a single parent who is struggling to raise a child is faced with visitation demands from a third party, the attorney's fees alone might destroy her hopes and plans for the child's future. Our system must confront more often the reality that litigation can itself be so disruptive that constitutional protection may be required; and I do not discount the possibility that in some instances the best interests of the child standard may provide insufficient protection to the parent-child relationship.[39]

This paragraph identifies a fundamental contradiction contained within the

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[35] The six justices were the four members of the plurality and Justices Souter and Thomas.

[36] *Troxel*, 530 U.S. at 58.

[37] *Id.* at 70.

[38] *Id.* at 73.

[39] *Id.* at 101.

states' prevailing grandparent visitation regimes: in allowing grandparents to initiate litigation against fit parents, the law encourages, augments, and intensifies a conflict that is detrimental to the children, the very people the law is meant to protect. The law *encourages* parent-grandparent conflict by directing it to the adversary system, where professional advocates define and sharpen the differences between the parties. Pleadings, affidavits, and other legal documents commit each side to its version of events, hardening positions and making reconciliation difficult. The multiple burdens of litigation, including high costs and substantial psychological stress, *augment* the parties' conflict.

These cases are often initiated at a time when the parent-child unit is already under great pressure, either from parental divorce or the death of one parent (two common statutory criteria for grandparent standing to sue).[40] The hostility generated by litigation, which leads parties to become angrier as they confront one another in repeated court appearances and forced visitation situations, *intensifies* parent-grandparent conflict. Visitation orders coercing interaction extend the conflict over the course of the child's entire childhood.

After *Troxel*, it is clear that courts, in both their "best interest" calculations and in their constitutional analyses, must give weight to the harms that litigation itself creates. The following section will discuss the extensive nature of these harms.

1. Stress on the parent and child

Judge Learned Hand once said of litigation, "As a litigant I should dread a lawsuit beyond almost anything else short of sickness and death."[41] Benjamin Cardozo recognized lawsuits as "catastrophic experiences" for ordinary citizens.[42] Courtrooms are intimidating, unfamiliar places for laypersons, and the legal process is often difficult to understand, exhausting, time consuming, anxiety provoking, and expensive.

Grandparent visitation litigation most resembles traditional child custody/visitation litigation, which lawyers and judges have long considered the most regrettable kind of legal conflict.[43] In custody litigation, children are typically

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[40] *See, e.g.*, N.Y. DOM. REL. LAW § 72 (2003); NEB. REV. STAT. § 43-1802(1) (1998); *see also* Stephen G. Gilles, *Parental (and Grandparental) Rights after Troxel v. Granville*, 9 SUP. CT. ECON. REV 69, 71 (2001) (discussing aforementioned statutes).

[41] Learned Hand, Address Delivered Before the Association of the Bar of the City of New York, *in*, 3 Lectures on Legal Topics 89, 105 (1926).

[42] BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 128 (1921).

[43] "A divorce-related custody dispute often causes more damage to the affected child than if lawyers and judges had never become involved. Contested custody disputes often drag on for years without resolution, leaving the child trapped between battling parents, adversarial lawyers, and overburdened courts applying uncertain substantive standards through procedures that increase parental conflict and expense." Andrew Schepard, *Taking Children Seriously: Promoting Cooperative Custody After Divorce*, 64 TEX. L. REV. 687 (1985); *see also* In re Marriage of Burgess, 51 Cal. Rptr. 2d 444, 455 (1996) ("[L]itigation to change custody... may itself be detrimental to the welfare of minor children because of the

placed in the middle of family combat, torn by conflicting loyalties, and used as pawns, spies, or prizes in the battle between the parties.[44] The legal contest can be an ugly struggle in which each spouse seeks to debase the other.[45] Charles Breitel, the former chief judge of the New York Court of Appeals, called one visitation case "a mass of hopelessly conflicting unpleasant cross-accusations."[46]

Grandparent visitation cases share many of these characteristics. Children are the focal point of anger between the parties. The litigants make allegations against each other of the most personal kind. Grandparents invoke the power of the state to diminish the parents' authority over their own children, and attack their adversaries' parenting ability. Parents respond with accusations against the grandparents that may go back to the grandparents' misdeeds while raising the parents in childhood. Each side seeks to expose the other's faults and character flaws, in an atmosphere of accusation and recrimination.[47] Children are enlisted in the battle, called upon to participate by talking to the judge and choosing sides.[48] Some children have lawyers appointed to represent their interests, a sign their parents cannot be trusted to protect them.[49] Children who do not understand their parent's reasons for vetoing visitation are given the opportunity to help overrule their own parent's decision, undermining parental authority. Parents who might normally choose to shield their children from family conflict are prevented by the legal system from doing so. Out of the turmoil of inter-generational warfare, ratcheted up by the litigation itself, supposedly emerges a decision that serves the best interest of the child.

Grandparent visitation litigation, like custody litigation, channels the anger of the parties into an adversary conflict that increases children's anxieties. Negative consequences emerge from court-ordered grandparent-child interactions. Children in this situation will (1) see that they are at the heart of the family strife; (2) experience the stress of loyalty conflicts; (3) perceive that the normal authority of their parent has been undermined by the power of the grandparent and the judge; (4) have to deal with attempts by parents, grandparents, or both to pressure or cajole them into taking sides in the conflict; (5) be exposed to a grandparent who communicates–explicitly or implicitly–anger at and criticism of the parent; (6) feel nervous, anxious, or frightened by the compulsion to do what their mother or father (or both) strongly opposes; (7) return from visitation to a parent who feels angered and upset by the grandparent's unwanted imposition and control; (8) experience the

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uncertainty, stress, and even ill-will that such litigation tends to generate.").

[44] *See* Wilson v. McGlinchey, 760 N.Y.S.2d 577 (Fam. Ct. 2003).

[45] *See* Marriage of Wilson, 55 P.3d 1106 (Or. App. 2002).

[46] Braiman v. Braiman, 407 N.Y.S.2d 449, 450 (App. Div. 1978).

[47] *See* Stephen A. Newman, *The Dark Side of Grandparent Visitation Rights*, N.Y.L.J., June 14, 2000 at 2.

[48] *See* Wenskoski v. Wenskoski, 699 N.Y.S.2d 150 (App. Div. 1999).

[49] JOSEPH GOLDSTEIN ET AL., BEFORE THE BEST INTERESTS OF THE CHILD 112 (1979): "The appointment of counsel for the child without regard to the wishes of the parent is a drastic alteration of the parent-child relationship. . . . It intrudes upon the integrity of the family and strains the psychological bonds that hold it together."

tensions in their own households caused by the tremendous stress of the litigation process. Instead of strengthening the custodial parent-child relationship, which is an important goal in other visitation disputes,[50] the court is adding significant new burdens to it.

Common sense tells us, and social science offers confirmation, that increasing stress, tension, and turmoil in the family lives of children is antithetical to their well-being. Much has been written on the detrimental effect on children of conflict between their adult caretakers, in the context of both divorce and domestic violence. Professor Andre Derdyn reviewed several studies that showed a correlation between marital conflict and behavioral disturbances in children, discovering that continued fighting after parental separation led to enduring conduct disorders in children.[51] High-conflict divorces have been recognized as posing special problems for children's emotional health.[52] In the context of domestic violence between adults in the child's household, courts recognize the anxiety and disturbance such conduct evokes in the child, even if that child is only indirectly exposed to the violence.[53]

The law's experience with joint custody arrangements also sheds light on the negative effect of conflict on children's welfare, and on the fallacy of reasoning based upon amicable family relationships in order to draw conclusions about antagonistic ones. In the late 1970s and 1980s, many states enacted legislation giving a preference to joint custody in divorce cases where child custody was in dispute.[54] Advocates of joint custody cited studies that showed joint custody kept both parents involved in close relationships with their children and diminished the adverse effects of spousal divorce on children's lives.[55] These studies, however, were of couples who had voluntarily chosen joint custody.[56] Courts and legislatures that viewed the success of joint custody arrangements in these families and assumed its success in all families –including those with parents battling in litigation–did not see that the success of the arrangements depended upon amicable

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[50] *See, e.g.*, Tropea v. Tropea, 665 N.E.2d 145 (N.Y. 1996) (finding child's welfare linked to how well custodial parent fares; court acknowledges it may be better to sacrifice non-custodial parent's "accustomed close involvement with children's everyday life" to further "the custodial parent's efforts to start a new life or to form a new family unit.").

