NOTES

GRANDPARENTS' STATUTORY RIGHT TO PETITION FOR VISITATION: VERMONT AND THE NATIONAL FRAMEWORK

INTRODUCTION

Relationships between grandparents and grandchildren are often very special. For a grandchild, the relationship can provide security and love without the tension or pressure commonly associated with a parent-child relationship.[1] Additionally, this relationship can add stability to a child's life after a divorce or after the death of a parent.[2] For a grandparent, the relationship offers a chance to once again experience the joy and excitement of parenting without the fulltime commitment necessary to raise a child.[3] Further, the relationship helps to relieve some of the loneliness felt by many elderly people.[4]

Grandparent-grandchild relationships can also be detrimental to a child's best interests. A grandparent can reject a child's love or use the grandchild as a tool through which to hurt the child's parents.[5] Further, a strained relationship between parents and grandparents, whether caused by a dispute over child rearing strategies, dislike, or any other reason, can confuse a child or cause a child to believe that he or she is the cause of the tension.[6]

Close relationships between grandchildren and grandparents are decreasing in number. Grandparents and grandchildren must maintain frequent personal contact in order to create a close relationship.[7] However, due to today's increasingly mobile population

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1. *See* A. KORNHABER & K. WOODWARD, GRANDPARENTS/GRANDCHILDREN: THE VITAL CONNECTION 37-42 (1981).

2. *Id.* at 188-89.

3. *Id.* at 54-62.

4. *See generally* R. TURNER, FAMILY INTERACTION 433-42 (1970) (Special relationship with grandchild a benefit of aging).

5. *See* Note, *Visitation Rights of a Grandparent Over the Objection of a Parent; The Best Interest of the Child*, 15 J. FAM. LAW 51, 60-62 (1979).

6. *Id.*

7. *See* A. KORNHABER & K. WOODWARD, *supra* note 1, at 37-42. The studies also show that the absence of a close relationship with grandparents can be deleterious to a child's emotional outlook. *Id.* at 42. *But see* Note, *supra* note 5, at 60-62.

and high divorce rate,[8] many grandparents see their grandchildren rarely, if ever. Consequently, mutually beneficial relationships between grandparents and grandchildren have become the exception, rather than the rule.[9]

Because a grandparent-grandchild relationship can prove to be highly beneficial to a grandchild, it ought to be accorded a special status in child-custody determinations.[10] Specifically, the premise of this Note is that grandparents should be granted some right to petition for visitation with grandchildren. The rationale for this premise is that all matters relating to the custody of children are decided according to the best interests of the children standard,[11] and a grandparent-grandchild relationship is often in the best interest of a child. Consequently, grandparents should have legal standing to petition the court for visitation rights with a grandchild.[12]

Two specific caveats concerning this premise should be made. First, this Note does not advocate that grandparents should be given an absolute legal right to visit with grandchildren. A grandparent-grandchild relationship might not serve the best interests of a child. This Note does advocate that grandparents should be given a right to petition the court for visitation rights with a grandchild. The court examination of the petition would allow a determination of whether visitation in a specific case would best serve the interests of the grandchildren.

Second, the premise fails to address the scope of a grandparent's right to petition for visitation. A grandparent's right to petition for visitation could be triggered in three ways: (1) by the occurrence of an event affecting the marriage, such as a divorce or death of a parent; (2) by the determination of which party is to receive custody of a child; or (3) by allowing a grandparent to petition the court for visitation at any time. Problems and benefits associated with each of these three alternatives exist which are dis-

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8. *See* Zaharoff, *Access to Children: Towards a Model Statute for Third Parties*, 15 FAM. L. Q. 165, 186 (1981).

9. A. KORNHABER & K. WOODWARD, *supra* note 1, 240 (Less than twenty five percent of grandparents surveyed saw their grandchildren all or most of the time.).

10. This is not to say that grandparents should be accorded the same status as a parent.

11. *See* Note, *supra* note 5, at 52-54; Zaharoff, *supra* note 8, at 186-87.

12. Granting grandparents the right to petition for visitation also may be a recognition of the biological relationship between a child and a grandparent. *See* Zaharoff, *supra* note 8, at 173-76.

cussed in Part II of this Note.[13]

Currently, an overwhelming majority of states give grandparents the right to petition for visitation with a grandchild.[14] However, the circumstances that trigger the right to petition for visitation vary widely. This Note does not advocate the adoption of any one of these three alternatives. Since each method has both positive and negative factors, a discussion of each method will allow the reader to make his or her own choice. By presenting a thorough discussion of the options, the Note can serve as a tool to be used in deciding whether to adopt a statute giving grandparents a right to petition for visitation or to modify a pre-existing statute.

This Note is divided into five parts. Part I gives the common law history of grandparent visitation rights. Part II places the current state statutes into a framework. This framework categorizes the statutes by the conditions which grant the grandparents a right to petition for visitation. Part III discusses issues that are not discussed by many statutes. The failure to address these issues can lead to conflicts with other statutes or to confusion in determining whether a right to petition for visitation exists. Part IV examines the Vermont legislation and places it into the statutory framework. Finally, the Note examines issues not addressed by the Vermont statute, and proposes specific statutory modifications.

I. Common Law History[15]

At common law, grandparents generally had no legal right to petition for visitation with their grandchildren if the custodial parent objected to the visitation.[16] One court commented that: "[t]he law gives no right of action to the grandparent . . . . [t]he obligation ordinarily to visit grandparents is moral and not legal."[17] The common law courts, with few exceptions,[18] were unwilling to create a right in grandparents to petition for visitation without statutory

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13. *See infra* text accompanying notes 36-42.

14. These circumstances include divorce, death of a parent, separations, and custody determinations. *See, e.g.*, N.Y. Dom. Rel. Law §§ 72, 240 (McKinney 1977 & Supp. 1983).

15. The words "common law" as used in this note refer to the law created solely by judicial decrees and judgements.

16. *See* Note, *supra* note 5, at 58; Foster & Freed, *Grandparent Visitation: Vagaries and Vicissitudes*, 23 St. Louis U.L.J. 643, 645 (1979).

