Honor Thy Father and Thy Mother: But Court-Ordered Grandparent Visitation in the Intact Family?

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Children's Children are the crown of old men; and the glory of children are their fathers.
Proverbs 17:6

I. INTRODUCTION

American family law has consistently protected the intact family from interference by the state, especially in childrearing decisions. Beginning in the 1960s, states began enacting statutes which abrogated the common law rule¹ that grandparents had no legally enforceable right to visitation of grandchildren. This rule, as articulated in Succession of Reiss², was based on several principles. It was a parent's moral, not legal, obligation to allow grandparent visitation. Court-ordered grandparent visitation would undermine the parents' right to rear their children as they think best. The state's intervention in family disputes would make them more pronounced by making them public.³

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² 15 So. 151 (La. 1894). This case is regarded as the first case litigating grandparent visitation, although it interprets the civil law and involves a lawsuit by the maternal grandparent against the father for visitation with her grandchildren, the children of her deceased daughter.
³ Id.
Today, all states, except the District of Columbia, have enacted grandparent visitation statutes, allowing grandparents to petition the court for visitation under certain circumstances against the wishes of parents. Until recently, most statutes excluded visitation rights within the intact family. There is now a trend to extend grandparent visitation statutes to the traditional intact family.

Forced grandparent visitation may erode the stability of a family that is intact. Little empirical data is available to assess the merits of grandparent visitation. The Supreme Court of the United States has declined to rule on the constitutionality of court-ordered grandparent visitation in the intact family. Therefore, it is imperative that state courts act to protect the intact family. This article argues that state courts, when deciding intact family grandparent visitation cases, must adhere to a standard that is closely tailored to continue the traditional policy of protecting the intact family from state interference. Part II of the article examines the competing interests of the intact family, parents, grandparents, grandchildren, and state. Part III contends that the standard for state intervention in grandparent visitation cases must be the traditional standard for state intervention in family life. Part IV makes several arguments for following the traditional standard. First, the reasons supporting the enactment of grandparent visitation statutes in the 1960s and 1970s are not relevant to grandparent visitation in the intact family. Second,

6 The intact family in this article is defined as the traditional, nuclear family composed of husband, wife and their biological children.
8 The Supreme Court has not ruled on the constitutionality of any of the grandparent visitation statutes. In 1992, the Court declined to hear a case which interpreted the Kentucky statute and involved a traditional, biologically intact family in King v. King, 828 S.W.2d 630 (Ky.), cert. denied, 113 S. Ct. 378 (1992). It also refused to hear a case which interpreted the Wisconsin statute and involved a step-parent adoption intact family in In re C.G.F., 483 N.W.2d 803 (Wis.), cert. denied, 113 S. Ct. 408 (1992).
the inherent problems of court-ordered visitation may be disruptive to the intact family. Third, court-ordered grandparent visitation, without compelling reasons, is an unnecessary disruption to the intact family. Finally, the traditional standard satisfies the constitutional standard for state intervention in the intact family.

II. THE COMPETING INTERESTS

In court-ordered grandparent visitation the interests of the intact family, parents, grandchildren, grandparents, and state usually clash because of the principle of family autonomy. This fundamental principle of family law serves to inhibit state intervention in intrafamily domestic disputes. This principle requires courts not to intervene to settle intrafamily domestic disputes except in certain specific circumstances and to protect the family from interference from others.9

A. The Intact Family and Parents

Historically, the principle of family autonomy has been applied to the traditional intact family. The family, as a unit, is autonomous and regulates its internal affairs.10 The common law also protected the intact family even though a parent's rights might be sacrificed. For example, a child born to a married woman was presumed to be the child of her husband even though he was not the biological father.11 Although the presumption was primarily to protect the child from the consequences of illegitimacy, it also protected the integrity and autonomy of the family unit. This presumption was so strong that it was very difficult to overcome.

The principle of parental autonomy, usually used interchangeably with the broader concept of family autonomy,12 protects the right of parents to rear their children without state interference except in certain specific circumstances.13 Paren-

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13 Odell v. Lutz, 177 P.2d 628, 629 (Cal. Ct. App. 1947); Succession of Reiss, 15 So. 151, 152 (La. 1894); Foster & Freed, supra note 4, at 643-53.
tal autonomy is justified on several grounds. First, under natural law principles, parental rights are part of the natural order of society, and parents are presumed to act in their child's best interest. 14 Second, parental autonomy promotes the nation's "commitment to diversity of views, lifestyles, and freedom of religion . . . by allowing families to raise children in a wide variety of living situations and with diverse childrearing patterns." 15

Third, since there is no consensus as to what constitutes the healthy adult and because of the impracticality of judicial system supervision over childrearing, 16 a system promoting parental autonomy will as likely produce a healthy adult as any other one. 17 Thus, the principle of family autonomy protects both the intact family as a unit and the parent as an individual in the exercise of childrearing rights. It also benefits the state by supporting cultural intrafamily diversity.

The principle of family autonomy is also constitutionally protected. The United States Supreme Court has consistently interpreted the Liberty Clause of the Fourteenth Amendment to protect the parent's right to rear children without interference from the state. 18 Beginning in 1965, Griswold v. Connecticut 19 and its progeny have described family autonomy in terms of the right of privacy.

