Statutory Visitation Rights of Grandparents: One Step Closer to the Best Interest of the Child

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NOTES

STATUTORY VISITATION RIGHTS OF GRANDPARENTS: ONE STEP CLOSER TO THE BEST INTERESTS OF THE CHILD

Traumatic as the death of his mother or father might be, a child learns to cope with its finality through the support and affection of surviving close friends and relatives. Often the primary figures in this new world are the child's grandparents, whose loving concern can replace the bonds of affection which are likely to have existed between the child and his deceased parent. Sadly, however, in a significant number of cases, the child is deprived of this comfort. He finds himself forcibly estranged from his grandparents by increasing hostilities between them and the surviving parent who is striving to restructure his or her own life. The parent, occasionally with the support of a new spouse, may choose to sever all contact between the child and his grandparents.

At common law, with rare exceptions, grandparents faced with this situation had no legal alternative other than to challenge the fitness of the custodial parent. If the custodial parent was found to be fit, the grandparents had to accept the decision of the parent and be content with memories of their grandchildren or brief glimpses of them as the children pursued their daily activities in public places. Recently, some state legislatures, sympathizing with the plight of grandparents in this predicament have enacted statutes creating an independent right of visitation for grandparents. Although there still must be a showing that such visitations are in the best interests of the child, these statutes have brought new hope to grandparents whose relationships with their grandchildren are warm, but whose ties with the surviving parent are less than harmonious.

Despite this statutory mandate, however, grandparents still have been unable to assert their newly granted right in some of these jurisdictions if the

3. See note 27 infra.
child has been legally adopted by the new spouse of the surviving parent. Courts espousing this point of view have found the visitation statute inoperative in view of preexisting adoption statutes which terminate all rights of natural parents and other blood relatives when a child is adopted.4 This result, however, is not inevitable. Other courts faced with this apparent statutory conflict have found grandparents' visitation rights secure despite displacement of their deceased child by an adoptive parent.5 This article will examine these divergent approaches in the context of the remedial purposes of the visitation statutes.

I. COMMON LAW: PARENTS AS DETERMINERS OF THE CHILD'S BEST INTERESTS

At common law, the right of the custodial parent to decide whether grandparents would be permitted visitation privileges with their grandchildren was subject to minimal judicial oversight. As a general rule, the right of the parents to control the activities of their children in the home was considered fundamental and only when parental authority was found to have been abused would the state intervene.6 Thus, except in rare cases, grandparents who attempted to secure visitation privileges through the courts against the wishes of the parent failed.

Succession of Reiss7 is generally recognized as the first case in which a grandparent actually sued for visitation privileges.8 While recognizing the desirability of a close grandparent-grandchild relationship, the Supreme Court of Louisiana upheld the right of the parent to deny visitations when a conflict of opinion between parent and grandparent arose.9 A careful reading of


6. See, e.g., Odell v. Lutz, 78 Cal. App. 2d 104, 106, 177 P.2d 628, 629 (1947), in which the court enumerated the rights incident to parenthood. One such right was the right to care and custody of the minor child. The supremacy of the parents in regulating the child's activities within the home is generally recognized by the courts. See id.; Ex parte White, 54 Cal. App. 2d 637, 129 P.2d 706 (1942)

7. 46 La. Ann. 347, 15 So. 151 (1894). The maternal grandmother, whose daughter had died six years before, sought to compel the father to send the two minor grandchildren to visit her at her home at times specified by the court.


9. 46 La. Ann. at 352, 15 So. at 152. The court was primarily concerned with the possibility of undermining parental authority by allowing grandparents to challenge a parent's decision.
Reiss suggests two approaches which later courts utilized to deny visitation rights to grandparents: 1) the parent's obligation to allow a child to visit his grandparents is a moral, not a legal, one and is, therefore, unenforceable in the courts; and 2) absent a showing that the custodial parent is unfit, the court should not interpose itself in visitation controversies. 10

Subsequently, grandparents seemed unable to clear the initial legal hurdle of establishing a right to visit their grandchildren, since most jurisdictions followed one of the Reiss approaches. The court in Smith v. Painter,11 for example, followed the first Reiss approach, refusing to allow visitation because the grandparents had no legal right of action by which to demand it.12 In several other jurisdictions,13 the grandparents have been effectively precluded from arguing the facts since the visitation issue has been viewed as a question of law.