17. Succession of Reiss, 46 La. Ann. 347, 351-53, 15 So. 151, 152 (1894).

18. *See infra* text accompanying notes 33-34.

authority.[19]

Several reasons were given for the common law refusal to create a right to grandparent visitation.[20] Some courts argued that the granting and enforcing of grandparental visitation rights would divide and therefore hinder the authority of the parents.[21] Several courts asserted that the obligation to provide visitation was moral and rested with the parents and not with the courts.[22] Other courts reasoned that the best interests of the child were not served when the child became the focal point of conflict between the parents and the grandparents.[23] Finally, some courts denied visitation because they did not consider the judicial enforcement of visitation rights to be the proper method of developing a family structure conducive to the restoration of a relationship between the grandparents and the grandchildren.[24] The proper method of restoring familial harmony between the grandparents and the parents was thought to be to allow nature and time to smooth out the difference.[25]

Perhaps the most frequent explanation given by courts in either denying a petition for visitation or in refusing to hear a petition was the notion of a compelling parental right.[26] The courts believed that parents had complete control over the upbringing of any child in their custody,[27] and that legally decreed grandparental visitation acted as a constraint upon that control.[28] Because the courts were reluctant to limit a custodial parent's control, they felt

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19. *See, e.g.*, Odell v. Lutz, 78 Cal. App. 2d 104, 107, 177 P.2d 628, 629 (1947). "The state may not constitutionally interfere with natural liberty of parents to direct the upbringing of their children." *See also*, Succession of Reiss, 46 La. Ann. at 342-53, 15 So. at 152 (the law gives no right of action to the grandparents to petition for visitation).

20. The phrase "grandparent visitation" is used here instead of right to petition for visitation because at common law, the cases did not usually deal with the right to petition for visitation, but with a grandparent's claimed legal right to access with grandchildren.

21. Odell v. Lutz, 78 Cal. App. 2d at ____, 177 P.2d at 629; Jackson v. Fitzgerald, 185 A.2d 724 (D.C. 1962).

22. Succession of Reiss, 46 La. App. at 353, 15 So. at 152; Smith v. Painter, 408 S.W.2d 785, 786 (Tex. Civ. App. 1966), *writ of error refused*, 412 S.W.2d 28 (Tex. 1967).

23. *See* Noll v. Noll, 98 N.Y.S.2d 938, 940 (N.Y. App. Div. 1950); Commonwealth *ex. rel.* Flannery v. Sharp, 151 Pa. Super. 612, ____, 30 A.2d 810, 812 (1943).

24. Succession of Reiss, 46 La. Ann. at 353, 15 So. at 152; Commonwealth *ex. rel.* Flannery v. Sharp, 151 Pa. Super. at ____, 30 A.2d at 812.

25. *See* Succession of Reiss, 46 La. Ann. at 353, 15 So. at 152; Commonwealth *ex. rel.* Flannery v. Sharp, 151 Pa. Super. at ____, 30 A.2d at 812.

26. Commonwealth *ex. rel.* McDonald v. Smith, 170 Pa. Super. 254, 256, 85 A.2d 686, 688 (1952).

27. Commonwealth *ex. rel.* Dogole v. Cherry, 196 Pa. Super. 46, 173 A.2d 650 (1961).

28. Shriver v. Shriver, 7 Ohio App. 2d 169, 171, 219 N.E.2d 300, 302 (1966).

obligated to deny grandparents any right to visitation or even any right to petition for visitation, barring exceptional circumstances. As one court stated:

> [T]he state may not constitutionally interfere with the natural liberty of parents to direct the upbringing of their children . . . . The supremacy of the father and mother in their own home in regard to the control of their children is generally recognized . . . .
>
> [T]he court does not have the power to compel the parents to allow the grandmother the right of visitation merely because the relationship is that of grandparent.[29]

At least one commentator has suggested that this judicial recognition of a compelling parental right may be a recognition that the parents have a "property right" in the child.[30] Since the best interests of a child may not always be consistent with the interests of the parents,[31] decisions resting upon compelling parental rights do not necessarily serve the best interests of the child.[32]

In some circumstances, courts have recognized a non-statutory right in grandparents to visit with their grandchildren. When parents agree in divorce or separation proceedings that the grandparents will be allowed visitation, courts have enforced the agreements.[33] Also, when the child has lived with his or her grandparents in the past, some courts have used this as a factor in deciding to allow visitation rights.[34]

The exceptions to the common law rule that grandparents have no right to visitation are very narrow. They rely upon a custodial parent to voluntarily allow a grandparent to intrude upon the parent's exclusive control over the child. Once the parent agrees to relinquish some control over the child to a grandparent, the courts

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29. Odell v. Lutz, 78 Cal. App. 2d at 105, 177 P.2d at 628.

30. *See* Note, *supra* note 5, at 56.

31. *See* J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 65-67 (1973).

32. Note, *supra* note 5, at 56-57.

33. Benner v. Benner, 113 Cal. App. 2d 531, 248 P.2d 425 (1952); *see also* Annot. 98 A.L.R. 2d 325, 328-29 (1965).

34. Benner v. Benner, 113 Cal. App. 2d at ____, 248 P.2d at 426. Other cases that found an exception to the common law rule include Boyles v. Boyles, 14 Ill. App. 3d 602, 302 N.E.2d 199 (1973) (maternal grandparents very close to grandchildren and had visited them every day after mother's death) and Solomon v. Solomon, 319 Ill. App. 618, 49 N.E.2d 807 (1943) (father's parents allowed visitation when father in military in another state and mother had custody).

may enforce this agreement. However, since the exceptions are so limited, an overwhelming number of grandparents had no right to visitation at common law and did not receive the right until legislatures began to pass grandparent visitation statutes.

II. Statutory Framework

Forty-eight states have statutes giving grandparents the right to petition for visitation with grandchildren.[35] However, wide variation exists between the states, both in terms of the circumstances under which a grandparent is given a right to petition for visitation, and in the way in which potential conflicts or inequities are addressed. This section creates a framework that will categorize the statutes according to the circumstances that trigger a right to petition or visitation. The discussion of each statute also includes a discussion of inequities and conflicts that are created by the language of many statutes.