[51] Andre P.Derdeyn, *Grandparent Visitation Rights: Rendering Family Dissension More Pronounced?*, 55 AM. J. ORTHOPSYCHIATRY, 277, 281-282 (1985). Derdyn specifically suggests that decision-making in grandparent visitation disputes should be informed by this literature, as the basic principles apply to the intergenerational conflict.

[52] Catherine C. Ayoub et al., *Emotional Distress in Children of High-conflict Divorce: The Impact of Marital Conflict and Violence*, 37 FAM. & CONCILIATION CTS. REV. 297, 311 (1999).

[53] *See, e.g.*, Trombley v. Trombley, 754 N.Y.S.2d 100 (App. Div. 2003).

[54] *See* Elizabeth Scott and Andre Derdeyn, *Rethinking Joint Custody*, 45 OHIO ST.L.J. 455, 467 (1984).

[55] *Id.*

[56] *Id.*

and cooperative parental relations.[57]

Courts that ordered joint custody for litigating couples found that the reality of contentious litigation and serious family conflict made the joint arrangement unworkable.[58] As Judge Shea wrote in one New York case, joint custody served to "exacerbate the adults' use of the children to defeat each other in defiance of the children's interest in stability, serenity and continuity."[59] Grandparent-parent legal conflict can similarly disrupt the child's tranquility, allowing the warring adults to "use . . . the children to defeat each other."[60]

Courts in grandparent visitation cases have sometimes tried to minimize the effects of conflict by saying that mere animosity between the parties is not a basis for denying visitation.[61] These courts not only fail to appreciate the significant negative effects of conflict, but they wrongly assume that the same beneficial effects of grandparent visits that occur in harmonious, non-litigating families will also occur in these situations.[62] Hostile relations between parents and relatives affect a child's capacity to benefit from contact with those relatives.[63] Antagonistic litigants cannot provide the secure environment that a child needs in order to relate well to both sides.[64] As psychologist David A. Martindale observes:

> When, in the name of preserving relationships between children and others whom we deem to be important, we expose children to overt disharmony between their parents and members of the extended family, we run the risk of doing more harm than good. Every time that a child departs the parental home for visitation that has been ordered by the court, the anger felt by the parents who must relinquish the child and the anger felt by the grandparents who must take the child under such circumstances will exacerbate the emotional wounds inflicted on all participants during the initial battle.[65]

The emotional distress of the grandparent-parent conflict can also have indirect effects on the child. Aggressive interference by grandparents can strain the parents' marriage and the parent-child relationship, raising the level of stress and tension in the household. A famous example of an interfering mother-in-law who did much to undermine the well-being of a nuclear family appears in Blanche

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[57] *Id.*

[58] *See* Dodd v. Dodd, 403 N.Y.S.2d 401 (Sup. Ct. 1978) (noting the children suffered "strong feelings of sadness, loneliness, and distress" because of the family tensions and arguments).

[59] *Id.* at 404; *See, also Braiman*, 407 N.Y.S.2d at 449 (finding joint custody "is insupportable when parents are severely antagonistic and embattled").

[60] *Dodd,* 403 N.Y.S. 2d at 404.

[61] Johansen v. Lanphear, 464 N.Y.S. 2d 301 (N.Y. App. Div. 1983).

[62] David A. Martindale, *Troxel v. Granville: A Nonjusticiable Dispute*, 41 FAM. CT. REV. 88 (2003) (concluding that "the emotional benefits to children that are derived from their interactions with members of the extended family are only realized when the relationships between the extended family and the nuclear family are satisfactory").

[63] *Id.*

[64] *Id.*

[65] *Id.* at 89.

Wiesen Cook's biography of Eleanor Roosevelt.[66] Franklin Roosevelt's mother, Sara Delano Roosevelt, made Eleanor's life a misery with her criticism, coldness, and interference.[67] She undercut Eleanor's disciplining of her children and communicated her contempt for Eleanor in ways obvious and subtle, despite Eleanor's constant attempts to placate the older woman.[68] By destroying Eleanor's peace of mind and security within her own family, Sara contributed to Eleanor's marital and child rearing difficulties.[69]

When a parent is sued for visitation by his or her own parents, special stresses can result. Parents in this situation are not only trying to effectuate a parenting decision, but are also fighting a special battle to maintain control over their own lives. They have grown to adulthood, moved away from the parental home, and achieved independence from parental authority. Yet, after creating a new family, the grandparent visitation law denies parents' independence by empowering grandparents to sue and try to control them as if they were still minor children. The law, when allowed to operate in this way, becomes the instrument for an attack upon the parents' status as adults.

As the foregoing discussion demonstrates, it is in the nature of grandparent visitation litigation to disturb deeply the emotional tranquility of the family. Litigation raises the conflict between parent and grandparent to the most visible level possible. At the center of the dispute is a child. Additionally, this litigation all too frequently comes at a time of great emotional upheaval in the family, when a divorce or the death of a parent creates an independent crisis for the child.

2. Timing of the lawsuit - parental divorce or death of one parent

Grandparent visitation statutes have been justified on the basis that they can help the child adjust to difficult life events, particularly the divorce of parents or the death of a parent.[70] The grandparent may comfort and console the child. However, this reassuring idea does not reflect the complexity of the situation, especially when grandparents and a custodial parent are at odds.

From a custodial parent's point of view, the additional burden of grandparent litigation could not come at a worse time. A marriage has dissolved or a spouse has unexpectedly died and the parent with custody must deal with the enormous stress of such an event. She must reorganize her life and her child's life, consider how financial needs will be met, and cope with her own sense of loss and anxiety about the future. She must hold herself together, knowing her child is also suffering from the loss and depending upon her for emotional support.

Into this picture come grandparents with their lawyers, demanding their rights. If the relationship with the grandparents were good, of course, there would be no

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[66] BLANCHE WIESEN COOK, ELEANOR ROOSEVELT VOL.1, 256-257, 311-313 (1992).

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *See* Emanuel S. v. Joseph E., 560 N.Y.S.2d 211, 213 (Fam. Ct. 1991), (quoting legislative history of N.Y. visitation statute).

problem (and no lawyers); the parent would welcome the help of extended family members. However, this is not the case when we posit a grandparent who is going to court to gain access to the child, for litigation in such circumstances is necessarily the product of animosity. At a time when both parent and child are suffering from the painful loss of divorce or death – a time of maximum vulnerability and stress – grandparent visitation litigation brings a potent new source of tension and stress into their lives.

