BEYOND TROXEL: THE PRAGMATIC CHALLENGES OF GRANDPARENT VISITATION CONTINUE

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I. INTRODUCTION

The phenomenon of grandparent visitation statutes evolved in the latter third of the twentieth century.\(^1\) Such statutes give standing to certain grandparents to petition for court-ordered visitation with a grandchild over the objection of either of the grandchild’s parents.\(^2\) State courts have differed on

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1. The concept of grandparent visitation has been around for much longer. See Succession of Reiss, 15 So. 151, 152 (La. 1894). Reiss is the earliest reported case litigating the issue of grandparent visitation; the court took the position that grandparent visitation was a moral, not a legal, obligation. Id. Although Reiss was a civil law case, the common law took the same position. See Emanuel S. v. Joseph E., 577 N.E.2d 27, 28 (N.Y. 1991) (stating that “grandparents had no standing to assert rights of visitation against a custodial parent”). Grandparent visitation statutes, however, make such visitation a legal obligation.

whether the constitutionality of these statutes should be weighed against the harm standard for state intervention or merely against the “best interest of the child” standard. 3 Beyond sentimental reasoning for grandparent visitation safeguards lay the pragmatic challenges of court-ordered grandparent visitation. 4 These challenges will persist because of the recent United States Supreme Court case, Troxel v. Granville, 5 which held grandparent visitation statutes are not per se unconstitutional. 6 Although Troxel was a plurality decision, the majority recognized the right of parents to rear their children as a liberty interest within the meaning of the Due Process Clause of the Fourteenth Amendment. 7 The


4. See, e.g., Laurence C. Nolan, Honor Thy Father and Thy Mother: But Court-Ordered Grandparent Visitation in the Intact Family?, 8 BYU J. PUB. L. 51, 64-65 (1993) (providing examples of such challenges, such as determining the length, frequency, and content of the visits).


6. Id. at 73. The statute at issue in Troxel was an open-ended third-party statute that gave standing to any person, including grandparents, to petition for visitation. Id.; see WASH. REV. CODE ANN. § 26.10.160(3) (West 1994) (“Any person may petition the court for visitation rights at any time including, but not limited to, custody proceedings. The court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances.”).

7. Troxel v. Granville, 530 U.S. at 75. Six Justices affirmed the judgment of the Washington Supreme Court, but did not adopt its rationale that the Washington statute was unconstitutional under the Fourteenth Amendment because there was no threshold of harm. Id. Justice O’Connor announced the judgment of the Court and was joined by Chief Justice Rehnquist, Justice Ginsburg, and Justice Breyer. Id. at 59. The plurality held the statute as applied was unconstitutional. Id. at 75. Justice Souter concurred in the result but held the application of the statute was not before the Court. Id. at 77 (Souter, J., concurring). He would sustain the Washington Supreme Court’s decision that the statute was facially unconstitutional. Id. at 79 (Souter, J., concurring). Justice Thomas concurred in the result, but held the statute was unconstitutional under a strict scrutiny standard. Id. at 80 (Thomas, J., concurring). Justices Stevens, Kennedy, and Scalia dissented, each writing separately. Id. at 80-93 (Stevens, Scalia, Kennedy, JJ., dissenting).
plurality held the Washington statute unconstitutional as applied in this case.\(^8\) Nevertheless, the future of such orders is unsettled because the Court did not decide whether a “harm” standard or a “best interest of the child” standard was the appropriate standard by which to weigh the constitutionality of grandparent visitation statutes.\(^9\) Thus, the pragmatic challenges inherent in grandparent visitation remain and must be carefully considered when determining the appropriateness of such visitation.

These challenges surface in all phases of grandparent visitation cases, often mirroring the problems that accompany noncustodial parental visitation cases. Such problems may include the following: (1) issues over the appropriate length of the visit; (2) duration and logistics of the visit; (3) issues arising when a parent, grandparent, or grandchild is hostile; (4) issues of supervised or unsupervised visits; (5) issues of modification and relocation; (6) issues arising when there are multiple visitation orders; and (7) issues of sanctions against parents for the violation of the order.\(^10\)

Usually parents are recognized as the ones who are adversely affected by these pragmatic challenges, but their children are often casualties as well.\(^11\) In many grandparent visitation cases, courts have not seriously considered these challenges in determining whether to grant visitation or in fashioning the order. Accordingly, this Article contends that a court must consider the pragmatic

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8. Id. at 75.
9. Id. at 73. Justice O'Connor reasoned that the trial court did not give proper weight to a fit parent’s decision to limit, but not cut off, visitation and that the statute was overbroad in allowing any person to petition for visitation. Id. at 67-71. Justice O'Connor further reasoned, “[W]e do not consider the primary constitutional question passed on by the Washington Supreme Court—whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation.” Id. at 73.

Recently in Santi v. Santi, 633 N.W.2d 312 (2001), the Iowa Supreme Court embraced Justice O'Connor's parental fitness reasoning in holding a subsection of the Iowa grandparent visitation statute, IOWA CODE § 598.35(7) (1999), facially unconstitutional under Iowa's constitution because it failed to “require a threshold finding of parental unfitness before proceeding to the best interest analysis.” Santi v. Santi, 633 N.W.2d at 321. The court emphasized that “unlike the other subsections of [this section] which contemplate some breakdown between parents before a judge is authorized to make a difficult choice for them, [subsection (7)] permits the court to usurp that judgment over the joint decision of two fit parents.” Id. The court also stressed that subsection (7), unlike the other subsections of § 598.35, swept too broadly to include fit parents and intact families. Id. Thus, it appears that Santi embraces the parental fitness doctrine of Troxel's plurality insofar as it applies to intact families, although the plurality made no such limitation. See id. (finding a “historic presumption that fit parents’ decisions will benefit their children, not harm them” (citing Troxel v. Granville, 530 U.S. at 60)). Troxel concerned the visitation of grandparents with their deceased son's children. Troxel v. Granville, 530 U.S. at 60-61. Furthermore, the Santi court, like Troxel’s plurality, declined to address the necessity of a threshold finding of harm. Santi v. Santi, 633 N.W.2d at 321.

10. See discussion infra Parts II-III.
11. See infra Part III.
challenges both when granting visitation and when crafting the order. The Article begins with a discussion of these challenges in Part II. Part III demonstrates that these challenges are best tolerated when prohibiting visitation results in greater harm to the child, and when the court tempers its visitation order with elements that will likely both satisfy a parent and make the parent less inclined to violate the order. In most cases, grandparents who can show that the bond with their grandchild approximates a child-parent bond will meet this standard.12

II. THE CHALLENGES OF COURT-ORDERED VISITATION

Many courts, especially trial courts, have little or no concern for the challenges inherent in court-ordered visitation when deciding the appropriateness of granting visitation or in fashioning the order.13 Even when applying the best interest of the child standard, courts seldom include these challenges in the analysis, except to the extent they recognize hostility exists in most grandparent visitation cases.14

These challenges begin with the litigation process itself. The pretrial process stands as the first challenge. The grandparents begin litigation by filing a petition for court-ordered visitation.15 In most instances, the parent, unlike the grandparent who has already hired an attorney and has had some counseling, must seek and hire an attorney when confronted with the petition.16 As in other civil cases, parties who cannot reach a settlement must prepare for trial, which


13. See, e.g., King v. King, 828 S.W.2d 630 (Ky. 1992) (upholding visitation when conflict existed between parents and grandparent); Hawk v. Hawk, 855 S.W.2d 573 (Tenn. 1993) (denying visitation when an unusual degree of conflict existed between parents and grandparents).