The various statutes are divisible into the following seven categories. The categories divide the statutes according to the circumstances which grant a right to petition for visitation. The catego-

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35. Ala. Code § 30-3-4 (Supp. 1984); Alaska Stat. § 25.24.150 (Supp. 1983); Ariz. Rev. Stat. Ann. § 25-337.01 (1983); Ark. Stat. Ann. §§ 34-1211.1, 56-215(b), 57-135 (Supp. 1983); Cal. Civ. Code §§ 197.5, 4601 (1983); Colo. Rev. Stat. § 19-1-116 (1983); Conn. Gen. Stat. Ann. §§ 46b-56, -59 (Supp. 1984); Del. Code Ann. tit. 10 § 950 (Supp. 1982); Fla. Stat. Ann. §§ 61.13, 1301 (West Supp. 1984); Ga. Code Ann. § 19-7-3 (1983); Hawaii Rev. Stat. § 571-46(7) (1976); Idaho Code § 32-1008 (1983); Ill. Ann. Stat. ch. 40, § 607, ch. 110 ½, § 11-7.1 (Smith-Hurd 1978 & Supp. 1984); Ind. Code Ann. §§ 31-1-11.7-1 to 7-8 (Burns Supp. 1984); Iowa Code Ann. § 598.35 (West 1981); Kan. Stat. Ann. § 38-129 (Supp. 1983); Ky. Rev. Stat. Ann. § 405.021 (Baldwin 1983); La. Rev. Stat. Ann. § 9.572 (West Supp. 1984); La. Civ. Code Ann. art. 157 (West Supp. 1984); Me. Rev. Stat. Ann. tit. 19, §§ 214, 581, 752 (Supp. 1983); Md. Fam. Law Code Ann. § 9-201 (1984); Mass. Ann. Laws ch. 119, § 39D (Michie/Law Coop. Supp. 1984); Mich. Comp. Laws §§ 722.27, .27b (Supp. 1984) (Mich. Stat. Ann. § 25.312(7), .312(7b) (Callaghan 1984)); Minn. Stat. Ann. § 257.022 (West 1982); Mo. Ann. Stat. § 452.400, .402 (Vernon Supp. 1984); Mont. Code Ann. §§ 40-4-217, -9-102 (1983); Nev. Rev. Stat. § 123.123 (1979); N.H. Rev. Stat. Ann. § 458:17 (1983); N.J. Stat. Ann. § 9:2-7.1 (West 1976); N.M. Stat. Ann. §§ 40-9.1 to -9.4 (1983); N.Y. Dom. Rel. Law §§ 72, 240 (McKinney 1977 & Supp. 1983); N.C. Gen. Stat. §§ 50-13.2, .5(j) (Supp. 1983); N.D. Cent. Code § 14-09-05.1 (Supp. 1983); Ohio Rev. Code Ann. §§ 3109.05, .11 (1983); Okla. Stat. Ann. tit. 10, §§ 5, 60.16 (West Supp. 1983); Or. Rev. Stat. §§ 109.121, .123 (1983); Pa. Stat. Ann. tit. 23, §§ 1012-1015 (Purdon Supp. 1984); R.I. Gen. Laws §§ 15-5-24.1, .2 (1981 & Supp. 1984); S.C. Code Ann. § 20-7-420(33) (1984); S.D. Codified Laws §§ 25-4-52 to -54 (Supp. 1983); Tenn. Code Ann. § 36-6-301 (1984); Tex. Fam. Code Ann. §§ 14.03, 15.07, 16.09 (Vernon Supp. 1984); Utah Code Ann. § 30-5-2 (Supp. 1983); Vt. Stat. Ann. tit. 15, §§ 1011-1016 (Supp. 1984); Va. Code § 20-107.2 (Supp. 1984); Wash. Rev. Code Ann. § 26.09.240 (Supp. 1984); W. Va. Code §§ 48-2-15, -2B-1 (1980 & Supp. 1984); Wis. Stat. Ann. §§ 763.245, 880.155 (1981 & Supp. 1983); Wyo. Stat. § 20-2-112 (Supp. 1984).

ries are comprised of statutes which give grandparents the right to petition for visitation:

A. Under no circumstances.
B. Under any and all circumstances.
C. Only after a dissolution of marriage, separation, or death of a parent.
D. Only after a dissolution of marriage or the death of a parent.
E. Only after the death of a parent.
F. Only after special circumstances affecting marriage, but not including the death of a parent.
G. Under miscellaneous circumstances.

Within each of the above categories, a right to petition for visitation could be triggered in one of three possible ways: (1) by the occurrence of an event affecting the family regardless of which parent retains custody; (2) by looking at the custody determination after an event affecting the family and granting the right to petition for visitation only to the parents of the non-custodial parent; or (3) by granting grandparents a right to petition for visitation under any and all circumstances. Each of these methods has both benefits and problems associated with it. Specifically, the choice of a triggering mechanism can create an inequitable result for either the parents or the grandparents. Although the standard for determining whether a grandparent should be given visitation rights should remain the best interests of the child standard, the state legislatures should consider the inequities created by the choice of a triggering mechanism.

The statutory language of many state statutes gives grandparents the unconditional right to petition for visitation after an event affecting the family, despite the retention of custody by the petitioning grandparents' child.[36] In these states, grandparents are denied the legal right to petition a court for visitation prior to the event affecting the family. The triggering mechanism for the right

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36. *E.g.*,

> If the parents of an unmarried minor child are divorced, or if either or both of the said parents are deceased, the grandparents of such minor child may be granted reasonable visitation rights to the minor child during his minority by the probate court upon a finding that such visitation would be in the best interests of said minor child.

MASS. ANN. LAWS ch. 119, § 39D. This statute gives grandparents standing to petition for visitation after the grandchild's parents divorce or if one of the parents dies. It does not condition the standing to file a petition upon which parent retains custody.

to petition for visitation is the event disrupting the nuclear family[37] and does not depend upon which parent retains custody of the child. Thus, in these states, a grandparent who could legally be denied access to a grandchild *before* the breakup of the nuclear family would gain the right to petition for visitation *after* the breakup of the family even when that grandparent's child retains custody of the grandchild.

