GRANDPARENT VISITATION LAW GROWS UP: THE TREND TOWARD AWARDING VISITATION ONLY WHEN THE CHILD WOULD OTHERWISE SUFFER HARM

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I. INTRODUCTION

In 1989, Allen and Gina Steward, parents of two year old Matthew, divorced.1 Under Nevada law, their divorce gave the paternal grandmother something she did not have while they were married, standing to seek court

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ordered visitation with their child.\textsuperscript{2} She sued, and despite their united objections, obtained visitation.\textsuperscript{3} On appeal to the Nevada Supreme Court the parents argued that their united opposition to visitation was no less significant after their divorce than it had been before.\textsuperscript{4} The Nevada Supreme Court agreed.\textsuperscript{5}

Although the Nevada statute that cost Michael and Gina Steward six years of their lives and thousands of dollars in legal fees is typical of grandparent visitation statutes nationally,\textsuperscript{6} the Nevada Supreme Court’s reaction is becoming increasingly typical as well. Grandparent visitation decisions increasingly reflect a recognition that visitation should not be awarded over the objection of a fit parent, whether that parent is divorced or widowed, married, remarried, or never married. Increasingly, courts find court ordered visitation justified only when it is necessary to avoid harm to the child.

This evolution of the law is occurring on several converging tracks. Sometimes it is clearly based on a constitutional analysis. In the 1993 case of \textit{Hawk v. Hawk},\textsuperscript{7} the Tennessee Supreme Court was the first court to hold that a grandparent visitation statute violated the constitutional rights of fit, married parents when it overrode the parents’ united decision and imposed visitation.\textsuperscript{8} Although \textit{Hawk} involved married parents, its condemnation of forced grandparent visitation was not limited to suits filed against intact families.\textsuperscript{9} As the Tennessee Supreme Court stated in a subsequent opinion, a finding that the child would suffer harm without court ordered visitation is the only legitimate basis for ordering it.\textsuperscript{10}

Grandparent visitation decisions have also moved toward this harm standard independently of any explicit constitutional argument as a result of increasingly realistic assessments of the best interests of the child under the circumstances and an increasing unwillingness to base awards of visitation on

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\item \textsuperscript{2} \textit{Id.} at 780. The Nevada statute provides, in pertinent part, that if “[o]ne parent of the minor child is deceased, divorced or separated from the other parent” the grandparent may be granted court ordered visitation “if the court determines that visitation is in the best interests of the child.” \textit{Nev. Rev. Stat.} § 125A.340 (1998).
\item \textsuperscript{3} Steward v. Steward, 890 P.2d at 780.
\item \textsuperscript{4} \textit{Id.}
\item \textsuperscript{5} \textit{Id.} at 782.
\item \textsuperscript{6} According to Sherry Olson-Kelm, the defendant parent in \textit{Olson v. Olson}, 534 N.W.2d 547 (Minn. 1995) and, subsequently, the founder of Parents for Better Family Solutions, the average cost of defending against a grandparent visitation suit is $70,000. E-mail letter from Sherry Olson-Kelm (May 7, 1999) (on file with author). When related costs such as payments to a court-ordered guardian ad litem are added in, the cost of the suit to the defendant parent can easily exceed $100,000. \textit{Id.}
\item \textsuperscript{7} \textit{Hawk v. Hawk}, 855 S.W.2d 573 (Tenn. 1993).
\item \textsuperscript{8} \textit{Id.} at 582.
\item \textsuperscript{9} \textit{See id.} at 582-83.
\item \textsuperscript{10} Simmons v. Simmons, 900 S.W.2d 682, 684-85 (Tenn. 1995).
\end{itemize}
sentimental generalizations about grandparents. For example, older decisions were often willing to presume that any grandparent visitation was beneficial and therefore were willing to ignore specific evidence to the contrary or to excuse procedural irregularities in a grandparent visitation suit.\textsuperscript{11} Recent decisions examine the specific grandparent and grandchild involved, however, and the courts are willing to acknowledge the fact that the petitioning grandparents may not always have a positive effect on the child.\textsuperscript{12} Recent decisions also observe threshold requirements to suit, refusing to overlook them out of a sentimental regard of grandparents.\textsuperscript{13}

Part II of this Article describes the general limitation on state authority to intrude on family life as it relates to grandparent visitation cases. This Part notes that the right of family autonomy is rooted in common law and is established by seventy-five years of United States Supreme Court decisions as a key component of the Constitution’s guarantee of liberty. Part III reviews the analyses of decisions invalidating grandparent visitation statutes on constitutional grounds, noting that the specific terms of these decisions do not limit the right identified to intact families, but instead describe a right belonging to all fit parents. Part IV discusses specific aspects of the recent trend in grandparent visitation decisions to limit suits regardless of the parents’ marital status or biological connection to the child. The first subpart of Part IV notes that courts in jurisdictions that have invalidated open-ended grandparent visitation statutes when suit was brought against the child’s married natural parents have subsequently recognized the same right to family autonomy where the child’s fit parent or parents are single, divorced, or adoptive. The second subpart explores a trend toward expanding the definition of “intact families.” In jurisdictions where grandparent visitation suits are not permitted if the child’s family is intact, “intact” no longer means simply that a child lives with his married, natural parents, but can also mean that the child is part of any stable family unit. The third subpart discusses a trend toward enforcing statutory threshold requirements for a grandparent visitation suit. In jurisdictions that fall into this category, courts have exhibited a new reluctance to excuse procedural irregularities by resorting to sentimental generalizations regarding grandparents or grandparent visitation.

Regardless of whether a court places limitations on a grandparent visitation suit because of the parent’s right to child-rearing autonomy or because a realistic assessment of the child’s best interests militates against it, courts have clearly moved to reduce intrusions of grandparent visitation awards against functioning


\textsuperscript{12} See In re Walker, 663 N.E.2d 586, 589 (Ind. 1996); In re Adoption of Ridenour, 574 N.E.2d 1055, 1059 (Ohio 1991).

\textsuperscript{13} See Castango v. Wholeman, 684 A.2d 1181, 1183 (Conn. 1996); Brooks v. Parkinson, 454 S.E.2d 769, 772-73 (Ga. 1995); Hawk v. Hawk, 855 S.W.2d at 580.
families. In effect, this trend applies to grandparent visitation cases the same harm standard that is applicable to all other areas of family law. In practice, this shift changes the focus of a grandparent visitation suit away from the irrelevancy of the parent's marital status and toward the fitness of the parents themselves, the well being of their children, and their joint interest as a family in avoiding state disruption of their lives.

II. SOURCES OF STATE AUTHORITY TO INTRUDE ON FAMILY LIFE THROUGH COURT ORDERED GRANDPARENT VISITATION

In a grandparent visitation case, the plaintiff grandparent disagrees with the parent's child-rearing decision regarding visitation and asks a court to override the decision. Parents and their children may be protected by their shared right to family autonomy; the parents may be specifically protected by that portion of the right to family autonomy corresponding to their child-rearing autonomy. On the other hand, the grandparents have no constitutionally recognized right to have contact with the child. A grandparent visitation suit, therefore, raises the

14. See Beagle v. Beagle, 678 So. 2d 1271, 1277 (Fla. 1996); Hawk v. Hawk, 855 S.W.2d at 582.

15. The disagreement may be of any sort and, indeed is sometimes not over whether the visitation should occur at all, but over the amount or scheduling. See Wolinski v. Brownmiller, 693 A.2d 30, 40-41 (Md. Ct. Spec. App. 1997).


17. See, e.g., Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (holding that "[w]ithout doubt, . . . [t]he Fourteenth Amendment's guarantee of liberty] denotes not merely freedom from bodily restraint but also the right of the individual to . . . establish a home and bring up children") (citations omitted).

18. Succession of Reiss contains one of the earliest judicial statements of this proposition and is generally representative of the position taken in common law jurisdictions in the absence of some legislative grant of grandparent visitation. Succession of Reiss, 15 So. 151, 152 (La. 1894); see also Deweese v. Crawford, 520 S.W.2d 522, 524 (Tex. App. 1975) (stating
question of the nature and extent of the right to family autonomy. Clearly a right of family autonomy protects the family from complete destruction by the state, such as when the state moves to terminate parental rights. To prevail in a grandparent visitation suit, then, the grandparent must convince the court that the right of family autonomy applies only to state intrusions of similar magnitude and not to less dramatic intrusions on child-rearing authority. The grandparent thus argues that the right to family autonomy cannot be invoked when the state countermands a fit parent's childrearing decision by ordering periodic visitation. This Part demonstrates that, quite to the contrary, the state may override a parental decision not to allow visitation only upon a showing that the child would otherwise be harmed.

Contrary to what the plaintiff grandparent must argue, the United States Supreme Court cases first establishing childrearing autonomy as an essential component of liberty do so in the context of ordinary family life rather than in the context of a dramatic and permanent disruption of family life by the state. In Meyer v. Nebraska, parents challenged a state law that prohibited teaching children a foreign language until they graduated from eighth grade. The Court reviewed the statute in light of the Fourteenth Amendment's guarantee, "no state shall ... deprive any person of life, liberty, or property, without due process of law." It noted that the definition of "liberty" could not be meaningfully limited to freedom from bodily restraint but instead must be read to include the right to engage in all "common occupations of life" including the right to "marry, establish a home and bring up children ...." The Court concluded the state's attempt to override parents' educational choices violated the parents' substantive rights guaranteed by the Fourteenth Amendment.

Similarly, in Pierce v. Society of Sisters and Wisconsin v. Yoder the Court concluded that when parents provided a reasonable alternative education, their liberty interest in directing their children's upbringing through choices regarding their educational experiences was entitled to constitutional protection

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19. This was most recently affirmed in M.L.B. v. S.L.J., 519 U.S. 102, 121-24 (1996).
22. Id. at 396-97.
23. Id. at 399.
24. Id.
25. Id. at 400-01.
against state intrusion.\textsuperscript{28} In \textit{Pierce}, the Court concluded that a state law requiring parents to send their children to public school, as opposed to a duly qualified private school, "interfere[d] with liberty of parents . . . to direct the upbringing and education of children under their control."\textsuperscript{29} \textit{Yoder}, on the other hand, involved Amish parents who feared erosion of their religious community if their children were required to attend any state approved school beyond the eighth grade.\textsuperscript{30} Although the \textit{Yoder} Court expressly recognized the importance of public education,\textsuperscript{31} it concluded that respondent parents' First Amendment right to religious freedom, coupled with their interest as parents in directing their children's upbringing, prevented state enforcement of the compulsory education laws at issue.\textsuperscript{32} Child-rearing autonomy is, thus, a right expressly construed to protect parental decisions made in the ordinary course of daily life.

Because child-rearing autonomy is a fundamental right and enjoys the substantive protection of the Fourteenth Amendment,\textsuperscript{33} the state may not constitutionally intrude upon it without compelling reason to do so.\textsuperscript{34} A compelling justification arises only when children would otherwise be exposed to a threat of serious harm.\textsuperscript{35} In \textit{Prince v. Massachusetts},\textsuperscript{36} a minor child's aunt, who was also her legal guardian,\textsuperscript{37} was convicted of violating a state law prohibiting minors from publicly offering merchandise for sale, because she allowed the child to distribute religious literature on the street.\textsuperscript{38} On appeal the aunt buttressed her argument that such conduct was a protected exercise of religious expression with a claim of parental right.\textsuperscript{39} Although it rejected her arguments, the Court expressly affirmed her claim to parental autonomy under virtually all circumstances, characterizing it as a "sacred private interest[ ], basic in a democracy."\textsuperscript{40} Nevertheless, when circumstances place a child in imminent...

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31. Id. at 213.
32. Id. at 233-35.
33. The most exacting procedural protections will not excuse state infringement on fundamental rights given their specific constitutional status. John E. Nowak et al., Handbook on Constitutional Law 485 (1st ed. 1978).
34. See Prince v. Massachusetts, 321 U.S. 158, 166 (1944).
35. See \textit{id}.
37. \textit{Id.} at 159. At no point does the Court distinguish between the aunt and a natural parent, lending support to the conclusion reached that no legal distinction can or should be made between a natural parent and a parent who acquires that status through adoption. See infra Part III.
39. \textit{Id.} at 165.
40. \textit{Id}.
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danger, or affect his well-being, the Court held the state could properly intrude on that "private realm of family life" to protect the child from harm.\textsuperscript{41} The Court found the statute at issue was justified by just such a danger.\textsuperscript{42} This exception to the right of parental autonomy is a narrow one, as the Court later stressed, one to be equated with "severe" evils\textsuperscript{43} and "substantial threat[s] to public safety, peace or order."\textsuperscript{44}

The narrowness of this exception to parental autonomy is illustrated by the limitations placed on the state's power to override parental decisions regarding medical treatment of their children when those decisions are contrary to established medical protocol.\textsuperscript{45} Clearly, when a parent refuses to consent to uncontroversial medical treatment for a child and the treatment is indisputably necessary to save the child's life, the state, as parens patriae, may order treatment over the parent's objection.\textsuperscript{46} In that circumstance the child is declared a ward of the state for purposes of ordering treatment only, and the parent's childrearing autonomy is not otherwise affected.\textsuperscript{47} This limited intrusion on parental autonomy is mandated by Prince's holding that neither rights of religion nor of parenthood permit parents to consign children to "ill health or death": the state as parens patriae may act when parents are unable or unwilling to protect children from impending danger.\textsuperscript{48}

Even within the confines of life threatening circumstances, however, the state as parens patriae is limited to alleviating direct and immediate threats to the child; it may not intervene simply to improve the child's life, and where several reasonable alternatives exist it must defer to parental choice.\textsuperscript{49} In Crouse Irving Memorial Hospital v. Paddock,\textsuperscript{50} respondents Mr. and Mrs. Paddock had been advised that their baby would require immediate medical treatment as soon as it was born.\textsuperscript{51} In the judgment of the attending physician, the baby's life would probably be in jeopardy without a blood transfusion to which mother and father—devout Jehovah's Witnesses—refused to consent.\textsuperscript{52} Noting that the state's interest in the welfare of its children permitted it to override parental

\begin{itemize}
\item \textsuperscript{41} Id. at 166.
\item \textsuperscript{42} See id. at 168-71.
\item \textsuperscript{43} Wisconsin v. Yoder, 406 U.S. 205, 230 (1972).
\item \textsuperscript{44} Id.
\item \textsuperscript{45} See Jehovah's Witnesses v. King County Hosp. Unit No. 1, 278 F. Supp. 488, 504-05 (W.D. Wash. 1967), aff'd, 390 U.S. 598 (1968) (affirming with one sentence).
\item \textsuperscript{46} Id.
\item \textsuperscript{47} Id.
\item \textsuperscript{48} Prince v. Massachusetts, 321 U.S. 158, 166-67 (1944).
\item \textsuperscript{50} Crouse Irving Mem'l Hosp. v. Paddock, 485 N.Y.S.2d 443 (Sup. Ct. 1985).
\item \textsuperscript{51} Id. at 444.
\item \textsuperscript{52} Id.
\end{itemize}
decisions where the life of a child was threatened, the court ordered all necessary transfusions.\(^5\) The court noted, however, that had the parents been able to choose among reasonable alternative treatments for their baby the state would have been powerless to determine the most effective treatment and impose that judgment upon the parents.\(^4\) Even within the confines of the life threatening circumstances before it, the state could properly intrude on family life only to the extent necessary to alleviate the direct and immediate threat to the child.\(^5\)

The family autonomy right thus protects a parent’s childrearing decisions from state oversight and review no less than it protects the family unit from complete destruction by the state. Indeed, the intrusion on parental decision-making occasioned by court-ordered grandparent visitation is different neither in kind nor degree from the state’s attempted intrusions on educational choices in \textit{Meyer,}\(^5\) \textit{Pierce,}\(^7\) and \textit{Yoder}.\(^8\) Neither in these cases nor in a grandparent visitation case do parents suffer any permanent intrusion on their relationship with the child. Yet in any case of forced grandparent visitation, as in \textit{Meyer, Pierce,} and \textit{Yoder,} the parent has been deprived of childrearing autonomy. Just as the state sought to override parental decision-making regarding a child’s education in \textit{Meyer, Pierce,} and \textit{Yoder,} any award of forced grandparent visitation dictates with whom the child will associate without parental consent. To impose grandparent visitation against the express wishes of parents without showing harm to the child if visitation does not occur, is to invade the “private realm” of family life.\(^9\)

III. THE HARM STANDARD IN DECISIONS INVALIDATING GRANDPARENT VISITATION STATUTES ON CONSTITUTIONAL GROUNDS

Decisions invalidating grandparent visitation on constitutional grounds correctly recognize that forced visitation is permissible only when it is necessary to avoid some threatened harm to the child.\(^6\) The fact that many successful

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53. \textit{Id.} at 444-45.
54. \textit{Id.} at 445.
55. \textit{See id.}
56. \textit{See generally} \textit{Meyer v. Nebraska}, 262 U.S. 390, 403 (1923) (holding unconstitutional a Nebraska statute which prevented the teaching of foreign languages to students until they have passed the eighth grade).
challenges to grandparent visitation statutes have been brought where a statute was applied to an intact family has occasionally given rise to the erroneous belief that intact family status is a determinative factor. In fact, however, decisions invalidating grandparent visitation against intact families set the same threshold requirement of harm or threat of harm to the child that controls all state intrusions on familial privacy. By their express terms, these decisions would apparently reach the same conclusions whether the child at issue was natural or adopted and whether his parents were married, divorced, or widowed.