The New Jersey case of *Wilde v. Wilde* illustrates this timing problem.[71] A husband committed suicide by shooting himself with a handgun in front of his wife. Less than five months later, the man's parents brought a grandparent visitation lawsuit against their widowed daughter-in-law.[72] In court papers, the paternal grandparents called her a greedy, vindictive liar.[73] They claimed that her spendthrift ways caused the husband to overwork, implying she was partly responsible for his suicide.[74] The grandparents' attack questioned the wife's parental fitness by casting aspersions on both her mental stability and her mothering ability.[75] A psychological evaluation ordered by the court produced no evidence that she was unfit in any way. The trial judge nevertheless ordered the parties to undergo "therapeutic mediation" with a psychologist.[76] On appeal, the state's Appellate Division held that the statute, as applied in such circumstances, violated the mother's fundamental right to raise her child as she saw fit, and dismissed the case.[77] The appellate court was apparently not misled by the "fantasy" that the grandparents would be a source of comfort and help for the child.[78] The Court saw the grandparents as selfish aggressors who were indulging their own hostility and generating legal conflict to achieve their own ends.[79]

Poorly timed litigation harms both parent and child. A court might be tempted to offset concern for the parent's distress by concern for the grandparent's distress at loss of contact with the grandchild. But this fails to account for the different roles these adults ordinarily play in the child's life. The parent is the child's caretaker, both physically and emotionally. The child's well-being is directly tied to the parent's well-being.[80] Children are sensitive to their caretaker's fears and anxieties.[81] Stress that diminishes a mother's or a father's parenting capacity

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[71] 775 A.2d 535 (N.J. Super. 2001).

[72] *Id.* at 541.

[73] *Id.* at 546.

[74] *Id.*

[75] *Id.* at 542.

[76] *Wilde*, 775 A.2d at 538.

[77] *Id.* at 546

[78] *Id.*

[79] For other cases brought soon after a traumatic event, *see* Roth v. Weston, 789 A.2d 431 (2002) (three months after wife's suicide); *Wenskoski*, 699 N.Y.S.2d at 150 (three months after parents separate); Linder v. Linder, 72 S.W.2d 841 (Ark. 2002) (seven months after husband's death).

[80] *See* Schepard, *supra* note 43; *Burgess*, 51 Cal. Rptr. 2d at 444.

[81] JUDITH WALLERSTEIN AND JOAN KELLY, SURVIVING THE BREAKUP: HOW CHILDREN AND

affects the child directly and acutely.[82] Grandparent visitation litigation stresses children and, at a time of heightened vulnerability, consumes parental time, attention, and resources that could be invested in the child.

Psychiatrist Andre Derdeyn comments on the psychological turmoil that the ill-timed lawsuit inflicts on the child:

> A grandparent's filing suit for visitation during times of children's great losses and changes occasioned by death, divorce, or remarriage of parents or adoption by stepparents can only be experienced as yet another stress or threat by the child's primary caretaker, and, therefore, by the child. At times when the child's need for stability and security and for being certain upon whom he can depend are very high, such legal initiatives by grandparents are likely only to add to the child's already excessive emotional turmoil, if for no more reason than the initiation of such litigation being seen as a threat to the integrity and economy of the family by the parent or parents.[83]

The litigation harms the child, both directly and through its adverse effects on the parent. As in custody litigation, the child is the object of the litigation, the focus of the conflict between parent and grandparent:

> Children are likely to encounter loyalty conflicts during the judicial proceedings, and if a visitation petition is granted, loyalty conflicts are likely to be maintained over time as the child remains the focus of intergenerational conflict. Because a child already experiences distress owing to the triggering conditions linked to a visitation petition (e.g., parental divorce or death), it is hard to see how further legal conflict between family members can assist the child in coping.[84]

The timing of litigation multiplies the parent's financial burdens, thereby imposing another source of stress on the parent-child unit. The untimely death of a spouse with minor children presents an acute financial, as well as emotional, crisis. A surviving spouse may suddenly find herself bearing new responsibilities, such as earning a living, paying down substantial debts acquired when the family was more financially secure, saving alone for the child's college education, and finding new sources of income to support the family.

If the grandparent visitation suit follows the parents' divorce, other financial problems arise. While divorce theoretically leaves the child with financial support from both parents, the downward pressure on the standard of living of divorced mothers with custody is well known, as are the difficulties of collecting court-ordered child support.[85] Thus, events that commonly trigger the filing of visitation lawsuits, like divorce or the death of one parent, impose monetary costs themselves.

PARENTS COPE WITH DIVORCE 215-221 (1980).

[82] *Id.*

[83] Derdeyn, *supra* note 51.

[84] Ross A. Thompson et al., *Grandparents' Visitation Rights: Legalizing the Ties That Bind*, 44 AM. PSYCHOLOGIST 1217, 1220 (1989).

[85] Paul K. Legler, *Child Support Enforcement Reform*, 17 FAIR$HARE 8 (June, 1997).

3. Financial burden

Grandparent visitation suits are brought by older people who often have the financial resources to spend significant sums of money hiring legal counsel and litigating a case. Their children have become adults and they no longer have any financial responsibility for them. Grandparents have the luxury of deciding whether or not they can afford litigation and proceeding only if the expense is not prohibitive.

Parents are in a different position in these cases. As defendants, they have no choice but to participate in the litigation. Once the grandparent files a complaint, the parent must respond or he will lose by default. Because of the costs involved, a parent may feel pressure to settle and allow visitation, despite his belief that visitation is not good for the child and despite the fact that visitation will invite an antagonist into family life for years to come.[86]

If the cost is substantial, though not prohibitive, a parent must make painful choices. Proceeding with a defense diverts scarce resources to a lawsuit–money that may be put to better use for the family. In his dissenting opinion in *Troxel*, Justice Kennedy recognized the parent's plight when he observed: "If a single parent who is struggling to raise a child is faced with visitation demands from a third party, the attorney's fees alone might destroy her hopes and plans for the child's future."[87] Litigation costs can deplete a family's savings, including funds earmarked for the children's college education.

Legal fees also put a strain on the family budget. As legal fees mount, parents may have to forego family vacations, Christmas purchases, and other important living expenses.[88] Some parents may have to work overtime or take on an extra job to defray litigation expenses, thus depriving their children of their presence, supervision, and care.

The realities of litigation costs can work against the best interests of the child. The more parents fear grandparent contact as a threat to their child, the more they will choose to sacrifice their family's well-being in order to fight the grandparent's lawsuit. If the costs of the lawsuit overwhelm the resources available to a parent, she will be forced to allow visitation, which she may rightly perceive not to be in the child's best interests.

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[86] *See, e.g.*, Farag v. Malaty, No. V-09449/99, 2001 WL 1263324 (N.Y. Fam. Ct. Sept. 28, 2001) (judge reported that finances led parents, who were strongly opposed to visitation, to capitulate). The imbalance of resources may favor grandparents, who have more time and money to litigate. *See Roth*, 789 A.2d at 448 (quoting *Rideout*, 761 A.2d at 310 (Alexander, J. dissenting)).

[87] *Troxel*, 530 U.S. at 101.

[88] *See Rideout*, 761 A.2d at 310 (Alexander, J. dissenting) ("If a parent were required to defend against such suit [sic] they [sic] may have to make sacrifices that are detrimental to the child. For example, instead of being able to buy the child a winter jacket the parent may have to pay an up-front fee to the attorney," (quoting trial judge)).

