Grandparent Visitation Statutes: Remaining Problems and the Need for Uniformity

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I. Introduction

There are more than one million divorces in the United States annually,¹ over one-half involving minor children.² In a growing number of the divorces which involve children, the custodial parent denies a grandparent the opportunity to see the children of the failed marriage.³ The unfortunate severing of relationships between grandparents and grandchildren may also occur when one or both of the parents die, and it is especially common if the children are subsequently adopted.⁴

Why would a parent deny a child the opportunity to communicate with loving and devoted grandparents? The answers to this question vary from a parent's desire to repress memories of an unhappy marriage or a deceased spouse,⁵ to a parent's desire to establish a new family, perhaps with a new spouse as the child's adoptive parent.⁶ Estrangement is sometimes the result of a "power struggle" between the parent and grandparent over control of the child. It may also stem from a fear that the grandparent will repeat mistakes the parent perceives the grandparent made in raising his or her own children.⁷

Grandparents' responses to the denial of contact with their grandchildren have been as diverse as its causes. Increasingly, grandparents are turning to the judicial system for resolution of these family disputes as well as lobbying for

3. *Id.* at 48.
4. *See infra* notes 118-61 and accompanying text.
changes in the visitation laws. At common law, grandparents were deemed to have virtually no rights with respect to their grandchildren. Recently, however, legislatures in a majority of the states have altered this by providing grandparents the legal right to petition for visitation privileges if they are deprived of contact which may benefit both the grandparent and the grandchild. In addition to state legislation, the United States Senate and House of Representatives introduced concurrent resolutions in 1983 dealing with grandparent visitation. The resolution, passed by the House and now pending in the Senate, endorses the concept of a uniform state act providing “grandparents with adequate rights to petition state courts for privileges to visit their grandchildren . . . .”

This comment will examine the traditional judicial response to grandparents’ petitions to see their grandchildren and will evaluate the array of visitation statutes currently in force. Specifically, this comment will analyze the effect on grandparents’ visitation rights if the parent removes the grandchild from the jurisdiction or if the grandchild is subsequently adopted. Finally, this comment will address the need for uniformity in the laws of grandparent visitation.

II. GRANDPARENTS’ RIGHTS AT COMMON LAW

Case law in the area of grandparent visitation is replete

10. See infra notes 48-51 and accompanying text.
11. For a discussion of the importance of permanent relationships between grandparents and grandchildren, see A. Kornhaber & K. Woodward, supra note 7, at 67-70, 200-13. See also F. Dodson, How to Grandparent 155 (1981); Divorce American Style, supra note 2, at 48 (“Grandparents offer grandchildren an emotional sanctuary from the everyday world. [Children with close relations to a grandparent] are secure in the knowledge that many people care for them.”) (quoting child psychiatrist Arthur Kornhaber).
with contradictions and question-begging\textsuperscript{14} and often appears to weigh the conflicting interests of the parent and the grandparent without considering the best interests of the child.\textsuperscript{15} At common law, under the aegis of the "parental rights doctrine," a grandparent was granted visitation privileges with his or her minor grandchild only in "exceptional circumstances."\textsuperscript{16} The general rule, first promulgated in \textit{Succession of Reiss},\textsuperscript{17} was "that the obligation ordinarily to visit grandparents is moral, and not legal."\textsuperscript{18} Inasmuch as \textit{Reiss} has been recognized as the guiding precedent in the area, analysis of the court's reasoning is warranted.

\textit{Reiss} was brought before the Supreme Court of Louisiana by a maternal grandmother who was appealing a lower court order regarding visitation with the children of her late daughter.\textsuperscript{19} The lower court had ordered the father to take the children to visit their grandmother and had also ordered the grandmother to visit the children at their father's home.\textsuperscript{20} The grandmother appealed, seeking visitation at her home without any requirement that she visit the children at their home because she "thought it proper to send them to

\textsuperscript{14} For example, some courts intimated that grandparent-grandchild visitation would be granted if it was in the best interests of the child, and simultaneously asserted that such visitation can never be in the child's best interests if the parent objects. \textit{See infra} notes 30-31 and accompanying text.

\textsuperscript{15} The "best interest of the child" is the governing standard in child custody and visitation determinations. \textit{See, e.g., Commonwealth ex rel. Flannery v. Sharp}, 151 Pa. Super. 612, 617, 30 A.2d 810, 812 (1943). The Uniform Marriage and Divorce Act lists five factors commonly relied upon to assess the best interests of the child:

1. the wishes of the child's parent or parents as to his custody;
2. the wishes of the child as to his custodian;
3. the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest;
4. the child's adjustment to his home, school, and community; and
5. the mental and physical health of all individuals involved.

\textit{UNIF. MARRIAGE & DIVORCE ACT} § 402, 9A U.L.A. 197-98 (1973). But see generally J. \textsc{Goldstein}, A. \textsc{Freud} \& A. \textsc{Solnit}, \textit{Beyond the Best Interests of the Child} (1979), wherein the authors criticize the traditional "best interests" approach and advocate replacing it with a "least detrimental alternative" standard.

\textsuperscript{16} \textit{Foster \& Freed, supra} note 9, at 645.

\textsuperscript{17} \textit{46 La. Ann.} 347, 15 So. 151 (1894).

\textsuperscript{18} \textit{Id.} at 353, 15 So. at 152.

\textsuperscript{19} \textit{Id.} at 349-50, 15 So. at 151.