For example, Hawk v. Hawk concluded that a grandparent visitation suit represents an unconstitutional intrusion on a parent’s right of childrearing autonomy without ever suggesting that this right belonged to parents in intact families alone. The court analyzed the constitutionality of the grandparent visitation statute before it by first addressing the dimensions of the right at issue under Tennessee law. It noted that prior Tennessee case law had characterized “[t]he relations which exist between parent and child [as] sacred.” The term “parent” here, as elsewhere in the opinion, is in the singular and the focus is on the bond between child and fit parent rather than the marital status of that parent. Further, the court noted that Tennessee case law had expressly recognized the parent’s right to rear a child free from state interference by upholding the custodial rights of a widowed “father who had not been proven unfit against [the claims of] prospective adoptive parents in far ‘better financial condition.’” The court’s choice of precedent thus confirms that parental rights are independent of family disruption.

559 N.W.2d 826 (N.D. 1997); Hawk v. Hawk, 855 S.W.2d 573 (Tenn. 1993); Williams v. Williams, 501 S.E.2d 417 (Va. 1998), modifying in part, aff'd in part, and dismissing in part 485 S.E.2d 651 (Va. Ct. App. 1997). The “intact family” in these cases was a nuclear family consisting of married natural parents and their biological children.

61. See Beagle v. Beagle, 678 So. 2d at 1277.


63. See generally WALTER O. WEYRAUCH & SANFORD N. KATZ, AMERICAN FAMILY LAW IN TRANSITION 351-52 (1983) (discussing the impact of the expansion of privacy rights on family law). Compare MARTIN GUIGENHEIM ET AL., THE RIGHTS OF FAMILIES: THE AUTHORITATIVE ACLU GUIDE TO THE RIGHTS OF FAMILY MEMBERS TODAY 87-89 (1996) (discussing the “right of family integrity” and noting the importance of the family privacy right), with id. at 94 (noting the necessity of a finding of future potential for harm in order to intervene on the behalf of children in need of assistance).

64. Hawk v. Hawk, 855 S.W.2d at 573; see Klyman, supra note 62, at 426-27.

65. Hawk v. Hawk, 855 S.W.2d at 577.

66. Id. at 578 (quoting In re Knott, 197 S.W. 1097, 1098 (Tenn. 1917)).

67. Id. (quoting In re Knott, 197 S.W. at 1098).
Similarly, Hawk apparently found nothing in United States Supreme Court precedent to suggest that familial rights hinge on whether the parents and child at issue constitute an intact unit. Quoting Prince, the Hawk court noted that the United States Supreme Court has characterized family life as a "private realm [that] the state cannot enter."68 The Hawk court was apparently as untroubled as was the United States Supreme Court itself by the fact that this seminal opinion on familial rights involved not a parent and child, but a child and the aunt who was her legal guardian. The Hawk court noted that Moore v. City of East Cleveland69 established the sanctity of the family by affirming the right of its members—a grandmother and grandsons who were cousins rather than brothers—to consider themselves a family despite zoning restrictions to the contrary.70 The Hawk court concluded its characterization of family rights under the Federal Constitution without having discussed the marital status of the parents at any point. Instead, it casts this right of privacy and autonomy in broader terms; rather than being the product of a marriage license, the court suggests parental rights are key to the greater privacy interests embedded in the Constitution itself and fundamental to the right to be left alone.71

Because the Hawk reasoning thus focuses on the constitutional right protecting the bond between a child and her fit parent, the threat of harm to the child as a prerequisite to any state intrusion on that right, logically, has the same significance whether the parent is married, divorced, or widowed. The Hawk court notes that in other family law contexts state action which may result in an intrusion on family life must be bifurcated with a showing that the child is subject to harm, or the threat of harm, before any analysis of the best interest of the child can properly occur.72 Citing Stanley v. Illinois,73 the Hawk court notes that the state cannot presume an unwed father is unfit in order to remove his children from his custody; it must instead demonstrate an "individualized finding of parental neglect."74 Hawk holds the threshold showing of harm must apply in

68. Id. (quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944)).
70. Hawk v. Hawk, 855 S.W.2d at 578 (citing Moore v. City of E. Cleveland, 431 U.S. at 503). Although, in terms of biology Mrs. Moore may have been grandmother, rather than mother, to the children, the Court emphasized that she functioned like a parent and that the constitutional protection she successfully claimed arose from this role. Moore v. City of E. Cleveland, 431 U.S. at 508 (Brennan, J., concurring) (discussing the constitutionality of applying "white suburbia’s" definition of the nuclear family through government sanctions). For a further discussion of this aspect of Moore see Joan C. Bohl, The "Unprecedented Intrusion": A Survey and Analysis of Selected Grandparent Visitation Cases, 49 OKLA. L. REV. 29, 43 (1996).
71. Hawk v. Hawk, 855 S.W.2d at 579.
72. Id. at 580.
74. Hawk v. Hawk, 855 S.W.2d at 580 (citing Stanley v. Illinois, 405 U.S. at 658).
grandparent visitation law, as in other areas of family law.\textsuperscript{75} Because this threshold by its own terms focuses on the child, it necessarily marginalizes or eliminates concerns like the marital status of fit parents.

\textit{Brooks v. Parkerson}\textsuperscript{76} reaches the same conclusion under both the Federal Constitution and Georgia’s state constitution with regard to rights of parental autonomy and the requirement that a threshold finding of harm precede state intrusion on parental decision-making.\textsuperscript{77} Again, the right at stake is the parents’ right “to raise their children without undue state interference.”\textsuperscript{78} In support of this proposition, the court cites the case law of both Georgia and the United States Supreme Court;\textsuperscript{79} the cited material is not specific to intact families or married couples, and \textit{Brooks} makes no specific reference to marital status itself.\textsuperscript{80}

\textit{Brooks} also notes that the requirement that harm or a threat of harm precede state intervention in family life has been expressly set forth in a long line of United States Supreme Court cases.\textsuperscript{81} In \textit{Wisconsin v. Yoder}, for example, the United States Supreme Court held Amish parents could not be required to send their children to public school past the eighth grade because the children would not be \textit{harmed} by receiving an Amish education rather than a public education.\textsuperscript{82} The \textit{Brooks} court notes that in \textit{Prince v. Massachusetts}, the United States Supreme Court affirmed a parent figure’s conviction for allowing her child to sell religious magazines in contravention of statute because it represented “legitimate state interference designed to prevent ‘psychological or physical injury’ to the child.”\textsuperscript{83} The \textit{Brooks} court’s litany of authorities mandating a threshold finding of harm does include a reference to a state divorce statute providing that “harm from the termination of the relationship between the child’s parents” permits the court to address the best interests of the child.\textsuperscript{84} This reference to divorce remains undiscussed dicta, however, and does not alter the court’s focus on the child’s health and welfare,\textsuperscript{85} rather than on the parents’ marital status. Having thus shifted its focus to the question of whether a child would suffer harm if

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\item \textsuperscript{75} \textit{Id.} at 581.
\item \textsuperscript{76} \textit{Brooks v. Parkerson}, 454 S.E.2d 769 (Ga. 1995).
\item \textsuperscript{77} \textit{Id.} at 772-73.
\item \textsuperscript{78} \textit{Id.} at 771.
\item \textsuperscript{79} \textit{Id.}
\item \textsuperscript{80} \textit{Id.}; \textit{Luther v. State}, 342 S.E.2d 316 (Ga. 1986).
\item \textsuperscript{81} \textit{Brooks v. Parkerson}, 454 S.E.2d at 771.
\item \textsuperscript{82} \textit{Id.} at 772 (citing \textit{Wisconsin v. Yoder}, 406 U.S. 205, 230, 235 (1972)).
\item \textsuperscript{83} \textit{Id.} at 773 (quoting \textit{Prince v. Massachusetts}, 321 U.S. 158, 170 (1944)) (emphasis supplied by the \textit{Brooks} court).
\item \textsuperscript{84} \textit{Id.} at 773 (citing \textit{GA. CODE ANN.} § 19-9-3 (Harrison 1998)).
\item \textsuperscript{85} In fact, \textit{Brooks} contains one of the earliest judicial expressions of the idea that a grandparent visitation suit itself may constitute harm to the child. \textit{Id.} (citing Joan C. Bohl, \textit{Breach of New Statutes: Grandparent Visitation Statutes As Unconstitutional Invasions of Family Life and Invalid Exercises of State Power}, 3 GEO. MASON U. CIV. RTS. L.J. 271, 289 (1993)).
\end{itemize}
court-ordered grandparent visitation did not occur, the court held that because the state statute at issue lacked this necessary threshold, it created an unconstitutional intrusion on family life.\textsuperscript{86} The \textit{Brooks} court’s conclusion thus does not factor in the parent’s marital status at all.

The court’s decision in \textit{Beagle v. Beagle}\textsuperscript{87} may be significant not only because it declares the provision of Florida’s grandparent visitation statute authorizing suit against intact families facially unconstitutional,\textsuperscript{88} but also because it demonstrates the logical difficulties involved in attempting to limit the right of family autonomy implicated by a grandparent visitation suit to intact families.\textsuperscript{89} Although the court expressly limited its analysis to the subsection of the statute conferring standing to sue intact families, its logic and its express language contain no such limitation.\textsuperscript{90} This expansive reach of the \textit{Beagle} decision is demonstrated in three related characteristics. First, \textit{Beagle} chose to articulate its holding in the following terms: “the challenged paragraph infringes upon the rights of parents to raise their children free from government intervention.”\textsuperscript{91} The court certainly could have specified that it sought to protect the rights of married natural parents to rear their children in an intact family,\textsuperscript{92} if that were truly the conclusion to which its analysis led; it did not. Second, the court cites approvingly to the threshold requirement of harm in \textit{Hawk} and \textit{Brooks}.\textsuperscript{93} With its focus on preventing harm to the child, this threshold requirement necessarily shifts the inquiry away from the parents’ marital status. Third, and perhaps most significant, is the substance of the \textit{Beagle} court’s application of the privacy rights conferred by the Florida Constitution to the defendant parents in a grandparent visitation suit, for by the court’s own terms the right it describes cannot be limited to married natural parents.\textsuperscript{94}

As the court explained, the Florida Constitution provides, in pertinent part, that “‘[e]very natural person has the right to be let alone and free from government intrusion . . . . ’”\textsuperscript{95} The court stressed that the drafters of this freestanding privacy provision rejected words of limitation such as “unreasonable” or “unwarranted” in connection with the limitation on

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\textsuperscript{86} \textit{Id. at} 774.
\textsuperscript{87} \textit{Beagle v. Beagle}, 678 So. 2d 1271 (Fla. 1996).
\textsuperscript{88} \textit{Id. at} 1276.
\textsuperscript{89} \textit{Id. at} 1275-76.
\textsuperscript{90} See \textit{id}.
\textsuperscript{91} \textit{Id. at} 1272.
\textsuperscript{92} \textit{Id. at} 1277.
\textsuperscript{93} \textit{Id. at} 1276.
\textsuperscript{94} \textit{Id. at} 1277.
\textsuperscript{95} \textit{Id. at} 1275 (quoting FLa. CONST. art. I, § 23).
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government intrusion. The freestanding privacy provision has been interpreted in the Florida courts as a “right . . . much broader in scope than that of the Federal Constitution.” The Beagle court’s own description of the general terms of the provision thus preclude any credible distinction between the right of fit parents in an intact marriage and the rights of other fit parents. Because all proffered limitations were expressly rejected in the selection of terms to be used in the privacy provision, it cannot now be reasonably interpreted to include a new limitation on the privacy rights of divorced or widowed parents as compared to the rights of married parents.

A second problem with any attempt to confine the Beagle court’s holding to fit married parents arises from its description of what circumstances will justify intrusion on this privacy right. The court explains that the state intrusion must be necessary to further a compelling state interest and that under well-settled Florida law “the State can satisfy the compelling state interest standard when it acts to prevent demonstrable harm to a child.” Thus, for example, the state may terminate parental rights when a “‘substantial risk of significant harm’ to a child exists.” The court does not relate this harm standard to whether or not the child’s natural parents are married. The harm standard in Florida thus focuses on the well being of the child just as it does in every other state.