The Supreme Court has recognized that the right to define a family without state interference is also part of the right to privacy interest. 20 This right extends to parents in the intact family. Although some of the recent Supreme Court cases may have weakened the biological parent's rights in childrearing,

14 Bartlett, supra note 12, at 887.
16 Id.
18 The first cases were Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (recognizing that among the liberties protected by the Fourteenth Amendment are the rights "to marry, to establish a home and bring up children"), and Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925) (stating "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations").
20 See, e.g., Moore v. City of East Cleveland, 431 U.S. 494 (1977) (allowing grandparent to define family with children and grandchildren); Loving v. Virginia, 388 U.S. 1, 12 (1967) (allowing interracial couple to define family); Shandling, supra note 17, at 127-29.
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those same cases have strengthened the constitutional protection of the integrity of the "family" as a unit.\(^{21}\) In several cases in which unwed fathers asserted their parental rights,\(^{22}\) the Court protected the family unit in which the child was a member over the parental rights of the fathers. In the most recent case, the Supreme Court protected an intact family from the intrusion of an unwed father asserting parental rights when the mother and her husband wanted to continue as an intact family.\(^{23}\) Thus, both the intact family as a unit and parents as individuals have constitutionally protected privacy interests.

B. Grandparents

Although grandparents are not asking to share legal custody of the grandchild, but merely to develop a relationship with the child, court-ordered grandparent visitation may intrude upon fundamental interests of the parents and the family. Under the common law doctrine of family autonomy, parents have the right to determine with whom the child develops a relationship and the right to define the boundaries of the family.\(^{24}\) Grandparent visitation statutes have abrogated the common law and have created for grandparents an independent right to petition the court for visitation.\(^{25}\) A number of policies may justify these statutes. There are unique bonds and relationships, some argue, between grandparents and grandchildren, which are mutually beneficial.\(^{26}\) In view of the general disintegration of the family, others argue, grandparent visitation strengthens family bonds and preserves intergenerational contact.\(^{27}\) Others contend that grandparents' rights are derivat-


\(^{24}\) Shandling, *supra* note 17, at 126-27.


\(^{27}\) *King*, 828 S.W.2d at 631.
tive of their children's rights. Thus, when their normal access through their own children to their grandchildren is disrupted, they should still have visitation rights to assert. Finally, some argue that this legislation's only justification is political: the inevitable result of intense lobbying efforts in all fifty states by grandparents and their supporters.

Grandparents may also assert that their right to visitation is constitutionally protected under principles articulated in Moore v. City of Cleveland. The Supreme Court, in that plurality decision, found a zoning ordinance unconstitutional because it defined "family" as essentially meaning the traditional intact family. The Court stated "[o]urs is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition." The grandparent's right to define the family to include access to the grandchild conflicts with the parent's right to define the family to exclude the grandparent.

Grandparents may also assert a claim under the Equal Protection Clause of the Fourteenth Amendment of the Constitution if the state allows only certain grandparents to assert visitation rights. It is, however, unlikely that the grandparent's right to visitation is itself a constitutionally protected liberty interest under the Due Process Clause of the Fourteenth Amendment. The prevailing test for determining whether an interest is constitutionally protected requires the ins-
terest to have been "deeply rooted in . . . tradition." Historically, grandparents did not have a right to visitation; therefore, it would fail this test of constitutionally protected rights.

C. The Grandchildren

The law has not adequately delineated the right of children to visit parents, let alone to visit grandparents. It is, therefore, predictable that grandparent visitation statutes, following the pattern of parental visitation statutes, are in terms of the right of the grandparent, not of the right of the child. Arguably, the grandchild's interest is to know and associate with grandparents. Under our jurisprudence, however, minors usually do not act for themselves—others speak for them. Many states, nevertheless, allow children to state a preference in custody decisions. The court typically considers the age and maturity of the child in determining what weight the court will give the child's preference in determining custody. Some states follow this approach in grandparent visitation statutes and allow the grandchild to state a preference. Conversely, the child's interest, for his or her own healthy development, is to live in a stable, intact family environment without state interference.

D. The State

The state's interest in court-ordered grandparent visitation stems from both its parens patriae power and its police power. Under the parens patriae principle, the state has an obligation to intervene to protect children under certain circumstances: when their parents have not met their parental duties; when the family is breaking up or has broken up; and when

38 See infra notes 101-103 and accompanying text.
there is a compelling public policy. The state then steps in and substitutes its judgment for the parent's, but only where the best interests and welfare of the child so demand. Presumably, in grandparent visitation cases the state intervenes and orders visitation in order to protect the child from the parent's decision to deny visitation.

The state's interest in court-ordered grandparent visitation that stems from its police powers illustrates the conflicting state interests. "The police power is the state's inherent plenary power both to prevent its citizens from harming one another and to promote all aspects of the public welfare." The state has established the family, traditionally the intact family, as a unit recognized by the government and has delegated to parents the childrearing responsibilities. Thus, stable marriages and children being reared in intact families have historically been considered fundamental to the general welfare of the state. Grandparent visitation may be disruptive to both.