Jurisdictions which did not utilize the first Reiss analysis approached the problem from a fitness-of-the-parent perspective. These courts have focused on the failure of the grandparents to allege that the custodial parent was unfit and have used that failure as a basis for denial of visitation rights.14 Courts which follow this line of analysis have generally viewed the award of visitation privileges as subject to the same standards as are applied in a custody proceeding incident to a divorce or separation.15 In making a custody determination, the court carefully considers the options before it in light of what

10. See id.
11. 408 S.W.2d 785 (Tex. Ct. App. 1966), writ ref'd n.r.e., 412 S.W.2d 28 (Tex. 1967) (per curiam). The trial court granted a motion for summary judgment after both sides filed affidavits stating their positions on the visitation issue. Without passing on the merits of the parties' claims, the Texas Court of Civil Appeals affirmed the judgment.
12. Accord, Green v. Green, 485 S.W.2d 941 (Tex. Ct. App. 1972). The jury in Green found that it would be in the child's best interests to grant the grandparents reasonable visitation privileges. The trial court, however, reversed the jury's verdict, ruling that the grandparents, as a matter of law, were not entitled to visitation privileges. The appeals court affirmed the trial court's holding.
13. See, e.g., Veazey v. Stewart, 251 Ark. 334, 472 S.W.2d 102 (1971); Odell v. Lutz, 78 Cal. App. 2d 104, 177 P.2d 628 (1947). For a compilation of cases from various jurisdictions that utilize this approach, see Gault, supra note 8, at 480.
would be most beneficial to the child. The complex interaction of relevant factors usually makes this determination an especially difficult one unless one parent is demonstrably unfit. If both parents are unfit, the court may award custody to a third person, such as a grandparent. Once custody is awarded to one parent, the court normally will order reasonable visitation privileges to the other parent. Therefore, a logical nexus between visitation and custody exists, since an award of visitation rights is often an integral part of a custody determination.

Although the question of fitness is in fact more relevant to the determination of custody than to the granting of visitation rights, even when both are litigated in the same proceeding, some courts have carried over the fitness standard into independent visitation suits by grandparents. In Jackson v. Fitzgerald, for example, the Municipal Court of Appeals of the District of Columbia held that because visitation rights are derived from custody rights, when the fitness of the custodial parent is not at issue, judicially imposed visitation impinges on the father's vested custody right.

One exception to the general common law bar of grandparents' visitation suits involved visitation requests made pursuant to a divorce proceeding. Under these circumstances, some courts recognized a limited right of the grandparent to intervene. The visitation privileges initially granted in this

16. Members of the ABA Family Law Section in a recent survey indicated the following preferential ranking of factors that should be considered in determining the best interests of the child: 1) emotional and physical health of the parent, 2) preference of the child (in light of age, maturity, and motivation), 3) physical environment and comparison of environments. 2 FAM. L. REP. 2719 (1976).

17. See, e.g., Kees v. Fallen, 207 So. 2d 92 (Miss. 1968); In re Craigo, 266 N.C. 92, 145 S.E.2d 376 (1965); State ex rel. Obrecht v. McClane, 256 S.W.2d 955 (Tex. Ct. App. 1953).

18. Alternatively, the court may order split or divided custody, but courts are generally reluctant to do so. See Annot., 92 A.L.R.2d 695 (1963).

19. In Odell v. Lutz, 78 Cal. App. 2d 104, 177 P.2d 628 (1947), both the maternal grandmother and the custodial father and his new wife were fit to raise the child. Even though no question of custody was involved, since the grandmother sought only reasonable visiting privileges with a child who was her only living descendent, the court still applied the custody standard and refused to allow visitation on the grounds that the parent's ability to raise the child was unquestioned. Id. at 107, 177 P.2d at 629. Accord, Lee v. Kepler, 197 So. 2d 570 (Fla. Dist. Ct. App. 1967).

The whole fitness argument as applied to visitation questions is something of a charade. If the grandparents could establish a parent's lack of fitness, they presumably would seek custody, not visitation. To demand allegations and proof of parental unfitness prior to entertaining requests for visitation is an effective way of foreclosing grandparent visitation actions.

20. 185 A.2d 724 (D.C. 1962). The lower court dismissed the grandmother's action for failure to allege parental unfitness or misconduct.

21. Id. at 726.

22. See, e.g., Scott v. Scott, 154 Ga. 659, 115 S.E.2d (1922); McKinney v. Cox, 18
manner were usually upheld when the custodial parent later challenged them. In determining whether grandparents' visits should be continued in the face of parental opposition the courts usually looked to the best interests of the child rather than assuming that hostilities between parents and grandparents automatically indicated that grandchild-grandparent visitation was counter to the child's best interests.