14. See, e.g., Lo Presti v. Lo Presti, 355 N.E.2d 372, 374 (N.Y. 1976) (“It 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.”). Even in the first recorded grandparent visitation case, the court recognized pervasive animosity between the parent and the grandparent. Succession of Reiss, 15 So. 151, 151-52 (La. 1894). The court did not order visitation on the rationale that grandparent visitation was a moral duty, not a legal one. Id. at 152.

15. Averett, supra note 2, at 366. However, South Dakota allows grandparent visitation with or without a petition. Id.

16. See, e.g., Marcia B. Gevers, Practice Tips for Attorneys Representing Grandparents, in GRANDPARENT VISITATION DISPUTES: A LEGAL RESOURCE MANUAL 41, 44 (Ellen C. Segal & Naomi Karp eds. 1989) (noting grandparents may have had some counseling from their attorney prior to serving the petition when they were unsuccessfully negotiating a grandparent visitation settlement).
includes preparing both lay and expert witnesses for direct and cross examination. In visitation cases, expert witnesses, such as psychologists, psychiatrists, and social workers, may be instrumental in helping the court reach its decision.17

Pretrial procedures also raise the issue of whether the child’s interest in grandparent visitation is properly protected by the parents and grandparents.18 Many courts appoint a guardian ad litem to represent the grandchild’s interests.19 Some appoint an attorney for the child.20 A few will appoint both.21 Whether a guardian ad litem or an attorney is appointed, there remains the issue of the value of the child’s own voice and how that voice should be heard by the court.22 Typically, it is within the discretion of the trial judge to allow a child’s wishes to be expressed, even if not mandated by statute.23

As in custody cases, the weight given to the child’s input in grandparent visitation cases depends upon the court’s interpretation of the child’s maturity.24 Nevertheless, the older the child, the greater the weight a court is likely to give the child’s wishes.25 A court may allow children to express their wishes by testifying in open court or in the judge’s chambers.26 The judge may also interview the child in camera or have a child specialist interview the child in or out of the judge’s presence.27

In addition to the burdensome pretrial process, mediation may also be required prior to trial. Generally, if mediation cases reach a settlement agreement

19. Id.
20. Id.
21. Id.
24. See, e.g., id. at 568 n.5 (“A child’s competency is generally determined by an analysis of the child’s intelligence, capacity to observe, remember, and relate the facts testified to, ability to know the difference between the truth and a lie, and understanding the importance to tell the truth under oath.”).
25. See, e.g., In re Griffiths, 353 N.E.2d 884 (Ohio Ct. App. 1975) (considering the child’s wishes when terminating grandparent visitation).
26. Fernandez, supra note 18, at 57.
27. In re Whitaker, 522 N.E.2d at 569 (holding an in camera interview may be an appropriate method to determine the child’s best interest for visitation, even if one party objects to the interview).
"costs may or may not be less" than proceeding immediately to trial.\textsuperscript{28} However, there is no doubt that the mediation process is trying on all parties, even the mediator. For example, one commentator described the mediation process for grandparent visitation as involving "gathering data, sharing and verifying the data with both parties, defining a problem statement from the data, developing options to solve the problem, and finally, negotiating over the precise option that best suits both parties’ needs."\textsuperscript{29} If mediation and settlement negotiations fail, the trial process will follow.

After the judge renders the decision on the grandparent’s petition, either party may appeal through the state appellate court system, ultimately to the United States Supreme Court.\textsuperscript{30} This avenue produces tremendous expense of both time and money for the parents.\textsuperscript{31} Grandparents face similar costs but have the opportunity to weigh the financial costs before proceeding.\textsuperscript{32}

The mediation and litigation processes are also stressful for all involved, not only because of time and money costs, but also because of psychological and emotional costs. The latter costs are just as important as the former, and in some instances, they may be more critical for parents and their children. The typical stress of litigation is exacerbated in a large number of grandparent visitation cases by hostility and animosity.\textsuperscript{33} Courts and commentators have acknowledged the stress, strife, and animosity involved in grandparent visitation proceedings.\textsuperscript{34}

\begin{itemize}
\item \textsuperscript{28} Richard Birke, \textit{Mandating Mediation of Money: The Implications of Enlarging the Scope of Domestic Relations Mediation from Custody to Full Service}, 35 WILLAMETTE L. REV. 485, 492 (1999).
\item \textsuperscript{29} John M. Haynes, \textit{The Use of Mediation in Grandparent Visitation Disputes}, in GRANDPARENT VISITATION DISPUTES, supra note 16, at 79, 81.
\item \textsuperscript{30} See, e.g., Troxel v. Granville, 530 U.S. 57, 61 (2000).
\item \textsuperscript{31} See, e.g., id. The Court heard Troxel seven years after the original petition was filed. \textit{Id.} Joan Catherine Bohl, \textit{Grandparent Visitation Law Grows Up: The Trend Toward Awarding Visitation Only When the Child Would Otherwise Suffer Harm}, 48 DRAKE L. REV. 279, 280 & n.6 (2000) (noting the parents in \textit{Steward v. Steward}, 890 P.2d 777 (Nev. 1995), spent six years in litigation and that the average cost of defending a grandparent visitation suit can range from $70,000 to $100,000).
\item \textsuperscript{32} See Gevers, \textit{supra} note 16, at 43.
\item \textsuperscript{34} McMán v. Dist. Court, 559 N.W.2d 12 (Iowa 1997) (noting that situations in which grandparents use legal proceedings to alter visitation rights can result in animosity between the parties); Rideout v. Rieudeau, 761 A.2d at 303 n.18 ("[T]he resolution of custody disputes through the adversarial process is . . . damaging to the psychological well-being of children and parents." (quoting Judicial Branch Performance Council, Report on the Implementation of the Recommendations of the Maine Commission on Gender, Justice, and the Courts 9 (2000)); Stephen G. Gilles, \textit{Parental (and Grandparental) Rights After Troxel v. Granville}, 9 SUP. CT.
As one court observed, the parties would have settled and would not be in court unless some animosity existed between them.\textsuperscript{35} This observation is not surprising because the disputing parties are family members, and the subject of the dispute is child visitation.\textsuperscript{36}

Upon granting grandparent visitation, the trial court faces the challenge of fashioning the order for visitation. What should be the frequency, duration, and nature of the visits? Many grandparent visitation statutes are cast in terms of "reasonable visitation," giving the trial court the discretion to determine what is reasonable.\textsuperscript{37} The frequency and length of grandparent visitation often follows the pattern of parental visitation.\textsuperscript{38} There is little explanation for why courts order the length and frequency of visitation in a particular case. It may be that courts accustomed to granting visitation orders for parents neglect to appreciate the significance that this is visitation for grandparents and not parents. One to two weekends a month is not uncommon, with visitations during holidays and summers.\textsuperscript{39} One commentator observed, "Visititation every two weeks is probably more than most grandparents have with their children absent a dispute."\textsuperscript{40} Courts may order visitation for several hours per week or several hours twice monthly.\textsuperscript{41} Courts have even ordered overnight visitation for very young children.\textsuperscript{42}

\textit{Econ. Rev.} 69 (2001) (noting "grandparent visitation litigation introduces a major new source of stress that may have lasting effects on the stability, finances, and well-being of single-parent families").