\textsuperscript{20} \textit{Id.} at 350, 15 So. at 151.
The supreme court dismissed the appeal, denying the existence of a legal right to visit one's grandchildren. The court reasoned that to permit judicial intervention by a grandparent would diminish parental authority. The authority of a parent was deemed so comprehensive as to preclude any inquiry into the father's motive for denying visitation. The Reiss court acknowledged the desirability of fostering ties between grandparent and grandchild, but opined that "the coercive measures which must follow judicial intervention" are not an efficacious means of restoring family relationships.

With only a few exceptions, cases following Reiss similarly rejected grandparents' petitions for visitation privileges. Most jurisdictions treated the issue as a matter of law, concluding that no legal basis existed for grandparental visitation. Courts subscribing to this view would entertain a

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21. Id. at 350-51, 15 So. at 151-52.
22. Id. at 353, 15 So. at 152-53.
23. Id. at 352, 15 So. at 152.
24. Id. Accord Odell v. Lutz, 78 Cal. App. 2d 104, 177 P.2d 628 (1947). "So fundamental are the rights of parenthood that infringements thereof have been held to constitute an encroachment on the personal liberty of the parent forbidden by the Constitution." Id. at __, 177 P.2d at 629 (quoting 39 AM. JUR. 593, 594). See In re Goldfarb, 6 N.J. Super. 543, 70 A.2d 94 (1949) (court cannot question parent's decision regarding grandparent-grandchild visitation).

The United States Supreme Court has often acknowledged parents' interest in raising children without interference. "It is cardinal with us that the custody, care and nurture of the child reside first in the parents . . . . And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter." Prince v. Massachusetts, 321 U.S. 158, 166 (1944). See also Wisconsin v. Yoder, 406 U.S. 205 (1972).

25. Reiss, 46 La. Ann. at 353, 15 So. at 152. Psychiatry professor Andre Derdeyn asserts that legal intervention into private matters should be used only as a last resort, advising that grandparent-grandchild contact "achieved by less adversary means is surely more satisfactory and more likely to be maintained." Grandparents seek protection of their rights, supra note 8. But see infra note 30.

26. See infra notes 32-47 and accompanying text for a discussion of the exceptions to the general common-law rule.

grandparent's petition for visitation only if the grandparent challenged the fitness of the custodial parent. In *Jackson v. Fitzgerald*,\(^\text{28}\) this rationale was succinctly explained:

> [I]n the absence of a charge of unfitness a grandparent is a "third person," without legal standing to demand custody.

In the absence of any charge of unfitness or misconduct, there was plainly no basis for disturbing the father's right to custody. And, logically, the same must be said as to the claim for visitation rights. The right of visitation derives from the right to custody. The court could not award the plaintiff visitation rights without impinging on the father's vested right of custody . . . .

Courts are not insensitive to the yearning of grandparents and other relatives for the company of children in their families. But such cannot be translated into a legal right without a showing that it is dictated by the needs and welfare of the child. In the absence of such a showing, custodial control goes along with custodial responsibility.\(^\text{29}\)

Some courts have professed to base the denial of grandparents' visitation rights on the best interests of the child while simultaneously asserting that the denial of such visitation was always in the child's best interests. These courts propounded the theory that it would be contrary to the child's best interest to subject the child to the competition for affection which court-ordered visitation would necessarily engender.\(^\text{30}\) The often inadequate solution was to advise

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\(\text{28. 185 A.2d 724 (D.C. 1962).}\)

\(\text{29. Id. at 725-26 (footnotes omitted). Accord Veazey v. Stewart, 251 Ark. 334, 472 S.W.2d 102 (1971) (grandmother conceded that the mother was a "good mother"); People ex rel. Schachter v. Kahn, 241 A.D. 686, 269 N.Y.S. 173 (1934) (per curiam) (father appeared to be a proper guardian; therefore, the court lacked jurisdiction).}\)

\(\text{30. See Commonwealth ex rel. McDonald v. Smith, 170 Pa. Super. 254, 258, 85 A.2d 686, 688 (1952) ("a contest for the child's affection . . . can lead only to the detriment of the child."). See also Commonwealth ex rel. Flannery v. Sharp, 151 Pa. Super. 612, 617-18, 30 A.2d 810, 812 (1943) (child's welfare "must not be shattered in the crossfire" resulting from irreconcilable differences existing between the parent and grandparents). Contra Evans v. Lane, 8 Ga. App. 826, 70 S.E. 603 (1911). In Evans, the court granted visitation to the maternal grandmother, despite dissension among the families, and stated:}\)

> It may be possible that this little one as an innocent messenger traveling from the home of on [sic] of "these warring families" . . . to the other all unconsciously may be the means of pouring oil upon the troubled waters, may be a balm of Gilead to heal the festering wounds, and thus effect a reconciliation . . . .
grandparents that if they would "cultivate a tolerable relationship" with the child's parents, perhaps voluntary visitation could be arranged.31

The common law did recognize exceptions to the general rule; however, the exceptions were only applicable in very limited factual situations.32 One such exception applied when the custodial parent had previously consented to grandparent-grandchild visitation, typically pursuant to a divorce decree.33 If the custodial parent later challenged the visitation, courts generally held that the grandparent had a legally enforceable right to visitation,34 provided that continued grandchild-grandparent contact was deemed in the best interests of the grandchild.35

A few courts granted visitation rights to grandparents based upon findings that the continuation of the grandparent-grandchild relationship was essential to the physical or emotional health of the child.36 Such a finding was made, however, only if the grandchild had lived with the grandparent for a significant portion of the grandchild's life.37 Visita-