4. Burdens in the litigation process

Various burdens inherent in the litigation process, such as stress, delay, intrusiveness, and cost, fall upon parents forced to respond to one or more grandparent visitation suits.[89] Even when a parent wins, he routinely suffers these burdens. Pretrial motions, discovery, court-ordered evaluations by mental health professionals, a trial, and the opportunity for appeals make these cases multi-year ordeals.[90]

The absence of strict threshold requirements for these suits, coupled with the many factors relevant to the "best interest of the child" standard, makes it possible for even harmful or harassing grandparents to subject a fit parent to an exhausting adversary process. In one case, a mother ended all contact between her son and his paternal grandfather when three incidents of inappropriate sexual touching at the grandfather's home, involving her son and two other boys, came to light.[91] When the mother stopped the visits, the grandfather sued her for visitation rights. The court conducted a full hearing at which the child's therapist opposed visitation. Both parties testified, and a law guardian for the child was appointed.[92] The trial court ruled in the mother's favor and an appellate panel unanimously rejected the grandfather's appeal.[93] The parent had to endure all of this to prevent an untrustworthy grandfather from assuming a permanent role in her child's life.

This parent's experience is, sadly, not unique. Other cases include a grandmother with a spouse who was admittedly prone to domestic violence,[94] a grandmother who lived with abusive relatives,[95] and a grandmother who indirectly facilitated her son's domestic violence against the child's mother.[96] The

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[89] For a case in which a child's paternal grandmother and maternal grandparents sued the child's mother, *see* Nelson v. Nelson, Nos. A-02-252, A-02-512, 2003 WL 1798939 (Neb. Ct. App. Apr. 8, 2003). For a case in which a grandparent filed four petitions in two years, see Matter of Patricia B. v. Janice J.-S., 1/18/2001 N.Y.L.J. 33 (N.Y. Fam. Ct. 2001). *See Rideout*, 761 A.2d at 310 (Alexander, J., dissenting) ("[T]he law presents the prospect of competent parents being caught in a withering crossfire of lawsuits by as many as four sets of grandparents.").

[90] Examples of lengthy litigation across the nation include Wickham v. Byrne, 769 N.E.2d 1 (Ill. 2002) (3 years, 1 month); *Roth*, 789 A.2d at 431 (1 year, 10 months); Linder v. Linder, 72 S.W.3d 841 (Ark. 2002) (3 years, 10 months), Crafton v. Gibson, 752 N.E.2d 78 (Ind. Ct. App. 2001) (4 years); Kan. Dep't of Soc. & Rehab. Servs. v. Paillet, 16 P.3d 962 (Kan. 2001) (2 years, 3 months).

[91] Matter of Richard YY v. Sue ZZ, 763 N.Y.S.2d 219 (App. Div. 1998).

[92] *Id.*

[93] *Id.*

[94] Grant v. Richardson, 697 N.Y.S.2d 17 (App. Div. 1999). The litigation lasted two years before the five-judge appellate panel ruled against the grandmother.

[95] *See* Henry Gottlieb, *Second Win for Parents in Disputes Over Grandparent Visitation Law; Appeals Panel Again Holds Statute Unconstitutional as Applied,* 165 N.J.L.J. 4 (2001) (describing Freas v. Freas; grandmother had convicted sex offender, who had molested mother when mother was a minor, living with her).

[96] In re Farag, No. V-09449/99, 2001 WL 1263324 (N.Y. Fam. Ct. Sept. 28, 2001).

grandparents lost all of these cases, but not before the parents spent a lot of time and money defending themselves. During the process, parents worry that, should a judge misunderstand or misinterpret the facts of their case, their children might have to visit people who could harm them.

5. Standing

Most grandparent visitation cases do not lend themselves to disposition prior to trial. Visitation statutes commonly contain standing requirements and establish a "best interest of the child" test to determine when visitation is appropriate. Some state statutes confer standing if a more amorphous criterion is met, e.g., "if equity would see fit to intervene."[97] Often, standing is automatic upon the occurrence of a specified event, e.g., the death of one parent or the divorce or separation of parents.[98] Once the triggering event occurs, the case proceeds to a full hearing, to explore what is in the child's best interests.[99]

The standing requirement may add costs and delays to the burden of litigation by necessitating two fact-finding hearings in one case.[100] To avoid multiple hearings, some courts combine the standing hearing with the hearing on the child's best interests.[101] This makes sense when the parties use the same evidence at both hearings. In New York, for example, where the statutory premise for standing is that "equity would see fit to intervene," the reasons for the parent's objections to visitation are relevant to both standing and the best interests analysis.[102] A single hearing promotes adjudicatory efficiency. It also, however, effectively insulates the grandparent from being required to make a threshold showing of standing before getting a trial on the merits of the child's best interests.

6. Pretrial activity

Pretrial motion practice can be extensive. Grandparents often seek visitation *pendente lite*.[103] If a visitation schedule is established, it may create further disputes over its proper implementation, and generate complaints for contempt to punish parental non-compliance. In pretrial depositions, parents are compelled to confront a hostile attorney and to defend their parenting ability and their decision not to allow visitation. Parents and children are also commonly required to meet with court-appointed mental health or social work evaluators, who make intrusive

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[97] N.Y. DOM. REL. L. § 72 (1) (2004).

[98] *Id.*

[99] *See generally* Gilles, *supra* note 40, at 71, for a description of the relevant statutes.

[100] On occasion, of course, standing is denied; *see, e.g.*, Matter of C.M. v. M.M., 672 N.Y.S.2d 1012 (Fam. Ct. 1998) (finding that grandparent failed even to attempt to protect grandchild from abuse).

[101] Matter of Smolen v. Smolen, 713 N.Y.S.2d 903 (Fam. Ct. 2000) (noting that consolidated hearings are common).

[102] *Emanuel S.*, 560 N.Y.S.2d at 211 (1991).

[103] *See Wilde*, 775 A.2d at 535 (three motions for visitation *pendente lite*).

inquiries.[104]

The involvement of legal and other professionals carries with it a loss more subtle than the loss of privacy. The parents experience a loss of control when professionals "take over" a case and start telling the parents what to do, what to say, and how to act, in an atmosphere familiar to the professional, but alien and disorienting to the parent. In a society where family autonomy has constitutional value, these losses of privacy and control are serious matters.[105]

Attorney's fees start to accumulate before trial, putting more pressure on the parent to either sacrifice family well-being or settle the case against his best judgment about his own child's welfare. Depositions and motions consume time and money, and the parent can foresee the potentially "disastrous" economic consequences of continued litigation.[106]

7. Guardian ad litem for the child

The court often appoints a lawyer as a law guardian for the child. Law guardians add the expense of another lawyer to the case. They implicitly or explicitly communicate to children that their parents are not controlling the lawsuit on their behalf.[107] They may use what the child says to them as a basis for arguing against the parent's decision, creating a division between parent and child and undermining parental authority.[108] The lawyer's broad goal of seeking out the poorly-defined "best interests of the child" fosters this unhealthy intrusion.[109]

Strategically, the parent is forced to vie with the grandparent to win this lawyer's support. Consequently, parents are put in the humiliating position of trying to persuade a stranger about what is best for the parent's own child. Guardians sometimes create their own solution to a dispute that may not be sensitive to the parent's central child rearing role, but that may be influential with the court because it is offered by a "neutral" - though not necessarily sophisticated - participant.[110]

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[104] *See, e.g.,* Linder v. Linder, 72 S.W.2d at 841; Graville v. Dodge, 5 P.3d 925 (Ariz. Ct. App. 2000) (ordering parties to undergo therapeutic mediation under supervision of court-appointed expert).

[105] Prince v. Massachusetts, 321 U.S. 158 (1944) (there is a "private realm of family life which the state cannot enter").

[106] *Rideout*, 761 A.2d at 310 (Alexander, J. dissenting) (quoting trial judge on the "disastrous" economic consequences to both parent and child).

[107] GOLDSTEIN ET AL., *supra* note 49, at 122-123.

[108] *See id.* at 120-121.

[109] *See infra* text at § B. The effect of appointing a guardian *ad litem* may simply be to pass along the subjective judgment rendered in the case from judge to lawyer.