Ill. App. 2d 609 (abstract), 153 N.E.2d 98 (abstract) (1958). Annot., 98 A.L.R.2d 325, 328 (1964), discusses this exception, noting that visitation rights generally are given when the custodial parent either consents or fails to object strenuously thereto. If the parent for any reason later changes his or her mind and bars the grandparents from visiting the grandchild, the grandparents' rights are likely to be upheld if they can demonstrate that a close relationship with the grandchild exists.

Visitation privileges for grandparents have also been upheld even when no prior award of visitation rights in a divorce proceeding has been made if the grandchild has lived with the grandparent. In Benner v. Benner, 113 Cal. App. 2d 531, 248 P.2d 425 (1952), initial custody of the child was given to the mother. Both mother and child resided with the grandmother until the mother disappeared. The father was then given custody, but he allowed the grandmother to visit her grandchild until his remarriage. One reason that the appellate court upheld the visitation was that, in light of the child's three year residence with the grandmother, the child's best interests required that their close relationship continue, at least through regular visits. Id. at 532, 248 P.2d at 426. Accord, Kentera v. Kentera, 66 Cal. App. 2d 373, 152 P.2d 238 (1944); McKinney v. Cox, 18 Ill. App. 2d 609 (abstract), 153 N.E.2d 98 (abstract) (1958); Commonwealth ex rel. Goodman v. Dratch, 192 Pa. Super. 1, 159 A.2d 70 (1960).

23. See, e.g., Minge v. Minge, 226 Ark. 262, 289 S.W.2d 189 (1956) (visitation granted at support hearing); Brock v. Brock, 281 Ala. 525, 205 So. 2d 903 (1967); Brookstein v. Brookstein, 7 Cal. App. 3d 219, 86 Cal. Rptr. 495 (1970). In some instances, however, the father has successfully attacked a court order of grandparent visitation which was incident to a divorce decree and originally accepted by the father. See Commonwealth ex rel. McDonald v. Smith, 170 Pa. Super. 254, 85 A.2d 686 (1952) (extensive visitation rights granted in the original order held to amount, in effect, to improper partial custody); People ex rel. Marks v. Greiner, 249 App. Div. 564, 293 N.Y.S. 364, aff'd, 274 N.Y. 613, 10 N.E.2d 577 (1937) (original order which gave maternal grandmother and maternal aunt and uncle visitation privileges held improper when the father, who was a fit guardian of the child, withdrew consent).


An interesting case in which a Pennsylvania court distinguished Goodman is Commonwealth ex rel. Dogole v. Cherry, 196 Pa. Super. 46, 173 A.2d 650 (1961). In Dogole, the adoptive mother died and her mother sued for visitation rights upon the father's remarriage. While the court would have granted visitation to a natural grandparent as it had in Goodman, it refused to grant the adoptive parent's mother the same right, reasoning that the grandmother in this case had never had any legal relationship with the child and functioned as a distant third party under the law. Arguably a different result would occur today in light of numerous statutes that bestow on adoptive parents all legal rights of natural parents vis-à-vis the child.
The case of Mirto v. Bodine represents another exception to the usual common law approach. At issue was whether a grandparents' suit for visitation rights must be tied to a past or pending divorce action. Instead of barring the grandparents' suit because this was not a divorce proceeding or because they failed to allege the unfitness of their son-in-law, the Supreme Court of Connecticut held that the best interests of the child were paramount. The grandparents were thus entitled to a hearing at which facts relevant to the child's best interests would be considered. The Connecticut approach is an isolated instance of judicial willingness to recognize the grandparents' independent right of action.

Apart from these two limited exceptions to the general rule, grandparents found themselves stymied because they had no traceable legal right to visitation privileges. They were forced, therefore, to look beyond the courts to find a basis for relief.

II. GRANDPARENTS' VISITATION STATUTES: PANACEA OR PANDORA'S BOX?

Beginning in the late 1960's, a handful of state legislatures, believing that the treatment received by grandparents at the hands of state courts was inequitable, took steps to provide a legal avenue for grandparents to pursue in securing the visitation privileges they desired. An independent right allowing grandparents to bring habeas corpus actions for visitation privileges has been established by statute in six states. These statutes give trial courts the discretion to award such privileges upon a showing by the grandparents that it would be in the best interests of the grandchildren to do so. Theoretically it is no longer possible in these jurisdictions for the grandparents to suffer dismissal of their suits prior to an adjudication on the merits because their right to sue is established by law and no allegation of unfitness of the custodial parent is required. Although there is no presumption in favor of visitation, after the trier of fact considers the circumstances of the particular parties, the statutes allow a court to determine impartially the child's best interest, rather than binding it to the decision of the parent.