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35. Bookstein v. Bookstein, 7 Cal. App. 3d 219, 223-24, 86 Cal. Rptr. 495, 498-99 (1970) ("there is sufficient evidence . . . the child would benefit from the visits to his grandparents."); Boyles v. Boyles, 14 Ill. App. 3d 602, 604, 302 N.E.2d 199, 201 (1973) ("the continuation of the relationship between child and grandparents, which may be promoted by visitation, may be a positive benefit affecting the best interest of the child.").
37. E.g., Brock v. Brock, 281 Ala. 525, —, 205 So. 2d 903, 910 (1967) (on rehearing) (child had lived with grandparents for several years, creating "ties of affection");
tion was granted in this situation because the child who was being removed from familiar surroundings should be spared the exacerbated trauma of a total separation from the customary environment. It was hoped that maintaining ties of affection to his or her grandparent would lessen the severity of the "separation trauma."

After determining that one of the exceptions was applicable to the particular facts of a case, courts then evaluated the child's best interests. At this point in the analysis, some courts gave weight to the value of maintaining ties with both the paternal and maternal sides of the grandchild's family. Such courts were amenable to awarding visitation privileges to a grandparent if the grandchild's noncustodial parent was deceased or unavailable for visitation.

Under the common-law exceptions, a particularly troublesome problem was posed when a grandchild was adopted by a stepparent, as occurred in Lee v. Kepler. In Lee the maternal grandmother was awarded visitation privileges pursuant to a divorce decree. The child's natural father remarried and his spouse adopted the child. Although the grandmother's visitation rights were enforceable against the natural father, they were not enforceable against the child's

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42. 197 So. 2d 570 (Fla. Dist. Ct. App. 1967).
adoptive mother because she obtained the status of a natural parent and had not given her consent to the visitation. Following the adoptive mother's wishes, the visits were terminated.

Adoption likewise barred visitation in Commonwealth ex rel. Dogole v. Cherry. Dogole involved a child who was initially adopted by a husband and wife. After the adoptive mother died, the adoptive father remarried and his new wife adopted the child. The first wife's mother sought, but was denied, visitation privileges. The court based its denial of visitation upon the finding that the "maternal grandmother" was "neither a blood nor an adoptive relative of the child." As the above discussion indicates, the common law was, in most cases, unresponsive to grandparents' desires to visit with grandchildren. Lacking a judicial remedy, grandparents were compelled to turn to state legislatures to seek vindication of their "right" to visit with their grandchildren through legislation.

III. STATUTORY VISITATION RIGHTS

In an attempt to alleviate the harshness of the common-law rule, in the late 1960s state legislatures began enacting statutes concerning grandparent visitation. These statutes provide a legal avenue for grandparents who have been denied visitation privileges with their grandchildren.

A. A Brief Survey

Forty-four states presently have statutes which purport
to give a legal right of visitation to grandparents.\textsuperscript{51} In addition to authorizing grandparent-grandchild visitation, some statutes apply to great-grandparents,\textsuperscript{52} siblings,\textsuperscript{53} stepparents,\textsuperscript{54} any relative\textsuperscript{55} or "any person interested in the child's welfare."\textsuperscript{956} The statutes vary from state to state and often

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\textsuperscript{53} In addition, D.C. CODE ANN. § 16-914 (1981) provides that following divorces, the family court retains jurisdiction to make future orders regarding custody and visitation and authorizes intervention by "any interested party." In making a determination of the best interests of the child, the court is instructed to consider the child's interrelationships and interactions "with his or her parent or parents, his or her siblings, and any other person who may emotionally or psychologically affect the child's best interests." \textit{Id.} This statute arguably permits a grandparent to petition for visitation privileges; however, it has never been so construed by a court.


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\textsuperscript{56} ALASKA STAT. § 25.24.150 (1983); CAL. CIV. CODE § 4601 (West 1983); CONN. GEN. STAT. ANN. § 46b-56 (West Supp. 1984); HAWAI'I REV. STAT. § 571-46 (1976 & Supp. 1983); ILL. ANN. STAT. ch. 110-1/2, § 11-7.1 (Smith-Hurd 1978);
are vague and in conflict with other statutes. Some state legislatures have amended their statutes because misconstructions had defeated the legislative intent. In short, many of the statutes created as many problems as they were designed to solve.

Forty states now permit a court to grant the parents of divorcing parties visitation rights with children of the marriage. Most of these statutes provide that once a divorce has occurred, a parent of either party, including the custodial parent, may petition for visitation privileges. These statutes enable a grandparent to commence an action against a custodial parent, including his or her own child.


57. See infra notes 118-61 and accompanying text for discussion of the often-existing conflict between visitation and adoption statutes.
58. See infra note 122.

60. The exceptions are ARIZ. REV. STAT. ANN. § 25-337.01 (Supp. 1983-1984); R.I. GEN. LAWS § 15-5-24.2 (Supp. 1983); UTAH CODE ANN. §§ 30-5-1 to -2 (Supp. 1983); and W. VA. CODE § 48-2-15 (1980), which are applicable only to the parents of the noncustodial parent, and even then, only if the noncustodial parent is unable to visit the child on his or her own behalf.
Thirty-four states\textsuperscript{61} permit a grandparent to petition for visitation if one or both of the grandchild's parents are deceased. These statutes often differ in their applicability. Some grant the right of visitation only to the grandparent whose own child has died.\textsuperscript{62} The majority of the grandparent visitation statutes, however, apply equally to paternal and maternal grandparents, provided the condition precedent, namely, that either of the grandchild's parents is deceased, has been met.\textsuperscript{63} This provision can engender litigation between the grandparent and his or her own child, but illogically limits such litigation to a situation where the child's spouse has died. It is unlikely that legislatures contemplated or intended this inconsistency.