This triggering mechanism adversely affects the rights of the custodial parent without apparent justification. Since there is no change in the relationship between the custodial parent and his or her parents, arguably the custodial parent should retain the power to refuse his or her parents access to grandchildren. Yet by triggering a right to petition for visitation upon an event affecting the nuclear family, the parents of the custodial parent are given a legal right to petition for visitation. Thus, this triggering mechanism increases the rights of a grandparent in relation to those of the custodial parent despite the fact that there may be no change in the relationship between the custodial parent and the grandparent.

Conversely, the second alternative—triggering a right to petition for visitation upon the determination of which parent retains custody—arguably is inequitable to the parents of the custodial parent. If the right to petition for visitation was given only to the parents of the non-custodial parent, a custodial parent could refuse to allow his or her parents access to a grandchild but could be ordered by the court to provide access to the parents of the non-custodial parent. This triggering mechanism thus gives greater rights to the parents of a non-custodial parent than it does to the parents of a custodial parent.[38]

These two alternatives are inversely related. Because any increase in the rights of grandparents will decrease the rights of the custodial parent, any method of triggering a right to petition for visitation that includes the break-up of the nuclear family as a required element[39] will adversely affect either the custodial parent or

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37. For the purposes of this Note, "nuclear family" denotes the family unit consisting of a mother and father and the birth children of those parents.

38. Triggering a right to petition for visitation upon custody may also lead to situations where a grandparent may desire his or her child to lose custody. For example, if John refuses to allow his parents access to the grandchildren during marriage, John's parents may hope that John loses custody of the children during any dissolution of the marriage because that will be the only way that they could receive a right to petition for visitation.

39. Both of these options require the break-up of the nuclear family before a right to

the parents of the custodial parent. However, these two methods share common benefits. They both provide grandparents with a right to petition for visitation under specified circumstances. Also, by limiting the right to petition for visitation to situations where the nuclear family is destroyed, the alternatives recognize conclusive parental control over children when the intact nuclear family exists.

The third alternative—giving grandparents the right to petition for visitation at any time—avoids the problems associated with using the break-up of the nuclear family as a required element in triggering a right to petition for visitation. Since a grandparent could petition the court for visitation rights at any time, the break-up of the nuclear family or the decision of which parent retains custody would be irrelevant. The single determinative factor in deciding whether a grandparent's petition for visitation should be granted would be whether the visitation is in the best interests of the child. If the assumption is made that the relationship between grandparents and grandchildren can be in the best interest of the child, then this alternative best serves the child's interests by allowing the greatest opportunity for a court to determine whether visitation in a specific case would be in the best interests of a child.

Giving grandparents an unlimited right to petition for visitation has one major disadvantage: the political feasibility of such a triggering mechanism in many states. Any system that allows grandparents an unlimited right to petition for visitation would significantly decrease the amount of control that parents have over the upbringing of children.[40] While many legislatures have recognized that grandparents should be granted rights to petition for visitation after the break-up of the nuclear family, the extension of that right to situations where the nuclear family is intact is politically infeasible.[41]

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petition for visitation is created. The difference between the two methods is that the custody method also looks to custody determination to see which grandparents are to receive a right to visitation.

40. Today, most states require a break-up of the nuclear family before a right to petition for visitation is created. *See infra*, text accompanying notes 56-76 for a discussion of those states that allow a petition at any time.

41. For example, in a discussion with members of the Judiciary Committee of the Vermont General Assembly in March of 1984, some expressed their opinion that such a broad grant of the right to petition for visitation would not be feasible in Vermont.

In presenting the framework of statutory visitation rights, this Note will state the triggering mechanism that is used by each state. In some states, more than one mechanism is used.[42] Another aspect of the state statutes that will be looked at is the way in which the statute addresses the issue of step-parent adoptions.[43] Many of the grandparent visitation statutes are silent on this issue, thus creating a potential for conflict with the state's adoption statutes.

In many states, an adoption terminates all relationships between an adopted child and his or her natural family.[44] Since many of these same adoption statutes are silent upon the issue of step-parent adoptions, a step-parent adoption can terminate any legal relationship between a grandchild and the parents of the non-custodial parent. Also, because many states' courts have interpreted the state adoption statutes as being preemptive of the grandparent visitation statutes,[45] step-parent adoption can serve not only to terminate the right to petition for visitation rights, but also to terminate already existing rights.[46] To illustrate, when a custodial natural parent remarries and the new spouse adopts the children of the first marriage, the parents of the non-custodial natural parent, in some states, will lose standing to petition the court for visitation rights. As a collateral result, the adoptive grandparents receive the right to petition for visitation if there is a break-up of the second marriage.[47]

The failure of the visitation statutes to address the issue of step-parent adoption creates an inequitable result because it fails to recognize the differences between a step-parent adoption and

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42. *See, e.g.*, CAL. CIV. CODE §§ 197.5, 4601. This statute is discussed *infra*, text accompanying notes 116-20.

43. For the purposes of this Note, "step-parent adoption" describes the situation where a custodial parent remarries and the children from a previous marriage are adopted by the custodial parent's new spouse.

44. For a full discussion of this topic, see *infra* text accompanying notes 172-87.

45. *E.g.*, *In re* Nicholas, ___ R.I. ___, 457 A.2d 1359 (1983) (an adoption terminates a grandparent's standing to petition the court because the grandparents derive their standing through the parent whose parental rights were terminated); *see also In re* Adoption of Gardiner, 287 N.W.2d 555 (Iowa 1980) (statute that terminates natural parent's rights in adoption also serves to terminate natural grandparent's right to petition for visitation); Sachs v. Walzer, 242 Ga. 742, 251 S.E.2d 302 (1978) (adoption by step-mother terminates natural grandparent's right to petition for visitation).

46. *E.g.*, Bikos v. Nobliski, 88 Mich. App. 157, 276 N.W.2d 541 (1979) (adoption by step-parent terminates existing rights of visitation possessed by natural grandmother); Sachs v. Walzer, 242 Ga. 742, 251 S.E.2d 302 (1978).