26. Id. at 511, 294 A.2d at 337.
Visitation Rights of Grandparents

Since legislative history surrounding the passage of the visitation statutes is largely unavailable, it can only be speculated whether the state legislatures could have anticipated the speed with which many thankful grandparents, finally in court, would be out of it again. All of the statutes permit the grandparents to sue for visitation privileges when their child has died and the custodial parent subsequently refuses them access to their grandchild. In such cases, the grandparents can present, in a habeas corpus proceeding, evidence showing that visitation would be in the best interests of the grandchildren. The court makes its findings of fact based on that evidence and any countervailing evidence submitted by the custodial parents. The problem arises, however, in those cases when the custodial parent has remarried and the new spouse has adopted the child. When the grandparents bring suit, the stepparent argues that the state statutes that terminate all rights of blood relatives upon the adoption of a child make the grandparents, in effect, strangers to the child because they no longer have any legal relationship with him. Despite the fact that these adoption statutes were enacted primarily out of a concern for defining rights of succession, their plain language provides the adoptive parent with a formidable argument.


30. These statutes are frequently part of the state probate code and are primarily concerned with succession rights. A typical example of such a statute is the District of Columbia termination statute, D.C. CODE § 16-312(a) (1973), which provides:

A final decree of adoption establishes the relationship of natural parent and natural child between adoptor and adoptee for all purposes, including mutual rights of inheritance and succession as if adoptee were born to adoptor. The adoptee takes from, through, and as representative of his adoptive parent or parents in the same manner as a child by birth, and upon the death of an adoptee intestate, his property shall pass and be distributed in the same manner as if the adoptee had been born to the adopting parent or parents in lawful wedlock. All rights and duties including those of inheritance and succession between the adoptee, his natural parents, their issue, collateral relatives, and so forth, are cut off, except that when one of the natural parents is the spouse of the adoptor, the rights and relations as between adoptee, the natural parent, and his parents and collateral relative, including mutual rights of inheritance and succession, are in no wise altered.

31. One of the primary reasons that state legislatures enacted the termination statutes was the confusion over the legal status of the adopted child because most adoption statutes conferred on the adoptee all the legal rights of the natural child without enumerating those rights. See generally Presser, The Historical Background of the American Law of Adoption, 11 J. Fam. L. 443, 469-70, 501-16 (1971).
The issue, admittedly complex, but one which had to be faced squarely by the courts is whether an adoption statute or a grandparents' visitation statute should prevail? Not all of the commentators in the jurisdictions in which the grandparents' visitation statutes were passed viewed them as enthusiastically as did the grandparents themselves.\(^3\) Similarly, the state courts are divided in their approach to the problem of reconciling the two statutes.

Texas, among others,\(^3\) opted for the preeminence of the adoption statute. In *DeWeese v. Crawford*,\(^3\) the grandparents sought visitation privileges with their only natural grandchildren, in accordance with the state's recently enacted visitation statute.\(^3\) Their only son and his wife were divorced, and custody had been given to the wife with visitation privileges granted to their son. The grandparents' contact with their grandchildren had continued through their son until his death. Thereafter the former wife's new husband adopted the children and all access of the grandparents to their grandchildren was denied. Confronted with this situation, the court considered the Texas adoption statute\(^3\) controlling. Because the children had been adopted in 1973, the grandparents were not, as a matter of law, "paternal grandparents" at the time the suit was instituted in 1974.\(^3\) They were found to possess no legal relationship with the children because, according to the terms of the adoption statute, all blood relationships ceased with adoption.\(^3\) The court

32. Duncan Gault, an articulate critic of the sweeping changes that the Texas Family Code effectuated, foresaw that certain problems might arise as a result of the new legislation. With regard to the grandparents' visitation section of Title 2, he voiced particular concern over practical access to the child which would decrease per capita as the right of access was expanded to include a wider range of persons. He also stressed the difficulties inherent in sending a case of this nature to the jury. See Gault, *supra* note 8, at 474; Gault, *supra* note 28, at 433.


34. 520 S.W.2d 522 (Tex. Ct. App. 1975).

35. **Tex. Fam. Code Ann.** tit. 2, § 14.03(d) (Vernon Supp. 1976) provides in pertinent part: "[T]he court may grant reasonable visitation rights to either the maternal or paternal grandparents of the child and issue any necessary orders to enforce said decree. . . ."


When a minor child is adopted in accordance with the provisions of this Article, all legal relationship and all rights and duties between such child and its natural parents shall cease and determine, and such child shall thereafter be deemed and held to be for every purpose the child of its parent or parents by adoption as fully as though naturally born to them in lawful wedlock . . .