The dissenting justice at the appellate level in the subsequent Florida grandparent visitation case of Von Eiff v. Azicri explains in practical terms the illogic of attempting to limit the Beagle analysis to grandparent visitation suits against intact families. Von Eiff involved a grandparent visitation suit filed against the child’s father and stepmother by the former maternal grandparents—parents of the child’s deceased mother. The Von Eiff majority declined to invalidate a provision of Florida’s grandparent visitation statute that remained extant in the wake of Beagle. These provisions allowed suit without any

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96. Id. (citing Winfield v. Division of Pari-Mutuel Wagering, 477 So. 2d 544, 548 (Fla. 1985)).
97. Id. at 1276 (quoting Winfield v. Division of Pari-Mutuel Wagering, 477 So. 2d at 548).
98. See id.
99. See id.
100. See id.
101. Id.
102. Id. (quoting Padgett v. Department of Health & Rehabilitative Serv., 577 So. 2d 565, 571 (Fla. 1991)).
104. Id. at 780 (Green, J., dissenting).
105. Id. at 773.
106. Id. at 773-74.
preliminary showing of harm to the child if, inter alia, one parent was deceased.\textsuperscript{107} Stating that the \textit{Beagle} holding applied only to suits filed against intact families, the majority characterized the case before it as one in which one parent was deceased and thus pronounced \textit{Beagle} inapplicable.\textsuperscript{108}

The \textit{Von Eiff} dissent took issue both with the majority's characterization of the facts of the case and with its conclusion that the remaining provisions of Florida's grandparent visitation statute were facially constitutional.\textsuperscript{109} The dissent first noted, with eloquent brevity, that at all times relevant to the suit the child did, in fact, have "two living married parents, her natural father, and adopted stepmother."\textsuperscript{110} The dissent then explained that the same showing of harm to the child that \textit{Beagle} set as a prerequisite to suit against an intact family \textit{must} logically be a prerequisite to suit against divorced or widowed parents.\textsuperscript{111} The \textit{Von Eiff} majority took the position that grandparent visitation could be imposed where the parents were divorced, or one had died, simply upon a finding that it was in the best interests of the child, without reference to a harm standard.\textsuperscript{112} The dissent commented that if this were an accurate statement of the law, then widowed or divorced parents—but not married parents—could be required to provide any number of experiences generally considered to be in a child's best interests: a college education, religious or spiritual instruction, or sharply limited access to television.\textsuperscript{113} As the dissent baldly asserts, "[t]he state's compelling interest has nothing to do with the parent or child's family status."\textsuperscript{114}

\textit{Castagno v. Wholeman}\textsuperscript{115} reached the same conclusion, couched in different terminology, by holding that the state may not intrude on parental decisions regarding visitation unless the parents had already invoked the court's jurisdiction regarding the custody or care of the child.\textsuperscript{116} In \textit{Castagno}, the maternal grandparents sought visitation over the united objections of the child's married, natural parents, under a statute which apparently conferred standing for them to do so.\textsuperscript{117} The child's custodial hadn't been at issue; the parents had never invited judicial scrutiny of their family relationship.\textsuperscript{118}

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\textsuperscript{107} \textit{Id.} at 773 (citing \textsc{Fla. Stat. Ann.} § 201(1)(a) (West 1995)).
\textsuperscript{108} \textit{Id.} at 775.
\textsuperscript{109} \textit{Id.} at 778-79 (Green, J., dissenting).
\textsuperscript{110} \textit{Id.} at 778 (Green, J., dissenting).
\textsuperscript{111} \textit{Id.} at 779 (Green, J., dissenting).
\textsuperscript{112} \textit{Id.} at 773.
\textsuperscript{113} \textit{Id.} at 782 n.21 (Green, J., dissenting).
\textsuperscript{114} \textit{Id.} at 782 (Green, J., dissenting).
\textsuperscript{115} \textit{Castagno v. Wholeman}, 684 A.2d 1181 (Conn. 1996).
\textsuperscript{116} \textit{Id.} at 1186.
\textsuperscript{117} \textit{Id.} at 1183 (referring to \textsc{Conn. Gen. Stat.} § 5b-59 (1995)).
\textsuperscript{118} \textit{Id.}
\end{flushright}
Although the court acknowledged that the statute “lacks specific language” imposing a prerequisite to suit, the court concluded that a threshold requirement did in fact exist and had not been met in the case before it.\(^\text{119}\) The court noted that decisions regarding access to a minor child were issues of “parental prerogative,” and that “strong tradition” rooted in common law militated against any intrusion on family autonomy “absent compelling circumstances.”\(^\text{120}\) To interpret the grandparent visitation statute at issue to allow suit against married parents in an intact family unit would represent an unconstitutional infringement on familial privacy.\(^\text{121}\) Although the court appears to be distinguishing between the constitutional rights of married parents versus those of divorced parents, the threshold it established actually has nothing to do with marital status per se. For the court, the key distinction is whether the parents have ever invited the court into the family relationship to resolve issues regarding the custody or care of the child.\(^\text{122}\)

Under *Castagnino*, the constitutional right to family autonomy protects the family from the intrusion of court-ordered visitation unless the family opens itself to state intrusion.\(^\text{123}\) Although it is stated in different terms, the threshold thus established is the same threshold approved in *Hawk, Brooks, and Beagle*,\(^\text{124}\) and the same threshold governing state intrusions on family in all areas of domestic relations law. Because our legal system entrusts a child’s well-being to his fit parents, children whose care and custody is placed in doubt are, in fact, threatened with harm. By its terms, *Castagnino* does not address the constitutional rights of widowed parents, parents who never marry, or parents who divorce amicably and resolve child custody issues privately. Because parents in these circumstances have not placed a child’s custody at issue by invoking the jurisdiction of the court, under *Castagnino* their right to family autonomy is presumably no different than that of married parents.

Subsequent Connecticut cases applying *Castagnino* in other family contexts bear out this interpretation by allowing state intrusion on family life where the intrusion followed the family’s own invocation of court authority.\(^\text{125}\) In

\(^{119}\) Id.

\(^{120}\) Id. at 1184-85.

\(^{121}\) Id. at 1186.

\(^{122}\) Id.

\(^{123}\) Id.

\(^{124}\) Hawk v. Hawk, 855 S.W.2d 573, 581-82 (Tenn. 1993); Brooks v. Parkerson, 454 S.E.2d 769, 772-73 (Ga. 1995); Beagle v. Beagle, 678 So. 2d 1271, 1275-76 (Fla. 1996).

Paraskevas v. Tunick,\textsuperscript{126} for example, the mother’s ex-boyfriend sought visitation with her child.\textsuperscript{127} The court found that although the three had lived together for a time as a “non-traditional family,” Castagno did not apply because the break up of the relationship was equivalent to a marital separation and the mother had invited court intervention into their family life by obtaining a restraining order against the boyfriend.\textsuperscript{128}

Similarly, Matthews v. Thomasen\textsuperscript{129} and Jacobs v. McCann\textsuperscript{130} both expressly justified state intrusion on family life under Castagno by finding that the respective parents had already invoked the jurisdiction of the court.\textsuperscript{131} In Matthews v. Thomasen, the child’s maternal grandmother and maternal aunt sought court-ordered visitation over the objections of the child’s custodial father; mother and father had lived together without marrying and the mother was incarcerated when the suit was filed.\textsuperscript{132} Citing Paraskevas v. Tunick, the court noted that the parents had consented to the court’s exercise of jurisdiction and concluded that the instances of court intervention were triggering events that gave standing to seek court-ordered visitation to third parties.\textsuperscript{133} In Jacobs v. McCann, the court cited Matthews v. Thomasen with approval.\textsuperscript{134} It then stated that the barrier to court-ordered visitation erected by Castagno did not apply to the case before it because “both the plaintiff and defendant have in the past invoked jurisdiction of the court, [and the] relationship has broken down and the family is not intact.”\textsuperscript{135}

Using techniques of judicial construction similar to those employed in Castagno, the Virginia Supreme Court in Williams v. Williams\textsuperscript{136} affirmed the facial constitutionality of a grandparent visitation statute by interpreting its general language to require a preliminary showing of harm or a threat of harm to the child.\textsuperscript{137} In Williams v. Williams the grandparents successfully sued their grandchild’s intact family to obtain visitation under a statute that purportedly

\begin{itemize}
\item \textsuperscript{126} Paraskevas v. Tunick, No. FA 950072398, 1997 WL 219831, at *1 (Conn. Super. Ct. Apr. 24, 1997).
\item \textsuperscript{127} Id.
\item \textsuperscript{128} Id. at *11-12.
\item \textsuperscript{131} See Jacobs v. McCann, 1998 WL 199302, at *1; Matthews v. Thomasen, 1997 WL 568035, at *3.
\item \textsuperscript{132} Matthews v. Thomasen, 1997 WL 568035, at *1.
\item \textsuperscript{133} Id. at *2 (citing Paraskevas v. Tunick, 1997 WL 219831, at *1).
\item \textsuperscript{134} Jacobs v. McCann, 1998 WL 199302, at *1.
\item \textsuperscript{135} Id.
\item \textsuperscript{136} Williams v. Williams, 501 S.E.2d 417 (Va. 1998).
\item \textsuperscript{137} Id. at 418.
\end{itemize}
allowed a court to award visitation to ""any other person with a legitimate interest [in the child]"" when such visitation was in the best interests of the child. The trial court dismissed the parents' constitutional claim and apparently attached no significance to the statutory admonition that the court ""give due regard to the primacy of the parent-child relationship."" The parents appealed.

When the case reached the Virginia Court of Appeals, the parents' constitutional claims met with a warmer—and more attentive—reception. The court of appeals characterized the parents' right of child-rearing autonomy as a fundamental right under the Federal Constitution with which the state can only interfere to further a compelling state interest. The court noted that a compelling state interest can be demonstrated only where the state acts to protect a child from harm. In neither its characterization of the right at stake nor its description of a compelling state interest does the court refer to the parents' marital status. Turning to the statute at issue, the court held that the language requiring due regard for the parent-child relationship evidenced the legislature's intent that a finding of harm to the child precede any intrusion on ""parental rights."" Given the harm threshold it had thus identified, the court of appeals pronounced the statute constitutional and ordered the case remanded to the circuit court to determine if the child would be harmed by a denial of grandparent visitation.

When the grandparents appealed, the Virginia Supreme Court agreed with the court of appeals' imposition of a harm threshold; its opinion tracks the court of appeals reasoning and, like the court of appeals, does not create any distinction based on the parents' marital status. The court concluded the statute was constitutional because, as interpreted, it imposed a threshold

138. Id. (quoting VA. CODE ANN. § 20-124.2(B) (Michie 1950)).
139. Id. (quoting VA. CODE ANN. § 20-124.2(B) (Michie 1950)).
141. The case ultimately wound its way through four levels of the Virginia court system—trial court, circuit court, the Virginia Court of Appeals, and the Virginia Supreme Court—before being resolved. Williams v. Williams, 501 S.E.2d at 417-18.
142. Williams v. Williams, 485 S.E.2d at 653.
143. Id. at 654.
144. Id.
145. Id. at 653-54.
146. Id.
147. Id.
149. Id.
150. Concurring in the result only, two justices further clarified the harm standard in a grandparent visitation suit by asserting that the statute should not be saved by the majority's
requirement of harm to the child before the state could intrude on constitutionally protected parental rights.\textsuperscript{151}

If our sympathies are more quickly aroused when married, natural parents are sued, than when a divorced or widowed parent is sued, it is simply a byproduct of the stark drama of a suit against a united husband and wife—not a matter of logic, law, and equity. This is clear from the case law itself. All cases invalidating grandparent visitation statutes on constitutional grounds apply a standard that focuses on the existence of some threat of harm to the child.\textsuperscript{152} Those cases find that this preliminary finding of harm represents the compelling state interest necessary to override the right of family autonomy.\textsuperscript{153} None of the cases condition constitutionality on marital status. This is also clear from the origins and contours of the family autonomy right itself. The United States Supreme Court cases establishing family privacy as a key component of ordered liberty involve single parents, guardians, and parents of unknown marital status as well as married parents.\textsuperscript{154} These cases also consistently recognize parental rights, rather than the rights of married parents.\textsuperscript{155} Logically, fit parents are entitled to a right of family autonomy in the context of grandparent visitation law, as in other areas of domestic relations law, regardless of whether they are married, single, widowed, or divorced.

\textsuperscript{151} Id. at 424 (Hassell & Kinser, JJ., dissenting in part and concurring in part). The justices characterized the statute as clearly unconstitutional as applied because [it] . . . permits the Commonwealth to interfere with the parents’ fundamental rights to raise their child even though the statute does not require the court to make a finding that the failure to award visitation over the parents’ objections would be detrimental to the health or safety of the child.

\textsuperscript{152} Id. Two other justices wrote separately to argue that the grandparents lacked any statutory authority to seek visitation because they were “not intervenors in an existing custody or visitation suit between parents” and had not asserted “parental unfitness, evidenced by abuse, neglect or abandonment, so as to qualify as parties otherwise properly before the court . . . .” Id. at 426.

\textsuperscript{153} See id.


\textsuperscript{155} See Wisconsin v. Yoder, 406 U.S. at 213; Pierce v. Society of Sisters, 268 U.S at 518.
IV. THE EXPANDING RECOGNITION OF FAMILY AUTONOMY RIGHTS IN THE CONTEXT OF THE GRANDPARENT VISITATION SUIT: SELECTED NATIONAL TRENDS TOWARD LIMITING GRANDPARENT VISITATION SUITS


The legacies of Hawk v. Hawk, Brooks v. Parkerson, and Beagle v. Beagle extend beyond recognition of the constitutional rights of intact families in the context of grandparent visitation.\textsuperscript{156} Within their individual jurisdictions these cases have formed the basis for subsequent decisions that expand the constitutional protection of the family autonomy right from intact, nuclear families to other familial configurations.\textsuperscript{157} This expansion has had the practical effect, of course, of expanding the pool of parents who can successfully defend against a grandparent visitation suit. It has also accelerated judicial acceptance of a harm standard in all types of grandparent visitation suits. As each new configuration of family members is presented to the court, the court is asked to consider whether there is any reason for judicial oversight of a child’s life that is not present when the child is part of an intact family. The more the court acknowledges that the issues of child welfare and parental autonomy remain constant, the more firmly established the harm threshold becomes.

1. Hawk v. Hawk

Hawk v. Hawk held that a right of family privacy prevented the state from imposing court-ordered grandparent visitation on a family absent a showing that the children would otherwise be harmed.\textsuperscript{158} Two years later, in Simmons v. Simmons,\textsuperscript{159} the Tennessee Supreme Court took the next step in exploring the implications of the Hawk holding outside the context of the natural nuclear family.\textsuperscript{160} In Simmons, the paternal grandparents obtained visitation rights in the same proceeding in which their son’s parental rights to his child were

\textsuperscript{156} Hawk v. Hawk, 855 S.W.2d 573, 575 (Tenn. 1993); Brooks v. Parkerson, 454 S.E.2d 769, 770 (Ga. 1995); Beagle v. Beagle, 678 So. 2d 1271, 1272 (Fla. 1996). One aspect of these opinions which is raised by implication in any discussion of their legacy is the fact that by applying a harm standard to grandparent visitation suits they harmonized grandparent visitation law with the greater body of domestic relations law. For further discussion of this trend, see Joan C. Bohil, Current Trends in Grandparent Visitation Law, in 1998 WILEY FAMILY LAW UPDATE 1-28 (1998).

\textsuperscript{157} See infra Part IV.A.1-3.

\textsuperscript{158} Hawk v. Hawk, 855 S.W.2d at 577.

\textsuperscript{159} Simmons v. Simmons, 900 S.W.2d 682 (Tenn. 1995).

\textsuperscript{160} Id.
terminated. The child’s mother subsequently remarried, and her new husband adopted the child. Sometime later the child’s mother and adoptive father refused to allow further court-ordered visitation and sought judicial termination of the visitation.

When the case reached the Tennessee Supreme Court, the grandparents argued that court-ordered visitation was not barred under *Hawk* because, unlike the children in *Hawk*, this child did not live in an intact family consisting of married, natural parents. Rejecting this argument, the Tennessee Supreme Court noted that the grandparents’ essential argument was that the rights of adoptive parents were inferior to those of natural parents, a position contrary to law and policy “as well as human experience.” Because adoptive parents are entitled to the same constitutional protection as natural parents, the court concluded *Hawk* required the grandparents to demonstrate that the child would be harmed absent visitation. Because the grandparents could not satisfy this threshold, the court terminated visitation, ruling that a right of family autonomy protected the parents’ decision regarding with whom their child would associate. The case provided the occasion for the court to expressly dispel any notion that the holding in *Hawk* was limited to the particular facts of the case, or that the right of family autonomy belonged to nuclear families alone.

A subsequent Tennessee Court of Appeals case further explains the practical application of the harm standard and demonstrates its focus on the child rather than the marital status of the parents while at the same time finding the harm standard was satisfied by the facts before it. In *Hilliard v. Hilliard* the child’s maternal grandmother was given temporary custody of an eighteen-month-old baby when the parents divorced. When the father later filed a successful petition to regain custody of the child, the order included an award of visitation to the maternal grandmother. The father appealed this latter portion of the order, relying on the threshold requirement of harm established in *Hawk*.