[110] *See, e.g., Richard YY*, 249 A.D.2d at 886 (law guardian recommends supervised visitation with grandfather in the mother's home despite grandfather's failure to protect child from sexual activity in grandfather's home). As three well-known authors observe, it is a "fantasy" to assume that lawyers, judges, experts, and other participants in cases involving children's issues are always the most skilled, the most sensitive, and the most competent personnel. *See* GOLDSTEIN ET AL., *supra* note 49, at 129.

8. Trial

At trial, the "best interest of the child" standard governs the proceedings.[111] This imprecise, broad standard allows the grandparents' attorney to pursue a wide-ranging and intrusive cross-examination of the parent. Under the broad parameters of the test, the court may hear from the parties, from experts in psychology, from medical witnesses if the child has health problems, and from lay witnesses who know the grandparent, the parent, or the child well enough to testify about some aspect of the parties' fitness, background or character.[112]

The child's wishes may also be considered at trial. This consideration creates an inappropriate and potentially damaging role for the child as a participant in the adults' conflict. The child should not be involved in an effort to overthrow parental authority nor embroiled in adult disputes beyond his understanding. Such conflicts serve only as a needless and traumatic test of a child's loyalty to the caretaking adults in his life.[113]

The best interest test also creates proof problems for parents. Parents make childrearing decisions based partly on instinct, and are encouraged by experts to trust their own judgment.[114] Instinctive judgments are not easy to turn into legal proof. Parents can face real difficulties trying to show that a grandparent's motives are bad, or that some seemingly innocent grandparental acts are not what they appear to be. For example, a grandparent may point to generous gifts to the grandchild as evidence of love and involvement with the child. However, the gift giving may be a competition with the parent to curry favor with the child, or to make the child aware of the parent's inability to match such expensive presents.[115] A parent uneasy with a grandparent's actions may have difficulty persuading a judge of the grandparent's ill motive, and of the hidden significance of acts that on the surface seem benign.

9. Enforcement and re-litigation

If an order of visitation is granted, the parties may re-litigate ensuing disputes over visitation compliance. The parties may bring motions to change visitation schedules and to punish non-cooperation with visitation orders.[116] Litigation

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[111] See discussion of common use of the best interest standard in Gilles, supra note 40.

[112] *See Wickham*, 769 N.E.2d at 3 (Ill. 2002) (calling 17 witnesses to testify - one of two consolidated cases).

[113] *See supra* text accompanying notes 41 - 69 for delineation of harms child suffers as a result of grandparent litigation generally.

[114] BENJAMIN SPOCK AND STEVEN J. PARKER, DR. SPOCK'S BABY AND CHILDCARE 1 (1998).

[115] For an example of such ill-motivated gift giving, *see* In re Marriage of Harris, 112 Cal. Rptr. 2d 127, 132 n. 4 (2001); *see also* COOK, *supra* note 66, at 257 ("Granny pampered the children with generous gifts that devoured parental authority.").

[116] *See* Glidden v. Conley, 820 A.2d 197, 206 (Vt. 2003) ("The ability to enforce an order, and the availability of contempt . . . can allow the grandparent to assert considerable control over the family. Grandparents may turn to the court for relief each time they perceive the

regarding the child can extend far beyond the original visitation order. In one case, a bitter litigation (still pending) has extended over seven years, shadowing the child's life from age three to age ten.[117] As a result of the father's failure to comply with the court's visitation order, he was jailed for a week on a motion for contempt.[118] The latest series of motions reflect continued hostility between the parties.[119] The grandparents are seeking a new contempt order, and the child's father is seeking to terminate visitation based on an independent mental health evaluator's report.[120] The report claims that the grandparents are telling the child that her father was somehow responsible for the child's mother's death in an automobile accident.[121] The father estimates he has spent $70,000 in legal fees.[122]

Visitation orders are re-litigated when circumstances change and parties go to court to modify orders. Circumstances can routinely be expected to change. For example, when a single parent remarries, her new family may create new time demands on her and her child. Other changes can be expected when a child's school, extracurricular, or community activities change, or when a custodial parent wants to relocate with the child to a new city. Additional conflicts may also flare up between the parent and grandparent, creating renewed demands for the cessation or enforcement of visitation.

Enforcing grandparent visitation orders can be particularly difficult. Litigation does not reconcile the parties, so every forced visit can breed additional resentment and anger.[123] The stage is set for arguments over interpretation of the order, over any visit that is missed for valid or invalid reasons, and over allegations of misconduct during the visits.[124] In one case where a visitation order may have been abused, grandparents used visits to take the child to their lawyer and to a forensic psychiatrist.[125]

Parents who are convinced that visitation will be harmful to their children will sometimes resist the visitation order, precipitating a contempt of court finding. But the cure for contempt - a jail sentence for the offending parent - is worse than the disease. Consider the case of *Olson v. Olson*.[126] A Minnesota mother, sued for visitation rights by her own mother, felt so adamantly opposed to the visitation that she defied a court order granting it.[127] The court found her in contempt and ordered

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parent is not following the court order and thereby ask the court to micromanage the parent's otherwise constitutionally protected right to raise the child free from state interference.").

[117] Author's interview, March 21, 2003. This parent showed me the documents in his case, but requested anonymity.

[118] *Id.*

[119] *Id.*

[120] *Id.*

[121] *Id.*

[122] Author's interview, March 21, 2003.

[123] *See* Martindale, supra note 52, at 88.

[124] Adoption of Berman, 118 Cal. Rptr. 804 (1975).

[125] *Id.*

[126] 534 N.W.2d 547 (Minn. 1995).

[127] *Id.* at 548.

her jailed for up to 90 days.[128] After a night in jail, the mother relented, and promised to cooperate with visitation.[129] A judge might well consider this a good result.

On closer examination, however, a more troubling aspect to this scenario emerges. Explaining why she relented, the child's mother said, "I called my daughter last night and she was so upset, and I realized my daughter needs me more at home."[130] The confinement of a parent in jail can be frightening to a child. This particular mother had to weigh her determination to prevent visitation against her child's need for her to be at home. By enduring a jail sentence, a parent would likely communicate to the child the message that avoiding visitation was so important that it merited the drastic step of going to prison. A news report quotes the child, age 10, describing her grandmother: "She's really a scary person to be around... She's really mean. She doesn't have anything nice to say about my parents at all."[131] The girl's stepfather, of whom the grandmother did not approve, adds that the child is afraid her grandmother will try to kidnap her.[132] The girl's fears may be the result of her own convictions or a result of ideas communicated to her by her mother and stepfather. Either way, they will exact an emotional toll on her.

The visitation order, contempt finding, and jail sentence cannot help but cause great anxiety for the child. At age ten, she is being ordered by a judge to go visit a person her mother deeply distrusts. In the course of the litigation, the mother had accused the grandmother of being an alcoholic.[133] This too may easily have been communicated to, or learned by, the girl.[134] This person has the power - already exercised - to have the child's mother sent to jail. Exactly who is the child to believe - her mother, her grandmother, her stepfather, or the judge? Whatever the result - maternal imprisonment or enforced visitation—a ten year old girl has been badly treated.[135]

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[128] Kimberley Hayes Taylor, *Mother Says She'll Allow her 10-year-old Daughter to Visit Her Grandmother; One Night in Jail was Enough to Halt a 4-year Feud Over Visitation Rights*, MINNEAPOLIS STAR TRIBUNE, Jan 31, 1996, at 1A.

[129] *Id.*

[130] *Id.*

[131] *Id.*

[132] *Id.*

[133] Taylor, *supra* note 128, at 1A.