\textbf{B. Application of the Statutes}

The visitation statutes do not give a grandparent an automatic right to visitation with a grandchild; rather, they

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\item[62.]See, e.g., ARIZ. REV. STAT. ANN. § 25-337.01 (Supp. 1983-1984); ARK. STAT. ANN. § 57-135 (Supp. 1983); CAL. CIV. CODE § 197.5 (West 1984); MINN. STAT. ANN. § 257.022 (West 1982); NEV. REV. STAT. § 123.123 (1979); TENN. CODE ANN. § 36-1101 (1977).
\end{enumerate}
\end{footnotesize}
merely give the grandparent the right to be heard in court.\textsuperscript{64} Under virtually all of the visitation statutes, the grandparent seeking visitation has the burden of proving that such visitation will be in the child's best interests.\textsuperscript{65} The factors determinative of "the best interests of the child" are the same as existed under the common law.\textsuperscript{66} One jurisdiction, however, has held that its visitation statute "creates a presumption that the best interests of the child[ren] ordinarily are served by maintaining their contact and communication with their grandparents,"\textsuperscript{67} thus shifting the burden of proof to the parent who opposes visitation.

After a grandparent has presented his or her case, the parent is permitted to rebut the grandparent's case by presenting countervailing evidence of the supposed detrimental effects visitation will have on the children, thus creating a triable issue of fact.\textsuperscript{68} It has been held, however, that the existence of animosity and ill-feelings between a parent and grandparent is an insufficient reason for denial of visitation because, as one court observed, "[i]t is almost too obvious to state that, in cases where grandparents must use legal procedures to obtain visitation rights, some degree of animosity exists between them and the party having custody of the child or children. Were it otherwise, visitation could be achieved by agreement."\textsuperscript{69}

\textsuperscript{65} But see HAWAI I REV. STAT. § 571-46 (1976 & Supp. 1983), and ILL. ANN. STAT. ch. 110-1/2, § 11-7.1 (Smith-Hurd 1978), which provide that visitation rights \textit{shall} be granted unless it is shown that such visitation would be detrimental to the child, thereby placing the burden upon the child's parents.
\textsuperscript{66} See supra notes 15-16 and accompanying text. See also Note, supra note 32.
\textsuperscript{68} See \textit{In re Adoption of Berman}, 44 Cal. App. 3d 687, 697, 118 Cal. Rptr. 804, 810 (1975).
\textsuperscript{69} Lo Presti v. Lo Presti, 40 N.Y.2d 522, 526, 355 N.E.2d 372, 374, 387 N.Y.S.2d 412, 414 (1976). \textit{Accord} Globman v. Globman, 158 N.J. Super. 338, _, 386 A.2d 390, 395 (1978) ("We do not regard this hostility alone . . . as justifying the extinguishment of the grandparental contact . . . ."); Johansen v. Lanphear, 95 A.D.2d 973, _, 464 N.Y.S.2d 301, 303 (1983); Lachow v. Barasch, 57 A.D.2d 896, 896, 394 N.Y.S.2d 284, 284 (1977). One commentary on grandparent visitation noted that "[t]he existence of animosity or hostility between . . . divorced parties, in and of itself, is not a ground for withholding visitation"; the authors assert that animosity between a parent and grandparent should rest upon the same basis. Foster & Freed, supra note 9, at 661. "Otherwise . . . the custodian may lift himself by his bootstraps by creating
C. Criticisms of the Statutes

A few courts have criticized the grandparent visitation statutes because they create a cause of action where none existed at common law and encourage litigation of disputes which would more appropriately be privately resolved. Additional resistance to grandparent visitation statutes originated from a fear that a grandchild may suffer from the competition of several people for his or her company, which would inevitably be contrary to the grandchild's best interests. In *In re Adoption of a Child by M*, a New Jersey court addressed this fear and held that a grandparent's right of visitation must be derived from the parent's right of visitation. Applying this "derivative theory," if the noncustodial parent has visitation privileges, the grandparent should seek visitation through the parent, making the statute inapplicable. The grandparent visitation statutes would be applicable only if the noncustodial parent did not have, or was unable to exercise, visitation privileges, for, as the New Jersey Superior Court observed, "[w]hen . . . the noncustodial parent has visitation, what right are the grandparents denied? They can always seek visitation through their own child." Most courts have rejected the "derivative theory," with the majority holding that grandparents' rights arise independently and therefore no consideration of the grandchild's parents is warranted.

At the opposite pole from those who deride the statutes for abrogating the common law are critics such as Congress-
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man Mario Biaggi of New York. Representative Biaggi has criticized the current visitation statutes because "[t]hey are vague and they vary, and very frankly, they don't give [grandparents] all that much." The remainder of this comment will address two specific problems facing the visitation statutes, namely, the effect of removal of the grandchild from the jurisdiction and the effect of adoption of the grandchild.

IV. THE EFFECT ON VISITATION OF GRANDCHILD'S REMOVAL FROM THE JURISDICTION

An issue which has been addressed by neither commentary nor case law concerns the enforcement of court-ordered grandparent visitation if the custodial parent desires to remove the grandchild from the jurisdiction. Because the topic of restrictions on the residency of custodial parents has not been previously analyzed with respect to the relatively new grandparent visitation statutes, this section will analogize this situation to an award of visitation to a noncustodial parent, note the differences, and suggest a resolution of the question.