The state also has a constitutional interest in court-ordered grandparent visitation since constitutionally protected fundamental rights are at stake if the state intervenes to order grandparent visitation. The United States Supreme Court views family autonomy as part of the fundamental right of privacy. Within the boundaries of family autonomy are the fundamental rights of childrearing and family definition. The Court requires that before the state can regulate fundamental rights, the state must have a compelling state interest and the regulation must be closely tailored to effectuate only the legitimate state interest.

When the parties have competing interests, as there are in grandparent visitation litigation, the court's usual approach is to balance those interests. When the intact family is involved, however, because of the importance of family autonomy, the court usually does not engage in balancing without

strong justification. Accordingly, if grandparent visitation statutes extend to the intact family, the court must first decide if it should intervene to balance the interests. 45

III. THE TRADITIONAL STANDARD FOR STATE INTERVENTION

The traditional standard for state intervention in family life under its parens patriae power begins with a determination that the child is harmed by the parent’s decision, which in this case is the parent’s decision not to allow visitation. 46 This standard of showing harm has consistently been used in abuse and neglect cases 47 and in custody cases between parent and nonparent. 48 In the latter, this standard is phrased in the more familiar language of the “unfitness” of the parent. 49 Theoretically, the “unfitness” of the parent causes harm to the child. 50 If no harm is shown, then there is no basis for state intervention. 51 In determining harm to the child in custody cases, the court must find that the parent’s decision fails to meet the minimum standard of care, not the best standard. After the court determines that the child is harmed, the court must then determine whether placing custody with the nonparent will best address the harm and be beneficial to the child. 52 Thus, before the state legitimately intervenes in family life, this two-step standard should be met.

This two-step standard should be applied to grandparent visitation cases in the intact family because these cases are

45 Some argue grandparent visitation statutes go too far if they include the intact family. Bartlett, supra note 12, at 958-62. The Illinois General Assembly amended its grandparent visitation statute to include the intact family in 1989, but repealed the amendment in 1991 at the urging of the Illinois Bar Association. The Bar argued that the statute unduly burdened parents’ childrearing rights. Brown, supra note 31, at 133.

46 The threshold for state intervention in parental decisions is that the child is harmed by the parent’s decision. This standard should be used in all grandparent visitation cases, not only the intact family, because all abridge parental autonomy. See Bean, supra note 21, at 394-407, for a comprehensive discussion of the threshold for state intervention in a parent’s decision not to allow visitation. See also Minerva, supra note 31, at 549; Wald, supra note 15, at 1004-07.

47 Minerva, supra note 31, at 549, 553-54.

48 Ex parte Mathews, 428 So. 2d 58 (Ala. 1983).

49 Id. at 59.

50 The parental preference doctrine and the presumption that custody should be awarded to the parent instead of a third party are other statements of this standard for awarding custody in parent-nonparent custody cases. See, e.g., Odell v. Lutz, 177 P.2d 628 (Cal. Ct. App. 1947).


52 Bean, supra note 21, at 424-25.
akin to custody cases between parent and nonparent.\(^{53}\) The threshold for court intervention requires that (1) denial of visitation harms the child and (2) that the level of the harm warrants intervention. That the child would be better off with grandparent visitation is neither a threshold harm, as Professor Kathleen Bean has perceptively written,\(^{54}\) nor is it the relevant issue. The court must identify the particular harm that deprivation of grandparent visitation causes a particular child. Once the harm has been identified, the court intervenes in the best interest of the child to determine whether court-ordered grandparent visitation is necessary to remedy the harm and would be beneficial to the child.\(^{55}\) The court should not intervene in the intact family simply because grandparent visitation is beneficial per se.\(^{56}\) Without first finding harm, the state would be substituting its judgment for that of the parent.\(^{57}\) Only after the court determines that denial of grandparent visitation will harm the child should the court then evaluate whether the intrusion will remedy the harm.

This two-step analysis is the appropriate standard for determining court-ordered grandparent visitation in the intact family. Most courts, however, begin and end the analysis of grandparent visitation with the assumption that grandparent visitation is in the best interest of the child.\(^{58}\) Courts omit altogether the crucial analysis as to whether the state should intervene.\(^{59}\) Courts may have unwittingly omitted this crucial analysis because grandparent visitation statutes are often cast

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53 Grandparent visitation cases involve litigation between a parent and a nonparent. When the intact family is involved, the nonparent is always a parent of one of the grandchild’s parents.

54 See Bean, supra note 21, at 423-30. One dissenting judge stated that in custody cases, showing general improvement in the child’s life if custody were awarded to a third party is not enough to deprive a parent of custody. A parent was deprived of custody only if it was shown by clear and convincing evidence that the parent was unfit. King v. King, 828 S.W.2d 630, 634 (Ky. 1992) (Lambert, J., dissenting).

55 Bean, supra note 21, at 394-95.

56 Id. at 433; King, 828 S.W.2d at 634 (Lambert, J., dissenting).

57 The state initially delegates childrearing responsibilities to parents. The state does not take away these responsibilities unless the child is harmed. As Professor Bean has stated: "For the state to delegate to the parents the authority to raise the child as the parents see fit, except when the state thinks another choice would be better, is to give the parents no authority at all.” Bean, supra note 21, at 441.