\textsuperscript{36} See id.
\textsuperscript{38} See, e.g., Olson v. Olson, 534 N.W.2d 547, 549 (Minn. 1995) (commenting that, historically, grandparent visitation rights in divorce cases were derived from the visitation rights of the noncustodial parent).
\textsuperscript{39} See, e.g., Troxel v. Granville, 530 U.S. 57, 61 (2000) (ordering "visitation one weekend per month, one week during the summer, and four hours on both the petitioning grandparents' birthdays"); Sanders v. Sanders, 452 N.E.2d 1057, 1058 (Ind. Ct. App. 1983) (ordering monthly grandparent visitation).
\textsuperscript{40} Fernandez, supra note 18, at 66.
\textsuperscript{41} See, e.g., Olson v. Olson, 534 N.W.2d at 548 n.2 (allowing visitation "during the summer and on alternating Wednesdays during the school year, from one-half hour after school to 8:00 p.m."); Graham v. Wofard, 12 P.3d 487, 487 (Okla. Civ. App. 2000) (allowing visitation with a young child from "one o'clock to five o'clock the first and third Sunday of each month").
\textsuperscript{42} See, e.g., Skeens v. Paterno, 480 A.2d 820, 823 (Md. Ct. Spec. App. 1984). Even in parental visitation cases regarding young children, overnight visitation may be an issue. See Richard A. Warshak, \textit{Blanket Restrictions: Overnight Contact Between Parents and Young Children\textsubscript{106}}\textsuperscript{42}
Critical challenges may exist when there is more than one visitation order for the same child. This circumstance usually occurs in cases of divorce, separation, or paternity in which there are visitation orders for both the noncustodial parent and the grandparents. A recent survey of grandparent visitation statutes found that twenty states restrict grandparent visitation petitioners to those cases in which a parent has been deprived of custody or has died. The remaining thirty states allow grandparent visitation even if the parent and child have not been separated by death or deprivation of custody. Thus, in all fifty states there is the possibility of more than one visitation order because a noncustodial parent may be involved.

One of the foremost challenges of grandparent visitation facing parents is accepting the realization that the trial court determines the length, duration, and how much control the parent will have in determining what happens during the visit. Thus, it is within the court’s discretion to determine how much input a parent will have as to grandparent visitation. In most cases involving young children, courts make the final decision to order supervised or unsupervised visitation after hearing from the parents and grandparents. If the child is


43. See Loeb, supra note 17, at 1-2 (discussing complications of grandparent visitation in cases of divorce).

44. Averett, supra note 2, at 357.

45. Id. at 361.

46. See id. at 357, 361.

47. Goff v. Goff, 844 P.2d 1087, 1092 (Wyo. 1993) (“It is true that the order of the district court impairs the custodial parents’ ability to dictate the terms of their child’s visitation with the grandparents, but the custodial parents have failed to show how this translates into a substantial impairment of their parental rights.”).

48. See Sanders v. Sanders, 452 N.E.2d 1057, 1059 (Ind. Ct. App. 1983) (holding the amount of grandparent visitation is within the discretion of the trial court); Goff v. Goff, 844 P.2d at 1091-93 (finding no abuse of discretion in a grandparent visitation schedule in which the district court outlined specific dates for visitation).

49. See Karen Czapanskiy, Grandparents, Parents and Grandchildren: Actualizing Interdependency in Law, 26 CONN. L. REV. 1315, 1331-46 (1994) (discussing cases in which court-ordered grandparent visitation was based on input from parents and grandparents). The terms “supervised visitation” and “unsupervised visitation” used in this Article only refer to the parent’s ability to supervise what should happen during the visitation and are not as restrictive as when referring to visitation with a noncustodial parent. The concept of visitation centers that help to meet the needs of children and parents involved in parental visitation issues has developed in many states and other countries. Robert B. Straus et al., Standards and Guidelines for Supervised Visitation Network Practice: Introductory Discussion, 36 FAM. & CONCILIATION CTS. REV. 96, 96 (1998). This concept may be helpful in some grandparent visitation cases; however, these centers are typically understaffed and in need of financial assistance. See generally Debra A. Clement, A Compelling Need for Mandated Use of Supervised Visitation Programs, 36 FAM. & CONCILIATION CTS. REV. 294, 295 (1998) (proposing that state legislatures enact laws “mandating participation in
represented by a guardian ad litem or an attorney, the child’s input will be considered through the attorney.\textsuperscript{50} Courts may permit older children to speak for themselves and give input before making the final order.\textsuperscript{51}

Even if the frequency and the nature of the visitation are clear, there are typically scheduling issues such as where the visitation will take place. The visitation generally takes place outside of the child’s home, which causes transportation issues of picking up and returning the child, as well as contact between the feuding parents and grandparents.\textsuperscript{52} If the child misses the visitation, there are rescheduling issues.\textsuperscript{53} Such issues may seem trivial to outsiders, but to the parties involved in court-ordered visitation, they may be the proverbial straws that break the camel’s back. These scheduling problems may be fueled by hostility between the parties, especially in the beginning of court-ordered visitation.\textsuperscript{54}

A visitation order is not a final order and may be modified as long as the child is an unemancipated minor.\textsuperscript{55} Grandparent visitation statutes provide for such modification.\textsuperscript{56} In most cases, to modify the grandparent visitation order means a return to the judicial process.\textsuperscript{57} Grandparents or parents may petition the court for modification of the order.\textsuperscript{58} Grandparents usually petition to increase visitation, while parents usually petition to decrease or terminate visitation. Typically, the standard for modification is a substantial or material change of

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\textsuperscript{50} See Fernandez, supra note 18, at 59-61.

\textsuperscript{51} See id. at 59-60 (discussing how factors such as the age and maturity of the child determine which view should be advocated—the attorney’s view of the best interest of the child or the child’s view of their own wishes).

\textsuperscript{52} See, e.g., Rideout v. Rendeau, 761 A.2d 291, 307 (Me. 2000) (stating that a Maine statute would require the parents and grandparents not to meet when exchanging children).


\textsuperscript{54} See Graville v. Dodge, 5 P.3d 925, 930 n.3 (Ariz. Ct. App. 2000) (“[The grandparents’] attempts to have and maintain a relationship with their grandchildren have been successfully thwarted by [the father]. He has been, at best, uncooperative in arranging for visitation. His attitude indicates he has been unreasonably vindictive and spiteful in effectively denying visitation.”).


\textsuperscript{56} Id. (citing OKLA. STAT. tit. 10, § 5(A)(1) (Supp. 1996)).

\textsuperscript{57} Id.

\textsuperscript{58} Id.
circumstances after the entry of the order. However, some courts apply the best interest of the child standard. If the parties cannot reach a settlement, all the challenges of litigation or mediation would emerge as they did in the petition for the initial order.

Furthermore, if a parent’s relocation interferes with the grandparent visitation order, the parent will usually need to petition the court for permission to relocate. Relocation cases have arisen frequently in the context of parental custody. In fact, a large body of law has developed in these parental custody relocation cases. Because this developing law provides no standard controlling parental relocation, complications arise when the interests of the child and the parents conflict and when the parents’ right to travel triggers constitutional protection.

Added to this unsettled area of the law are relocation cases involving grandparent visitation. These cases involve similar issues, but add the grandparents’ interests. A review of the few cases that have reached the appellate courts generally shows that the courts have allowed the parent to relocate and adjust the visitation schedule. For example, in Love v. DeWall, the court applied the best interest of the child standard when the custodial parent wanted to move from North Dakota to Arizona, allowing the parent to move but awarding visitation for one month in the summer to the grandparents. In Fisher v. Fisher, a Florida appellate court upheld a visitation order granting weekly visitation to the paternal grandparents, but overruled a provision denying the children’s mother from moving to another county when the basis for the denial was only to facilitate grandparent visitation. In Dixon v. Melton, the appellate court upheld the lower court’s ruling denying relocation because the ruling was not solely entered to facilitate grandparent visitation, but “to preserve the integrity of the court’s process pending resolution of the adoption issues . . . in the companion case.”