Absent an award of joint physical custody of minor children, a typical divorce decree will grant one parent custody and the other, noncustodial parent reasonable visitation privileges. Visitation rights granted to the noncustodial parent are enforceable by court order, and interference with these rights by the custodial parent may be punishable by a

76. Grandparents' Rights, supra note 5.
77. But see Fisher v. Fisher, 390 So. 2d 142 (Fla. Dist. Ct. App. 1980) (per curiam), wherein it was held that although a trial court properly granted visitation privileges to paternal grandparents, it erred by forbidding the mother to remove the grandchildren from their county of residence. Prior to the Fisher decision, Florida enacted a grandparent visitation statute which provides, in relevant part, that "[n]o court shall order that a child be kept within the state or jurisdiction of the court solely for the purpose of permitting visitation by the grandparents." FLA. STAT. ANN. § 61.13(2)(b) (West Supp. 1984). See also R.I. GEN. LAWS §§ 15-5-24.1 to -24.2 (Supp. 1984).
contempt citation or modification of the divorce decree with an attendant change of custody. To avoid these harsh results, in most cases the custodial parent must seek court approval prior to removing a child from the jurisdiction for an extended period of time. The requirement of court approval is commonly imposed by the terms of the divorce decree, stipulation of the parties or state statute.

Reasons often cited for relocation include the pursuit of an education, better employment opportunities, the desire to rejoin other family members, the health needs of either the parent or child, or the job transfer of the custodial parent or his or her new spouse. A custodial parent might also decide to relocate solely to frustrate visitation privileges. As one commentator pointed out:

There is no more effective way of preventing a non-custodial father from seeing his child than to remove it to a distant point. Of what practical use to a father are his

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80. E.g., Daghir v. Daghir, 56 N.Y.2d 938, 439 N.E.2d 324, 453 N.Y.S.2d 609 (1982) (custody given to father during mother’s absence from state); Fritschler v. Fritschler, 60 Wis. 2d 283, 208 N.W.2d 336 (1973) (custodial mother moved without court approval; custody was then transferred to the father); MINN. STAT. ANN. § 518.175(4) (West Supp. 1984). Such transfers of custody have been called “punitive custody modifications” because the change of custody is effected in order to punish a custodial parent who violates a court order by leaving the local jurisdiction. Bodenheimer, Progress Under the Uniform Child Custody Jurisdiction Act and Remaining Problems: Punitive Decrees, Joint Custody, and Excessive Modification, 65 CALIF. L. REV. 978, 1003-04 (1977). Professor Bodenheimer argues that custody modification should stem from the well-being of the child, rather than to punish or reward a parent, and that punitive custody changes are generally not in the child’s best interests because they “disrupt the stability and continuity of the child’s environment.” Id. at 1004, 1005 n.157.
81. See generally Note, A Proposed “Best Interests” Test for Removing A Child from the Jurisdiction of the Noncustodial Parent, 51 FORDHAM L. REV. 489, 497-98 & nn.33-34.
82. Id.
84. See, e.g., MINN. STAT. ANN. § 518.175(3) (West Supp. 1984); WIS. STAT. § 767.245(6) (1981-82).
85. E.g., Harris v. Harris, 57 Misc. 2d 672, 293 N.Y.S.2d 592 (1968).
87. E.g., Tandy v. Tandy, 42 II. App. 3d 87, 355 N.E.2d 585 (1976).
88. Id.
visitation rights, decretal or contractual, if he has to go hundreds, if not thousands, of miles to exercise them? The same can surely be said of a grandparent’s visitation privileges.

Courts faced with a custodial parent’s petition to relocate have applied the “best interests of the child” standard, the same standard used in grandparent visitation determinations. However, although applying the same standard, courts have reached disparate results. Some courts have reasoned that it may indirectly benefit the child to have a happy and well-adjusted custodial parent and that it is also in the best interests of the child to have a continuing relationship with only one custodial parent. Accordingly, such courts will grant the custodial parent’s petition to move unless the noncustodial parent can show that moving will have a detrimental impact on the child. For example, the Minnesota Supreme Court recognized an “implicit presumption” that the custodial parent’s desire to relocate is in the best interests of the child. The custodial parent, the court reasoned, was granted custody precisely because it was in the child’s best interests, and concomitantly, that parent’s desire

90. 1 A. LINDEY, supra note 83, § 14, at 14-81.
91. Cf. Divorce American Style, supra note 2, at 48 (“The law may say that the grandparent is entitled to visit, but who will keep the parent from moving . . . ?”). For example, Mr. and Mrs. Harvey Kudler incurred $60,000 in legal fees to obtain visitation rights with their grandchildren whom they had raised for five years. Within three months of the New York court’s order granting visitation, the Kudlers’ ex-son-in-law fled, with the children, to Colorado, where a judge refused to recognize the New York visitation rights and advised them to “forget about the children.” Grandparents: The Other Victims of Divorce and Custody Disputes: Hearing Before the Subcommittee on Human Services of the Select Committee on Aging, House of Representatives, 97th Cong., 2d Sess. 32-34 (1982).
93. In re Marriage of Burgham, 86 II. App. 3d 341, , 408 N.E.2d 37, 40 (1980) (requirement of a “superficial showing” that the move is consistent with the child’s best interests).
94. Id. See also, e.g., Pender v. Pender, 598 S.W.2d 554 (Mo. Ct. App. 1980); Gottschall v. Gottschall, 210 Neb. 679, 316 N.W.2d 610 (1982). See generally Professor Bodenheimer’s criticism of punitive custody modifications, supra note 80.
to move must also be in the child's best interests. Therefore, in Minnesota a custodial parent will be permitted to remove a child from the state unless the noncustodial parent can overcome the presumption by establishing, by a preponderance of the evidence, that the move is contrary to the child's best interests.97