[134] *See id.*

[135] The grandmother said she loved her grandchild and would do anything to resume her relationship with her. Apparently, however, this did not include counseling, which the grandmother rejected, saying it was her own adult daughter who needed the counseling, not her. *See* Olson v. Olson, 518 N.W.2d 66, 66 (Minn. Ct. App. 1995). Instead, the grandmother took her lawsuit through all three levels of the state court system. She won visitation rights, conditioned on her "abstinence from the use of any mind or mood-altering chemicals . . . during the visitation," and her not making negative statements about the child's parents in her presence. *See* Olson v. Olson, 534 N.W.2d 547, 548 n.2.

Other incarcerations for contempt have gone on for longer periods,[136] with no apparent consideration of the fear and anxiety generated for the child by the parent's imprisonment, or the effect of the loss of parental care and companionship. The result - harming children in order to serve their "best interests" - could hardly be more perverse.

B. Courts can't predict when children's best interests are served by grandparent visitation, except in extreme circumstances

Numerous state grandparent visitation statutes require that visitation, if it is to be granted, must serve the "best interests of the child."[137] The phrase is a common one in family law, especially in divorce cases, when child custody is at issue.[138] The courts must assess all relevant factors and conscientiously and carefully weigh the benefits to and the burdens on the child of any custody or visitation arrangement that might be ordered.[139]

The observation that the best interests standard is vague and indeterminate is a familiar one.[140] Courts, out of necessity, have applied the best interest standard in custody disputes between divorcing parents, and it might be assumed that they could do so equally well in grandparent visitation cases. But applying the best interest test to grandparent-grandchild relationships, in litigation brought against the parent, poses unique difficulties not present in the divorce context. These difficulties are so substantial that courts applying the best interest test in good conscience should grant visitation to grandparents only in the clearest of circumstances. Such circumstances include when the grandparent has become a parent-like figure in the child's life and loss of contact would be traumatic to the child, or when the child is the victim of parental abuse or neglect and grandparent's presence is protective of the child's safety.

In the traditional divorce context, courts have narrowed the broad parameters of the best interest test in practice. In choosing a custodial parent, courts have routinely identified which parent is the child's primary caretaker,[141] which parent is likely to facilitate the child's relationship with the other parent,[142] and which parent

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[136] Michael Shaw, *Woman Wages Fight in Court for Right to See Granddaughter; Mother Has Gone to Jail Rather Than Comply With Court-ordered Visitation; Hearing is Set for Wednesday*, ST. LOUIS POST-DISPATCH, Dec. 12, 1999, at C2.

[137] Gilles, Stephen G. *Parental (and Grandparental) Rights After Troxel v. Granville*, 9 SUP. CT. ECON. REV. 69, 72 (2001).

[138] Friederwitzer v. Friederwitzer, 447 N.Y.S.2d 893 (1982).

[139] *Id.*

[140] *See, e.g.*, Robert H. Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy,* LAW & CONTEMP. PROBS. 226, 229 (Summer 1975); David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 481-482 (1984); Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TUL. L. REV. 1165, 1181 (1986).

[141] *Dodd*, 403 N.Y.S.2d at 401.

[142] Young v. Young, 628 N.Y.S.2d 957, 960 (App. Div. 1995).

has shown the greater capacity to nurture the child.[143] In making parental visitation decisions, the courts assume, with strong support in the psychological literature, that a child needs and benefits from contact with both parents.[144] They accept the view that a non-custodial parent should receive liberal visitation privileges, absent evidence that the parent poses a danger to the child.[145] With such commonly accepted reference points, the best interests standard has become a somewhat more predictable and definable test in the context of parental divorce.

Courts deciding visitation disputes involving non-parents have proceeded much more cautiously.[146] Those that have granted such claims have hewed closely to the "psychological parent" concept advanced most prominently by Goldstein, Freud, and Solnit in their influential book, Beyond the Best Interests of the Child.[147] Persons found to be of such psychological importance to the child as to be parent-like figures, and whose continued companionship would serve the child's best interest, have validly won visitation rights in some states.[148] This application of the best interest standard has solid social science foundations.

In grandparent visitation cases, courts are asked to assess not primary attachments to parent-like figures, but secondary attachments. When the best interest standard changes context, however, to cover visitation by non-psychological parents, the test loses its essential analytical support. Modern grandparents occasionally assume a parent-like role in their grandchildren's lives, as the Supreme Court noted in *Troxel*.[149] But the vast majority of today's grandparents are secondary figures in children's lives. The widely shared understandings about the critical importance of primary attachment figures in a child's life are not relevant to ordinary grandparents. The task of weighing the benefits of court-imposed grandparent visitation, where the significant negative consequences discussed earlier must also be weighed, cannot be done with confidence in any but the most extreme cases. Courts that order visits often do so with much reliance on generalization, speculation, and subjective judgments, but, in the words on one state supreme court, with "little evidence."[150]

One difficulty with secondary relationships is that children have a wide variety of them. Children typically interact, at some time in their lives, with teachers, coaches, peers, aunts and uncles, cousins, other relatives, and family friends. These relationships, even when a clear source of satisfaction to children, tend to ebb and

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[143] In re Marriage of Carney, 598 P.2d 36, 44 (Cal. 1979).

[144] *Burgess*, 51 Cal. Rptr. 2d at 451 (1996); *see* WALLERSTEIN & KELLY, *supra* note 81.

[145] In re Baby M, 537 A.2d 1227, 1262 (N.J. 1988).

[146] *See, e.g.* Alison D. v. Virginia M., 569 N.Y.S.2d 586 (1991).

[147] *Supra* note 49.

[148] See, e.g., Carter v. Brodrick 644 P.2d 850 (Alaska 1982); V.C. v. M.J.B., 748 A.2d 539 (N.J. 2000)

[149] *Troxel*, 530 U.S. at 64.

[150] Brooks v. Parkerson, 454 S.E.2d 769 (Ga. 1995); Connecticut and Oklahoma have rejected trial judges' "vague generalizations about the positive influence of grandparents on grandchildren." *Roth*, 789 A.2d at 431; Neal v. Lee, 14 P.3d 547 (Okla. 2002).

flow.[151] Unless the child's health, safety or other vital need is implicated, the influence on the child of any one relationship cannot be separated out and its consequences for the child's development readily understood. Such determinations exceed our ability to understand human development. As professors Elizabeth Scott and Andre Derdeyn have observed, "The variables that influence the child's development are so multi-dimensional that, aside from clearly harmful situations, substantial speculation is implicit" in any decision that claims to ascertain the importance of any one variable.[152] Goldstein, Freud, and Solnit cautioned judges (and mental health experts) about the dangers of unjustified assertions about the importance of specific relationships on children generally.[153] They warned that "it is beyond the competence of any judge, or for that matter of any discipline, to appraise the amalgam of human factors in any child placement dispute for purposes of making long-term predictions or dictating special conditions for custody."[154]

Child rearing ideas and philosophies vary widely, and there are few universally accepted axioms.[155] In the course of childrearing, it is difficult for parents to make provably correct judgments, whether about visitation or any other matter. However, courts are not better situated to make these decisions. In most situations, there is no clearly "right" or "wrong" decision, and the present state of knowledge about childrearing simply does not permit judges to draw conclusions contradicting a fit parent's choice.

Uncertain benefits of grandparent visitation

Some courts believe grandparents' relations with grandchildren are inherently worthy of court ordered protection due to the assumed special benefits of the relationship.[156] Studies done on this subject, however, do not bear out that belief.