161. *Id.*
162. *Id.* at 682-83.
163. *Id.*
164. *Id.* at 684.
165. *Id.*
166. *Id.* at 684-85.
167. *Id.*
168. *Id.* Despite *Simmons’s* express and unequivocal clarification, this aspect of *Hawk* is still—one might begin to suspect, rather conveniently—misunderstood. See Von Eiff v. Azicri, 699 So. 2d 772, 774 n.1 (Fla. Dist. Ct. App. 1997), vacated, 720 So. 2d 510 (Fla. 1998).
170. *Id.* at *1.
171. *Id.*
and Simmons.\textsuperscript{172} Rejecting his appeal, the court concluded that the evidence suggested the child would suffer harm absent visitation, due to the maternal grandmother having functioned as the child’s mother since infancy.\textsuperscript{173} If the harm standard was satisfied an award of visitation would be constitutionally permissible.\textsuperscript{174}

If any other affirmation of the harm standard were needed, it came after the Tennessee Legislature enacted a new grandparent visitation statute to succeed the one invalidated by Hawk and Simmons.\textsuperscript{175} For some reason the legislature drafted a statute that was “essentially the same” as its constitutionally flawed predecessor.\textsuperscript{176} Like its predecessor, the new statute provided for “reasonable visitation” when the visitation would be in the best interests of the child, and made no mention of an initial showing of harm.\textsuperscript{177} Relying on Hawk, Simmons, Floyd v. McNeely,\textsuperscript{178} and Hilliard, the Tennessee Court of Appeals found the statute facially unconstitutional, noting that for purposes of ordering grandparent visitation, “there is no real difference between the rights of a single parent and both parents.”\textsuperscript{179}

2. Brooks v. Parkerson

Less than six months after Brooks v. Parkerson asserted that court-ordered grandparent visitation unconstitutionally intruded on fit parents’ rights to childrearing autonomy,\textsuperscript{180} the Georgia Court of Appeals ruled the harm standard espoused in Brooks extended to any fit parent, regardless of marital status.\textsuperscript{181} In

\begin{itemize}
\item \textsuperscript{172} Id. (citing Simmons v. Simmons, 900 S.W.2d at 684-85; Hawk v. Hawk, 855 S.W.2d 573, 582 (Tenn. 1993)).
\item \textsuperscript{173} Id. at *3-*4. As the court noted, the natural mother was not granted any visitation.
\item \textsuperscript{174} Id. at *3.
\item \textsuperscript{175} Id. at *4. The court of appeals remedied the case for a determination of whether a denial of grandparent visitation would result in harm to the child. \textit{Id}.
\item \textsuperscript{176} TENV. CODE ANN. § 36-6-301 (1996).
\item \textsuperscript{177} Ellison v. Ellison, 994 S.W.2d 623, 625 (Tenn. Ct. App. 1998). For a brief discussion of the political forces underlying grandparent visitation statutes see Bohl, \textit{supra} note 156, at 1-28.
\item \textsuperscript{178} Ellison v. Ellison, 994 S.W.2d at 623-24 (citing TENV. CODE ANN. §§ 36-6-301, 36-6-306, 36-6-307 (Supp. 1998)).
\item \textsuperscript{179} Floyd v. McNeely, No. 02A01-9408-CH-00187, 1995 WL 390954 (Tenn. Ct. App. July 5, 1997).
\item \textsuperscript{180} See Brooks v. Parkerson, 454 S.E.2d 769, 774 (Ga. 1995).
\item \textsuperscript{181} Bergman v. McCullough, 461 S.E.2d 544, 547 (Ga. Ct. App. 1995).
\end{itemize}
Bergman v. McCullough, the paternal grandmother successfully obtained court-ordered visitation with the child after intervening in an action commenced by the mother’s new husband to adopt the child. Appeals followed, and the case reached the Georgia appellate court. In the context of an opinion in which the court addressed other issues raised in extensive detail, its cursory treatment of the grandparent visitation issue is as significant as the conclusion it reached. In a single paragraph of discussion, the court noted that the original visitation award predated Brooks, that Brooks had ruled the statute was unconstitutional, the grandparent visitation issue had been rendered moot, and thus visitation could not be awarded. The court apparently saw no reason to note that Brooks involved married parents living with the child in an intact nuclear unit, whereas the child involved in the case before it had been born out of wedlock and lived with her mother and prospective adoptive father. Apparently, parental fitness, marital status, and family configuration are not factors at all.

A new grandparent visitation statute, enacted just under a year after Brooks was decided, also demonstrated that Brooks’s recognition of a constitutional right to privacy in the context of court-ordered grandparent visitation was correctly interpreted as a mandate in support of parental rights regardless of marital status. Under this new statute, any grandparent could seek visitation, but only if a court was presently addressing some issue regarding the custody of the child. The statute enumerated the circumstances: (1) when the child’s custody is at issue; (2) when the child’s parents are divorcing; (3) when parental rights to the child are being terminated; or (4) when the child is being adopted by a stepparent. The statute also specifies that suit may not be brought when the child’s parents are not separated or divorced, and the child is living with both parents. Thus, a suit would be allowed only where custody is currently at issue. Although the statute appears to distinguish between children based on the marital status of their parents, the statute’s real focus is on the child’s

183. Id. at 546.
184. Id. The child’s natural father appealed the order allowing the adoption of the child by the mother’s new husband. Id. at 547. The child’s paternal grandmother appealed an order awarding her less visitation than she sought. Id. at 548.
185. For example, the court devotes four paragraphs to discussing the fact that the Parental Kidnapping Prevention Act could not apply to the facts of the case. Id. at 546-47 (citing 28 U.S.C. § 1738A (1994)).
186. Id. at 548 (concluding the trial court’s authority to grant grandparent visitation was unconstitutional).
187. See id. at 546.
188. See GA. CODE ANN. § 19-7-3 (1998).
189. Id. § 19-7-3(b).
190. Id.
191. Id.
circumstances.\textsuperscript{192} When a child’s custody is placed at issue the child is subject to a threat of harm because the child is deprived of united parental decision-making on his behalf. A past divorce or custody dispute which is now resolved could not confer standing to sue on a grandparent. Under the terms of the statute the parental rights of widowed, divorced, or single parents not involved in litigation would be entitled to the same constitutional protection afforded the parental rights of married parents.

The statute also expressly requires a finding that “the health or welfare of the child would be harmed” absent court-ordered visitation and a finding that “the best interests of the child would be served by such visitation.”\textsuperscript{193} The statute specifically drafted to respond to Brooks\textsuperscript{194} thus codifies a requirement that court-ordered grandparent visitation be ordered only when the court determines the child would suffer harm without grandparent visitation. The factual circumstances of Brooks notwithstanding, the statute protects the parental rights of widowed parents or the united decision-making of divorced parents as completely as it protects the childrearin decisions of married, natural parents.

Finally, the preliminary standing requirement limiting grandparent visitation suits to circumstances where the child is already the subject of a custody proceeding correspond to another important aspect of Brooks’s reasoning. Brooks noted that governmental intrusion on family life is permissible only when the child would otherwise be harmed and only when the intrusion promotes the child’s health and welfare.\textsuperscript{195} Declining to view a child’s well-being in a vacuum, Brooks factored in the effect of the suit itself, commenting that a grandparent visitation suit necessarily has a deleterious effect on the child’s life.\textsuperscript{196} The threshold requirement thus serves to further focus the statute on protecting the child from harm by limiting grandparent visitation suits—and thus

\textsuperscript{192} See id.

\textsuperscript{193} Id. By requiring the visitation serve the best interests of the child, the statute continues to track the obligations imposed on the state when it has been authorized to supplant parental decision-making—it must affirmatively further the best interests of the child.

\textsuperscript{194} See Rogers v. Barnett, 514 S.E.2d 443, 445 (Ga. Ct. App. 1999) (noting that the legislature had amended the statute to address the Georgia Supreme Court’s objections in Brooks).


\textsuperscript{196} This deleterious effect has been the subject of considerable comment. See, e.g., Brooks v. Parkerson, 454 S.E.2d at 773 (noting that although the grandparent grandchild relationship may benefit the child, there is little evidence that this is always—or even most often—the case, and ample evidence that the impact of the grandparent visitation suit on the grandchild can cause great harm); McMain v. Iowa Dist. Court, 559 N.W.2d 12, 14 (Iowa 1997) (noting that “[t]he mere fact that grandparents seek to force visitation through court action can be counterproductive in stabilizing a child’s life”). For a discussion of this aspect of the McMain decision, see Bosh, supra note 156, at 1–28; see also Fairbanks v. McCarter, 622 A.2d 121, 127 (Md. 1993) (stating a trial court should be aware of the stress “the visitation dispute itself” could have on children forced into the midst of contesting adults).
the negative impact of the suit—to those situations where the harm standard and the best interests of the child can—at least theoretically—be met.

In *Hunter v. Carter*\(^{197}\) the Georgia Court of Appeals demonstrated that the standard articulated in *Brooks* and subsequently codified addressed the well-being of the child, regardless of family configuration.\(^{198}\) In *Hunter*, paternal grandparents who were the parents of the child’s biological father obtained court-ordered visitation in the same proceeding in which the child’s stepfather sought to adopt her.\(^{199}\) On appeal, the court concluded that the standard for requiring grandparent visitation in the absence of the parent’s consent had not been met.\(^{200}\) Making no mention of the marital status of the parents before it, the court stated: “The right to the custody and control of one’s child is a fiercely guarded right in our society and in our law.”\(^{201}\) It noted that the state may interfere with this right only when it acts to protect the child from harm, and in the case before it no evidence supported the trial court’s finding that the child would be “harmed” absent court-ordered visitation.\(^{202}\) It made no difference that the child was not living with her married, natural parents. The court concluded that, under *Brooks*, only a danger of harm to the child would have justified overriding the parents’ constitutional right to childrearing autonomy.\(^{203}\)

3. **Beagle v. Beagle**

*Beagle v. Beagle* invalidated one of the five subsections of Florida’s grandparent visitation statute on constitutional grounds.\(^{204}\) That subsection specifically permitted an award of grandparent visitation in situations where the child lives within an intact family.\(^{205}\) The *Beagle* court unanimously concluded

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198. See id. at 829-30.
199. Id. at 828. The child’s biological father’s parental rights had been surrendered in an earlier proceeding. Id.
200. Id. at 828-29.
201. Id. at 829 (citing Brooks v. Parkerson, 454 S.E.2d at 772).
202. Id. The court noted, in fact, that the proposed visitation “over the objections of the child’s parents would be detrimental and disruptive to the child and her parents.” Id.
203. Id. at 828-29.
205. FLA. STAT. ANN. § 752.01(1)(e) (West 1995). Section 1 of the grandparent visitation statute as a whole reads as follows:

(1) The court shall, upon petition filed by a grandparent of a minor child, award reasonable rights of visitation to the grandparent with respect to the child when it is in the best interest of the minor child if:

(a) One or both parents of the child are deceased;

(b) The marriage of the parents of the child has been dissolved;

(c) A parent of the child has deserted the child;
that the challenged subsection impermissibly "infringe[d] upon the rights of
parents to raise their children free from government intervention [because it
failed] to require a showing of harm to the child prior to any award of any
grandparent visitation rights."206

On its face, Beagle appears to differ from Hawk and Brooks in that the
specific code section interpreted, rather than the facts of the case alone, forced
the court to consider grandparent visitation in the context of an intact nuclear
family.207 The Beagle court expressly stated that its holding was limited to the
specific subsection of the statute before it and that subsection alone.208 In effect,
however, Beagle has served as a springboard for extending constitutional rights
of parental autonomy beyond the nuclear family in grandparent visitation suits
just as effectively as decisions interpreting more general statutory language. In
fact, in the two and one-half years following Beagle, Florida's Grandparental
Visitation Rights statute was efficiently dismantled, section by section,209 by a
series of decisions applying Beagle's recognition of a right of privacy in family
decision-making.210

In Ward v. Dibble,211 decided four months after Beagle,212 the Florida
Court of Appeals vacated an award of grandparent visitation finding the trial
judge's conclusion that grandparent visitation was in the best interests of the
children was not supported by any competent evidence.213 Although the court
noted this conclusion mooted the constitutional issue, the constitutional issue
continued to simmer just below the rim of the court's reasoning nevertheless.214
In its first substantive footnote, the court acknowledges the Beagle decision and
its invalidation of suits filed against intact families.215 It then comments that

(d) The minor child was born out of wedlock and not later determined to
be a child born within wedlock as provided in s. 742.091; or
(e) The minor is living with both natural parents who are still married to
each other whether or not there is a broken relationship between either or
both parents of the minor child and the grandparents, and either or both
parents have used their parental authority to prohibit a relationship
between the minor child and the grandparents.

Id. § 752.01(1).

207. Id.
208. Id.
209. Section 752.01(1)(c) applies when a parent has abandoned the child and has not yet
been the subject of judicial review.
212. Beagle was decided in August of 1996; Ward was decided in December of that year.
213. Ward v. Dibble, 683 So. 2d at 668.
214. Id.
215. Id. at 666 n.2 (citing Beagle v. Beagle, 678 So. 2d 1271, 1276 (Fla. 1996)).
"[f]rom the standpoint of a parent’s fundamental right to raise his or her children . . . the distinction between an intact marriage where one parent objects to visitation and a case where one parent has died and the surviving parent objects to visitation is hard to discern."216 Two footnotes at the end of the opinion further foreshadow the constitutional decisions to come.217 In the first, the court refers the reader to Steward v. Steward,218 noting that the Steward court construed a statute nearly identical to Florida’s grandparent visitation statute to “embody a presumption against grandparent visitation when divorced parents with full legal rights to the children agree that it is not in the child’s best interest.”219 In a final and lengthy footnote, the court notes that “constitutional challenges to these statutes have apparently just begun” and provides a comprehensive overview.220

An impassioned dissent in the Florida Court of Appeals decision Von Eiff v. Azicri, written approximately nine months later,221 demonstrated that any real hope the Beagle court had of keeping the grandparent visitation genie in the bottle with a specifically limited decision was simply not to be.222 Von Eiff involved a constitutional challenge to a Florida statute that permitted grandparents to seek court-ordered visitation when one or both parents of a child are deceased.223 In Von Eiff, the natural maternal grandparents of the child sought court-ordered visitation over the objections of the natural father and the adoptive mother; the child’s natural mother was deceased.224 Upholding the constitutionality of this subsection, the majority noted that the Beagle holding was limited to a different subsection of the statute,225 and by virtue of this limitation had invalidated court-ordered grandparent visitation only when it was awarded over the objections of a child’s married, natural parents.226

In an opinion considerably longer than the majority, the dissent took on the majority’s carefully confined analysis with an almost gleeful eloquence.227 If, as

216.  Id. This footnote was cited several more times as the post-Beagle momentum grew in the Florida courts. See Fitts v. Poe, 699 So. 2d 348, 348-49 ( Fla. Dist. Ct. App. 1997).

217.  See Ward v. Dibble, 683 So. 2d at 670 n.5-6.


219.  Ward v. Dibble, 683 So. 2d at 670 n.5.

220.  Id. at 670 n.6 (noting grandparent visitation statutes have been upheld under rational, intermediate, and strict levels of scrutiny; however, Georgia and Tennessee have applied strict scrutiny analyses to invalidate grandparent visitation statutes).

221.  Ward was decided in December of 1996; Von Eiff was decided in September of 1997.


223.  Id. at 773 (addressing Fla. STAT. ANN. § 752.01(1)(a) (West 1995)).

224.  Id.

225.  Id. at 774.

226.  Id. at 775.

227.  See id. at 778.
the majority argued, a valid distinction could be made between the constitutional rights of married parents and those of divorced parents, the dissent noted, then the state could not enforce the most routine and commonly accepted regulations against intact families. Furthermore, the state could "(1) enact any regulatory measure deemed to be in the child’s best interest, and (2) enforce the same over parental objections as long as the child’s family is not intact." The subtext for all the grandparent visitation cases to follow was thus set, for as the dissent observed, "[t]here is nothing in the Beagle analysis to suggest that parents who are single, widowed, separated or divorced should have less constitutionally protected privacy rights in the rearing of their children than married parents in the context of an intact family." A series of decisions over the next two years used this idea to challenge the Von Eiff majority’s conclusions and to invalidate three of the remaining four sections of Florida’s grandparent visitation statute. In Fitts v. Poe and Russo v. Perisco for example, judicial panels in different districts of the Florida Court of Appeals concluded that a widowed parent’s right to privacy under the Florida Constitution and under the Beagle reasoning was equal to that of a parent in an intact marriage. Fitts cited Beagle and observed, "we are unable to discern any difference between the fundamental rights of privacy of a natural parent in an intact family and the fundamental rights of privacy of a widowed parent." The Russo court likened its conclusion that court-ordered grandparent visitation infringed on the widowed father’s rights to the Beagle court’s conclusion that court-ordered grandparent visitation infringed on the rights of married natural parents. The Russo court noted that its opinion was thus in conflict with the

228. Id. at 782. The dissent’s examples of logically unenforceable regulations include "curfew laws, child restraint seat laws, inoculation laws, [and] school attendance laws." Id.