In contrast to those courts which place the burden upon the noncustodial parent to show that the move will be harmful to the child is the approach taken by New York, which places a heavy burden upon the custodial parent who wishes to remove the child from the jurisdiction. The New York Court of Appeals has held that the custodial parent must show the existence of "exceptional circumstances" in order to justify removal of the child.98 In Weiss v. Weiss99 the court indicated that health or educational reasons might be sufficient, but that the mother's desire to move to Las Vegas to pursue a singing career was not an exceptional circumstance adequate to warrant relocation and the modification of the visitation order which such relocation would necessarily entail.100 The Weiss court concluded that frequent and regular visits with the father were more beneficial to the child than the less frequent, though longer, visits which would occur if the mother was permitted to relocate with the child.101 The court therefore enjoined the mother from removing the child from New York. One court has aptly summarized the policy reasons opposing relocation, stating, "[g]enerally it can be said that the best interests of a child require that he or she be allowed the opportunity to develop a meaningful relationship with both parents."102 To protect the child's relationship with the noncustodial parent, it is

100. Id. at 177, 418 N.E.2d at 381, 436 N.Y.S.2d at 866.
101. Id. at 176-77, 418 N.E.2d at 380-81, 436 N.Y.S.2d at 865-66.
deemed reasonable to prohibit the custodial parent from removing the child from the jurisdiction. ¹⁰³

In conflict with restrictions on the custodial parent's right to relocate and remove the child from the jurisdiction is the constitutional right to travel freely. ¹⁰⁴ It is clear that in the absence of any visitation rights with which a move will interfere, a parent may relocate with his or her child. Thus, if the two natural parents of a child are married, they may move with the child to any point on the globe. ¹⁰⁵

As previously explained, if a divorce has occurred the visitation rights of the noncustodial parent qualify and limit the custodial parent's right and liberty to move freely. ¹⁰⁶ Extending this analysis, if a divorce has occurred or if one of the parents is deceased and a court has ordered grandparent visitation rights pursuant to a statute, ¹⁰⁷ the question then arises whether the existence of these rights interferes with the custodial parent's right to relocate and raise children wherever he or she chooses.

Given the constitutional proportions of the right to travel, the parent's desire to relocate should be paramount. If the best interests of the child standard was the sole consideration, it would be reasonable to require a parent to show the existence of exceptional circumstances to justify a pro-

¹⁰³. *Id.*; Fritschler v. Fritschler, 60 Wis. 2d 283, 289, 208 N.W.2d 336, 339-40 (1973) ("Living in Colorado is not as conducive to a normal relationship between a father and his children ... as living in the same city.").


¹⁰⁵. In such a situation, the grandparents would have to voluntarily arrange with the parents to visit the child. In the majority of families this will present no insurmountable challenge, although visits may be infrequent.


posed relocation. This conclusion logically follows from a court’s finding, prior to granting a grandparent visitation privileges, that continued grandparent-grandchild contact would benefit the grandchild. However, in view of the right to travel and the mobile nature of modern society, a court should not restrict a custodial parent’s right to relocate, with the child, solely to accommodate a grandparent’s visitation rights. As one court stated, “in today’s society it is simply unrealistic to expect an individual to remain within one small geographic area for the remainder of his or her life.” Additionally, it is clear that married parents can act upon the desire to relocate, with or without exceptional circumstances present.

There are distinctions between parents and grandparents, and there should be corresponding differences in enforcement of their visitation rights. Generally, grandparents do not exercise parental authority over their grandchildren; the right to control children’s lives belongs to the parents. Thus while it may be important for a child to have frequent contact with both parents so each may shape the child’s development, the grandparent-grandchild relationship is more attenuated. Given the fact that even in harmonious nuclear families grandparents do not exercise day-to-day responsibility for their grandchildren, it is not as vital that grandparent and grandchild see each other on a weekly or bi-weekly basis as it is for parent and child. In relation to

109. See supra notes 65-69 and accompanying text.
110. See supra note 104 and accompanying text.
111. Griffin v. Griffin, 424 So. 2d 1228, 1232 (La. Ct. App. 1982). However, restrictions imposed upon a custodial parent’s right to travel terminate when the youngest child reaches majority.
112. See supra note 24 and accompanying text.
114. [O]n the one hand, the child’s bond to a grandparent is normally not as indispensable for the child’s physical survival and emotional health as the bond to a parent; on the other hand, a child need never — and usually does not — abandon the feelings of dependency and trust generated by loving grandparents.

A. Kornhaber & K. Woodward, supra note 7, at 64 (emphasis omitted).
the parent's right to relocate, the grandparent's right to visitation should be subordinate.

A possible solution to the conflict between court-ordered grandparental visitation and the parental desire to move is the modification of the visitation order. Inasmuch as grandparents are commonly not involved in daily matters and decisions concerning grandchildren, altering visitation from frequent short visitation to less frequent but longer intervals will not be as detrimental to the child as it might be in the case of a noncustodial parent. Moreover, there are other modes of access to children, such as long-distance telephone calls. A court may consider ordering a parent to permit telephone access if frequent visitation is impractical. This resolution both respects grandparents' visitation rights and recognizes parents' freedom of mobility.