59. Id.
61. See supra notes 15-36 and accompanying text.
64. Rotman et al., supra note 63, at 348.
65. Id. at 349.
67. Id. at 108.
69. Id. at 143.
71. Id. at 1381.
the grandparent of the proposed move and provide the new address and telephone number.\textsuperscript{72} California, however, provides that a grandparent visitation order is a factor for the court to consider in a petition for relocation.\textsuperscript{73}

Violations of grandparent visitation orders are enforced by courts.\textsuperscript{74} Enforcement is through the court’s contempt power, initiated by a petition for an order to show cause by the grandparent.\textsuperscript{75} If the parent is found to be in contempt of court,\textsuperscript{76} as in any other civil contempt hearing, there are a number of remedies a court may impose short of incarceration. The court may, in its discretion, order such remedies as counseling, mediation, makeup visits, and payment of attorney fees.\textsuperscript{77} Incarceration is the most severe penalty for a parent found in contempt for noncompliance with a grandparent visitation order.\textsuperscript{78}

Finally, enforcement issues may extend extraterritorially in grandparent visitation cases. If a parent relocates to another state, the grandparents would need the new state to enforce the rendering state’s existing order.\textsuperscript{79} In most cases, the new state would have jurisdiction to enforce the existing order if the requirements of the state’s version of the Uniform Child Custody Jurisdiction Act (UCCJA)\textsuperscript{80} and the federal Parental Kidnapping Prevention Act (PKPA)\textsuperscript{81} are met.\textsuperscript{82} The purpose of these statutes is to enforce the original order and not for

\begin{itemize}
\item \textsuperscript{72} See, e.g., N.M. STAT. ANN. § 40-9-4 (Michie 2000).
\item \textsuperscript{73} CAL. FAM. CODE § 3103(f) (West 2000).
\item \textsuperscript{74} See Crowl v. Berryhill, 678 N.E.2d 828, 830 (Ind. Ct. App. 1997).
\item \textsuperscript{75} See, e.g., id. at 829-30.
\item \textsuperscript{76} Id. The purpose of civil contempt is “to vindicate the court’s dignity and to enforce litigants’ rights pursuant to court orders.” Id. at 830. The reason for finding a party in contempt of court is that the party willfully disobeyed a court order. Id.
\item \textsuperscript{77} See, e.g., Miers v. Miers, 53 S.W.3d 592, 597 n.6 (Mo. Ct. App. 2001) (ordering counseling or makeup visitations as a punishment for contempt); Otte v. Otte, No. 01-0368, 2001 WL 1336004 (Wis. Ct. App. Oct. 31, 2001) (ordering mediation in a contempt hearing); Crowl v. Berryhill, 678 N.E.2d at 831 (awarding attorney’s fees as a result of a finding of contempt).
\item \textsuperscript{78} See Artibee v. Chebogian, 243 N.W.2d 248, 249 (Mich. 1976). Noncompliance with a paternity judgment, like a grandparent visitation order, entails a maximum penalty of incarceration. See id.
\item \textsuperscript{79} See Kalusin v. Schwadron, 695 So. 2d 817, 818 (Fla. Dist. Ct. App. 1997) (stating that the Full Faith and Credit Clause, U.S. CONST. amend. IV, § 1, requires a state to give “full faith and credit” to another state’s judgment).
\item \textsuperscript{80} UNIF. CHILD CUSTODY JURISDICTION ACT § 3, 9 U.L.A. 307 (1999).
\item \textsuperscript{82} See id.
\end{itemize}

The appropriate authorities of every state shall enforce according to its terms, and shall not modify . . . any child custody determination made consistently with the provisions of this section by a court of another state. . . . A child custody determination made by a court of the state is consistent with the provisions of this section only if a court has jurisdiction under the law of such state, and [one of the five listed conditions—child’s best interests, emergencies, time in the jurisdiction, presence, and necessity—is] met.
the new state to modify the order, provided the rendering state has not lost jurisdiction over its order. Therefore, parents will not be able to simply move to another state to avoid the grandparent visitation order. Furthermore, under the Full Faith and Credit Clause, a state may have to enforce another state’s grandparent visitation order even if the order was based on grounds not available in the enforcing state.83

As demonstrated, there are many inherent challenges for parents and their children when the court becomes involved in disputes between parents and grandparents over grandparent visitation. Part III argues that these challenges must be considered in determining the appropriateness of grandparent visitation and that their consideration supports using the harm standard for state intervention to determine the appropriateness of such visitation.

III. THE CHALLENGES INHERENT IN COURT-ORDERED GRANDPARENT VISITATION SUPPORT A HIGHER STANDARD WHEN DETERMINING THE APPROPRIATENESS OF THE VISITATION

There are two prevailing issues in court-ordered grandparent visitation. First, when is it appropriate for the state to intervene in the relationship between a child and the child’s parent? Second, who should speak for the minor child?

The common law doctrine of family autonomy, usually used interchangeably with the narrower term, parental autonomy, has a long history and tradition in American jurisprudence in defining the relationship between parents and their children, between the parents and the state, and between the parents and third parties.84 This doctrine allows fit parents to rear their children without interference from the state except for specific reasons.85 Parents have the right to care for, have companionship with, supervise, and control their

Id.

83. See, e.g., Kalusin v. Schwadron, 695 So. 2d at 818 (enforcing a third-party visitation order from another state where grounds providing for visitation in the rendering state did not exist in enforcing state).


85. See Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (stating that “the custody, care and nurture of the child reside first in the parents,” but recognizing that parental rights are not beyond limitation; for example, the state may require school attendance and may regulate or prohibit the child’s labor).
children.86 Recently, in *Troxel v. Granville*,87 the United States Supreme Court reaffirmed its longstanding holding that family autonomy is a fundamental liberty interest within the meaning of the Due Process Clause of the Fourteenth Amendment.88 The United States Constitution provides parents the fundamental right to rear their children.89 The Supreme Court also recognizes family autonomy as part of the fundamental right to privacy.90 Thus, both the common law and the United States Constitution recognize that there is a private realm and a public realm in the life of its citizens. Parental childrearing decisions are within that private realm. Thus, parents speak for their minor children in most childrearing decisions.

Because children need to be cared for, nurtured, and protected, the idea that fit parents should have the responsibility to care for their children seems to be reasonable and intuitive.91 The *Troxel* Court observed that the changes in the makeup of the traditional family have resulted in persons outside the nuclear family helping with these childrearing responsibilities and thereby becoming involved in the parent-child relationship.92 Nevertheless, the plurality continued to recognize that the decisions of fit parents must be given deference, even while the legislature may try to protect these new relationships with the child.93 Even so, grandparent visitation statutes are not cast in terms of the rights of the grandchild, but the rights of the grandparent.94 However, the law recognizes that as children mature they may be mature enough to speak for themselves.95 Several of the grandparent visitation statutes provide that the preference of the child is a factor to be considered in determining visitation issues.96


88. *Id.* at 65-67.

89. *Id.*


91. See, e.g., Parham v. J.R., 442 U.S. 584, 602 (1979) ("The law’s concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life’s difficult decisions.").