229. Id. (emphasis added). After suggesting that most people would agree that children benefit, for example, from regular dental checkups, the dissent commented that "[f]ew, if any people, however, would dare suggest that the state has the power to constitutionally enact measures to require parents to provide such things...." Id. at 782 n.21.

230. Id. at 783.

231. See Russo v. Perisco, 706 So. 2d 933, 934 (Fla. Dist. Ct. App. 1998); Fitts v. Poe, 699 So. 2d 348, 348-49 (Fla. Dist. Ct. App. 1997). Apparently no suit was filed under the fourth provision of the statute during this time period. Fla. Stat. Ann. § 752.01(1)(c) (West 1995). Section 752.01(1)(c) authorizes grandparent visitation when the parent has abandoned the child. Id.


234. Russo v. Perisco, 706 So. 2d at 934; Fitts v. Poe, 699 So. 2d at 348-49.

235. Fitts v. Poe, 699 So. 2d at 348-49 (citing Beagle v. Beagle, 678 So. 2d 1277, 1276 (Fla. 1996)).

236. Russo v. Perisco, 706 So. 2d at 934.
majority in *Von Eiff*, and like the *Von Eiff* court, the *Russo* court certified a question regarding the statute’s constitutionality to the Florida Supreme Court.\(^{237}\)

A few months later, in *Ocasio v. McGlothin*,\(^ {238}\) a suit brought in the same judicial district in which *Von Eiff* was decided required a different panel of that same court to revisit the issue of whether a grandparent could constitutionally seek court-ordered visitation under the same statute when one of the child’s parents had died.\(^ {239}\) Because the child had been born out of wedlock, another subsection of the statute, subsection (d), also provided a statutory basis for the grandparent visitation suit.\(^ {240}\) The *Ocasio* court first stated its disagreement with the *Von Eiff* majority stating its position that “the grandparent [visitation] statute, as presently written, is facially unconstitutional for the reasons expressed in the *Von Eiff* dissenting opinion.”\(^ {241}\) It acknowledged, however, that stare decisis required it to “adhere to the *Von Eiff* majority decision and affirm” the lower court’s determination that subsection (a) was constitutional.\(^ {242}\) Because *Von Eiff* had not addressed subsection (d), however, the *Ocasio* court held that the subsection (d), permitting a grandparent visitation suit where the child had been born out of wedlock, was unconstitutional under the reasoning of the *Von Eiff* dissent.\(^ {243}\)

A third subsection of the grandparent visitation statute was invalidated when *Williams v. Spears*\(^ {244}\) held that divorced parents who were united in their opposition to grandparent visitation were entitled to the same privacy right articulated in *Beagle*\(^ {245}\) and applied to widowed parents by *Fitts* and *Russo*.\(^ {246}\) *Williams*, too, acknowledged that *Beagle* had attempted to limit its conclusions regarding parental privacy rights in grandparent visitation cases to married natural parents.\(^ {247}\) *Williams* noted, however, that the state constitutional


\(^{239}\) *Id.* at 918; see Fla. STAT. ANN. § 752.01(1)(a) (West 1995).

\(^{240}\) *Ocasio* v. *McGlothin*, 719 So. 2d at 918 (addressing Fla. STAT. ANN. § 752.01(d)).

\(^{241}\) *Id.*; see *Von Eiff* v. *Azcoc*, 699 So. 2d at 778-87 (Green, J., dissenting).

\(^{242}\) *Ocasio* v. *McGlothin*, 719 So. 2d at 918.

\(^{243}\) *Id.* at 918-19.


\(^{245}\) *Id.* at 1240-42 (invalidating section 752.01(1)(b) of the Florida grandparent visitation statute as applied to divorced parents who share a parental relationship).

\(^{246}\) *Id.* at 1240 (citing *Fitts* v. *Poe*, 699 So. 2d 348, 348-49 (Fla. Dist. Ct. App. 1997) (invalidating section 751.01(1)(a) of Florida grandparent visitation statute on grounds that privacy rights of intact family and of widowed parents were indistinguishable); *Russo* v. *Persico*, 706 So. 2d 933 (Fla. Dist. Ct. App. 1998) (holding section 751.01(1)(a) of Florida grandparent visitation statute unconstitutionally infringed on a widowed parent’s right to raise his child).

\(^{247}\) *Williams* v. *Spears*, 719 So. 2d at 1241.
provision of privacy Beagle invoked “has never been narrowly construed.”
Stressing that familial privacy applies to responsible parental decision-making, the court concluded that the joint childrearing decisions of divorced parents are “entitled to deference from the government.” The court also concluded that section 752.01(1)(b) of the statute—allowing court-ordered grandparent visitation whenever the child’s parents were divorced—would be unconstitutional whenever applied “to divorced parents who are in agreement that a court should not order grandparent visitation.”

The question Von Eiff certified to the Florida Supreme Court was answered a few weeks later when the court not only held that section 752.01(1)(a)—authorizing a grandparent visitation suit when one parent had died—was facially unconstitutional, but also reaffirmed the crucial role of the harm standard in any grandparent visitation suit. Noting that only a compelling state interest could justify intrusion on the fundamental right of childrearing autonomy, the court held that harm or the threat of harm to the child was the only state interest of sufficient magnitude. Rejecting the grandparents’ argument that the death of a parent gives rise to a compelling state interest in the child’s welfare, the court noted that it “would inappropriately expand the types of harm to children that have traditionally warranted government intervention in parental decision-making.” In contrast to situations where a child suffers abuse, neglect, or a lack of life saving medical treatment, a surviving parent’s response to the death of a biological parent could appropriately vary among families.

The court was similarly unequivocal that the status of a child’s family as “intact” did not play a role in its analysis. Although the court in Beagle

248. Id.
249. Id.
250. Id. at 1242.
251. The question the Von Eiff majority certified to the Florida Supreme Court read as follows: “May the state constitutionally allow reasonable grandparent visitation where one or both parents of a child are deceased and visitation is determined to be in the best interests of the child?” Von Eiff v. Azicri, 699 So. 2d 772, 778 (Fla. Dist. Ct. App. 1997), vacated, 720 So. 2d 510 (Fla. 1998). Von Eiff contains a striking lesson in the significance of accurately phrasing a question presented. The question as the Florida Supreme Court elected to rephrase it prior to answering it read as follows: “Is section 752.01(1)(a), Florida Statutes (1993), facially unconstitutional because it impermissibly infringes on privacy rights protected by Article I, Sections 23 [the privacy provision] of the Florida Constitution?” Von Eiff v. Azicri, 720 So. 2d at 510-11.
252. Id. at 514.
253. Id. at 514-16.
254. Id. at 514-15.
255. Id. at 515.
256. See id. at 516.
257. See id. at 515.
referred to the fact that the Beagles were "an intact family," the decision itself rested on parents' constitutional rights to childrearing autonomy. While the child's biological mother was alive, Philip Von Eiff had a right under Beagle to decide with whom his child would have a relationship. "[N]othing in the unfortunate circumstance of one biological parent's death [affects] the surviving parent's right of privacy in a parenting decision concerning the child's contact with her maternal grandparents." Furthermore, the court stated that when the child's father remarried and his new wife adopted the child, the child was once again part of an intact family. Although this circumstance did not affect the decision, the court noted that it illustrated the difficulty of attempting to base government intrusion in family life on categories of family status.

B. Redefining the Concept of the "Intact Family" in Grandparent Visitation Law: Any Stable Family, Any United Parental Decision-Making by Fit Parents

In jurisdictions where grandparent visitation statutes prohibit suit against intact families, the recent judicial trend to limit state intrusion on family life through court-ordered grandparent visitation has also manifested itself in judicial interpretations of "intact family." In older opinions, courts tended to define "intact family" literally rather than in terms of function and purpose. An intact family meant a nuclear unit consisting of the child's married, natural parents. Increasingly, however, opinions have begun to define intact family in other ways. These opinions fall into two general categories. In one category, courts find that children are part of an intact family when they are part of a stable family group and their custody has not been placed at issue. The child born out of wedlock and his single mother would therefore constitute an intact family as long as the

260. Id.
261. Id.
262. Id. at 515-16.
263. Id.
264. See, e.g., Van Cleve v. Hemminger, 415 N.W.2d 571, 574 (Wis. Ct. App. 1987) (holding there is "no justifiable reason for the state to override determinations made by parents as to what is in the best interests of their children" when the family unit is intact).
265. See, e.g., Marotz v. Marotz, 259 N.W.2d 524, 529-30 (Wis. 1977) (analyzing the situation as a non-intact family because of a divorce).
266. See Van Cleve v. Hemminger, 415 N.W.2d at 574 (validating the denial of grandparent visitation rights by married, biological parents of two children stating "decisions made by an intact family unit in regard to the children’s best interests must be respected").
267. See, e.g., Fisher v. Fisher, 477 S.E.2d 251, 253 (N.C. Ct. App. 1996) (holding that "[i]t is only when the custody of a child is 'in issue' or 'being litigated' that the grandparents are entitled to relief pursuant to [the North Carolina statute]").
father had not contested custody. In the other category of opinions, the court focuses on the parental decision-making itself, concluding that united parental decision-making is entitled to the same judicial deference regardless of whether the parents are married or not. Thus, where divorced parents with joint custody were united in their opposition to grandparent visitation, the court refused to interfere with their decision because they, like any married parents, had full legal rights to their child and had never abdicated parental responsibility.

In essence, both strands of this redefinition of the intact family reflect the trend toward applying the same harm standard to grandparent visitation suits that applies to all other domestic relations cases.

Fisher v. Fisher represents the first category of cases. In Fisher, the maternal grandparents challenged their daughter's right to deny them visitation on the grounds that, although she and her children were a stable family unit, they could not be considered an intact family because she was not married to and living with the children's natural father. Under North Carolina law, grandparent visitation may be awarded under a general statute or under one of three specific provisions. The general statute conferred standing to sue on grandparents in an "action or proceeding for custody of [a minor child] ..." Thus grandparents, like "[a]ny parent, relative or other person, agency, organization or institution" could seek custody or visitation when the child's family life suffered a disruptive precipitating event, placing custody at issue. The grandparents argued under this provision "only parents residing with their children in an 'intact nuclear family'... are insulated from grandparent visitation actions." The grandparents also argued, in the alternative, that if their action under the general statute failed, they were nonetheless entitled to sue under a specific provision authorizing an award of grandparent visitation as part of a custody order because their daughter had filed a motion for a determination of

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268. See id.
270. See Williams v. Spears, 719 So. 2d at 1241; Steward v. Steward, 890 P.2d at 782.
272. See id. at 253.
273. Id. at 252-53. The parental rights of one child's father had been terminated. Id. at 252. The other child had been born out of wedlock. Id. Shortly after the birth of this child the mother had filed an order seeking an award of custody and an order seeking child support from the child's father. Id. With the exception of these two orders, mother and children had had no contact with the judicial system. Id. at 253.
275. Id. §§ 50-13.2(b1), 13.2(f), 13.2A.
276. Id. § 50-13.1(a).
custody after the birth of her second child. The trial court rejected both arguments, ruling that the grandparents had no standing to sue because the children lived in an intact family and that no other statutory provision applied. The grandparents appealed, renewing both arguments in the North Carolina Court of Appeals.

The court of appeals first rejected the grandparents’ argument that their daughter’s family was not intact because it did not consist of “a mother, a father and a child residing in a single residence.” The court noted that other groups of people living together have been accorded family status and that stable relationships between one parent and a child have long been accorded constitutional protection. The court pointed out in Moore v. City of East Cleveland that the United States Supreme Court declared a statute unconstitutional when it failed to protect the familial rights of a household consisting of a grandmother, her son, and two grandchildren. The court found similar support for a single parent’s familial rights in Hodgson v. Minnesota, where the United States Supreme Court upheld the constitutionality of a parental notification statute that allowed a minor to obtain an abortion after consulting only one parent. For the court of appeals, the daughter and her children were an intact family because they were a stable unit functioning without judicial oversight or intrusion.

The deference to family function implicit in this redefinition of the concept of an intact family is also evident in the court’s rejection of the grandparents’ alternative argument that the fact that their daughter filed a complaint seeking orders of custody and support shortly after her second baby’s birth should constitute an “ongoing custody dispute” within the meaning of the General Statutes of North Carolina Section 50-13.2(b1). After commenting that an ongoing custody dispute of the sort the grandparents posited would certainly give them standing to sue their daughter, the court stated flatly that no such dispute existed. The father had never contested the children’s custody; their custody was not in any sense “in issue” or “being litigated.” For the court, parental

279. Id.
280. Id. at 252.
281. Id.
282. Id. at 253.
283. Id.
284. Id. (citing Moore v. City of E. Cleveland, 431 U.S. 494, 539 (1977)).
287. Id.
290. Id.
decision-making cannot be countermanded by court order absent a genuine threat to the stability of the children’s lives.\textsuperscript{291}

This process of redefining the concept of the intact family in the context of a grandparent visitation suit is not simply a byproduct of North Carolina’s particular statutory scheme; it is also evident in cases from other jurisdictions where a grandparent’s standing to sue depends on whether the child is part of an intact family.\textsuperscript{292} Under Arizona law, for example, grandparents acquire standing to sue when a child’s parents have been divorced for at least three months.\textsuperscript{293} The law also preserves grandparent visitation if the natural parent remarries and the new spouse adopts the child.\textsuperscript{294} In \textit{Guethie v. Turscott},\textsuperscript{295} the biological, paternal grandmother relied on those provisions to seek visitation with a grandchild after her son—the child’s father—divorced the child’s mother and voluntarily relinquished his parental rights.\textsuperscript{296} The child’s mother remarried, her new husband adopted the child, and the biological, paternal grandmother sued two years later.\textsuperscript{297} The Arizona Court of Appeals rejected her suit finding none of the provisions of the grandparent visitation law applicable.\textsuperscript{298} The child, the court asserted, was now part of an intact family.\textsuperscript{299} In \textit{In re Appeal in Maricopa County},\textsuperscript{300} the Arizona Court of Appeals reached the same conclusion where a child, born out of wedlock, was adopted by the child’s natural, maternal grandfather and his wife.\textsuperscript{301} The child’s natural, maternal grandmother sought court ordered visitation pursuant to the portion of the grandparent visitation statute conferring standing to sue where the child was born out of wedlock.\textsuperscript{302} The court held that state adoption law required it to treat the child as part of an intact family and did not reach a decision on the issue of standing.\textsuperscript{303} Although it conceded that the adoption law could not “change a physiological fact,” the court asserted that following adoption a child is “born within ‘lawful wedlock,’”\textsuperscript{304} in the eyes of the law and the plaintiff grandmother did not have standing to sue.

This functional, fact specific inquiry into whether a family unit is intact for purposes of a grandparent visitation suit can appear either as the express

\textsuperscript{291} See id.
\textsuperscript{292} See \textsc{Ariz. Rev. Stat.} § 25-409(A) (1999).
\textsuperscript{293} Id.
\textsuperscript{294} Id. § 25-337.01(F).
\textsuperscript{296} Id. at 34.
\textsuperscript{297} Id.
\textsuperscript{298} Id.
\textsuperscript{299} Id.
\textsuperscript{300} In re Appeal in Maricopa County, 925 P.2d 738 (Ariz. Ct. App. 1996).
\textsuperscript{301} Id. at 739 (quoting \textsc{Ariz. Rev. Stat.} § 8-117(A) (1996)).
\textsuperscript{302} Id.
\textsuperscript{303} Id. at 740.
\textsuperscript{304} Id. at 740 n.3.
specifications in a court’s analysis or simply as a necessary implication of a court’s holding or use of precedent. In *Waite v. Wemmer*, the court held that whether a family is intact or not is a “fact specific inquiry.” Although the court noted that whether the child lived with a biological parent was an “influential” factor, it refused to find it to be determinative. In *Sposato v. Sposato* on the other hand, the dissenting justice treated a single mother and her children as an intact family unit without articulating the specific terms of any test.