47. *E.g.*, Daly v. Morse, ___ Nev. ___, 665 P.2d 797 (1983) (step-grandmother's petition for visitation may be considered by the court).

other forms of adoption. The purpose of terminating the relationships between an adopted child and that child's natural relatives is to allow the child to have a "fresh start" with the new family.[48] However, in a step-parent adoption the need for a fresh start is not as great. In fact, if the child has developed a close relationship with the parents of the non-custodial parent, the termination of the relationship can be detrimental to the child's best interest. Thus, the grandparent visitation statutes ought to recognize the unique nature of step-parent adoptions and specifically state that a step-parent adoption does not affect the rights of grandparents to petition for visitation.

Finally, prior to setting out the framework, the standard of review used in determining whether to grant a petition for visitation rights should be addressed. No state grants an absolute right to grandparents to visit with their grandchildren. Instead, the statutes give grandparents the right to petition for visitation. This visitation will be granted only if it is in the best interests of the grandchildren. The best interests of the child standard is a vague standard.[49] The legislatures in many states have elaborated upon this standard and have created lists of factors to be considered in applying the best interests of the child standard.[50] The Vermont legislature included such a list of factors in the grandparent visitation statute.[51] This is desirable because it gives practitioners guidance and allows a measure of consistency between cases.

A. *Under No Circumstances*

At the present time, only Mississippi, Nebraska and the District of Columbia fail to provide grandparents with a statutory right to petition for visitation rights with their grandchildren. The common law still controls in these jurisdictions.[52] Thus, grandparents in these jurisdictions can gain access to their grandchildren only if the child's parents agree to the visitation.

Although Nebraska is included in this section because there is

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48. For a discussion of this concept, see Mimkon v. Ford, 66 N.J. 426, ____, 332 A.2d 199, 202-04 (1975).

49. *See generally*, J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 31; *see also* Note, *Determining "Best Interests" of the Child in Divorce Custody Dispute: A Procedural Approach*, 9 VT. L. REV. 311 (1984).

50. *E.g.*, VT. STAT. ANN. tit. 15, § 1013.

51. *Id.*

52. *See supra* text accompanying notes 15-34.

no statute giving grandparents an *express* right to petition for visitation, there is some support in the language of the child custody determination statute[53] for an argument that grandparent visitation may be ordered by the court in certain circumstances. The statute states that:

> When dissolution of a marriage or legal separation is decreed, the court may include such orders in relation to any minor children and their maintenance as shall be justified, *including placing the minor children in the custody of the court or third parties,* or terminating parental rights . . . . *Custody and visitation of minor children shall be determined on the basis of their best interests.*[54]

The language of the statute appears to be broad enough to support the granting of visitation rights to parties other than the parents. However, no cases support or reject this argument.[55] One possible difficulty in raising this argument may be that the Nebraska statutory scheme does not give grandparents standing to intervene in cases involving determinations of visitation rights so there may be no one to assert a petition that grandparent visitation would be in the best interests of the child.

B. *Under Any and All Circumstances*

Eight states allow a grandparent to petition for visitation at any time.[56] Grandparents in these states are allowed to petition for visitation rights whenever they are denied access to their grandchildren. However, some differences exist between these statutes in terms of the court's power to grant visitation.

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53. NEB. REV. STAT. § 42-364 (Supp. 1983).

54. *Id.* (emphasis added).

55. One case implies that the Nebraska Supreme Court would accept an interpretation of the statute that gave grandparents a right to petition for visitation. *In re* Ditter, 212 Neb. 855, 326 N.W.2d 675 (1982). In *Ditter*, the court rejected a grandmother's intervention for the purpose of visitation stating that, as a matter of law, visitation by the parent of a parent whose parental rights have been terminated would not be in the best interest of the child. The court, however, specifically stated that it was not addressing the issue of grandparent visitation where the parental rights have not been terminated. *Id.* at ____, 326 N.W.2d at 677.

56. These states are: Connecticut, CONN. GEN. STAT. ANN. §§ 46b-56, -59 (Supp. 1984); Delaware, DEL. CODE ANN. tit. 10, § 950(7) (Supp. 1984); Idaho, IDAHO CODE § 32-1008 (1983); Montana, MONT. CODE ANN. §§ 40-4-217, -9-102 (1983); North Dakota, N.D. CENT. CODE § 14-09-05.1 (Supp. 1983); South Carolina, S.C. CODE ANN. § 20-7-420(33) (Law Coop. 1983); Texas, TEX. FAM. CODE §§ 14.03(e), 15.07, 16.09(d) (Vernon Supp. 1984); and Washington, WASH. REV. CODE ANN. § 26.09.240 (Supp. 1985).

The Idaho[57] and North Dakota[58] statutes instruct the courts to look to the amount of personal contact between the grandparents and the child in determining whether a visitation petition should be granted.[59] In fact, the Idaho statute limits the court's ability to grant a visitation petition to situations where grandparents can prove that they have had a "substantial relationship"[60] with their grandchildren.[61] This limitation can effectively foreclose the possibility of a grandparent receiving court imposed visitation rights. To illustrate, if John and Mary have a child after becoming alienated from Mary's parents, Mary's parents would never have the opportunity to develop a substantial relationship with their grandchildren. Therefore, Mary's parents could not satisfy the statutory criteria and the court would deny their petition for visitation rights.

In North Dakota, the court is instructed to "consider the amount of personal contact" between the grandparent and the grandchildren in making its decision whether to grant visitation rights.[62] Thus, Mary's alienated parents would also be foreclosed from receiving visitation rights if they lived in North Dakota. Grandparents who are alienated from their children are presumably those most in need of legal assistance in gaining visitation with their grandchildren.[63] By requiring personal contact as a prerequisite to allowing visitation, Idaho and North Dakota are placing a major obstacle in the path of those grandparents who most need the court's help in obtaining visitation.[64]

The law in South Carolina has changed rapidly over the last

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57. IDAHO CODE § 32-1008.