58 Id. at 430.

in terms of the best interest of the child.⁶⁰ The best interest standard is not the appropriate standard because this standard is generally used to settle disputes between parents, not disputes in which a third party is interfering with a parent's decision.

On the other hand, the best interest standard is the appropriate standard between parents, because the competing interests of the parents "[t]end to cancel each other leaving only the interests of the children as relevant considerations."⁶¹ The interests of grandparents and parents are not comparable and do not tend to cancel each other out. If the best interest standard were used without first showing harm, any interested person could request custody of or visitation with the child because he or she could demonstrate the child would be better off. The state delegates childrearing responsibilities to parents and does not take them away unless the child is harmed.⁶²

A few statutes require the existence of a substantial relationship between grandchild and grandparent before the grandparent has standing to petition the court for visitation.⁶³ But these statutes still do not focus on the issue of whether to intervene. Although requiring a substantial relationship implies that grandparent visitation is not accepted as being beneficial, per se, a substantial relationship does not necessarily mean the child is harmed if visitation is denied. In an attempt to limit the judge's discretion under the best interest standard, a few statutes explicitly define the factors that a court should consider when determining grandparent visitation.⁶⁴

Even if applicable, the best interest standard is frequently misapplied by the courts. Although the burden should be on the grandparents to prove visitation is in the child's best interests,

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⁶¹ In re Marriage of Hruby, 748 P.2d 57, 63 (Or. 1987).

⁶² Bean, supra note 21, at 424.

⁶³ See; e.g., IDAHO CODE § 32-1008 (1993); IOWA CODE § 598.35 (West Supp. 1993); MINN. STAT. ANN. § 257.022 (West 1992). The Minnesota statute requires visitation be in the best interests of the child and not interfere with the parent-child relationship.

⁶⁴ See, e.g., FLA. STAT. ANN. § 752.01(2) (West Supp. 1993); NEV. REV. STAT. § 125A.330(1) (1991); N.H. REV. STAT. ANN. § 458:17-d (1992); VT. STAT. ANN. tit. 15, § 1013(b) (1989); VA. CODE. ANN. § 20-107.2 (Michie Supp. 1993). The best interest standard is criticized because it is so broad that it gives too much discretion to the judge. Statutes which delineate the factors which the court must determine when applying the best interest standard are attempting to curb the judge's discretion.
courts have usually assumed that grandparent visitation is in the best interest of the child. This assumption, in most cases, has become, in effect, a legal presumption in the course of the court's analysis. As a result the parent must prove visitation would be harmful.65 Courts have lost sight of the fact that it is the parent who has a right to uninterrupted custody.66

The traditional standard puts the burden where it rightfully belongs. The grandparent must show that denial of visitation harms the child, granting visitation is necessary to remedy this harm, and that visitation is beneficial to the child. Thus, if court-ordered grandparent visitation is extended to include the intact family, courts should determine these cases by applying the traditional standard for state intrusion in family life.

IV. ARGUMENTS FOR FOLLOWING THE TRADITIONAL STANDARD

Heretofore, state legislatures may have intuitively recognized the potential harm that grandparent visitation may cause to the stability of an intact family and omitted the intact family from grandparent visitation legislation. The state's interest in the stability of intact families outweighs other considerations. Nevertheless, if the trend to include all family structures in grandparent visitation legislation continues, the following arguments support the contention that courts should interpret this legislation by applying the traditional standard for state intrusion in family life.67

A. Reasons Supporting the Early Grandparent Visitation Statutes Are Not Relevant to the Intact Family

Grandparent visitation statutes evolved because of a disruption in the intact family by death, separation, divorce or a

65 In King v. King, 828 S.W.2d 630 (Ky. 1992), the court reasoned that "if a grandparent is physically, mentally, and morally fit, then a grandchild will ordinarily benefit from contact with the grandparent." Id. at 632. The court found that the child would be safe in the grandparent's home and upheld grandparent visitation in this intact family. One dissenting judge chided the court for finding that the grandfather presenting such evidence had met his burden of proof under the best interest standard. Id. at 635-36 (Wintersheimer, J., dissenting).

66 Bean, supra note 21, at 398.

67 Some have argued parental rights should not be absolute but should be guided by the traditional test for state intervention. See Bean, supra note 21, at 405. Subjecting all families to grandparent visitation would also meet the Equal Protection argument because all families would be treated equally. See infra note 117 and accompanying text.
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custody proceeding. The first generation statutes provided standing for grandparents to petition the court to visit with their deceased child's children. The second generation statutes, following on the heels of the divorce rate explosion in the 1970s, expanded to include standing for grandparents to petition the court for visitation when their children did not receive custody of the grandchildren in separation, divorce, and custody cases.

The premise for these statutes was that the normal channel, through which grandparents have access to grandchildren, is through their own children. When a child dies or becomes the noncustodial parent in divorce, separation and custody cases, the grandparent's access to the grandchild is often cut off. These statutes create an access channel. Such statutes are consistent with the principle that courts will not interfere with an intact family unless it is broken. Statutes allowing grandparent visitation in an intact family are radically out of step with this fundamental principle. Families that have remained intact, despite the national decline in traditional family structures, should be spared any intrusion that might weaken or break them.