93. *Id.* at 63-64.

94. See Nolan, *supra* note 4, at 60-61 (stating that most courts analyze grandparent visitation under the assumption that “visitation is in the best interest of the child”).

95. See, e.g., Bellotti v. Baird, 443 U.S. 622, 643 (1979) (recognizing right of pregnant minor to judicial hearing in order to determine competency to obtain abortion); Gary B. Melton, *Children’s Competence to Consent: A Problem in Law and Social Science*, in *Children’s Competence to Consent* 1, 14-16 (Gary B. Melton et al. eds. 1983).

Although parental autonomy in raising a child free from state interference is protected as a fundamental right, the protections are not absolute. The state, under its parens patriae power, may intervene if the child is harmed. This protects the parent-child relationship unless the parents do not meet the minimum standards for caring for the child. The harm standard assumes that fit parents are proper decisionmakers for their children, and prevents the state from making what it considers to be a better decision. Similarly, the constitutional standard for determining whether the state is interfering with family autonomy requires the state to show a compelling state interest and to narrowly tailor the regulation to protect only the legitimate interest at stake. The harm standard would meet this constitutional standard.

Thus, the state possesses authority to intervene and interfere with a fit parent's decision not to allow grandparent visitation under its parens patriae power only when the child may be harmed by the parent's decision. The inherent challenges in court-ordered grandparent visitation help focus the argument that the harm standard is the appropriate standard. Because these challenges place tremendous burdens on the parent-child relationship, visitation should not be ordered unless it is essential. In some cases, these challenges may necessitate that no visitation be allowed even when harm is likely. In any event,
visitations will be tolerated only if the parent will likely be satisfied and comply with such a visitation order.107

A. The Effects of the Challenges

As illustrated, these challenges have numerous reciprocal effects on the parent, child, and the parent-child relationship.108 The troubling issue raised by grandparent visitation statutes is the implication that a fit parent is not free to decide with whom the child may associate or to determine the nature of that association without the possibility of the state intervening and second-guessing the parent’s decision. The state interferes with the essentials of parenting through its court order. Moreover, there are consequences if the parent disobeys the court order.109

Undeniably, a court order disrupts the normal routine of parents and their children.110 This disruption may be minimal or quite burdensome.111 The order, for example, could be as minimal as ordering supervised grandparent visitation for two hours every three months at a neutral place in the child’s hometown with the parents present.112 It could be as burdensome as mandating grandparent visitation weekly, every other weekend, or one weekend per month.113

107. See Bean, supra note 103, at 447.
108. See supra Part III.
109. See infra notes 146-48 and accompanying text.
110. Nolan, supra note 4, at 64-65.
111. Id.
113. See, e.g., Crowl v. Berryhill, 678 N.E.2d 828, 830 (Ind. Ct. App. 1997) (ordering visitation on the first and third Saturdays of each month from 10 a.m. until 4 p.m.); Raney v. Blecha, 605 N.W.2d 449, 451 (Neb. 2000) (reinstating an order allowing visitation on alternate Sundays from 9 a.m. until 7 p.m.); Neal v. Lee, 14 P.3d 547, 549 (Okla. 2000) (ordering visitation on the second Saturday of each month and four hours on the fourth Tuesday of each month); Graham v. Woffard, 12 P.3d 487, 487 (Okla. Civ. App. 2000) (granting visitation from 1 p.m. to 5 p.m. on the first and third Sunday of each month); Goff v. Goff, 844 P.2d 1087, 1089 (Wyo. 1993) (providing visitation for ten consecutive days during the summer, one weekend per month, and during the Christmas holiday from December 26 through December 30). But see Hampton v. Hampton, 17 S.W.3d 599, 600-06 (Mo. Ct. App. 2000) (overruling trial court’s order of visitation every other weekend from 6 p.m. Friday to 6 p.m. Sunday because the visitation exceeded the minimal intrusion of the family relationship standard); Ring v. Jensen, 20 P.3d 205, 207-10 (Or. Ct. App. 2000) (reversing trial court’s order for visitation every other weekend, during spring break every other year, during one-half of each Christmas school vacation, four weeks each summer, on the day of child’s mother’s death each year, on the grandmother’s birthday each year, and on Mother’s Day and Thanksgiving every other year because grandmother failed to prove that she was denied reasonable opportunities to see her grandchild, thus making the court unauthorized to intervene in the family situation); Hawk v. Hawk, 855 S.W.2d 573, 577-83 (Tenn. 1993) (reversing the trial court’s order of visitation for two full weekends in odd months, one weekend in even months, two weeks in the summer, and Thanksgiving and Christmas afternoons because the Tennessee statute providing for grandparent visitation unconstitutionally interfered with the parents’ fundamental right to control the rearing of their children).
The more intrusive the order as to the frequency and length of the visit, the more disruptive are its effects on the parent, child, and their relationship.\textsuperscript{114} Often court-ordered visitation is extensive when the grandparent is the parent of a deceased child.\textsuperscript{115} However, in one case, the therapist for the child opined that the parent-child relationship should take the “lead role” over the grandparent-grandchild relationship. The fact the [child’s] mother was dead did not mean [the child] needed greater contact with her maternal grandparents; rather, she needed to have a normal relationship with them during which they could help to keep the memory of her mother alive.\textsuperscript{116}

The nature of weekend visits is also disruptive to the parent, child, and the development of the parent-child relationship.\textsuperscript{117} Working parents have less quality time to spend with the child if court-ordered visitation with grandparents is on the weekend. Parents may also be working and going to school, again leaving the weekend as an optimal time for parents and the child.\textsuperscript{118} The child’s activities must be scheduled around these visits unless the grandparent and parent can agree to alternate plans.\textsuperscript{119} When there is more than one visitation order, the custodial parent’s time is often sacrificed.\textsuperscript{120} Neither do noncustodial parents want the order to interfere with their time with their child. If the grandparent is the parent of the noncustodial parent, this may be an attempt for the noncustodial parent to gain more time with the child.\textsuperscript{121} When there are multiple parties with visitation rights, the time factor is more apparent, especially in instances when the parents or the various grandparents are in different households.\textsuperscript{122} As one court observed,

\textsuperscript{114} Nolan, supra note 4, at 64-68.
\textsuperscript{115} Kyle O. v. Donald R., 102 Cal. Rptr.2d 476 (2000).
\textsuperscript{116} Id. at 482-83.
\textsuperscript{117} See Marsha B. Freeman, Reconnecting the Family: A Need for Sensible Visitation Schedules for Children of Divorce, 22 Whittier L. Rev. 779, 805-08 (2001) (suggesting children benefit from frequent weekly visitation with noncustodial parent); Mark D. Matthew, Curing the “Every-Other-Week-End Syndrome”: Why Visitation Should Be Considered Separate and Apart from Custody, 5 WM. & MARY J. WOMEN & L. 411, 444 (1999) (“The current visitation system does not work as well as it should. It generally places little or no emphasis on protecting the relationship of children of divorce and their non-custodial parents.”).
\textsuperscript{118} See Lilley v. Lilley, 43 S.W.3d 703, 708 (Tex. App. 2001).
\textsuperscript{119} See Swartz v. Swartz, 720 N.E.2d 1219, 1222 (Ind. Ct. App. 1999) (noting the trial court order for visitation every other weekend “prohibited Mother from involving [child] in any activities that would take place on Grandparents’ weekends without first consulting and receiving permission from them”).
\textsuperscript{120} See id. In Swartz v. Swartz, 720 N.E.2d 1219 (Ind. Ct. App. 1999), the child lived seventy-three days a year outside her mother’s home. Id. at 1222.
\textsuperscript{121} Fairbanks v. McCarter, 622 A.2d 121, 127 (Md. 1993).
\textsuperscript{122} See Swartz v. Swartz, 720 N.E.2d at 1221 (assigning separate visitation rights for each paternal grandparent as well as the paternal great-grandparents and requiring the child to spend alternate weekends in three different households).
There are a finite number of hours in a day to be distributed among the various players, and the trial court did not err in reducing the number of hours of visitation to which the [grandparents] are entitled by court order in order to facilitate [the father] and [the mother in] establishing and/or maintaining a relationship with their daughter.  