V. THE EFFECT OF ADOPTION ON VISITATION PRIVILEGES

The greatest obstacle the grandparent visitation statutes have encountered is preexisting adoption statutes which sever an adoptee's relationship with his or her natural family. Since visitation statutes are generally applicable only if the parents of the child are divorced or one of them is deceased, there is an inherent possibility that the custodial parent will remarry. When remarriage occurs, the custodial parent's new spouse often adopts the child of the prior marriage as his or her own. Similarly, if both of the child's parents are deceased, the child is typically adopted, either by a relative or by a stranger. When this occurs, the

115. See supra notes 112-14 and accompanying text.
117. Cf. id. at 166 n.3.
120. Id.
121. See, e.g., People ex rel. Simmons v. Sheridan, 98 Misc. 2d 328, 414 N.Y.S.2d 83 (Sup. Ct. 1979), aff'd sub nom. People ex rel. Sibley v. Sheppard, 54 N.Y.2d 320,
grandparent-grandchild relationship is frequently severed as the grandchild is assimilated into a new family unit with a new set of grandparents.

Statutes in sixteen states\(^1\)\(^2\) presently specify the effect of a child’s adoption on a grandparent’s visitation rights. Only four of these statutes provide that any adoption will terminate rights the grandparent would otherwise have.\(^1\)\(^2\)\(^3\) The remaining eleven provide that the visitation statute will not be defeated if the child is adopted by either a natural relative or a stepparent.\(^1\)\(^2\)\(^4\) If such provisions were universally enacted, the greatest barrier to a grant of visitation under the statutes would be largely eliminated. Unfortunately, the majority of jurisdictions do not statutorily address the effect of the grandchild’s adoption. In most states, whenever a child is adopted, a conflict arises between the visitation statutes and the adoption statutes.\(^1\)\(^2\)\(^5\) The responses of courts faced with this conflict have varied significantly.

The Arkansas Supreme Court has twice addressed the effect of a grandchild’s adoption on a grandparent’s visitation rights. The Arkansas court has held that grandparents who possess court-ordered visitation rights “are constitutionally

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It should be noted that the Oklahoma and Texas provisions were amended in response to errant judicial interpretations. See In re Fox, 567 P.2d 985 (Okla. 1977); Deweese v. Crawford, 520 S.W.2d 522 (Tex. Civ. App. 1975).


124. See supra note 122.

entitled to receive notice of an adoption proceeding." 126

However, the court's narrow holdings provide that although grandparents who have been granted visitation have sufficient interest to intervene in adoption proceedings, such intervention is:

for the limited purpose of offering such evidence as may be relevant to the focal issue, i.e., whether the proposed adoption is in the best interest of the children. . . . If the court resolves the issue in favor of adoption, of course [the grandparents'] legal right of visitation is automatically extinguished. 127

Many other courts facing the same issue have reasoned that since adoption statutorily terminates a child's relationship with his or her natural family, 128 the natural grandparents are clearly not the child's legal grandparents. 129 In fact, the natural grandparents are legally strangers to the child. As such, the visitation statute does not apply and the grandparents lack standing to petition for visitation privileges. 130 This strict interpretation summarily precludes evaluation of

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126. Brown v. Meekins, 278 Ark. 67, __, 643 S.W.2d 553, 554-55 (1982) (fourteenth amendment due process, "at the very least, requires reasonable opportunity to be heard."); Quarles v. French, 272 Ark. 51, __, 611 S.W.2d 757, 758 (1981). But see Aegerter v. Thompson, 610 S.W.2d 308 (Mo. Ct. App. 1980), wherein the court held that the grandparents had no right to notice of adoption proceedings initiated by a stepfather. The court observed that "the grandparents had only an inchoate right under a statute permitting a court to grant or deny them reasonable visitation rights. . . . [The grandparents] had no constitutionally protected interest . . . ." Id. at 310 (emphasis added).


128. Deweese v. Crawford, 520 S.W.2d 522, 525-26 (Tex. Civ. App. 1975). See also In re K.S., 654 P.2d 1050, 1051 (Okla. 1982) (grandparent visitation statute held inapplicable because it refers to the grandchild's deceased or divorced parent; "[n]o reference or inference is made as to a grandparent of a child who's [sic] parent has had his or her parental rights terminated").


130. See supra note 129. Accord Browning v. Tarwater, 215 Kan. 501, __, 524 P.2d 1135, 1139 (1974); Leake v. Grissom, 614 P.2d 1107, 1109 (Okla. 1980) (adoption by a stepparent); In re Fox, 567 P.2d 985, 986 (Okla. 1977) (adoption by a relative). In the few jurisdictions which permit a court to award visitation rights to "any person interested in the child's welfare," the change in legal status would not necessarily preclude the natural grandparents' petition; however, such jurisdictions are rare. See supra note 56 and accompanying text.
the child's best interests.\textsuperscript{131}

This approach was illustrated in a Kansas case, \textit{Browning v. Tarwater}.\textsuperscript{132} In \textit{Browning}, the paternal grandmother had been awarded visitation privileges prior to the child's adoption by her stepfather.\textsuperscript{133} The Kansas Supreme Court held that the grandmother's existing right to visitation automatically terminated the moment the adoption occurred.\textsuperscript{134} The explanation provided by the court was that the adoptive father should not be subjected to the influence of a third party.\textsuperscript{135} The dissent in \textit{Browning} observed that as a result of the decision, an adoptive parent attained rights superior to those of the natural parent.\textsuperscript{136} The dissent also criticized the majority for not considering the child's best interests.\textsuperscript{137} The child's best interests, concluded the dissent, would not be achieved by terminating preexisting grandparent-grandchild visitation.\textsuperscript{138}

Some courts facing this conflict have held that the grandparent visitation statutes prevail over adoption statutes.\textsuperscript{139} However, these cases have dealt with adoption by stepparents or relatives. A distinction has wisely been made between adoption by stepparents or relatives and adoption by strangers.\textsuperscript{140} In the latter situation, the adopted child usually

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must adapt to two entirely new families, whereas in the former situation the child's family relationships and living arrangements may not have undergone a dramatic change as a result of the adoption.