37. 520 S.W.2d at 526.

38. See *id.* at 525-26. The Louisiana courts came to a similar conclusion in *Smith v. Trosclair*, 321 So. 2d 514 (La. 1975). The grandparent's visitation statute, **La. Rev.**
noted that the visitation statute did not act to restore a relationship eliminated by the adoption statute.\textsuperscript{39}

The holding in \textit{DeWeese}, although arguably defensible in its legal reasoning, effectively eliminates the right of grandparents to sue for visitation rights in Texas in any case in which the deceased or divorced parent has been displaced by adoption. Since it can be assumed that adoption will occur in a great number of cases, the Texas approach, which is also used by courts in Florida and Louisiana,\textsuperscript{40} makes a substantial incursion into the effect of visitation statutes in those jurisdictions. Other courts, however, have been more liberal in their construction of the statutes.

\textbf{III. THE BEST INTERESTS OF THE CHILD: A MORE FLEXIBLE STANDARD}

The long range problem with the Texas court's approach is clearer in juxtaposition with the New Jersey Supreme Court's opinion in \textit{Mimkon v. Ford}.\textsuperscript{41}

The facts are similar: after the death of the child's natural mother, who had been granted custody at the time of divorce, the natural father and his second wife took custody and later adopted the child. When denied the right to visit her grandchild, the maternal grandmother sued. Reading the statutes\textsuperscript{42}

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\textsuperscript{39} One of the points raised by Duncan Gault is the constitutionality of conferring visitation privileges on grandparents over the objections of a fit custodial parent. Mr. Gault suggests that because this is state interference in the child-rearing process, such an "encroachment" is an unconstitutional interference with the natural liberty of the parents to direct the upbringing of their children. Gault, supra note 8, at 483, citing \textit{Odell v. Lutz}, 71 Cal. App. 2d 104, 177 P.2d 628 (1947). The \textit{DeWeese} court rejected this constitutional argument, noting that the key issue was the best interests of the child. The court held that the state had a sufficient interest in the area of visitation rights to justify statutory guidelines in this area. 520 S.W.2d at 526.

\textsuperscript{40} \textit{Lee v. Kepler}, 197 So. 2d 570 (Fla. Dist. Ct. App. 1967); Smith v. Trosclair, 321 So. 2d 514 (La. 1975).


\textsuperscript{42} The relevant statute at the time the case was heard provided:

Where either or both of the parents of a minor child, residing within this State, is or are deceased, a grandparent or the grandparents of such child, who is or are the parents of such deceased parent or parents, may apply to the Superior Court for a writ of habeas corpus to have such child brought before such court; and on the return thereof, the court may make such order or judgment, as the best interest of the child may require for visitation rights for such grandparent or grandparents in respect to such child.

1971 N.J. Laws, ch. 420 § 1 (current version at N.J. \textsc{Stat. Ann.} § 9:2-7.1 (West 1976)). The adoption statute at the time the case was decided, provided, in pertinent part:

This act shall be administered so as to give effect to the public policy of
in pari materia,\(^43\) the court made two relevant observations. First, the adoption statute is principally concerned with adoptions by persons other than relatives of the children involved and was intended to protect the relationship between the adopted child and its adoptive parents from interference by the natural parents.\(^44\) Since grandparents normally do not assume the role of parental authority, their relationship with the children does not directly undermine the authority of adoptive parents and, therefore, does not call for such a harsh preventive remedy as termination of visitation rights.\(^45\) Second, because the visitation statute begins with the premise that either one or both of the child's parents are deceased, divorced, or separated, the legislature must have contemplated that the custodial parent might remarry and that the new spouse might object to the continuing relationship between the grandparents and their grandchild.\(^46\) Therefore, the legislature could not have intended that the adoption statute should frustrate grandparents' rights.

The New Jersey court did not, of course, say that the grandparents would always be awarded visitation rights, but rather that the possibility of ordering visitation is not precluded by the adoption of the child by a stepparent and

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\(^{43}\) Catholic University Law Review

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this State to provide for the welfare of children requiring placement for adoption and so as to promote policies and procedures which are socially necessary and desirable for the protection of such children, their natural parents and their adopting parents. To that end, it is necessary and desirable . . . (c) to protect the adopting parents . . . from later disturbance of their relationships to the child by the natural parents . . . .