68 See, e.g., CAL. CIV. CODE § 197.5 (West Supp. 1967); ILL. REV. STAT. Ch. 110 1/2, para. 11-7 (1977); MICH. COMP. LAWS ANN. § 722.27a (West Supp. 1977-78); N.J. STAT. ANN. § 9.2-7.1 (West 1971); N.Y. DOM. REL. LAW § 72 (Consol. 1966).


70 Many of the second generation statutes have been revised to give standing to all grandparents in separation, divorce and custody cases.

71 The problem with these statutes is that courts still fail to make the analysis as to whether the family is so broken that the child is harmed by denial of grandparent visitation, and granting visitation will alleviate this harm and be beneficial to the child.

72 There is also the question of court-ordered visitation of the biological grandparents in the intact adopted stepparent family (the child's stepparent adopts the child) and the intact stranger adopted family (the adopting parents are not stepparents to the child). Prior to their creation, the adopted child most likely came from a broken home where the state traditionally intervened. Biological grandparents may have already been awarded court-ordered visitation prior to the adoption. It may be detrimental to the child to discontinue visitation after the adoption. Under the theory that grandparent rights are derivative from their own children, grandparents should cease to have rights when their children's rights have been terminated. In adoption cases, parental rights are terminated. Many states do not follow this theory of derivative rights in stepparent adoption cases and allow court-ordered visitation for the biological grandparents. However, in most
There is also support in behavioral science literature that early grandparent visitation statutes reflect the traditional standard. Studies show that a child, whose family has been disrupted because of the death of a parent or of a divorce, is often harmed if grandparent contact is not continued. The problem with these statutes is that they assume that harm occurs in every case and need not be proved on a case-by-case basis. The better, more consistent and more appropriate approach would be to apply the traditional standard in every grandparent visitation case. This approach would preserve the principles of family autonomy and would protect the child.

B. Inherent Problems in Court-Ordered Visitation

The problems inherent in court-ordered visitation would be disruptive to the intact family. The initial problem the family faces in court-ordered visitation is determining the frequency and length of the visits. Usually, "reasonable visitation" is the statutory language for determining the frequency and length of visitation in custody decisions for the noncustodian. Accordingly, courts in many of these cases have ordered an amount of time that is equivalent to a noncustodial parent's visitation. There is no analysis in these cases that indicates the amount of visitation was ordered because it was the amount needed to remedy the harm caused by the denial of visitation. Courts have merely assumed that grandparents should have this amount of time. Moreover, the cases usually fail to analyze the effect the visitation will have on the intact family unit and fail to address the critical problems concerning the statutes biological grandparents do not have court-ordered visitation rights in the stranger adopted case.

73 Ingulli, supra note 26, at 311.

74 These problems are continuing sources of conflict between parents in many custody cases.


76 Broadus v. Broadus, 217 So. 2d 811 (Ala. 1969) (first and third weekends and other times); Kewish v. Brothers, 181 So. 2d 903 (Ala. 1966) (two days every other weekend); King v. King, 828 S.W.2d 630 (Ky. 1992) (a 17-month old child in an intact family, visitation with her grandfather twice a week from 4 p.m. to 6 p.m. on each Wednesday and Saturday); Pacell v. Birkmire, 24 Phila. Co. 468 (Phila. Fam. Ct. 1992) (every other Sunday noon to 3:45 p.m.). But cf. Leach v. Leach, 306 P.2d 193 (Kan. 1957) (a weekend each 60 days); Schampp-Cook v. Cook, 455 N.W.2d 216 (N.D. 1990) (one weekend per month).

77 Courts may discuss or minimize the level of hostility between the adults,
parents' control over the actual visitation. Decisions as to what can, should, and does occur during visitation, go to the essence of parenting. It is the parents and not the courts who should decide to whom and what to expose their children unless the decision results in harming the child.  

Further disruption may occur to the family because courts usually enforce visitation orders through their powers of contempt. If the parents refuse to obey the order, the ultimate penalty for such parents may be incarceration in the county jail until they comply. On the other hand, parents may dispute between themselves about obeying the visitation order. Such parental disputes are disruptive to family life and are ultimately unhealthy for the child.

Typically, a visitation order cannot be modified without court approval. The intact family's normal activities, such as moving from one place to another or disciplining the child, may be subject to court approval if they interfere with grandparent visitation. Modification usually means litigation even if it were at the parents' instigation. Litigation is costly and is disruptive to the family. Thus, the inherent problems of court-ordered visitation may be so onerous that the benefit of grandparent visitation, even when intended to remedy a harm that has been identified by the court, may be canceled out by its overall disruptive impact on the intact family. It is likely that a child is far better off to live in an intact family than to have the intact family break up because of grandparent visitation issues.

C. No Compelling Reasons Unless Harm Is Shown

The state has used the principle of family autonomy to protect the privacy and integrity of the family from disruption by others unless there are compelling reasons. Behavioral science literature has been important in helping courts to decide custody decisions, to understand childhood development generally and also to understand a particular child in a specific context but not the effect the hostility may have on the child. Cf. King, 828 S.W.2d at 631 (Wintersheimier, J., dissenting). The Minnesota statute requires that visitation be in the best interests of the child and not interfere with the parent-child relationship. See Minn. Stat. Ann. § 257.022 (West 1992).