Although, this court recognized the parents’ interests, it failed to note the child’s interests in a visitation order that would impede her ability to maintain a relationship with her parents and limit the number of hours in the day for her own interests. Courts, however, taking the child’s perspective, may conclude that moving a child between too many homes could cause confusion and interfere with the child’s normal life. 

The court order usually disregards the wishes of the parent dictating the terms of the visit. One grandparent complained the child’s father “wanted to maintain all control over his daughter, including what she ate and wore. ‘Why all of a sudden do we have to have specific orders when we’re grandparents?’” A trial judge, while ordering an extensive visitation schedule, “added that the grandparents ‘don’t have to answer to anybody when they have the children.’” These orders allow the wishes of parents to be superseded. They interfere with parental disciplining. Moreover, overnight visitation of young children with grandparents may be problematic, causing stress in both the child and the parent. Even in parental overnight visitation cases affecting young children, social scientists differ as to whether overnight visitation should be restricted.

124. *See id.* at 348-53.
126. *See id.* at 359.
128. Hawk v. Hawk, 855 S.W.2d 573, 577 (Tenn. 1993).
129. *See Kyle O. v. Donald R.*, 102 Cal. Rptr. 2d at 483; *see also* Santi v. Santi, 633 N.W.2d 312, 314 (Iowa 2001) (discussing parents’ complaint that grandparents bought child’s first shoes, took her to see Santa Claus without their permission, and ignored their decision regarding how much “fast food” the child was permitted to eat).
130. *See, e.g.*, Shadders v. Brock, 420 N.Y.S.2d 697, 700 (Fam. Ct. 1979) (holding “a child’s right of visitation with a grandparent once established and consistent as a ‘special visitation’ may not be denied by a parent as a means of punishment or discipline to the child”); Goff v. Goff, 844 P.2d 1087, 1089 (Wyo. 1993) (discussing parents’ complaint that grandparents did not follow their disciplinary guidelines when they allowed their grandchild to watch a video the parents considered inappropriate and purchased a jean jacket for their grandchild against the parents’ wishes).
All phases of court-ordered grandparent visitation engender hostility and animosity and provide the fuel to continue these feelings and, in some cases, escalate them. Parents, grandparents, and grandchildren are all affected by the continued conflict between the adults. Children are aware of these feelings even though courts can command that the adults not make negative comments in front of the child. Sometimes children are directly involved in the conflict because they do not want to visit. Added to these feelings is the stress that grandparent visitation generates. The litigation process is stressful. Children may feel further stress and conflict in their loyalty to parents and grandparents. The behavioral sciences have well documented the fact that family stress and strife associated with divorce are damaging to children. Many courts accept as a given fact that hostility and animosity exist in most grandparent visitation litigation, but order visitation nevertheless.

Court-ordered grandparent visitation could be used as a means for grandparents to continue to control the lives of their adult children, their spouses, former spouses, and partners of these adult children. Court-ordered grandparent visitation allows grandparents to challenge the decisions of fit parents. Often, when grandparents go to court to petition for visitation, the reason is not that they have been denied visitation, but they have rejected what the parent will allow. Consequently, not only can adult children become resentful, but social science research suggests that when parents can overrule decisions made by their adult children, the development of the identities of their adult children as parents is

134. Id.
135. See id. (finding that a four-year-old child was old enough to recognize the strife); Olson v. Olson, 534 N.W.2d 547, 548 n.2 (Minn. 1995) (ordering parents and grandparents to refrain from making negative statements about each other in front of the child).
136. See, e.g., In re Griffiths, 353 N.E.2d 884, 886 (Ohio Ct. App. 1975) (discussing the thirteen-year-old grandchild’s adamant refusal to see his grandparents).
137. See Rideout v. Rienodeu, 761 A.2d 291, 303 n.18 (Me. 2000).
138. See, e.g., Matthew, supra note 117, at 413-18 (discussing how children cope with the effects of stress caused by divorce); Nolan, supra note 4, at 67 n.90 (citing studies showing the damaging effects of divorce on children).
139. See, e.g., Lo Presti v. Lo Presti, 355 N.E.2d 372, 374 (N.Y. 1976) (stating that animosity is neither a proper test for denial of visitation nor a “proper yardstick by which to measure the best interests of the child”).
141. See Succession of Reiss, 15 So. 151, 151 (La. 1894) (suggesting that grandparent was not satisfied with terms of visitation); see also Troxel v. Granville, 530 U.S. at 71 (noting the grandparents petitioned the Court for longer visitation than allowed by the mother); Sanders v. Sanders, 452 N.E.2d 1057, 1058 (Ind. Ct. App. 1983) (stating that the mother did not object to visitation with the grandmother, but the grandmother petitioned the court for more visitation).
disrupted. Part of this identity development requires that parents relinquish control over their adult children’s lives. Also, grandparents do not have to deal directly with their children and can bypass them under court-ordered grandparent visitation. Such enabling power not to deal directly with their adult child may, in the long-run, also be detrimental to the relationship between grandparents and their adult children.

Moreover, if parents do not obey the order, they may be in contempt of court. These proceedings illustrate that the level of animosity and hostility continues. The ultimate penalty is that a parent may be incarcerated for disobeying an order. How is jailing a child’s custodial parent not harming the child? One mother, who, after being jailed for a night for noncompliance with court-ordered visitation, gave in to her mother and allowed visitation with the ten-year-old granddaughter, put it this way: “I called my daughter last night and she was so upset, and I realized my daughter needs me more at home.” How does jailing reduce the alienation, the animosity, and the anger between the parties?

There are, however, both private and public rationales for contempt proceedings. The private interests of the grandparents are to have their rights under the court order protected and enforced. Private interests would also extend to those of the grandchild because the statutes are based on the welfare of the child. The public, however, also has an interest. Visitation orders are not like money judgments. Noncompliance with a visitation order is also showing

143. Id.
144. See id. at 286.
145. See Czapanskiy, supra note 49, at 1360 (“If the grandparent were forced by the lack of judicial access to make his or her overtures directly to the custodial parent, the result might be a better relationship in the long run with both the parent and grandparent.”).
146. See supra notes 74-78 and accompanying text (summarizing enforcement issues); infra notes 149-52 and accompanying text (summarizing rationales for contempt proceedings).
148. Olson v. Olson, 534 N.W.2d 547, 548-49 n.2 (Minn. 1995). In Olson v. Olson, 534 N.W.2d 547 (Minn. 1995), the Supreme Court of Minnesota upheld the visitation order conditioned upon the grandmother’s “abstinence from the use of any mind or mood-altering chemicals, not prescribed by a physician, 48 hours prior to and during the visitation.” Id. at 548-49 n.2. In a later proceeding, the trial court denied visitation. See Bohl, supra note 31, at 325 n.443 (describing the procedural history of Olson v. Olson, 534 N.W.2d 547 (Minn. 1995)).
149. See Crowl v. Berryhill, 678 N.E.2d 828, 830 (Ind. Ct. App. 1997) (stating that contempt proceedings “are intended . . . to enforce litigants’ rights pursuant to court orders” (citation omitted)).
150. Sykora, supra note 147, at 759.
disrespect to the court. 151 "The integrity of the court system and its judgments demands that parties may not cease compliance with judgments at whatever times they may see fit." 152