Courts which have held that visitation statutes prevail over adoption statutes have utilized diverse reasoning to support this conclusion. In Reeves v. Bailey, the California Court of Appeal faced a situation similar to that of Browning v. Tarwater. In Reeves the paternal grandparents were awarded visitation rights under the California statute. The court held that those preexisting visitation rights were not automatically terminated by the child's subsequent adoption by his maternal grandparents, but rather depended solely upon the child's best interests. Another approach yielding the same result is illustrated in Roquemore v. Roquemore, where the California Court of Appeal held that the California statute which terminates natural family relationships was intended solely for the purpose of determining rights of succession and inheritance and therefore did not apply to prevent the natural grandparents from seeking visitation privileges under the statutes.

Yet another analysis was offered in Mimkon v. Ford, in which the New Jersey Supreme Court reversed a lower court ruling that adoption terminates the right of grandparents to petition for visitation. The supreme court determined that both the adoption and visitation statutes had the best interests of the child as their central purpose; thus, the statutes

143. 53 Cal. App. 3d 1019, 126 Cal. Rptr. 51 (1975).
145. Reeves, 53 Cal. App. 3d at 1021, 126 Cal. Rptr. at 53.
146. Id. at 1026, 126 Cal. Rptr. at 56.
148. Id. at ___, 80 Cal. Rptr. at 433-34.
150. Id. at ___, 332 A.2d at 202.
were *in pari materia*. This approach presumes that when the visitation statute was enacted, the legislature considered the effect of the adoption statute. Construing the statutes *in pari materia*, the court held that the visitation statute prevailed because it was enacted after the adoption statute.

Perhaps the simplest and most reasonable approach is that propounded by New York courts in *Scranton v. Hutter* and *People ex rel. Simmons v. Sheridan*. Both cases involved children who were adopted: in *Scranton* by a step-parent; in *Simmons* by the paternal grandparents. Both courts determined that, in view of the fact that adoption is common when parents are divorced or deceased, the purpose of New York’s visitation statute would be frustrated if the natural grandparents were not permitted to petition for visitation privileges. Both cases were therefore remanded to the trial court for determination of the best interests of the children involved. The New York courts have wisely limited application of this analysis to cases of adoption by a relative or stepparent, recognizing a difference between such a situation and the situation in which a child is adopted by strangers. Those visitation statutes which specify the effect of a grandchild’s adoption upon a grandparent’s visitation rights similarly recognize this distinction.

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151. *Id.* at __, 332 A.2d at 202-03. See generally 2A SUTHERLAND STATUTORY CONSTRUCTION § 51.03 (4th ed. 1973). Statutes are *in pari materia* if they relate to the same subject matter. *Id.*

152. 2A SUTHERLAND STATUTORY CONSTRUCTION § 51.03 (4th ed. 1973). It is debatable whether visitation and adoption statutes are truly *in pari materia* since visitation statutes generally make no reference to adoption and it appears that few state legislatures have considered the effect of adoption upon visitation rights.


159. *Scranton*, 40 A.D.2d at 299, 339 N.Y.S.2d at 711; *Simmons*, 98 Misc. 2d at __, 414 N.Y.S.2d at 86.


161. *See supra* note 124 and accompanying text.
In view of the "best interests of the child" standard, approval should be bestowed upon those courts which have, by utilization of varied analyses, determined that grandparent visitation rights are not automatically terminated by an adoption. However, due to the decisions of many state courts which defeat the purpose of the visitation statutes, universal legislative determination of the effect of adoption is advisable.

VI. CONCLUSION

The legislative response to grandparents lobbying for visitation has been overwhelmingly positive, as is evidenced by the forty-one states with grandparents' visitation statutes. However, these statutes are inconsistent in their application. In addition, the statutes have been the subject of countless interpretations and misinterpretations. Judicial resistance to and confusion about the statutes has likewise been strong. Nevertheless, despite their imperfections, the statutes are a positive step in the family law area inasmuch as their goal is fulfillment of the "best interests of the child."

In 1983, the United States House of Representatives passed a resolution, now pending in the United States Senate, "[e]xpressing the sense of the Congress that a uniform state act should be developed and adopted which provides grandparents with adequate rights to petition state courts for privileges to visit their grandchildren following the dissolution (because of divorce, separation, or death) of the marriage of such grandchildren's parents." Passage of this resolution and enactment of uniform visitation laws will promote the child's best interests more effectively than the current collection of statutes and case law is capable of doing. In addition to the benefits of uniformity among the states, such legislation will assure grandparents that their rights will

162. See supra note 50.
163. See supra text accompanying notes 50-63.
exist despite relocation or adoption of their grandchildren. The current problem-ridden visitation statutes should be considered a temporary solution until national uniformity becomes a reality.

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