58. N.D. CENT. CODE § 14-09-05.1.

59. This factor is probably considered by most states as one factor in its determination of whether granting a specific petition for visitation is in the best interests of the child. What is interesting about the Idaho and North Dakota statutes is that the courts are required to look at this factor.

60. At the present time, the term "substantial relationship" has not been defined by either the Idaho legislature or the Idaho courts.

61. IDAHO CODE § 32-1008.

62. N.D. CENT. CODE § 14-09-05.1.

63. It must be remembered that any petition for visitation will only be granted if the visitation is in the child's best interest.

64. It may be possible for a grandparent who is alienated from the child's parents to still receive visitation rights in North Dakota. For example, if the alienation occurred after the child's birth, the possibility of developing a relationship between the child and the grandparent would still exist. Also, the statute does not state that the amount of personal contact is the only factor to be considered; it merely states that the court must consider this factor.

few years. Since 1981, the South Carolina legislature has granted grandparents the right to petition for visitation,[65] taken away that right,[66] and finally has given the family court jurisdiction to "order periods of visitation for the grandparents of the child."[67] The scope of this grant of jurisdiction is unclear in that it fails to state the circumstances under which visitation may be ordered. Thus, until the South Carolina courts interpret the statute, it is uncertain whether this statute does allow a grandparent to petition for visitation under any and all circumstances.

Another variation among the statutes in this category is the way in which the right to petition for visitation is affected by the termination of parental rights. In Texas,[68] the termination of parental rights does not act as a bar to grandparental visitation rights so long as one of the child's natural parents is still one of the child's legal parents.[69] North Dakota[70] and Montana[71] deal with the issue of termination of parental rights only in the adoption context; a grandparent's right to petition for visitation is terminated upon the adoption of the child by any person other than a step-parent or other grandparent. All three of these states specifically provide that a step-parent adoption has no effect upon grandparent visitation rights. Furthermore, the North Dakota and Montana statutes also state that an adoption by a grandparent has no effect upon grandparent visitation rights.

The other five states in this category: Connecticut,[72] Delaware,[73] Idaho,[74] South Carolina,[75] and Washington[76] do not expressly state what effect the termination of parental rights will have upon the visitation rights of grandparents. Further, these five

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65. 1981 S.C. Acts 85 § 1.
66. 1981 S.C. Acts. 102 § 2(a).
67. S.C. CODE ANN. § 20-7-420(33).
68. TEX. FAM. CODE ANN. § 15.07.
69. For the purposes of this note, "legal parents" refers to:
    a) A natural parent whose parental rights have not been terminated; or
    b) A step-parent who has legally adopted a child from a previous marriage.

A legal parent is a parent who has all the legal obligations, rights and duties of a parent.
70. N.D. CENT. CODE § 14-09-05.1.
71. MONT. CODE ANN. § 40-9-102.
72. CONN. GEN. STAT. ANN. §§ 46b-56, -59.
73. DEL. CODE ANN. tit. 10, § 950(7).
74. IDAHO CODE § 32-1008.
75. S.C. CODE ANN. § 20-7-420(33).
76. WASH. REV. CODE ANN. § 26.09.240.

states are silent upon the issue of step-parent adoptions as well. Because of this silence, the effect of step-parent adoptions and termination of parental rights on grandparent visitation rights is undecided and left open to court interpretation.

C. *Only After the Dissolution of a Marriage,*[77] *Separation or Death of a Parent*

Eight states give grandparents the right to petition for visitation under these circumstances.[78] Each of these states conditions the right to petition for visitation upon the break-up of the nuclear family. If a couple remains living together, the grandparent is given no legal right to petition the court for visitation. Before the break-up of the nuclear family, the grandparents may be totally denied access to a grandchild.

Seven of these eight states trigger the grandparent's right to petition for visitation after a dissolution of marriage or separation upon the occurrence of the dissolution or separation and not upon the determination of which parent receives custody.[79] In other words, a grandparent can petition for visitation after a dissolution of marriage or separation even if that grandparent's child retains custody of the grandchild. Similarly, after the death of a parent, Alaska,[80] Missouri,[81] and New Mexico[82] allow a grandparent to petition for visitation even if the surviving parent is the child of the petitioning grandparent.

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77. The term "dissolution of marriage" is used to denote any legal decree that terminates a marriage including divorce, annulment, or the voiding of an illegal marriage. Dissolution of a marriage does not include separations because the marriage is not legally dissolved in a separation.

78. These states are: Alaska, ALASKA STAT. § 25.24.150 (1983); Illinois, ILL. ANN. STAT. ch. 40, § 607, ch. 110 ½, § 11-7.1 (Smith-Hurd 1978 & Supp. 1984); Missouri, MO. ANN. STAT. §§ 452.400, .402 (Vernon Supp. 1984); New Jersey, N.J. STAT. ANN. § 9:2-7.1 (West 1976); New Mexico, N.M. STAT. ANN. §§ 40-9.1 to -9.4 (1983); Utah, UTAH CODE ANN. §§ 30-5-1, -2 (1984); West Virginia, W. VA. CODE §§ 48-2-15, -2B-1 (1980 & Supp. 1984); and Wyoming, WYO. STAT. § 20-2-113 (Supp. 1984).

79. For purposes of consistency, this type of triggering mechanism—where the right to petition for visitation is triggered by the occurrence of the event affecting the marriage and not by the custody determination—will be called the "occurrence method." The only one of these eight states that does not use the occurrence method after a dissolution of marriage or separation is West Virginia.

80. ALASKA STAT. § 25.24.150.

81. MO. ANN. STAT. § 452.402.

82. N.M. STAT. ANN. § 40-9.2.

In contrast to the states discussed above, West Virginia,[83] after the death of a parent, dissolution of marriage or separation and Illinois,[84] New Jersey,[85] Utah,[86] and Wyoming,[87] after the death of a parent, utilize the custody determination as the triggering mechanism for giving grandparents a right to petition for visitation. In other words, in these states under these circumstances, only the parents of the non-custodial parent are given the right to petition for visitation.