From the beginning, the adversarial system is costly and disruptive to the child, the parent, and the child-parent relationship. 153 It interferes with childrearing autonomy because parents must defend their decisions. 154 The court becomes the final decisionmaker, often issuing burdensome visitation orders and micromanaging the decisions of parents. Family disputes are private disputes. Litigation is not the best way to resolve family disputes. 155

On the other hand, mediation is not a panacea as an alternative to court litigation though it encourages family members to work out visitation disputes without court litigation. 156 The state is still interfering with the decision of the parents because mediation requires participation in a proceeding that causes both parent and grandparents to reconsider the parent's decision and try to reach a mutual agreement. Although mediation is praised for its efficiency and party satisfaction, 157 commentators have pointed to several potential problems with mediation. 158 They have questioned whether there is a level playing field between the parties when there are cultural differences between the parties and the mediator, 159 and when there are distributional disparities between the parties of tangible resources of income, education, and occupation as well as of the

151. See Croll v. Berryhill, 678 N.E.2d at 830 (stating that contempt proceedings "are intended... 'to vindicate the courts' dignity" (citation omitted)).

152. Gleeson v. Dembrosky, 327 S.E.2d 60, 63 (N.C. Ct. App. 1985); see Croll v. Berryhill, 678 N.E.2d at 830 (finding contempt proceedings "are intended to vindicate the courts' dignity").

153. See Czapaniski, supra note 49, at 1360; Sykora, supra note 147, at 760.

154. See Deryn, supra note 142, at 284.

155. See Robert D. v. Carol F., 194 Cal. Rptr. 2d 801, 804 (Cal. App. 1984) (describing adversarial process as unsatisfactory context in which to resolve sensitive child custody issues); Sykora, supra note 147, at 763 (concluding that "the court system is not a substitute for therapists, psychologists, [and] mediators" who are trained to facilitate settlements and compromises and avoid emotional legal battles).


158. See, e.g., Jessica R. Dominguez, Comment, The Role of Latino Culture in Mediation of Family Disputes, 1 J. LEGAL ADVOC. & PRACT. 154, 161-68 (1999) (citing mediator's lack of understanding and appreciation of the culture and language of participants); Cynthia R. Mabry, African Americans "Are Not Carbon Copies" of White Americans - The Role of African American Culture in Mediation of Family Disputes, 13 OHIO ST. J. ON DISP. RESOL. 405, 419 (1998) (noting that cultural differences between mediators and disputants, mediators' stereotypical beliefs about disputants based on race, and mediators' inability to achieve trust and rapport with disputants of a different race, may affect the outcome of the mediation).

159. Dominguez, supra note 158, at 161-68; Mabry, supra note 158, at 419.
intangible resources of status, dominance, depression, and self-esteem. Mediation does not protect the parties by applying the substantive law, but the mediator encourages the couple to design an agreement to reflect their particular needs and interests. Fact finding is also not within the scope of the mediation process, but the adversarial process is designed to assist in determining the facts. For some fit parents, therefore, mediation may represent a second-rate form of justice.

The financial cost of grandparent visitation litigation is high. Parents realize quickly that attorney’s fees are not the only financial costs. The typical litigation costs borne by civil litigants include court costs, expert witness fees, pretrial discovery costs, and if there is an appeal, numerous appeal costs. If the court orders counseling, mediation, or persons to represent the interests of the child, these costs may or may not be shared by the parties. As to the payment of attorney’s fees, most jurisdictions follow the American Rule, requiring litigants to pay their own attorneys’ fees unless there is a statute, agreement, or rule to the contrary. Even if the jurisdiction provides for the payment of attorney’s fees for the prevailing party in grandparent visitation litigation, the parent still needs to have money up front to defend against the action because the awarding of attorney’s fees is post-hearing. On the other hand, the parent may not be the prevailing party and the grandparents may be awarded attorney’s fees. Parents may be forced to settle instead of litigating because of these money issues. Single parents are especially vulnerable to settling because of financial constraints. Many parents will not pursue appellate litigation because they cannot afford the expense and thereby lose the opportunity to prevail at the

161. Id. at 445, 447.
162. Rotman et al., supra note 63, at 343.
163. See Bohl, supra note 31, at 280 n.6 (noting “the average cost of defending against a grandparent visitation suit is $70,000”).
164. See In re Marriage of Holm, 919 P.2d 1164 (Or. 1996). Grandfather intervened in daughter’s and son-in-law’s divorce proceedings, petitioning for grandparent visitation. Id. at 1165. The Oregon divorce statute, OR. REV. STAT. § 107.105(5), provided for attorney’s fees under certain circumstances for the parties. Id. at 1165 nn.3-4. The court interpreted the statute to include intervenors, such as a grandparent requesting visitation, within the term “party.” Id. at 1167.
165. See Crowl v. Berryhill, 678 N.E.2d 828, 831 (Ind. Ct. App. 1997) (noting Indiana “follows the American rule which requires each party to litigation to pay his or her own attorney’s fees absent statutory authority, agreement, or rule to the contrary” (citation omitted)).
167. Id.
168. Id.
appellate level.170 Thus, the pragmatic challenge of economics is disruptive to the parent-child relationship.171

It is clear that parents’ resources used to pay for these financial costs deplete resources that otherwise would be available for the child. In Troxel, both Justice O’Connor and Justice Kennedy specifically noted the economic costs to parents.172 The economic costs influenced Justice O’Connor’s rationale for not remanding the case.173 Justice O’Connor, writing about these costs, stated that the mother’s litigation costs were “without a doubt already substantial” and she sought to avoid any “further burden [on the mother’s] parental rights.”174 Justice Kennedy, dissenting, raised the point that the high cost in attorney’s fees may be a reason that the best interest of the child standard might be insufficient to protect the parent-child relationship.175

B. Are These Effects Justified Because They Accomplish Important Public Policies?

The challenges of grandparent visitation and their effects are similar to those of custody and visitation cases between a child’s parents. It is well settled in the behavioral sciences that children benefit from contact with both parents.176 Even if the child may be harmed and has been moved to foster care, behavioral sciences still support the conclusion that a child will benefit from contact with the parents.177 Efforts are made to continue to have parent-child contact through supervised visitation, if possible.178 Notwithstanding the stress and other adverse psychological and emotional effects on the child, the benefits of contact with a parent outweigh the detriments. Grandparent visitation should yield the same benefits to the child to justify the challenges of grandparent visitation.


171. See Nolan, supra note 4, at 67.


173. Id. at 75.

174. Id.

175. Id. at 101 (Kennedy, J., dissenting).

176. See, e.g., R. Kevin Grigsby, Maintaining Attachment Relationships Among Children in Foster Care, 75 J. CONTEMP. HUM. SERVICES 269, 270 (1994) (“Affective bonding is not limited to mother and infant, but exists in Father-Child relationships . . . .”)