In *Sposato*, the paternal grandfather successfully obtained a visitation order providing for a single instance of visitation. The mother appealed, but before her appeal was heard logistical difficulties unrelated to the order or appeal forced cancellation of the court-ordered visit. Pointing to this cancellation, the majority refused to address the substance of the mother’s appeal, characterizing it as moot. Taking issue with this conclusion, the dissent observed that the visitation issue was likely to resurface and should be resolved now in favor of the “family unit” consisting of the mother and her children. To reach this conclusion, the dissent cited the court’s earlier opinion in *Peterson v. Peterson* which disapproved of court-ordered visitation over the objections of a child’s fit married parents. The dissent noted the function of this single mother in her children’s lives was to be a “protective” and “responsible” presence. The grandfather who sought visitation was a “virtual stranger.” The dissent then quoted a statement from *Peterson* regarding the constitutional protection parents are entitled to in the context of grandparent visitation. Instead of including the *Peterson* court’s original references to married parents, however, the dissent

306. *Id.* at *2.
307. *Id.*
309. *See id.* at 216-17 (Meschke, J., dissenting).
310. *Id.* at 213.
311. *Id.*
312. *Id.* at 214.
313. *Id.* at 214-16 (Meschke, J., dissenting).
314. *Id.* at 216-17 (Meschke, J., dissenting).
316. *Sposato v. Sposato*, 570 N.W.2d at 216-17 (Meschke, J., dissenting) (citing *Peterson v. Peterson*, 559 N.W.2d at 832). This aspect of the *Peterson* decision is dicta. The lower court did not address the constitutional issues raised on appeal and the *Peterson* court commented that it was “at a loss to understand why.” *Peterson v. Peterson*, 559 N.W.2d at 832. Therefore, they could not properly be resolved on appeal. *Id.*
318. *Id.* (Meschke, J., dissenting).
319. *Id.* at 217 (Meschke, J., dissenting).
substitutes references to this single mother. Without stating any particular test or factor, the dissent has demonstrated the underlying trend toward treating a functioning family group as an intact family.

In contrast to these opinions, other courts in jurisdictions that protect the intact family have broadened the definition of intact family, not by focusing on the existence of a stable family unit, but by equating united parental decision-making on the part of divorced parents with the united parental decision-making that occurs between married parents in an intact family. In *Lockhart v. Lockhart*, the court concluded that the united parental decision-making occurring in a case of joint custody was sufficient to prevent a grandparent visitation suit under a statute that conferred standing only when the parent who was the grandparent’s child had either died or lost custody. The court was addressing a situation where divorced parents retained joint custody and the child’s father denied his parents visitation. When the parental grandparents sued, the child’s mother and father joined forces in a successful motion to dismiss at the trial level. On appeal, the grandparents argued the fact that the parents had divorced and now shared joint custody from their separate households should be interpreted as a loss of full custody for each parent under the grandparent visitation statute rather than as the retention of full custody by each parent.

The court’s rejection of this argument affirmed the value of united parental decision-making whether it emanates from one household or two. The court first noted that the rationale underlying the statute is that grandparents’ ordinary avenue of access to a grandchild is through their own child, the grandchild’s parents. Thus, when a parent divorces and loses custody, he loses some of the corresponding right to participate in child-rearing decisions. The statute is

320. *Id.* (Meschke, J., dissenting).
323. *Id.* at 866.
324. *Id.* at 865.
325. *Id.*
326. *Id.* at 866. The grandparents also unsuccessfully argued that the statute violated the equal protection clauses of the Federal and Indiana Constitutions by creating a distinction between groups of grandparents without a rational basis for doing so. *Id.* at 865-66. The court easily found a rational basis in the fact that the grandparents’ ordinary avenue of access to a grandchild is through their own child. *Id.* When the parent who is their own child loses custody, grandparents are afforded statutory protection of a relationship with a grandchild because these grandparents can no longer count on their own child’s ability to provide it. *Id.* One can only shudder at the temerity—or perhaps marvel at the courage—of a lawyer who shoulders the undeniably unsympathetic argument that his clients are disadvantaged by an adult son who has not seen fit either to die or to lose custody of his child.
327. *Id.* at 865.
triggered at that point to protect the grandparent–grandchild relationship.\textsuperscript{328} Where parents divorce but retain joint custody, on the other hand, they retain “virtually the same legal parenting rights they had while they were married.”\textsuperscript{329} Because grandparents would not be able to interfere with the united child-rearing decisions of married parents, the court reasoned they should not be able to interfere with the united childrearing decisions of divorced parents with equal custody.\textsuperscript{330} The court thus concluded that, for purposes of applying the grandparent visitation statute, divorced parents’ united childrearing decisions are no less significant than married parents’ united childrearing decisions.\textsuperscript{331}

In Steward v. Steward, the Nevada Supreme Court also elected to limit grandparents’ ability to seek visitation under a statute that prohibited interference with intact families by equating the concept of intact family with united parental decision-making.\textsuperscript{332} In Steward, the parents divorced but retained joint custody of their child and were in agreement the child should not have contact with his paternal grandparents.\textsuperscript{333} Under Nevada’s grandparent visitation statute,\textsuperscript{334} the divorce itself appeared to give the grandparents the standing they needed to seek court-ordered visitation.\textsuperscript{335} A lower court awarded visitation and both parents appealed.\textsuperscript{336} The parents argued that the statute could not have been intended to give grandparents a means of overriding the decisions of natural parents with full legal rights to their child.\textsuperscript{337} On appeal, the Nevada Supreme Court agreed.\textsuperscript{338}

The court reached its conclusion by looking to the dimensions of the right at stake\textsuperscript{339} and to the purpose of the statute.\textsuperscript{340} It noted that parents have a liberty interest in childrearing autonomy.\textsuperscript{341} Reviewing testimony given in support of enactment of the statute in light of this basic principle, the court observed that

\begin{itemize}
  \item \textsuperscript{328} Id.
  \item \textsuperscript{329} Id. at 866.
  \item \textsuperscript{330} Id.
  \item \textsuperscript{331} Id.
  \item \textsuperscript{332} Steward v. Steward, 890 P.2d 777, 782 (Nev. 1995).
  \item \textsuperscript{333} Id. at 777.
  \item \textsuperscript{334} The Nevada statute provides, in pertinent part, that a parent of either parent of an unmarried minor child, if: 1. One parent of the minor child is . . . divorced . . . from the other parent . . . may visit the child during the child’s minority and spend sufficient time with the child to establish a meaningful relationship, if the court determines that visitation is in the best interests of the child.
  \item \textsuperscript{335} Steward v. Steward, 890 P.2d at 782.
  \item \textsuperscript{336} Id. at 777.
  \item \textsuperscript{337} Id. at 780.
  \item \textsuperscript{338} Id. at 783.
  \item \textsuperscript{339} Id. at 780-83.
  \item \textsuperscript{340} Id. at 781-82; see Nev. Rev. Stat. § 125A.340.
  \item \textsuperscript{341} Steward v. Steward, 890 P.2d at 782.
\end{itemize}
none of the testimony suggested the statute was intended to countermand the childrearing decisions of fit parents “who had never relinquished responsibility for a custody of the child.”\textsuperscript{342} The court concluded that to interpret the grandparent visitation statute to allow visitation over both parents’ objection simply because they had divorced would have the “absurd result” of permitting state intrusion on childrearing decisions for no other reason than that the parents’ marital status had changed.\textsuperscript{343} In keeping with this conclusion, the court interpreted the grandparent visitation statute as setting up a presumption against court-ordered grandparent visitation when divorced parents who share full legal rights to a child agree that the visitation should not occur.\textsuperscript{344}

In essence, these two analytical approaches to redefining the concept of the intact family—the “stable household” approach and the “united parental decision” approach—are more closely related than they might first appear. Both are part of the same movement toward the application of a harm standard in any grandparent visitation case. Under either analysis, the term “intact family” becomes less of a description of exactly who lives in a single household and more of a shorthand description of circumstances that pose no threat of harm to the child.

C. Farewell to Sentiment: the Judicial Trend Toward Strict Adherence to All Applicable Preconditions to a Grandparent Visitation Suit

The trend toward limiting the state intrusion on family life resulting from a grandparent visitation suit is also seen in recent opinions which require genuine adherence to the threshold requirements set forth in a grandparent visitation suit, even if this sometimes precludes the suit entirely.\textsuperscript{345} Where courts of twenty years ago might have dismissed inconvenient barriers to a grandparent’s suit with a sentimental characterization of grandparents, or the grandparent-grandchild bond,\textsuperscript{346} or with unsubstantiated speculation regarding the legislative intent behind a particular provision,\textsuperscript{347} current opinions are much more likely to enforce

\textsuperscript{342} Id. The court noted the grandparent visitation statute was designed to remedy “egregious circumstances” such as those in which grandparents wanted to step in because parents were unfit, but were denied the legal right to help, or acted as legal guardian for a child only to be later shut out of the child’s life. \textit{Id.}

\textsuperscript{343} Id.

\textsuperscript{344} Id.


\textsuperscript{346} See, e.g., Graziano v. Davis, 361 N.E.2d 525, 527 (Ohio Ct. App. 1976) (describing the “typical” attitude of grandparents toward grandchildren as “pride, love and enjoyment”).

\textsuperscript{347} See, e.g., Ehrlich v. Ressner, 391 N.Y.S.2d 152, 153 (App. Div. 1977) (stating “[t]he humanistic concern evinced by the Legislature in enacting this section is an implicit recognition that “[v]isits with a grandparent are often a precious part of a child’s experience””) (quoting Mimkon v. Ford, 332 A.2d 199, 204 (N.J. 1975)).
these threshold requirements. Thus a grandparent visitation opinion written within the last few years is far more likely to include specific discussions of how the statute’s requirements have or have not been met, and far less likely to resort to sentimental generalizations.

In the older case of Mimkon v. Ford, for example, the child’s maternal grandmother obtained court-ordered visitation despite the fact that the award was in apparent conflict with applicable adoption law. In Mimkon, the mother of the child in question died, the father assumed custody, and when he remarried, his new wife adopted the child. Sometime after this adoption, the maternal grandmother sought court-ordered visitation under a grandparent visitation statute which conferred standing to sue on a grandparent when the parent who was the grandparent’s child had died. The lower court refused to order forced visitation, relying on pertinent provisions of the adoption code. The court noted that the intent of those provisions was to protect the adopting parents “from later disturbance of their relationship with the child by the natural parents” and that the judgement of adoption should terminate “all relationships between the child” and any person when those rights flowed from the biological parents, who were now supplanted. The New Jersey Supreme Court disagreed.

The New Jersey Supreme Court in Mimkon first noted that grandparent visitation is a purely statutory right. This position is identical to that taken in virtually all recent decisions. Unlike recent decisions, however, Mimkon did

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348. See Beagle v. Beagle, 678 So. 2d 1271, 1272 (Fla. 1996). There are always exceptions. In the 1974 case of Geri v. Fanto, Judge Leo Glasser denied the grandparents’ petition for visitation asking:

Could it possibly be in the best interest of the children to compel their mother and father to observe a visitation regime imposed by the court when they, the custodial parents, are opposed to it? Could it possibly be in the best interests of the children to have them become victims of paralyzing loyalty conflicts, assuming they have any sense of loyalty toward [the grandparents]?

Geri v. Fanto, 361 N.Y.S.2d 984, 988 (Fam. Ct. 1974). The judge concluded by suggesting “that the legislature give serious consideration to the advisability of repealing [the grandparent visitation statute].” Id. at 989.


350. Id. at 202.

351. Id. at 200.


354. Id. (citing N.J. STAT. ANN. § 9:3-17 (repealed 1977)).

355. Id. (citing N.J. STAT. ANN. § 9:3-30(A), (B) (repealed 1977)).


357. Id. at 201-02.

358. See, e.g., Turner v. Turner, 706 So. 2d 1219, 1220 (Ala. Civ. App. 1997) (“Because grandparent visitation is purely statutory, it is restricted according to the terms provided by the
not use this fact to limit visitation to the precise terms of the applicable statutes. Instead, the court stated that because the grandparent’s right to visitation had been created by statute, it was “an independent action,” limited only where necessary by the best interests of the child. The court justified overriding the clear ban on grandparent visitation embodied in the adoption law by stating that the grandparent visitation statute and the adoption statute shared a common purpose: “[T]o provide substitute parental relationships for children who, for some reason, have been deprived of the benefits of a healthy relationship with one or both natural parents.” The court then used a sentimental generalization to remove grandparents from the adoption code’s prohibition on interference with the newly formed family unit. Grandparents, the court asserted, are not like a natural parent in that they will not be conflicting authority figures in the child’s life. Instead, grandparents “[a]t best . . . are generous sources of unconditional love and acceptance, which complements rather than conflicts with the roles of the parents.” Disregarding the fact that it had just stated the grandparent visitation statute was intended to foster a substitute “parental” relationship between grandparent and grandchild, the court awarded visitation.

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359. See, e.g., Mimkon v. Ford, 332 A.2d at 200-05 (concluding the legislature did not intend the adoption statute to wholly override grandparents’ statutorily granted rights to visitation).

360. Id. at 201-02, 205.

361. Id. at 202. This statement must have come as a particularly unpleasant shock to the new Mrs. Ford, who may well have expended considerable effort navigating the difficult course leading to stepmotherhood, and must certainly have considered herself the little girl’s new mother.

362. See id. at 204-05.

363. Id. at 204.

364. Id. The court conveniently and perhaps predictably omits any discussion of “at worst.” Years would pass before it would become commonplace for courts to acknowledge that grandparents, like everyone else, can range from the sublime (the author wishes to offer her daughter’s grandfather, Leland S. Bohl, Sr., as a prime example of the best in grandparenting) to the ridiculous. See Luma v. Kawalchuk, 658 N.Y.S.2d 744, 746 (App. Div. 1997) (grandparents alleging their relationship with grandchildren was sufficiently substantial to trigger protection of equity based on the grandparent visitation statute though the grandparents had failed to visit, telephone, or send grandchildren cards or presents). Grandparents may also be truly evil. See Indiana Farmers Mut. Ins. Co. v. Ellison, 679 N.E.2d 1378 (Ind. Ct. App. 1997) (involving the grandmother’s knowledge of and failure to stop the molestation of her grandchild by her husband).

365. Mimkon v. Ford, 332 A.2d at 205. The development of today’s more principled body of grandparent visitation law makes it clear that the Mimkon facts represent one of the few circumstances in which grandparent visitation could legitimately be awarded over the objections of the fit parents. See id. at 204-05. The natural parents of the child in question in Mimkon had separated prior to her birth and the child and her mother had lived with the grandmother through the mother’s terminal illness and for at least half the child’s life. Id. at 200. Sharing “a common
In contrast to the results-oriented statutory interpretations of older cases, in which courts were willing to use generalizations and unsupported speculation to justify awards of grandparent visitation, recent cases demonstrate the current trend toward precise statutory interpretation and meticulous attention to statutory thresholds. In Beard v. Pannell, the court declined to award grandparent visitation to the parents of the child’s deceased father after her adoption by her mother’s new husband, choosing instead to adhere precisely to the terms of the applicable statutes. In Toth v. Toth, the court’s interpretation of statutory standing requirements was similarly precise, and it was equally unwilling to circumvent the legal effect of a child’s adoption in order to confer standing to sue on the petitioning grandmother. If the days of sentimentalizing grandparent visitation in blurry and mystical terms have not drawn to a close, then certainly, as these cases illustrate, twilight has fallen.