The West Virginia statutes provide grandparents an extremely limited right to petition for visitation. Not only do the statutes limit the right to petition for visitation to the parents of the non-custodial parent, after the dissolution of marriage or a separation, the right to petition is limited even further. After a dissolution of marriage or a separation, a grandparent is given the right to petition for visitation *only* when the grandparent's child either fails to answer and defend the suit or if the whereabouts of the parent are unknown. Thus, in West Virginia, if the grandparent's child shows up to defend his or her position in a dissolution or separation proceeding, that grandparent will receive no right to petition for visitation even if the grandparent's child is refused custody or visitation rights.

D. *Only After the Dissolution of a Marriage or the Death of a Parent*

This is the most common type of grandparent visitation statute. Nine states currently have statutes that give grandparents the

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83. W. VA. CODE §§ 48-2-15, -2B-1.

84. ILL. ANN. STAT. ch. 40, § 607. The passage of this statute in 1982 dramatically increased the scope of the right to petition for visitation in Illinois. Prior to 1982, grandparents were given the right to petition for visitation only if both of a grandchild's parents were dead and then only the parents of the child's legal parents were given the right to petition. ILL. ANN. STAT. ch. 110 ½, § 11-7.1. It is not yet clear, however, what the final scope of the rights granted by section 607(b) will be. The language of the section is quite broad; "The court may grant reasonable visitation privileges to a grandparent or great-grandparent of any minor child. . . ." *Id.* at ch. 40, § 607(b). The location of the statute is within the Marriage and Dissolution Act. Because of this location, it is doubtful that the courts will interpret the statute as granting to grandparents a right to petition for visitation at any time. This conclusion is further bolstered by language in the statute that specifically grants grandparents the right to petition for visitation after the death of their child. This language would be unnecessary if the grandparents were given a right to petition at any time.

85. N.J. STAT. ANN. § 9:2-7.1.

86. UTAH CODE ANN. §§ 30-5-1, -2.

87. WYO. STAT. § 20-2-113.

right to petition for visitation under these circumstances.[88] Once again, however, these states split on whether to use the occurrence of the event or the custody decision as the triggering factor in determining which grandparents will receive a right to petition for visitation. Massachusetts[89] is the only one of these states that uses the occurrence triggering mechanism after both the dissolution of a marriage or the death of a parent. Thus, in Massachusetts, any grandparent can petition for visitation after the death of a parent or the dissolution of a marriage, even if that grandparent's child retains custody of the grandchild.

Four of these states[90] use both the occurrence and custody methods of triggering a right to petition for visitation. In these four states, any grandparent can petition for visitation after a dissolution of marriage, even if the grandparent's child retains custody. If the marriage ends by the death of a parent, however, only the parents of the deceased parent receive a right to petition for visitation. No rational basis appears to exist for distinguishing between these two situations. The rights granted to the parents of the custodial parent are dependent upon whether the marriage was terminated by the death of a parent or by dissolution. The cause of the termination of the marriage should have no bearing upon the status of the parents of the custodial parent.

The remaining four states in this category use only the custody method of triggering a right to petition for visitation.[91] In these states, a grandparent is given a right to petition for visitation rights only if that grandparent's child is the non-custodial or a deceased parent. Thus, the parents of a custodial parent can gain access to a grandchild only with the consent of the custodial parent.

In Rhode Island,[92] a grandparent's right to petition for visitation after a dissolution of marriage is limited. Rhode Island gives grandparents a right to petition for visitation after a marriage is

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88. These states are: Alabama, ALA. CODE § 30-3-4 (Supp. 1984); Arizona, ARIZ. REV. STAT. ANN. § 25-337.01 (Supp. 1984-85); Indiana, IND. CODE ANN. §§ 31-1-11.7-1 to .7-8 (Burns Supp. 1984); Massachusetts, MASS. ANN. LAWS ch. 119, § 39D (Michie/Law Coop. Supp. 1984); Nevada, NEV. REV. STAT. § 123.123 (1979); Ohio, OHIO REV. CODE ANN. §§ 3109.05(B), .11 (Baldwin 1983); Oklahoma, OKLA. STAT. ANN. tit. 10, §§ 5, 60.16 (West Supp. 1984-85); Rhode Island, R.I. GEN. LAWS §§ 15-5-24.1, .2 (1982 & Supp. 1984); and Tennessee, TENN. CODE ANN. § 36-6-301 (1984).

89. MASS. ANN. LAWS ch. 119, 39D.

90. Alabama, Oklahoma, Ohio, and Tennessee.

91. These states are Arizona, Indiana, Nevada, and Rhode Island.

92. R. I. GEN. LAWS § 15-5-24.2.

dissolved only if the grandparent's child does not receive custody *and* fails to exercise or is denied parental visitation rights.[93] Therefore, the grandparents are granted an independent right to petition for visitation only when the parent does not receive or fails to exercise visitation rights.[94] If the parent does receive and exercises visitation rights, the grandparent must gain access to the child through the parent: a dependent right.

E. *Only After the Death of a Parent*

Kansas[95] and Kentucky[96] limit a grandparent's right to petition for visitation to situations where a parent has died. Once again, however, each state uses a different triggering mechanism for the right to petition for visitation. Kentucky uses the occurrence mechanism and therefore allows any grandparent to petition for visitation after the death of a parent regardless of the petitioning grandparent's relationship to the surviving parent.[97] Kansas, on the other hand, uses the custody mechanism and thus gives a right to petition for visitation only to the parents of the deceased parent.[98]

F. *Only After Specific Circumstances Affecting Marriage, But Not Including the Death of a Parent*

The six states in this category[99] are not completely consistent

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93. The language of the statute is:

> In any divorce proceeding commenced before or after the effective date of this section, should the noncustodial parent fail to exercise his or her visitation rights . . . or should the noncustodial parent have been denied said visitation rights, then the Family Court may, upon petition of a grandparent whose child is the noncustodial parent, grant reasonable visitation rights of said grandchild or grandchildren to said grandparent.

R. I. GEN. LAWS § 15-5-24.2.

94. This limited right to petition for visitation may be an indication that the Rhode Island Legislature felt that grandparents should gain access to the grandchild(ren) through the parent if the non-custodial parent is granted and exercises visitation rights. A possible rational behind this would be to minimize the number of people able to interrupt the custodial parent's care of the child with requests for visitation.