1953 N.J. Laws, ch. 264 § 1 (current version at N.J. STAT. ANN. § 9:3-17 (West 1976)); and

The entry of a judgment of adoption shall terminate all relationships between the child and his parents, and shall terminate all rights, duties and obligations of any person which are founded upon such relationships, including rights of inheritance under the intestate laws of this State; provided however, that when the adopting parent is a stepfather or stepmother, and the adoption is consummated with the consent and approval of the mother or father, respectively, such adoption shall not affect or terminate any relationships between the child and such mother or father.

1953 N.J. Laws, ch. 264 § 14 (current version at N.J. STAT. ANN. § 9:3-30(A) (1976)).

43. 66 N.J. at 433-34, 332 A.2d at 202-03. This principle of statutory construction presumes that legislators are aware of prior legislation when they enact subsequent legislation.

44. Id. at 434, 332 A.2d at 203. That interference most often takes shape in the conflict between authority figures that disrupts and undermines the adoptive relationship.

45. Id. at 435-36, 332 A.2d at 204.

46. Id. at 436, 332 A.2d at 204. The court could not speak with certainty as to what the legislators actually contemplated when they enacted the statute because legislative history on the bill is unavailable. Consequently, the court's conclusion concerning legislative intent was somewhat speculative.
that a full examination of what is in the best interest of the child is the proper
procedure to make this determination. 47

Even before New Jersey faced the question, New York courts were grapp-
ing with two similarly worded statutes in Scranton v. Hutter. 48 The trial
court disregarded earlier cases 49 which held that an adoption order super-
seded any right the grandparents had under the visitation statute 50 and made
a determination based on the facts presented by the parties. The Supreme
Court, Appellate Division, considered the legislative intent 51 and concluded

47. Id. at 437, 332 A.2d at 205. The New Jersey courts recently refused to grant
visitation privileges to grandparents whose divorced son had visiting privileges with his
son who was in the mother's custody. Although the statute did create an independent
right of visitation in the grandparents in situations where the noncustodial parent has
been given visitation privileges, the court held that this right should seldom, if ever, be
granted. In the Matter of the Adoption of a Child by M, 140 N.J. Super. 91, 355 A.2d
211 (1976).

Prior to this holding, Duncan Gault, a critic of the statutes permitting grandparents
to apply for court ordered visitation, had pointed out the problem caused by ambigu-
ously worded statutes. He believed the statutes created an impractical logistic situation:
six people with the right to judicial determination of their rights to visit with the child—
the father, the mother, and four grandparents. See Gault, supra note 8, at 484-85.
However, at this writing, In the Matter of the Adoption of a Child by M is the only
case to have been heard in any of the jurisdictions with grandparents' visitation statutes
that has posed the problem envisioned by Gault. Thus his fears of expansive judicial
interpretation of dubious language have so far proved largely unfounded.


49. People ex rel. Herman v. Lebovits, 66 Misc. 2d 830, 322 N.Y.S.2d 123 (Sup.
Ct. 1971); People ex rel. Levine v. Rado, 54 Misc. 2d 843, 283 N.Y.S.2d 483 (Sup. Ct.
1967).

50. At the time this case was decided, section 72 of the Domestic Relations Law
provided that the grandparents had the right to file a habeas corpus petition for visitation
rights with their grandchild. After both filing of the petition and notice to any parents
having custody of the child, the court could order visitation rights if the grandparents
had demonstrated that it was in the child's best interests to do so. 1966 N.Y. Laws,
ch. 631 § 1 (current version at N.Y. DOM. REL. LAW § 72 (McKinney Supp. 1976)).

51. When section 72 was originally passed in the form referred to in Scranton, As-
semblyman Noah Goldstein discussed the intent of the legislature in enacting it. Under
its terms, application for the visitation privilege could only be made when the child's par-
ent or parents were dead. Goldstein remarked that it was ironic that although grandpar-
tents could sue for custody, they could not apply for visitation rights. The legislature,
therefore, was attempting to remedy this injustice by providing for a court determination
of the benefit to the child of such visits. Goldstein expressed particular concern over
situations in which grandparents have lost their only child and then, because they have
no legal route to follow, have been cut off from their grandchildren as well. See 1966
N.Y. STATE LEGIS. ANNUAL 14.