Protecting the best interest of the child is the basic policy reason stated for grandparent visitation legislation, though some believe these statutes were the result of an intense political movement by grandparents. Those supporting grandparent visitation statutes believe that there is a special bond between grandchild and grandparent that is mutually beneficial. There are no convincing studies, however, indicating that the benefit of court-ordered grandparent visitation outweighs the detriment. The data justifying grandparent visitation often has been in the form of courts’ sentimental generalizations about this special bond between parent and child. The few behavioral studies that support grandparent visitation involve cases in which the disruption to the family has been through the death of a parent or divorce and the


Grandparent visitation statutes are a legislative recognition that a child’s best interest is often served by developing and maintaining contact with his or her grandparents. Grandparents are members of the extended family whom society recognizes as playing an important role in the lives of their grandchildren, the importance of which has been given added meaning by the legislature’s policy judgment underlying the Act. The legislature designed the Act to promote intergenerational contact and strengthen the bonds of the extended family in an era that has witnessed the disintegration of the nuclear family in an effort to provide an alternative or supplementary source of family support for children.

Id. (citations omitted).

180. See Kean Decarlo, Parent and Child Relationship Generally: Provide Requirements and Judicial Standards for Original Actions for Visitation Rights or Intervention; Provide for Revocation or Amendment of Visitation Rights, 13 Ga. St. U. L. Rev. 148, 154 n.56 (1996) (discussing the sentiment that large and vocal lobbyist groups politically foreclosed any opportunity to restrict the Georgia Grandparent Visitation Act); Nolan, supra note 4, at 68-69 (commenting on the political movement for visitation statutes by grandparents).

181. See Minkon v. Ford, 332 A.2d 199, 205 (N.J. 1985) (stating that grandparents’ rights to visitation are based on more than ordinary devotion because “the continuous love and attention” of grandparents can be beneficial to the child); see also Arthur Kornhaber & Kenneth L. Woodward, Grandparents/Grandchildren the Vital Connection 55 (1981); Elaine D. Ingulli, Grandparent Visitation Rights: Social Policies and Legal Rights, 87 W. Va. L. Rev. 295, 295-98 (1985) (discussing court decisions finding that biology, kinship, and heredity justify a unique treatment for grandparent and grandchild relationships and noting psychologists’ appreciation for the special bond between grandparents and grandchildren).

182. See Andrew J. Cherlin & Frank F. Furstenberg, Jr., The New American Grandparent: A Place in the Family, a Life Apart (1986); Czapskiy, supra note 49, at 1360; Sykora, supra note 147, at 755-57.


Visits with a grandparent are often a precious part of a child’s experience and there are benefits which derive upon the grandchild from the relationship with his grandparents which he cannot derive from any other relationship. Neither the Legislature nor this court is blind to human truths which grandparents and grandchildren have always known.

Id. at 204-05; see also Bohl, supra note 31, at 315-31.
children had a close relationship with the grandparent that would be harmed if contact ended.\textsuperscript{184}

However, statutes that provide automatic standing to grandparents in death and divorce cases, including paternity cases, are problematic. They assume that in all of these single parent homes the grandchild is harmed unless grandparent contact is protected through a court order.\textsuperscript{185} These single parents should not have a standard different from the standard of two parent homes.\textsuperscript{186} In fact, single parents may be even more vulnerable to the inherent problems of grandparent visitation.\textsuperscript{187} Typically, there is a visitation order for the noncustodial parent. By adding a grandparent visitation order, the single parent and the children must deal with at least two court orders. If there are existing hostilities between the child’s parents in divorce and paternity cases, allowing grandparent visitation litigation, especially if the petitioner is a former in-law, adds to an already stressful environment for the children.\textsuperscript{188} The economic woes for single parents may even be greater than those of intact families.\textsuperscript{189}

The harm standard may justify the disruption of family autonomy in order to litigate the issue of grandparent visitation, but the court still must determine whether a court order is appropriate. “Once the harm has been identified, the court intervenes in the best interest of the child to determine whether court-ordered grandparent visitation is necessary to remedy the harm and would be beneficial for the child.”\textsuperscript{190} In other words, does the benefit of grandparent visitation outweigh the detriment in this particular case?

If visitation is appropriate, an order of visitation that satisfies parents is one that is likely to be obeyed and will lessen many of these pragmatic challenges, especially considering the penalties for noncompliance. How are children benefited if there are problems with noncompliance and more court hearings? Court orders that are less intrusive to the lives of parents and children and the parent-child relationship will enhance parental satisfaction. Intrusive court orders lie at the core of many problems of postvisitation litigation. Therefore, the

\textsuperscript{184} Ingulli, supra note 181, at 310-11.
\textsuperscript{185} Id. at 311.
\textsuperscript{186} Nolan, supra note 4, at 72 (raising equal protection issue if grandparent visitation is treated differently for intact families than for nonintact families); see Bohl, supra note 31, at 308-15 (discussing the redefining of the concept of the intact family to include any stable family unit with fit parents); Laura W. Morgan, What Is a Family? Implications of New Trends in Grandparent Visitation Law, 12 NO. 6 DIVORCE LITIG. 109 (2000) (discussing how the concept of an intact family has been redefined to include any stable family unit with fit parents).
\textsuperscript{187} See Troxel v. Granville, 530 U.S. 57, 101 (2000) (Kennedy, J., dissenting) (identifying how the intrusion of state intervention may be particularly damaging to the single parent).
\textsuperscript{188} See id. (Kennedy, J., dissenting).
\textsuperscript{189} See Nolan, supra note 4, at 67.
\textsuperscript{190} Id. at 60; see Bean, supra note 103, at 424.
state's intervention into the parent-child relationship should be an order that satisfies the parent and is least intrusive.\textsuperscript{191}

IV. CONCLUSION

The problems inherent in court-ordered grandparent visitation are challenging. Nevertheless, they help to focus the answer to the question of which constitutional standard should be used to judge these statutes when they interfere with a fit parent's decision not to allow visitation. The answer should be the harm standard. Although \textit{Troxel} did not clarify whether the constitutional standard was the harm standard or the best interest of the child standard, the plurality emphasized that the court failed to give deference to a fit parent's decision.\textsuperscript{192} The grandparents had not shown that the parent was unfit.\textsuperscript{193} Unfitness—the potential to make harmful decisions—is familiar language in traditional custody cases in which custody is awarded to the nonparent if the parent is unfit.\textsuperscript{194} The \textit{Troxel} plurality further observed that family autonomy did not permit a trial judge to intervene in childrearing decisions "simply because a state judge believes a 'better' decision could be made."\textsuperscript{195} Therefore, the many pragmatic challenges of court-ordered grandparent visitation must be considered even if harm is shown because these challenges may outweigh the benefit gained. The disruption to the parent-child relationship may be too great emotionally, psychologically, and financially.

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\textsuperscript{191} The least intrusive means could be through communication other than physical contact, such as by telephone or mail. \textit{See, e.g.,} N.M. \textsc{Stat. Ann.} § 40-9-2(I) (Michie 2000) ("When the district court decides that visitation is not in the best interest of the child, the court may issue an order requiring other reasonable contact between the grandparent and the child, including regular communication by telephone, mail, or any other reasonable means.").
\textsuperscript{192} \textit{Troxel v. Granville}, 530 U.S. at 69-70.
\textsuperscript{193} \textit{Id.} at 68.
\textsuperscript{194} \textit{See In re Eric O.}, 617 N.W.2d 824, 831 (Neb. Ct. App. 2000) (discussing the necessity of finding a parent unfit before granting custody to a nonparent).
\textsuperscript{195} \textit{Id.} at 73.
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