Perhaps the most sympathetic study of grandparents' importance in the lives of grandchildren is that of Arthur Kornhaber and Kenneth L. Woodward, in their 1981 book, GRANDPARENTS/GRANDCHILDREN: THE VITAL CONNECTION.[157] Here, the authors argue that grandparents are uniquely positioned to play various beneficial roles in the extended family, including those of nurturer, mentor, role model, and transmitter of family history and values.[158] The authors studied over 300 children

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[151] The quality of such relationships often depends upon physical proximity and in a mobile society they often lose significance after geographic relocations by the parties to them. *See, generally* ANDREW J. CHERLIN AND FRANK F. FURSTENBERG, JR., THE NEW AMERICAN GRANDPARENT: A PLACE IN THE FAMILY, A LIFE APART (1992).

[152] Scott & Derdeyn, *supra* note 54 at 467.

[153] *See* GOLDSTEIN ET AL, *supra* note 49, at 50-52.

[154] *Id.*

[155] *See* Stacy Schiff, *Because I Said So*, N.Y.TIMES BOOK REVIEW, April 27, 2003, at 9 (reviewing ANN HULBERT, RAISING AMERICA: EXPERTS, PARENTS, AND A CENTURY OF ADVICE ABOUT CHILDREN (2003)).

[156] Mimkon v. Ford, 332 A.2d 199 (N.J. 1975).

[157] KORNHABER AND WOODWARD, *supra* note 3.

[158] *Id.*

to assess the emotional attachments between children and grandparents, and they divided the children into three groups.[159] The first group had "close contact," such as frequent contact between child and grandparent such that a close, intimate relationship existed.[160] The second group had "sporadic contact," meaning irregular, intermittent contact between child and grandparent which did not result in the formation of intimate ties. The third group had "no contact" (either minimal or no contact between child and grandparent).[161]

The first group comprised only five percent of the children in the study; the second, eighty percent; and the third, fifteen percent. Very few grandparents were, in fact, closely involved in their grandchildren's lives.[162] The authors believed that societal changes, such as the increasing use of daycare facilities, partly explained the diminishing need for grandparents.[163] However, they felt that grandparents also shared some of the blame by choosing to ignore or restrict their extended family connections.[164] The authors fervently urged return to the former norm of close extended family relations.[165] They advised grandparents to accomplish this "by establishing and maintaining vital connections to every family member," explicitly including reaching out to, and if need be reconciling with, the parents of their grandchildren.[166] Another suggestion was building relationships, rather than coercing them, as this can lead to more rewarding extended family experiences for grandparents and grandchildren.[167]

A subsequent, large scale study of grandparents by Andrew J. Cherlin and Frank F. Furstenberg, Jr., similarly found that only a minority of grandparents play a truly critical role in their grandchildren's lives.[168] The vast majority of grandparents, dubbed "companionate grandparents," preferred lives that were independent from their children and grandchildren. They spent regular but very limited time with their grandchildren, largely on "recreational or ceremonial occasions."[169] Such grandparents did not engage in childrearing activities, did not discipline the child, and did not become closely involved in the child's life.[170] While the relationships were likely pleasurable, they did not confer substantial benefits on the child. When Cherlin and Furstenberg asked adolescents to whom they would most likely turn for help with a personal problem, most indicated parents and siblings; only two

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[159] *Id.*

[160] *Id.*

[161] *Id.*

[162] KORNHABER AND WOODWARD, *supra* note 3.

[163] *Id.* at 131.

[164] *Id.* at 88.

[165] *Id.*

[166] *Id.* at 200, 210.

[167] *Id* at 200.

[168] CHERLIN AND FURSTENBURG, *supra* n. 151.

[169] *Id.* at 184. They also identified two other categories, "remote" grandparents and "involved" grandparents. Involved grandparents actively helped top rear their grandchildren; 16% of the grandparents in their survey played this role. *Id.* at 205.

[170] *Id.*

percent mentioned a grandparent.[171] Furthermore, the authors reported that they "discovered very little evidence of intergenerational transmission of attitudes from grandparents to grandchildren."[172] Most notably, they concluded: "We could discover no evidence that greater involvement by grandparents had a positive effect on the behavior or mental health of the children in our study."[173]

Cherlin and Furstenberg found that grandparents "want intimate, satisfying, stable family ties, but at the same time they want to retain their independence from kin. They want affection and respect from their children and grandchildren, but they do not want to be obligated to them."[174] This is not to say that grandparents did not feel strong attachments to their grandchildren.[175] But claims that the companionate relationship between grandparents and grandchildren produced lasting, substantial benefits for the child did not hold up.

Lacking empirical support for general propositions concerning the importance of grandparent-grandchild relationships, family court judges sometimes fall back upon their own experiences of grandparenthood or invoke airy platitudes about the benefits of grandparents. The trial judge in *Troxel*, explaining his decision to order visitation, said "I look back on some personal experiences . . . we [had] as kids a week with one set of grandparents and another set of grandparents, [and] it happened to work out in our family that [it] turned out to be an enjoyable experience."[176]

In *Punsly v. Ho*, a California judge said, "I don't see any problem with the [grandparent] being similar to a Disneyland dad . . . . I am a grandparent. That seems to be what we do for grandchildren."[177] In ordering visitation, this judge ignored facts showing the lack of a significant existing relationship between the child and her grandparents, and disregarded evidence that the grandparents sometimes yelled and cursed during telephone conversations with the child and her mother.[178]

A Michigan judge granting a visitation petition stated: "Grandmothers are very important. I don't say that just because I am one, but I do believe they are important. I have a niece who doesn't have any and she borrows grandparents . . . ."[179] The judge's reliance on the generalization that grandmothers

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[171] *Id.* at 169.

[172] *Id.* at 173.

[173] CHERLIN AND FURSTENBURG, *supra* n. 151 at 183.

[174] *Id.* at 187.

[175] *Id.* at 191.

[176] *Troxel*, 530 U.S. at 72 (quoting the trial judge from the Verbatim Report of Proceedings, 220-221).

[177] 104 Cal. Rptr. 2d 139, 147 (Ct. App. 2001). *See also* Santaniello v. Santaniello, 850 P.2d 269, 270 (Kan. App. 1992) (reversing trial judge, ordering visits because it is "nice" if children know their grandparents); Marriage of Oswald, 847 P.2d 251 (Colo. App. 1993) (reversing trial judge, ordering visits so grandmother could take child to church).

[178] *Id.*

[179] Derose v. Derose, 643 N.W.2d 259 (Mich. Ct. App.2002) (quoting trial judge).

are important led to a reversal on appeal.[180] In New York, some lower court judges demonstrated their commitment to the "rightness" of grandparent visitation by ordering visitation without bothering to hold any hearing at all.[181] Under the vague rubric of "the best interest of the child," a judge can easily impose his or her personal views about childrearing on parents who may legitimately disagree.