In 1975, section 72 was further amended to read:

Where either or both of the parents of a minor child, residing within this
State, is or are deceased, or where circumstances show that conditions exist
in which equity would see fit to intervene, a grandparent or the grandparents
that the right granted by the New York visitation statute was not automatically nullified by a stepparent's adoption of the child.52

In supplementing its legislative analysis the Scranton court relied in part on the reasoning in the California case of Roquemore v. Roquemore.53 In Roquemore, the court approached the problem from a slightly different perspective because of the peculiar facts of the case. Temporary visitation rights had been awarded the grandparents prior to the stepparent's adoption of their grandchild. Denied permission to intervene in the adoption, the grandparents had been assured by one department of the court that adoption would not affect their visitation rights. Later when the adoption was granted, another department of the same court dismissed the visitation action on the basis that the grandparents' legal relationship with their grandchild had been severed by the adoption.54 On appeal, the grandparents successfully argued that the adoption should have no effect on their ability to institute an action since the California visitation statute created an independent right of action for them.55

The court made a distinction between the termination of legal rights of blood relatives upon adoption of the child for purposes of succession and the severance of the bonds of affection and respect between blood relatives which persist despite the finality of adoption.56 The court discussed the competing

of such child may apply to the supreme court for a writ of habeas corpus ...

(emphasis indicates the language added by the 1975 amendment). N.Y. DOM. REL. LAW § 72 (McKinney Supp. 1976). At the time the new section was added, Senator Leon Giuffreda wrote a brief memorandum on the change, describing the broadening of the court's jurisdiction to include situations other than the death of the child's parents as a legislative attempt to give the courts greater flexibility in promoting the welfare of the child. 1975 N.Y. STATE LEGIS. ANNUAL 51.

52. 40 App. Div. 2d at 299-300, 339 N.Y.S.2d at 711. Arguably both the New York and New Jersey courts were on firmer statutory ground than the Texas court in their determination that the adoption statute was not controlling. In those states the particular statutory language that the courts had to interpret was more precise than in Texas.


54. Id. at 913, 80 Cal. Rptr. at 433.

55. When this case was decided the California law read:

If either the father or mother of an unmarried minor child is deceased, the parents of such deceased person may be granted reasonable visitation rights to the minor child during its minority by the superior court upon a finding that such visitation rights would be in the best interests of the minor child. 1967 Cal. Stats. ch. 276 § 1 (current version at CAL. CIV. CODE § 197.5 (West 1976)). In 1973, this section was amended to extend the right to apply for visitation privileges to the child's brothers, sisters, and great-grandparents. 1973 Cal. Stats., ch. 823 § 1 (1973). California is the only state that has granted judicially enforceable visitation rights to a class of relatives much beyond grandparents.

56. The court quotes from section 257 of the California Probate Code (amended in
relationships between the adoptive family and the natural family which further complicate the visitation decision. It reversed the order that dismissed the grandparents’ complaint, holding that the grandparents were entitled to visit their grandchildren if, as a matter of fact, such visits would be in the best interests of the child and would not hinder the adoptive relationship.

Strong policy reasons support the result reached by the New York, New Jersey, and California courts. The purpose of the visitation statutes is to offer the grandparents a remedy where one would not otherwise exist. The statutes create an independent right of action that is not contingent on the rights already given to the child’s parents, either by common law or by legislative enactment. The policy sought to be furthered is the continued relationship between blood relatives. Psychologists are now concerned with the need to preserve, rather than to disrupt, continuing relationships of the child and are advocating a complete reevaluation of the standards used in child placement and custody decisions. Reflecting these concerns, the statutes are de-

1955) which specifically limits that section to matters of succession, and thereby creates the possibility that the status of a minor adoptee is not regulated for all purposes by its terms. 275 Cal. App. 2d at 914, 80 Cal. Rptr. at 434.

57. Id. at 914-15, 80 Cal. Rptr. at 434-35. Some courts have been careful to distinguish cases in which the new spouse of the natural parent adopts the child from cases in which neither of the adoptive parents is the child’s natural parent. Visitations privileges may be granted in the former case but not in the latter. See, e.g., Reeves v. Bailey, 53 Cal. App. 3d 1019, 126 Cal. Rptr. 51 (1975) (maternal grandparents’ adoption of child cut off visitation rights of paternal grandparents).


59. It is paradoxical that some courts are attempting to cut off the furtherance of blood relationships by denying grandparents the right to access to their grandchildren while others are being forced to unseal records of adoptions, since adoptees have been held to have the right to know and communicate with their natural parents and other blood relatives. For a full discussion of the constitutional considerations that mandate the unsealing of such records, see Note, The Adult Adoptee's Constitutional Right to Know His Origins, 48 S. Cal. L. Rev. 1196 (1975).