78 See King, 828 S.W.2d at 635 (1992) (Lambert, J., dissenting); Bean, supra note 21, at 446-47.


case. This literature would be helpful in deciding grandparent visitation cases as well. The principle underlying grandparent visitation is that the ties between grandparent and grandchild should be maintained because there is a special relationship between them that is beneficial to the child.

Nevertheless, there is insufficient behavioral science literature on the grandparent-grandchild relationship to reach a conclusion that court-ordered grandparent visitation is in the best interest of the child. Researchers are just beginning to study this relationship. The study by Dr. Arthur Kornhaber and Kenneth Woodward in 1981 concluded that: (1) children who have close relationships with a grandparent, unlike children who do not, are emotionally secure; and (2) there exists a bond between grandparent and grandchild which is stronger than any other except the parent-child bond. This study has been criticized, however, for its methodological weaknesses and because other researchers have not been able to replicate the results. In addition, other empirical studies which have been done do not support the conclusions of Kornhaber and Woodward. Another researcher has concluded that studies reported in 1984, 1986 and 1987 show that the direct and indirect influences of grandparents on their grandchildren's development depended on a number of factors, including, geographical proximity, age and gender of grandparent and grandchild, health status, socioeconomic conditions, and marital status of the grandparent. The most significant factor, however, was the quality of the relationship between the grandparent and the parent of the grandchild. If this is true, then court-ordered grandparent visitation would be counterproductive and

82 Ingulli, supra note 26, at 298.
83 See supra note 26 and accompanying text.
84 See Ingulli, supra note 26, at 301-02; Derdeyn, supra note 29, at 281; Thompson et al., supra note 29, at 1218.
85 Kornhaber & Woodward, supra note 26, at 55.
86 Ingulli, supra note 26, at 299-300. But advocates for passage of grandparent legislation have frequently cited this study to legislators. See, e.g., supra note 5 and infra note 99 for congressional committee action on grandparent legislation.
87 Ingulli, supra note 26, at 300 n.34. The more reliable studies will eventually be those using grandchildren and grandparents who are participating or have participated in court-ordered visitation.
88 Thompson et al., supra note 29, at 1219.
89 Id.
needlessly stressful to all three generations.

Psychological studies show that family stress and conflict are emotionally damaging to children.\(^9^0\) Grandparent visitation litigation in the intact family involves conflict between the grandparent and the grandparent's own child. The grandchildren may experience stress and instability from the undermining of parental authority and the conflicting loyalties to parent and grandparent. Studies also show that children's behavior in divorce cases improved if there is a reduction in family conflict.\(^9^1\) Moreover, lawsuits, per se, generate stress and conflict.\(^9^2\) The emotional and psychological costs of litigation are high. Findings of psychological studies about the parent-child relationship justify these costs, however, when parents and children are involved. There are no similar studies about the grandparent-grandchild relationship to justify such costs.\(^9^3\) Furthermore, litigation depletes family financial resources, as well as its time and energy, often rendering the family incapable of defending itself from more financially secure grandparents. Because of these costs, parents may grudgingly settle the case and agree to visitation when they would ordinarily not agree.

On the other hand, psychological studies indicate that children benefit from the continuity in grandparent relation when there has been a disruption in the family because of death, separation or divorce, or when the grandparent stood in loco parentis to the grandchild.\(^9^4\) These instances of continuing contact support the traditional standard for state intervention because the child is harmed if the contact is not continued and the continuing contact addresses the harm. Similarly, if the relationship between a grandchild and grandparent in an

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\(^9^0\) Although most of these studies are based on the effect of divorce on children, studies also show that persistent conflict in the intact family is also damaging. See Joseph Goldstein et al., Beyond the Child's Best Interests 31-39 (1979); Joan Wallerstein & J. Kelly, Surviving the Breakup: How Children and Parents Cope with Divorce 215-21 (1980); Derdeyn, supra note 29, at 282; Diane Carlson Jones, Parental Divorce, Family Conflict and Friendship Networks, 9 J. Soc. & Pers. Relationships 219 (1992); James Peterson & Nicholas Zill, Marital Disruption, Parent-Child Relationships, and Behavior Problems in Children, 48 J. Marriage & Fam. 295 (1986) (finding persistent conflict in intact families is also related to behavior problems).

\(^9^1\) Derdeyn, supra note 29, at 281.


\(^9^3\) Derdeyn, supra note 29, at 282; Ingulli, supra note 26, at 326.

\(^9^4\) Goldstein et al., supra note 90; Ingulli, supra note 26, at 311.
intact family is such that the child will be harmed upon separation and the continuing contact will address this harm, then the contact should continue. Nevertheless, the strength of the grandparent-grandchild relationship in the intact family is unlikely to justify visitation. Such visitation would more likely be an “onset of a new source or exacerbation of a chronic source of conflict.”

Court-ordered grandparent visitation may impede the natural development of boundaries between parent and adult child. The behavioral science literature suggests that adult children must develop their own identities as parents and spouses. Part of this development is accomplished by the children’s own parents relinquishing their parental status over them. This relinquishment is the natural course of the relationship for both generations. The end result should produce better functioning parents for the grandchildren. Court-ordered grandparent visitation interferes with this process.