In Beard, the child’s father and mother divorced, after which the father committed suicide. One year later the paternal grandparents sought court-ordered visitation. During the period between the first and second evidentiary hearings in the case, the mother’s new husband adopted the child, and the mother and stepfather argued that the adoption severed any right the biological paternal grandparents had to court-ordered visitation. The grandparents argued that their rights were preserved under either of two statutory provisions. One statute provided that remarriage of the surviving spouse could not affect visitation. The other provided that if the spouse of a surviving parent adopted the child then “the child’s rights from or through the deceased parent for all purposes, including inheritance and applicability or construction of documents, statutes, and instruments, are not restricted or curtailed by the adoption.”

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home” for such an extensive period should have vested the grandmother with some quasi-parental rights of her own. See Bohl, supra note 85, at 279-87. She should also have prevailed under a theory that to sever a relationship of this sort by denying visitation would be a threat of harm to the child. See, e.g., Hilliard v. Hilliard, No. 02A01-9609-CH-00230, 1997 WL 615110, at *4 (Tenn. Ct. App. Feb. 14, 1997) (stating that the trial court should first determine if the cessation of the relationship presents a substantial danger of harm and then to determine if grandparent visitation is in the child’s best interest); see generally Bohl, supra note 156, at 1-28 (discussing how several state cases address the issue of grandparent visitation).

367. Id. at 1226-27.
369. Id. at 115-16.
371. Id.
372. Id.
373. Id. at 1227.
374. Id. (citing OHIO REV. CODE ANN. § 3109.11 (Anderson 1996)).
375. Id. at 1227 n.4 (quoting OHIO REV. CODE ANN. § 3107.15B).
The court rejected the grandparents’ arguments holding that the adoption had divested the grandparents of any visitation rights because “their child [was] no longer the legal parent of their grandchild.” It refused to entertain the grandparents’ argument that the provision preserving grandparent visitation rights after the remarriage of the surviving spouse was relevant stating simply that the facts before it included an adoption, not simply a remarriage. The court was similarly unimpressed with the argument that the provision preserving “the child’s rights from and through the deceased parent” was relevant. Refusing to read any broad policy mandate into the statute, the court simply asserted that it was not applicable to a petition for grandparent visitation rights.

In Toth v. Toth, the court’s interpretation of statutory standing requirements was similarly uninfluenced by any appeal to sentiment in the guise of policy. In Toth, both biological parents consented to the adoption of their child by his paternal grandfather and the paternal grandfather’s wife. The paternal grandmother exercised court-ordered visitation during the pendency of the adoption proceeding. When the adoption became final, the court terminated her visitation and she filed suit arguing that she had a right to continue her relationship with the child through visitation. The court disagreed, holding that the grandparent visitation statute allowed suit only when a child custody dispute was pending. When the adoption became final, the child’s custody was no longer at issue and the grandparent visitation statute could not be properly

376. Id. at 1227.
377. Id.
378. Id.
379. Id. This conclusion also reflects the unsentimental perceptiveness characterizing many recent decisions. See Toth v. Toth, 577 N.W.2d 111, 115 (Mich. Ct. App. 1998). Grandparent visitation statutes confer a benefit on the grandparent, not the grandchild. No grandparent visitation statute purports to confer any obligation on the grandparent, whether it be to continue visitation once started, to provide supervision when needed, or any other obligation. See Bohl, supra note 156, at 1-28.
380. Toth v. Toth, 577 N.W.2d at 115.
381. Id. at 114.
382. The court explained the unusual facts of the case as follows: Barbara Toth and Frank Toth, divorced in 1988, are the parents of David Toth, Sr. Frank Toth is currently married to Wanda Toth, who is the mother of Brandi Sanson. David Toth, Sr., and Brandi Sanson are the biological parents of David Michael Toth, Jr., the minor child at issue in the proceedings herein. Frank and Wanda Toth are therefore both the adoptive parents and the child’s paternal grandfather and maternal grandmother respectively.
383. Id. at 113.
384. Id. at 114.
invoked.\textsuperscript{386} The court expressed sympathy for the paternal grandmother,\textsuperscript{387} but in contrast to many decisions of the \textit{Mimkon v. Ford} era, it refused to translate sympathy into some sort of exception to the clear standing requirements of the grandparent visitation statute.\textsuperscript{388} Instead, it pointed to the purpose of adoption law: the creation of a new, complete family unit.\textsuperscript{389} Strict adherence to threshold limitations on grandparent visitation suits was a necessary part of protecting the autonomy of the “new and complete” substitute family.\textsuperscript{390}

In a sense, \textit{In re Visitation of J.P.H.}\textsuperscript{391} brings this trend toward preservation of family autonomy through strict adherence to statutory thresholds full circle by concluding that the petitioning grandparents had not satisfied an essential threshold to suit despite the fact that the grandparents qualified for visitation under the literal terms of the statute.\textsuperscript{392} In \textit{In re Visitation of J.P.H.}, the child at issue was born out of wedlock.\textsuperscript{393} The child’s biological mother and father subsequently married, however, and were living together as an intact family unit when the paternal grandparents sued.\textsuperscript{394} As the grandparents pointed out and the court itself acknowledged, Indiana’s grandparent visitation statute conferred standing to seek court-ordered visitation when “‘the child was born out of wedlock.”’\textsuperscript{395}

The court nevertheless concluded the statutory threshold had not been satisfied, organizing its reasoning around the principles and policies of parental autonomy.\textsuperscript{396} It stated first that all grandparent visitation statutes are in derogation of common law and must be strictly construed.\textsuperscript{397} The court then discussed public policy militating against governmental intervention in private

\begin{itemize}
\item \textsuperscript{386} \textit{Id.}
\item \textsuperscript{387} \textit{Id.}
\item \textsuperscript{388} \textit{Id.}
\item \textsuperscript{389} \textit{Id.} at 114-15.
\item \textsuperscript{390} \textit{Id.} at 115.
\item \textsuperscript{391} \textit{In re Visitation of J.P.H.}, 709 N.E.2d 44 (Ind. Ct. App. 1999).
\item \textsuperscript{392} \textit{Id.} at 47-48.
\item \textsuperscript{393} \textit{Id.} at 45.
\item \textsuperscript{394} \textit{Id.}
\item \textsuperscript{395} \textit{Id.} at 46 (quoting \textsc{Ind. Code Ann.} § 31-17-5-1 (Michie 1997)). The grandparent visitation statute reads, in pertinent part:
\begin{enumerate}
\item A child’s grandparent may seek visitation rights if:
\begin{enumerate}
\item the child’s parent is deceased;
\item the marriage of the child’s parents has been dissolved in Indiana; or
\item subject to subsection (b), the child was born out of wedlock.
\end{enumerate}
\item A court may not grant visitation rights to a paternal grandparent of a child who is born out of wedlock under subsection (a)(3) if the child’s father has not established paternity in relation to the child.
\end{enumerate}
\item \textsuperscript{396} \textit{In re Visitation of J.P.H.}, 709 N.E.2d at 46.
\item \textsuperscript{397} \textit{Id.}
family matters.\textsuperscript{398} Grandparent visitation statutes are intended to allow grandparents to seek court-ordered visitation only when the parent who is their child has lost custody; otherwise the grandparent would have impermissible control over the upbringing of the grandchild.\textsuperscript{399} Finally, the court noted Indiana precedent providing that the parents' marriage, plus the father's acknowledgement of an illegitimate child rendered the child legitimate.\textsuperscript{400} Given these converging considerations of policy, the court reasoned, the legislature could not possibly have intended to allow suit under these circumstances, regardless of whether the grandparents could fulfill the literal terms of the statute.\textsuperscript{401}

The evolution of grandparent visitation law from decisions that were sentimental and often somewhat illogical to decisions that promote family autonomy through adherence to statutory thresholds\textsuperscript{402} is particularly striking in a comparison of older New York cases with recent New York cases.\textsuperscript{403} Under New York's grandparent visitation statute, a court must first determine if the grandparents have standing to sue either by virtue of the death of a parent or because circumstances make it appropriate for the court to intervene to protect a beneficial grandparent and grandchild relationship.\textsuperscript{404} Where the child's parents are both living and standing must be determined based on the grandparent and grandchild relationship, New York courts must essentially do a preliminary best interests of the child analysis.\textsuperscript{405} Particularly striking changes have occurred at this threshold point in the analysis of a grandparent visitation suit under New York law.

The standing analyses in older New York decisions are expressly guided by a perception of grandparent visitation statutes as "humanitarian" statutes designed to facilitate presumptively valuable contact between the generations.\textsuperscript{406}

\textsuperscript{398} \textit{Id.} at 47.
\textsuperscript{399} \textit{See id.}
\textsuperscript{400} \textit{Id.} (citing Brock v. State, 85 Ind. 397, 398-99 (1882); Bailey v. Boyd, 59 Ind. 298, 299 (1877)).
\textsuperscript{401} \textit{Id.}
\textsuperscript{403} \textit{See} Gloria R. v. Alfred R., 631 N.Y.S.2d 1011 (Sup. Ct. 1995). This is so because New York's grandparent visitation statute was enacted in 1966 and is the oldest statute in the country. \textit{N.Y. DOM. REL. LAW} § 72 (McKinney 1988). Its body of grandparent visitation law has thus enjoyed the longest evolution. \textit{Id.}
\textsuperscript{404} \textit{Id.}
\textsuperscript{405} \textit{See, e.g.,} Gloria R. V. Alfred R., 631 N.Y.S.2d at 1013.
Armed with this broad standard, courts had no difficulty finding grandparents had standing to sue despite animosity between parents and grandparents\(^{407}\) or a protracted lack of communication between grandparents and grandchildren.\(^{408}\) In the 1983 decision of *Johansen v. Lanphear*,\(^ {409}\) the grandparents obtained court-ordered visitation even after failing to communicate with their grandson for four years—half the child’s life.\(^ {410}\) The respondent mother argued that the grandparents’ prolonged silence constituted abandonment of any relationship with their grandson and should preclude court-ordered visitation.\(^ {411}\) Pointing to a statute providing that children may be adopted without their parents’ consent when parents fail to communicate with them for six months,\(^ {412}\) respondent argued that to award these grandparents visitation would be to elevate their rights over those of a natural parent.\(^ {413}\) The court disagreed with the somewhat inapposite comment that respondent had not cited any statute that imposed penalties on grandparents for failure to communicate.\(^ {414}\) It held visitation was appropriate because the grandparent visitation statute was enacted for “humanitarian purposes” and grandparent visitation is “often a precious part of a child’s experience.”\(^ {415}\) Similarly, in *Vacula v. Blume*\(^ {416}\) the court found it unnecessary to do more than cite this same mantra to support its conclusion that the grandparents had standing to sue despite the animosity between them and the respondent.


\(^{408}\) Indeed, New York decisions of this period unhesitatingly award visitation over the strenuous objections of mature grandchildren themselves. *See id.* Although standing was not an issue in *Lo Presti v. Lo Presti*, it illustrates the profound influence of the “humanitarian purpose” reasoning on New York’s grandparent visitation decisions. *See id.* at 375 (holding “the question of whether visitation should be granted lies solely in the discretion of the court and must . . . be determined . . . in the best interest of the child or children”).

In *Ehrlich v. Ressner*, the lower court denied the grandparents’ visitation petition after testimony from the teenaged grandchildren that they did not want to be compelled to give up other activities in order to have preset periods of visitation with their grandparents. *Ehrlich v. Ressner*, 391 N.Y.S.2d 152, 152-53 (App. Div. 1977). Reversing the lower court, the appellate court chided it for placing “undue emphasis” on the teenagers’ wishes, thereby failing to implement the statute’s humanitarian purpose. *Id.* at 153. Though armed with this general purpose, the appellate court declined to conduct any realistic evaluation of what benefits, if any, would accrue to the unwilling teenaged recipients of the statute’s largesse. *See id.*


\(^{410}\) *Id.* at 302. The child was born in 1975, and visitation was awarded in 1983. *Id.*

\(^{411}\) The grandparents did not communicate with the child between 1979 and 1983. *Id.*

\(^{412}\) *Id.* at 303. At the time of suit, the mother had sole custody of the child and the father was apparently no longer involved in the child’s life. *Id.* at 302.

\(^{413}\) *Id.* at 303 (citing N.Y. DOM. REL. LAW § 111(2)(a) (McKinney 1975)).

\(^{414}\) *Id.*

\(^{415}\) *Id.*

mother. In short, New York grandparent visitation cases consistently resolved questions of standing without critical examination of the circumstances or concern for family autonomy.

By the mid 1990s, on the other hand, most New York courts were no longer willing to use a general reference to “humanitarian purposes” to confer standing and instead were engaging in the type of realistic assessment of the circumstances that no longer guaranteed the petitioning grandparent success. Where a grandparent and grandchild relationship already existed, courts now asked whether it was a beneficial one, warranting the state intrusion necessary to protect it under grandparent visitation laws. In Coulter v. Barber, for example, after hearing testimony from the parents, other witnesses, and the children themselves, the lower court denied the grandparents standing to sue based on the specific relationship it found. The grandparents appealed, relying on the conclusory statements of older opinions regarding the general benefit that would “devolve upon grandchildren as a result of a relationship with their grandparents.” Expressly rejecting any such sentimentalization of the relationship involved, the appellate court affirmed the trial court’s denial of standing. It stated that the evidence demonstrated the grandparents’ visits were a source of “stress, tension and uncertainty,” and that the grandfather often “directed criticism and demeaning comments” at both the parents and grandchildren. The court concluded the grandparents did not meet the threshold requirement of demonstrating circumstances that warranted overriding the right accorded fit parents “to choose with whom their children should associate.”

Similarly, where no grandparent and grandchild relationship currently exists, recent decisions demonstrate the same antipathy to sentimental generalizations about grandparents, requiring instead specific evidence of the

417. Id. The court’s “analysis” on this point consists of one brief paragraph composed exclusively of general quotes to this effect. Id.
418. See id.
420. See id. at 271 (noting the testimony from “the grandchildren revealed a superficial relationship at best”).
422. Id. at 271.
423. Id.
424. Id.
425. Id.
426. Id.
grandparent’s efforts to establish a relationship. In both *Luma v. Kawalchuk* and *In re C.M.*, the grandparents claimed that they had no relationship with their grandchildren because the parents had excluded them from their grandchildren’s lives. In both cases the courts approached an analysis of standing in specific and realistic terms. Each decision lists the opportunities the grandparents had to send cards, make phone calls, provide assistance, or arrange visits with the children. In each decision the court not only notes the grandparents did not take these steps to establish a relationship, but it describes exactly how the steps could have been taken. In *In re C.M.*, for example, the court commented that if the grandmother’s inability to drive made visits difficult, then she could have asked family members to drive her. Clearly modern New York courts are unwilling to engage in assumptions or sentimental generalizations at any level of the inquiry.

Finally, as part of an analysis of grandparent standing to sue, recent New York decisions look beyond the grandparent and grandchild relationship to examine the totality of the circumstances. In practice this exercise translates into a respect for family autonomy which is lacking in many older opinions. In *Luma*, the court characterized the respondent parent’s decision to terminate visitation as legitimate in light of evidence demonstrating that the grandfather was “a domineering person, prone to threatening and emotional outbursts ...” *In re C.M.*, with its stark and troubling tableau of domestic violence, would presumably have elicited a denial of visitation in any era. The court illustrated the recent trend of expressing respect for family autonomy with a totality of the circumstances approach, however, through the specific terms it used to reject the grandmother’s petition. The court was clearly angered that the visitation petition was ever brought. It condemned the grandmother’s overall conduct

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429. *In re C.M.*, 672 N.Y.S.2d 1012 (Fam Ct. 1998).
434. *In re C.M.*, 672 N.Y.S.2d at 1017.
435. See id. at 1016-17.
437. See *In re C.M.*, 672 N.Y.S.2d at 1015.
438. See id. at 1016-18.
439. See id. at 1017-18. Some of this ire spills out in the court’s rejection of the grandmother’s argument that she had no relationship with her grandchild because her daughter-in-
and expressly validated the mother’s choices. The court noted that the grandmother failed to offer the mother any assistance “and, in fact, . . . asked respondent to conceal [the domestic violence] from others.” The court also pronounced the steps the mother took to deny the grandmother visitation reasonable and justified under circumstances in which the mother and child were engaged in repairing their lives. The totality of the circumstances analysis thus not only contributes a specific and unsentimental assessment of the circumstances under which visitation is sought, it also may often serve to affirm the parent’s need—and right—to make whatever choices he or she feels are necessary.