60. Commentators have expressed the need for courts involved in child placement to recognize their responsibility to protect a child's psychological as well as physical welfare. The crucial problem in this area is finding methods by which the law can protect both by manipulating the child's external environment. The goal of any child placement decision should be to insure the child an opportunity to be a fully loved and fully accepted member of a family. Society's best interests demand that the needs of the child be the primary determinant in custody situations. While some child placement proposals stress improvement of traditional procedures for assuring minimal psychological damage to the child when a custody decision is necessary, some rather radical child placement proposals have also been advanced: custody determinations should be absolute, not temporary; once custody is awarded to one parent, the other parent should be barred from ever seeing or contacting the child again; and whenever an adult assumes
signed to stabilize and shield a grandparent-grandchild relationship that is demonstrably beneficial to the child. From this point of view, the state has a substantial interest in safeguarding the psychological well being of the child.

The adoption statutes on the other hand protect the newly formed family relationship from outside interference. They promote a public policy in favor of a strong central family unit, each of whose members has the right to a stable daily life, unmarred by outside harassment and repeated court appearances. From this perspective, the state has a substantial interest in safeguarding the integrity of the family.

In considering the relative merits of the public policy favoring continued relationships among blood relatives, the legislatures now seem to have struck a realistic compromise. Viewing the statutes in their proper light, a court would have the discretion to award visitation privileges to a child's natural grandparents if it determined that these visits would be beneficial to the child's development. Clearly relevant among the factors that should be considered in making such a determination would be the nature of the relationship between the child and his grandparents, the nature of the relationship between the child and his adoptive parents, and the nature of the relationship between the grandparents and the adoptive parents.61 To assume, as the Texas court did in DeWeese, that adoption is a bar to judicial determination of the desirability of grandparent-grandchild visitation62 is to frustrate the purpose for which the visitation statutes were enacted and to abrogate the duties the state owes to the child.

IV. CONCLUSION

The grandparents' visitation rights statutes established an independent right in a child's grandparents to utilize state habeas corpus proceedings to the role of psychological parent to the child, severing that relationship by interference from the biological parents should be prohibited. See generally J. Goldstein, A. Freud & A. Solnit, Beyond the Best Interests of the Child 1-19, 32-34, 37-45 (1973).

61. A factor that ought to be a prime consideration in awarding visitation rights is the preference of the child. Many courts have recognized that a child of sufficient age, intelligence, and maturity should have significant input into the custody decisionmaking process. Most jurisdictions, either by legislative enactment or judicial decision, treat the wishes of the child as a relevant factor in custody cases. See, e.g., Jensen v. Jensen, 142 Colo. 420, 351 P.2d 387 (1960) (per curiam); Udell v. Udell, 151 So. 2d 863 (Fla. Dist. Ct. App. 1963) (per curiam); Tobler v. Tobler, 78 Idaho 218, 299 P.2d 490 (1956); Holley v. Holley, 158 So. 2d 620 (La. Ct. of App. 1963). See generally Annot., 4 A.L.R.3d 1396 (1965). It is arguable that the same rationale should apply in habeas corpus petitions of grandparents under visitation statutes.

62. See 520 S.W.2d at 526. It should be noted that DeWeese was decided prior to the revision of Texas' adoption statute, and the court did not decide if the same rule would apply under the revised statute. Id.
Visitation Rights of Grandparents

force an impartial evaluation of their request for visitation privileges with their grandchild. In doing so, the statutes took positive steps to protect established relationships with relatives who love the child and care about his welfare. The child whose parents are divorced or whose parent has died has already had his life disrupted and disorganized. It is incumbent upon the state to help preserve what little continuity may be left by allowing the grandparents to maintain healthy relationships previously established with the child. To this end, application of the “best interests of the child” standard is an equitable and rational method of determining grandparent visitation.

The fundamental difference between these statutes and the common law is, in a sense, a procedural one: a shift in the method of determining the best interests of the child. The decisionmaking power is shifted from the parents to the courts, thus removing the problem posed by the dual roles of interested party and ultimate arbiter that parents have played under the common law. On balance, the more objective analysis by the courts of what is in the best interests of the child should provide a more satisfactory solution to the difficult problem of determining grandparents’ visitation rights.

Legislatures which have recognized the problem and have enacted statutes to solve it have the continuing responsibility to assure that the exercise of these newly granted rights is not thwarted by conflicting legislation, such as that terminating the rights of blood relatives when a child is adopted. Legislatures which have not yet recognized the need for grandparents’ visitation statutes will have to face this larger issue as more and more children become pawns in bitter custody and visitation fights and judicially frustrated grandparents demand the basic right to a hearing on their complaints. It is only with responsive, responsible, and conscientiously drafted legislation and a concurrent awareness in the courts of the spirit of such legislative enactments that the establishment of the rights of grandparents to continue satisfying and mutually beneficial relationships with their grandchildren will be secure.

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