Court-ordered grandparent visitation also changes how the family functions. Family disputes are traditionally settled by the family, not by the court. Parents, not grandparents, have childrearing responsibilities. Court-imposed grandparent visitation in the intact family interferes with these rights and duties.

The enactment of grandparent visitation statutes, for the most part, is the result of intense political lobbying in all fifty states by grandparents and their supporters for their rights at the expense of the rights of others. Their efforts have occurred almost as a silent revolution, and have transformed grandparent visitation law. Legislators have been sympathetic to the idea that grandchildren and grandparent have a unique bond which should be developed. Some commentators have ascribed the success of this lobbying to the political clout of this generation of grandparents and to legislators who wish to appeal to an important voter group. In light of the fact that

95 Derdeyn, supra note 29, at 282.
96 Id. at 284.
98 Derdeyn, supra note 29, at 282.
99 Derdeyn, supra note 29, at 282. Both the House Select Committee on Aging and the Senate Subcommittee on Separation of Powers have held hearings on grandparent visitation rights and recommended that the National Conference of Commissioners on Uniform State Laws consider drafting a uniform law. See generally Grandparents: The Other Victims of Divorce and Custody Disputes: Hearings Before the Subcomm. on Human Services of the House Select Comm. on Aging, 97th
these statutes emerged as a political movement and with little attention to the ultimate effect on parents and their children, courts must use the traditional two-part standard in deciding grandparent visitation cases.

The importance of the intact family as an institution may override including the intact family in court-ordered grandparent visitation if such visitation would have a disrupting and destabilizing effect on the intact family. Although there is a growing body of data about how well nontraditional families can function in rearing children, the studies do not contradict the importance of the intact family. The various studies on aspects of child development are usually more favorable for children in intact families than for children in non-intact families. Studies also show that children are better off when they do not experience stress and insecurity associated with divorce, separation and lawsuits. Stress and instability generated from grandparent visitation disputes may further weaken the stability of the institution of the intact family. Moreover, the policy of all fifty states is to preserve marriage and to promote family life. Indeed, society has interests in


101 See Darin R. Featherstone et al., Differences in School Behavior and Achievement Between Children from Intact, Reconstituted, and Single-Parent Families, 26 ADOLESCENCE 105 (1992) (indicating students from intact family ranked highest); Robert D. Felner et al., Family Stress and Organization Following Parental Divorce or Death, 4 J. DIVORCE 67 (1980) (showing children with histories of parental divorce/separation seemed to be experiencing significant lower levels of educational stimulation from parents and having other problems than those from intact families or homes broken by parental death); John Guidubaldi & Helen Cleminshaw, Divorce, Family Health, and Child Adjustment, 34 FAM. REL. 35 (1985) (health ratings for intact-family children, their parents and siblings were higher than ratings assigned to divorced-family children, their parents and siblings); Roger L. Hutchinson et al., The Effects of Family Structure on Institutionalized Children’s Self-Concepts, 24 ADOLESCENCE 303 (1989) (reviewing, in addition to their study, other studies supporting the proposition that children in intact families have slightly higher self-concepts); Vernon R. Wiehe, Self-Esteem, Attitude Toward Parents, and Locus of Control in Children of Divorced and Non-Divorced Families, 8 J. SOC. SERV. RES. 17 (1984) (indicating children from divorced families showed lower self-esteem, more negative attitudes toward their parents).

102 See supra notes 90-92 and accompanying text.

103 See, e.g., COLO. REV. STAT. § 26-18-105(1)(c) (1993); DEL. CODE ANN. tit.
maintaining formal marriage as a societal norm and in protecting children to continue to live in an undisturbed intact family environment.\textsuperscript{104}

D. Constitutional Standard

The United States Supreme Court has not decided whether the boundaries of court interference in family autonomy will be extended to include court-ordered grandparent visitation. Nevertheless, the Supreme Court has consistently held that family autonomy is an area of family life in which the state cannot intervene. Since 1965, the Supreme Court has viewed family autonomy as part of the fundamental right of privacy. Within the boundaries of family autonomy are the fundamental rights of childrearing and family definition. The fundamental right of childrearing has protected parents and the intact family from interference by the state and third parties. No case has extended this right to a member of the extended family unless the member is the child's guardian.\textsuperscript{105} Thus, grandparents do not have a protected constitutional right in childrearing.

Under \textit{Moore v. Cleveland},\textsuperscript{106} however, the right of family definition is a constitutionally protected right within the right of privacy which both parents and grandparents may assert. The grandparents' right of family definition, however, is not equivalent to that of the parents' right of family definition because of the parents' protected right of childrearing. Part of the childrearing right is the parents' right to determine with whom the child visits.

When the fundamental right of childrearing is at stake, the state's regulation limiting that right must be justified by a

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29 § 9001(b) (1992); MD. CODE ANN., FAM. LAW § 4-401 (1993); TENN. CODE ANN. § 71-3-127 (1993).