Judicial analysis of standing to sue in New York’s grandparent visitation decisions as in grandparent visitation law nationally, has thus undergone a striking evolution. Gone is the virtually automatic presumption of standing, supported by generalizations and sentimental assumptions; in its place a realistic and specific assessment of relationships and circumstances. This realistic assessment reflects the judicial trend towards protecting family autonomy in the context of grandparent visitation. Indeed, real adherence to threshold requirements for standing becomes another path towards application of the harm standard in grandparent visitation law; grandparent visitation should be ordered only when the specific circumstances unequivocally show that the child will be harmed without it.

law shut her out. Id. at 1017. In specific and profoundly chastening detail, the court lists the many ways that the grandmother “could have made herself an important person in this child’s life, but failed to do so.” Id.

440. Id.
441. Id. at 1018.
442. Id. at 1013, 1016.
443. This has been the result even when the rhetoric of an appellate opinion appears to be to the contrary. For example, Olson v. Olson states that court-ordered grandparent visitation is desirable as a matter of policy when the best interest of the child was in question and was minimally intrusive on parental decision making. Olson v. Olson, 534 N.W.2d 547, 549-50 (Minn. 1995). In fact, on remand, the grandmother was denied visitation when the mother and father both concluded that visitation was contrary to the best interests of the child. Indeed, the court cites with approval an examining psychologist’s assertion that the grandparent visitation litigation itself was harmful—and likely to interfere with any future relationship between the grandmother and the child. In pertinent part, the final order entered in Olson v. Olson reads as follows:

THE COURT FINDS:
1. Pursuant to this Court’s Order dated May 3, 1996, Patti W. Frisch was appointed as guardian ad litem to represent [the minor child’s] interests in this matter. At that time, Petitioner and Intervenor were both represented by legal counsel and they agreed that Ms. Frisch would be appointed to act as [the minor child’s] guardian. Each party was ordered to assume responsibility for payment of one-half of Ms. Frisch’s fees and expenses.
In analyses of whether visitation is in the best interests of the child, as in analyses of whether threshold requirements for standing have been met, recent decisions demonstrate a trend toward limiting grandparent visitation and protecting family autonomy. Thus, in a grandparent visitation suit where standing requirements are clearly met, the courts next turn a sometimes skeptical eye to the question of whether forced visitation that places a child in the midst of warring adults will be in the best interests of the child. Older opinions often

5. The guardian found [the minor child] to be a well-adjusted child and did not find or determine that there was any area of concern regarding [the minor child’s] care in her mother’s home.

6. The guardian ad litem arranged for Dr. Matthew F. Gundlach, a licensed consulting psychologist, to attempt the therapeutic intervention with the petitioner and Ms. Farr [the grandmother]. Dr. Gundlach reports that, in his opinion, the relationship between Ms. Olson-Kelms and Ms. Farr has ended and will “not be revived,” that [the minor child] has been caught between her mother and grandmother in their battle, and that he believes that face-to-face contact between Ms. Farr and [the minor child] would be stressful for [the minor child] at this time.

7. The guardian ad litem also arranged for [the minor child] to be evaluated by Dr. Donald F. Rahe, Ph.D., L.P. Dr. Rahe administered various tests to [the minor child] and determined that she is bright, articulate, and has been “very stressed by the episodes of separation and threatened separation from her mother.” Dr. Rahe reports that [the minor child] perceives her grandmother to have a hostile intent in attempting to exercise visitation with her and that he does not believe that [the minor child] would benefit from engaging in a “forced relationship” with Ms. Farr at this time. [The minor child] reportedly views Ms. Farr’s request for visitation as meeting Ms. Farr’s needs and her need to control, rather than of having a real interest in [the minor child]. It is Dr. Rahe’s opinion that [the minor child’s] best interests will be served if the pressure to visit her grandmother is relieved and that [the minor child] is more likely to consider reconciliation with her grandmother in the future if this current litigation is, at least temporarily, put to rest.

11. Scott Olson, [the minor child’s] father, has experienced frustration because he has not received all communication from the parties or the guardian, though he has consistently shown interest in this proceeding. Mr. Olson originally was supportive of visitation between [the minor child] and her grandmother, but no longer supports visitation at this time. He also believes that [the minor child] has been stressed by being caught in the battle between her mother and grandmother and believes that [the minor child] needs a rest from this litigation.

15. This Court is not able to conclude at this time that forcing face-to-face visitation between Ms. Farr and [the minor child] will serve [the minor child’s] interests, especially in light of the conclusions and recommendations of Dr. Gundlach and Dr. Rahe. . . .

IT IS ORDERED . . .

paid little attention to hostilities that accompany grandparent visitation suits.445 These older opinions tended to find the best interests of the child presumptively served by contact with the grandparents, making any specific discussion of the best interests of the child unnecessary.446 These decisions further noted that family tensions were inevitable in the context of a grandparent visitation suit—if everyone got along, suit would not have been brought.447 Recent decisions have increasingly refused to simply presume a benefit to a grandparent-grandchild relationship and indeed, have noted that thrusting a child into the midst of adult hostilities through court-ordered visitation will have a negative effect on the child.448 In 1995, Brooks v. Parkerson took this aspect of a grandparent visitation suit and integrated it into its analysis of the grandparent visitation statute and its analysis of the best interests of the child in a grandparent visitation suit.449 Brooks held that because court-ordered visitation will inevitably have some "deleterious effect" on a child, the grandparent visitation statute could not be justified as an exercise of state power designed to promote children’s health and welfare.450 Similarly, because of this deleterious effect, court-ordered grandparent visitation must be considered contrary to the best interests of the child, at least to some extent.451 Brooks involved the parents’ successful challenge to the constitutionality of a grandparent visitation statute which allowed the maternal grandparents to seek visitation over the parents’ united objection.452 Brooks first established that a parent’s right to childrearing autonomy was constitutionally protected as one of the fundamental liberty interests guaranteed by the Fourteenth Amendment.453 As a fundamental right, it could be subjected to state regulation only when necessary to protect the child’s health or welfare from harm.454 Brooks


449. Id.

450. Id. at 773.

451. Id.

452. Id. at 770.

453. Id. at 771-72. The court also noted that the family unit is protected from state intrusion under the equal protection and due process clauses of the Fourteenth Amendment, under the "privacy aspects of the Ninth Amendment," and under the "privacy rights inherent in the constitution." Id. (citations omitted).

454. Id. at 772.
concluded that the grandparent visitation statute could not satisfy this test.\textsuperscript{455} Expressly rejecting any sentimental assumptions regarding the grandparent-grandchild bond, Brooks noted that there was insufficient proof that "grandparents' visitation with their grandchildren always promotes their welfare."\textsuperscript{456} Brooks then stated that even if a beneficial grandparent-grandchild bond existed, the impact of a grandparent visitation suit to insure continued contact would have a deleterious effect—essentially canceling any benefit.\textsuperscript{457} Brooks concluded that the statute was facially unconstitutional, in part because it did not clearly promote a child's health and welfare.\textsuperscript{458} Even if one posited an ideal grandparent-grandchild relationship, court-ordered grandparent visitation is per se inconsistent with the promotion of a child's health and welfare. Under the Brooks logic, the preservation of family autonomy against the threat of suit promotes the best interests of the child, not the contact with a grandparent, when the price of contact is litigation.

In Maner v. Stephenson,\textsuperscript{459} the court used this thread of reasoning, divorced from its constitutional dimension, to support its affirmance of a lower court decision that denied grandparent visitation.\textsuperscript{460} In Maner, the maternal grandparents sought visitation over the parents' united objections.\textsuperscript{461} The evidence demonstrated a long standing and deeply rooted hostility between the grandparents and their daughter's family.\textsuperscript{462} Under Maryland law, the trial judge was charged with applying a best interests of the child standard, yet the constitutionality of the standard itself went unchallenged.\textsuperscript{463} The trial court listed aspects of the hostile relationship between the parents and grandparents, noting that it was obligated to be "alert to the psychological toll [the] visitation dispute itself might exact on a child in the midst of contesting adults."\textsuperscript{464} Given the tensions and hostilities it had found, the court held that the potential benefits of forced visitation were at best speculative and denied visitation.\textsuperscript{465}

On appeal, the Maryland Court of Appeals affirmed the lower court's decision in specific terms.\textsuperscript{466} It found the trial judge had properly considered the

\begin{itemize}
\item \textsuperscript{455} Id. at 773-74.
\item \textsuperscript{456} Id. at 773.
\item \textsuperscript{457} Id.
\item \textsuperscript{458} Id. at 774. Brooks concluded that to be constitutional, a grandparent visitation statute must require a showing of harm to the child if visitation is not ordered and must clearly further the health and welfare of the child. Id. at 773.
\item \textsuperscript{459} Maner v. Stephenson, 677 A.2d 560 (Md. 1996).
\item \textsuperscript{460} Id. at 564.
\item \textsuperscript{461} Id. at 561.
\item \textsuperscript{462} Id.
\item \textsuperscript{463} Id. at 562-63 (citing Md. CODE ANN., FAM. LAW § 9-102 (1991 & Supp. 1995)).
\item \textsuperscript{464} Id. at 562.
\item \textsuperscript{465} Id.
\item \textsuperscript{466} Id. at 564.
\end{itemize}
hostility between parents and grandparents. The court also noted that prior case law had recognized that "judicial supervision of familial relationships is disruptive to the lives of children." Citing Brooks, the court acknowledged the "deleterious effect" of a suit enjoining visitation over the parents' objection. Thus the court not only affirmed a denial of visitation based on the conclusion that the attendant hostilities created an environment contrary to the child's best interests, it also essentially set a limiting benchmark on any grandparent visitation decision. As part of its best interests analysis, a court must now factor in "the psychological toll" that the forced visitation amid warring adults could exact from the child.

McMain v. Iowa District Court explicitly reconciled the fact that grandparent visitation suits have a negative impact on children with the fact that their stated goal is to foster the best interests of the child by making recognition of that negative impact a necessary limitation on any interpretation of the statute itself. In McMain, the child's paternal grandparents unsuccessfully sought appointment as her guardians over the objections of her natural father. Although the probate court rejected their application, it awarded them visitation, and the father appealed. Reversing the visitation award, the Iowa Supreme Court held that the very existence of the grandparent visitation suit can be a destabilizing force in a child's life and that this recognition must inform any analysis of the statute. Although it acknowledged statutory authority to order grandparent visitation in "certain closely circumscribed situations," interpretation of those circumstances must necessarily be as narrow and limited as possible given "the adverse effect of litigation to enforce visitation." The court concluded that the facts before it did not qualify as one of those circumstances.

467. Id.
468. Id. (citing Brooks v. Parkerson, 454 S.E.2d 769, 773 (Ga. 1995); In re Adoption No. 10941, 642 A.2d 201, 205 (Md. 1994)).
469. Id. (citing Brooks v. Parkerson, 454 S.E.2d at 773).
470. See id.
471. Id. (citing Fairbanks v. McCarter, 622 A.2d 121, 126-27 (Md. 1993)).
472. McMain v. Iowa Dist. Court, 559 N.W.2d 12 (Iowa 1997).
473. Id. at 14.
474. Id. at 13.
475. Id.
476. Id. at 14.
477. Id. at 15 ("[A]uthority ... to order grandparent visitation [exists] in certain closely circumscribed cases.").
478. Id.
479. Id. at 14.
480. Id. at 15.
The generalizations which the McMain dissent uses to support its arguments to the contrary serve to highlight the wisdom of the majority's realistic and unsentimental balancing of the child's specific needs and the statute's specific mandate. Conceding that no statutory provision applies, the dissent asserts that the probate court could and should act under its general authority to further the best interests of the child and award visitation over the father's objections. Visitation would further the best interests of the child, the dissent explains, because grandparents are a stabilizing influence in grandchildren's lives due to the fact they have "only [the grandchildren's] best interests at heart." Testimony had demonstrated that the little girl in question had been "traumatized by psychological problems and dysfunctional caregivers," and that the grandparents refused to recognize the extent of her problems or cooperate in her treatment. In its best interests argument, however, the dissent addresses neither the destabilizing influence these particular grandparents had already had on this specific child nor the destabilizing effects of forced visitation itself. Instead, its focus on sentimental assumptions allowed it to completely ignore the rather harsh realities before it.

The dissent also noted that recent legislation had expanded the pool of grandparents with standing to seek court-ordered visitation, arguing that this legislative blessing of expanded visitation should have shaped the majority's analysis. This argument misunderstands the significance of the majority's focus on the harm that a grandparent visitation suit may cause the child. The majority's position is unaffected by these legislative changes because they are irrelevant to the yardstick the court established against which any grandparent visitation suit must be measured. For the majority, the analytical starting point is that court-ordered grandparent visitation harms children. The question of whether to award it must be answered in this context. Because the majority

481. See id. at 15-19 (Snell, J., dissenting).
482. Id. at 17-18 (Snell, J., dissenting).
483. Id. at 19 (Snell, J., dissenting).
484. Id. at 13.
485. Id. at 14.
486. See id. at 15-19 (Snell, J., dissenting). The majority, on the other hand, goes to great lengths to present those realities, particularly as they relate to the child's need for stability. See id. at 13-14. It quoted extensively from the mental health professionals who had evaluated the child and noted that she had suffered a slight regression during the pendency of the court hearings. Id.
487. See id. at 19 (Snell, J., dissenting) (giving sentimentalized generalizations regarding grandparents).
488. Id. at 18-19 (Snell, J., dissenting).
489. Id. at 19 (Snell, J., dissenting).
490. Id. at 14 (noting that "[t]he mere fact that grandparents seek to force visitation through court action can be counterproductive in stabilizing a child's life [and that] our own court has recognized the adverse effect of litigation to enforce visitation").
focuses on the child rather than the class of grandparents with standing to sue, its measure of a grandparent visitation suit is unaffected by legislative expansion of the grandparent class. The harm to the individual child affected by a visitation suit does not change if more grandparents acquire standing to sue.

V. CONCLUSION

The trend in the vast majority of recent grandparent visitation decisions is toward implementation of a standard that permits state intrusion on the family only when the child would be harmed absent court-ordered visitation. Some courts expressly reject any best interests of the child determination until the petitioning grandparent has first established that the child would be harmed without visitation. According to Hawk and Brooks, only a finding of harm can legitimize the state intrusion on family life occasioned by a grandparent visitation suit. For these courts and their progeny, the harm standard is the express corollary of their conclusion that parents’ liberty interests in childrearing autonomy govern in the context of grandparent visitation. Even courts that do not expressly address the constitutional issues, however, have shown a recent tendency to limit grandparents’ opportunities to sue, imposing the harm standard in a different way. By redefining the intact family to include any stable family unit or to reflect united parental decision-making, courts have essentially shifted the focus of the inquiry to whether the child is at risk of harm. Clearly, when children are part of a stable family unit they are presumptively free of the harm that threatens a child whose custody is at issue. Similarly, when a child’s parents participate in cooperative decision-making on the child’s behalf, the child enjoys the same protection from harm whether those parents are married or divorced.

491. Id.
494. Brooks v. Parkerson, 454 S.E.2d at 773; Hawk v. Hawk, 855 S.W.2d at 579.
496. See Hunter v. Carter, 485 S.E.2d at 829-30 (stating the impact of a lawsuit is deleterious and negates any positive impact of visitation).