The U.S. Supreme Court recognized the special problem that imprecise legal standards impose in family law cases in *Santosky v. Kramer*, where the Court considered New York's statute authorizing the termination of parental rights on the basis of "permanent neglect."[182] The statute required New York judges to determine the quality of parents' contacts with children who lived in foster homes.[183] The judges also had to ascertain whether the state foster care agency had made "diligent efforts" to strengthen the parental relationship and, if so, whether the "best interests of the child" required termination of parental rights.[184] The Court found that these imprecise standards tended to "magnify the risk of erroneous factfinding."[185]

Courts applying grandparent visitation statutes must make determinations similar to those in *Santosky*. The judge must determine the depth of the relationships between child and grandparent, assess the quality of the parental objections to grandparent contact, and define the benefit to be derived by the child from grandparent visits. All this must be done while the parties are engaged in conflict with each other that affects the child's life in complex ways. That effect on the child is also relevant to the court's determination of the child's best interests. The fact finding tasks of the trial judge are formidable, and the risks of error are significant enough to justify the imposition of a "clear and convincing evidence" standard of proof, just as the Court imposed in *Santosky*.[186]

The *Santosky* court further observed that the challenged state proceedings "employ imprecise substantive standards that leave determinations unusually open to the subjective values of the judge."[187] This problem is found in grandparent visitation cases as well. It is striking to see some judges openly declaring that they are influenced by their own personal experience of grandparenthood, either as

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[180] *Id.*

[181] The judges were told to hold hearings on appeals from their orders. Quintela v. Ranieri, 499 N.Y.S.2d 562 (App. Div. 1986); Schoffman v. Schoffman, 524 N.Y.S.2d 209 (App. Div. 1988).

[182] 455 U.S. 745 (1982).

[183] *Id.* at 746.

[184] *Id.* at 748.

[185] *Id.* at 762. The risk of error helped to persuade the Supreme Court to require an elevated standard of proof - "clear and convincing evidence" - whenever the state sought to terminate parental rights.

[186] *Roth*, 789 A.2d at 431 (2002) (imposing a clear and convincing standard of proof under supervisory powers but not finding that the standard was constitutionally required).

[187] Santosky v. Kramer, 455 U.S. 745, 762. Courts in other childrearing contexts have expressed a similar concern. *See* In re Hofbauer, 419 N.Y.S.2d 936, 940 (App. Div. 1979) (parental choice of medical care).

grandparents or as children recalling their interactions with their grandparents.[188] In doing so, they fail to factor in the complex dynamics of the family that is embroiled in irreconcilable intergenerational conflict.

The power of the trial judge to impose his or her subjective values is further enhanced in these cases when appellate courts confer broad discretion on trial courts to determine the child's best interests, and refuse to overturn lower court visitation orders absent an abuse of discretion.[189]

C. How to regulate grandparent visitation litigation

If grandparent visitation litigation imposes substantial burdens on children and on the parent-child relationship, states must take special measures to strictly regulate this litigation. These measures are necessary to comply with the *Troxel* mandate to give "special weight" to parents' fundamental constitutional right to raise their children without undue state interference.[190] They are also necessary to better serve the common statutory mandate to promote the "best interest of the child."[191]

Two sorts of measures are needed. First, threshold requirements, which would serve as barriers to grandparent visitation lawsuits, must be in place to prevent grandparents from too easily haling parents into court to face a full scale adversary proceeding. Second, there must be standards and procedures protecting parents and children through the entire litigation process.

1. Threshold requirements:

To protect parents from litigation, it is most important to ensure that parents can not be subjected to a full adversary hearing by grandparents based upon general claims about the child's best interests. The following suggestions are offered to help achieve this goal.

A. Standing

A standing test must be based not on specific events that confer automatic standing, but on behaviors that relate directly to the child's well-being. I suggest that soon after the commencement of a grandparent suit, the grandparent be required to show there is probable cause to believe that (i) if visitation is denied, the child will suffer either substantial harm to health or safety, or substantial impairment of emotional health; (ii) the grandparent is a psychological parent to the child or has been a primary caretaker for a significant time (e.g., two years)

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[188] *See Troxel*, 530 U.S. at 72.

[189] *See, e.g.*, Frazier v. Frazier, 2003 WL 931296 (Ohio Ct. App.); *Olson*, 534 N.W.2d at 547. Much deference is ordinarily paid to the trial courts that apply the "best interest" standard to individual cases. *See Burgess*, 51 Cal. Rptr. 2d at 444.

[190] *Troxel*, 530 U.S. at 70.

[191] *Id.* at 69.

immediately preceding the visitation claim; (iii) the grandparent has respected parental decisions on child rearing matters (e.g., on discipline, religion, health, nutrition) unless those decisions are obviously harmful; (iv) the grandparent has made a good faith attempt at reconciliation with the parent; and (v) the grandparent will not denigrate the parent in the eyes of the child.

B. Pleading.

In pleading a visitation claim, the grandparent must state with particularity, in a verified petition, the facts supporting the above requirements.[192]

C. Decision.

Standing shall be determined as soon as practicable after the filing of a petition for visitation.

2. Adjudication protections

A. Substantive standard.

To gain court-ordered visitation, the grandparent must prove each of the elements specified in the probable cause standard specified above.

B. Standard of proof.

An elevated standard of proof, e.g., clear and convincing evidence, must be met in proving the claim.

C. No appointment of counsel for the child.

A *guardian ad litem* or other counsel for the child shall not be appointed, unless the court has substantial evidence that the parent is unfit.

D. Attorney fees

Attorney fees shall be awarded to the parent if the petitioner loses the claim for visitation. The court shall have the discretion to require the grandparent to pay the parent's attorney fees as the case proceeds, subject to recoupment if the grandparent prevails.[193]

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[192] *See* Blixt v. Blixt, 774 N.E.2d 1052 (Mass. 2002).

[193] "A parent who does not have the up-front out-of-pocket expense to defend against the grandparent's petition may have to bow under the pressure even if the parent honestly believes it is not in the best interest of the child. The awarding of attorney fees post-hearing does not provide a parent with the out-of-pocket expenses required before any petition is filed or any hearing has begun." *Rideout*, 761 A.2d at 310 (Alexander, J. dissenting).

E. Strict scrutiny.

A "strict scrutiny" standard should be employed for evaluating the constitutionality of visitation orders.[194]

F. Conflict as a factor.

The consequences of conflict between the parties must be part of the court's analysis of the child's best interest. Grandparent behavior before and during litigation will be relevant in assessing the consequences of the conflict.

G. Specific findings of fact.

The court must make specific findings of fact on the benefits and burdens of visitation before issuing a visitation order.

H. Orders.

Visitation orders should be limited to the least coerced time necessary, consistent with the goals of the order to promote the child's health or safety or to restore the child's emotional well-being. Orders shall respect other demands on the child's time and incorporate the expectation that as child grows older, the amount of ordered visitation will decrease.

I. Enforcement.

Imprisonment of a parent will not be permitted as a means of enforcing visitation orders.

J. Standard of review.

Appellate review should be de novo, with appellate scrutiny of fact finding and of application of law to the facts. Appellate review should not be based upon an "abuse of discretion" standard.

CONCLUSION

By its very nature, grandparent visitation litigation imposes substantial burdens on children and on their parents, who are required to defend their childrearing decisions despite their fundamental constitutional right to raise their children as they see fit. These burdens include invasions of privacy, tremendous stresses on the family, psychological harm to children, and lengthy, costly, and traumatic legal

[194] Courts have split on this question, differing on the degree of encroachment on the parents' fundamental rights that court-ordered grandparent visitation claims involve. *Compare Roth*, 789 A.2d at 431 *and Graville*, 985 P.2d at 604. This article is intended to demonstrate just how substantial that encroachment is.

proceedings. Often these lawsuits come at a time when the family is especially vulnerable, either because of divorce or the death of one parent. When the family unit is most in need of peace, these lawsuits create more trauma.

These problems are compounded by the use of the "best interest of the child" standard, which is ill-suited to the assessment of coerced visitation with secondary figures in the child's life. In reality, judges in grandparent visitation cases are given free rein to impose their subjective value judgments on parents. Cheerful stereotypes about grandparents, and unsupported generalizations about their felicitous role in children's lives, have led courts to supplant parental decision making with judicial childrearing decrees. But the law loses touch with reality and causes additional harm when it insists that all families, no matter how troubled or chaotic, behave just as happy families do.