104 In the words of Willima Galston:

A healthy liberal democracy . . . requires the right kinds of citizens, possessing the virtues appropriate to a liberal democratic community. A growing body of empirical evidence developed over the past generation supports the proposition that the stable, intact family makes an irreplaceable contribution to the creation of such citizens, and thus to promoting both individual and social well-being. For that reason, among others, the community as a whole has a legitimate interest in promoting the formation and sustaining the stability of such families.


compelling state interest, and the regulation must be narrowly drawn to express only the legitimate state interest at stake.\textsuperscript{107} The traditional state standard for intervention in family life satisfies this standard.\textsuperscript{108} The state should not intervene in the intact family to order grandparent visitation unless the child is harmed by the parent's decision to deny visitation and the intervention to order visitation will alleviate the harm. Thus, the state's compelling interest to intervene in the intact family is to protect the child from harm.

If protecting a child under the state's parens patriae power is a compelling interest of the state, the best interest standard, as applied by the states, is not the standard to use when the state is interfering with the parents' fundamental right of childrearing. The state's compelling interest is to protect the child from harm, not to arbitrate when the child will be better off. The best interest standard, as applied, omits altogether the analysis that before a state can interfere with a parental decision, there must be a determination that this decision fails to satisfy only the minimal standard of care, not the best standard.\textsuperscript{109} Moreover, the best interest standard diverts the court from critically analyzing what harm court-ordered grandparent visitation may cause a particular family unit and ultimately its effect on the grandchild. In \textit{King v. King},\textsuperscript{110} for example, the court assumed that there is a special tie between grandparents and grandchildren and that the child was better off with visitation.\textsuperscript{111} The court's opinion did not consider the potential harm to the child's family life with her parents, and as a result jeopardized both the family and the child.

The state also has a compelling interest to protect the general welfare of its citizens. The institution of the intact family is basic to the state and may override even the state's interest in protecting the child.\textsuperscript{112} In \textit{Palmore v. Sidoti},\textsuperscript{113}

\begin{itemize}
\item \textsuperscript{107} \textit{Santosky v. Kramer}, 455 U.S. 745 (1982).
\item \textsuperscript{108} \textit{Bean, supra} note 21, at 431-441; \textit{King}, 828 S.W.2d at 431-441 (1992) (Lambert, J., dissenting).
\item \textsuperscript{109} "The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents." \textit{Santosky}, 455 U.S. at 753.
\item \textsuperscript{110} 828 S.W.2d 630 (Ky.), \textit{cert denied}, 113 S. Ct. 378 (1992).
\item \textsuperscript{111} \textit{Id.} at 631, 635.
\item \textsuperscript{112} State court decisions usually focus only on the state's interest in the child under its parens patriae prerogative and not the state's interest under its police powers.
\item \textsuperscript{113} 466 U.S. 429 (1984).
\end{itemize}
the United States Supreme Court determined that the state's interest in the child's best interest, with only a showing of possible injury to the child, was not a compelling interest as compared to the policy of eradicating racial discrimination. Similarly, the state has a fundamental interest in maintaining the intact family, since it is viewed as the fundamental unit of the state and has traditionally been viewed as the best place to rear the child.\textsuperscript{114} The likelihood is greater that the child will develop into a healthy adult when the family continues to exist as an intact family.\textsuperscript{115} Thus, if the family is intact, arguments must be compelling before imposing court orders which may destabilize it.\textsuperscript{116}

Grandparent visitation may also be constitutionally attacked based on the Equal Protection Clause of the Fourteenth Amendment. If court-ordered grandparent visitation is not allowed in the intact family, but allowed in non-intact families, states may be unconstitutionally discriminating against some grandparents, parents and families. All grandparent visitation cases impinge upon the fundamental right of childrearing. When a classification intrudes upon the fundamental right of childrearing, state regulation limiting the right is unconstitutional if it is not justified by a compelling state interest and the regulation is not narrowly drawn to express only the legitimate state interests at stake. The traditional standard for state intervention in family life satisfies this standard.\textsuperscript{117} Thus, if all grandparent visitation statutes included all families, the Equal Protection Clause issue would not be raised because all grandparent visitation would be treated similarly and submitted to the same standard.

V. CONCLUSION

There is probably no more painful situation than for adult children to be at odds with their parents over grandparent visitation. The court, however, is not the best forum to resolve this painful situation. The reasons articulated in Succession of

\begin{footnotes}
\item 114 Bartlett, supra note 12, at 882; Galston, supra note 104.
\item 115 See supra notes 101-03 and accompanying text.
\item 116 Based on constitutional standards, the state may require a higher level of harm to the child in intact families than would be required in non-intact families because of the importance of the intact family.
\item 117 See supra notes 109-16 and accompanying text.
\end{footnotes}
Reiss\textsuperscript{118} remain as valid today as they were in 1894. Court-ordered grandparent visitation intrudes upon the traditional principle of family autonomy. It interferes with basic rights of parents to rear their children without state intervention unless the child is harmed by the parents' decision and such intervention will address that harm. Court-ordered grandparent visitation in an intact family may cause unnecessary stress and disruption, and may ultimately cause its demise. Thus, if a court must decide an intact family grandparent visitation case, the court must apply the traditional standard for state intervention.

\textsuperscript{118} 15 So. 151 (La. 1894).