95. KAN. STAT. ANN. § 38-129 (Supp. 1983).

96. KY. REV. STAT. ANN. § 405.021 (Baldwin 1983).

97. *Id.*

98. KAN. STAT. ANN. § 38-129.

99. These states are: Hawaii, HAWAII REV. STAT. § 571-46(7) (1976); Maine, ME. REV. STAT. ANN. tit. 19, §§ 214, 581, 752 (Supp. 1984-85); Maryland, MD. FAM. LAW CODE § 9-102 (1984); New Hampshire, N.H. REV. STAT. ANN. § 458:17(VI) (1983); North Carolina, N.C. GEN. STAT §§ 50-13.2(b)(1), .5(j) (1984); and Virginia, VA. CODE § 20-107.2 (Supp. 1984).

in their grant of the right to petition for visitation. None of these states, however, allows a grandparent to petition for visitation after the death of a parent. In Maryland[100] and New Hampshire,[101] grandparents are given the right to petition for visitation only after a dissolution of marriage. Maine[102] gives a right to petition after a divorce, separation or the desertion of a parent. Virginia gives the right to petition for visitation after a dissolution of marriage or a legal separation.[103] And in North Carolina[104] and Hawaii,[105] grandparents may petition for visitation after any custody dispute involving the grandchildren. All six states use the occurrence method of triggering the right to petition for visitation; the relationship of the petitioning parent to the custodial parent is irrelevant.

G. *Under Miscellaneous Circumstances*

Fifteen states, including Vermont, grant the right to petition for visitation in an unique array of circumstances.[106] This category discusses each statute separately. The Vermont legislation[107] is discussed in detail in Part IV of this Note.

1. *Arkansas*: The Arkansas statutes allow grandparents to pe-

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100. MD. FAM. LAW CODE ANN. § 9-102. This statute is unique in that it is the only one that expressly gives grandparents the right to petition for visitation with an adopted child whose parents have received a divorce. Thus, if John and Mary had adopted a child and then had divorced, then the grandparents would be able to petition for visitation with that adopted child.

101. N.H. REV. STAT. ANN. § 458.17. This statute also refers to decrees of nullity in granting a right to petition for visitation. For the purpose of this note, this distinction is irrelevant because both a divorce and a decree of nullity fully terminate a marriage and thus both come under the term dissolution of marriage.

102. ME. REV. STAT. ANN. tit. 19, §§ 214, 581, 752.

103. VA. CODE § 20-107.2.

104. N.C. GEN. STAT. §§ 50-13.2(b)(1), .5(j).

105. HAWAII REV. STAT. § 571-46(7).

106. These states are: Arkansas, ARK. STAT. ANN. §§ 34-1211.1, 56-215(b), 57-135 (Supp. 1983); California, CAL. CIV. CODE §§ 197.5, 4601 (1983); Colorado, COLO. REV. STAT. § 19-1-116 (Supp. 1984); Florida, FLA. STAT. ANN. §§ 61.13, .1301 (West Supp. 1984); Georgia, GA. CODE ANN. § 19-7-3 (1982); Iowa, IOWA CODE ANN. § 598.35 (West 1981); Louisiana, LA. REV. STAT. ANN. § 9:572 (West Supp. 1985), LA. CIV. CODE ANN. art. 157 (West Supp. 1985); Michigan, MICH. COMP. LAWS §§ 722.27, .27b (19xx) (MICH. STAT. ANN. §§ 25.312(7)(b) & (g), .312(7b) (Callaghan 1984)); Minnesota, MINN. STAT. ANN. § 257.022 (West 1982); New York, N.Y. DOM. REL. LAW §§ 72, 240 (McKinney 1977 & Supp. 1984-85); Oregon, OR. REV. STAT. §§ 109.121, .123 (1983); Pennsylvania, PA. STAT. ANN. tit. 23, §§ 1012-1015 (Purdon Supp. 1984); South Dakota, S.D. CODIFIED LAWS §§ 25-4-52 to -54 (1984); Vermont, VT. STAT. ANN. tit. 15, §§ 1011-1016 (Supp. 1984); and Wisconsin, WIS. STAT. ANN. §§ 763.245, 880.155 (1981 & Supp. 1983).

107. VT. STAT. ANN. tit. 15, §§ 1011-1016.

tition for visitation after the death of a parent[108] and also allow grandparents the right to petition the court *during* any custody or divorce proceeding.[109] The statute allowing a petition after the death of a parent uses custody as a triggering factor and thus grants a right to petition for visitation only to the parents of the deceased parent.[110] Thus, if John and Mary lived in Arkansas and John died, only his parents would receive a right to petition for visitation. The right to petition for visitation that is created by a divorce or custody proceeding, however, is not dependent upon the custody determination. The statute allows any grandparent to enter any divorce or custody proceeding for the purpose of petitioning for visitation.[111] Thus, the right to petition is triggered by the occurrence of the divorce or custody proceeding.

Arkansas specifically addresses the issue of step-parent adoptions.[112] Although an adoption will usually terminate all legal relationships between a child and his or her natural relatives,[113] the statute goes on to state that:

> [I]f a parent of a child dies without the relationship of parent and child having been previously terminated and a spouse of the living parent thereafter adopts the child, . . . at the time of granting the adoption the court may grant the parents of the deceased parent reasonable rights to visit the children of the deceased parent.[114]

The language cited above means that most step-parent adoptions will not affect any rights possessed by the parents of the deceased non-custodial parent. However, some circumstances do exist in which a step-parent adoption could cut off a grandparent's visi-

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108. ARK. STAT. ANN. § 57-135.

109. *Id.* at § 34-1211.1. It should be noted that this section does not provide grandparents with an independent right to initiate an action for the purpose of petitioning for visitation after a divorce or custody proceeding. The grandparents must intervene in an action previously commenced in order to petition for visitation.

110. *Id.* at § 57-135.

111. The statute states:

> In any divorce or custody proceedings heretofore or hereafter commenced in this state, the court may, upon petition of a grandparent, grant reasonable visitation rights to either the maternal or paternal grandparents of the child, or children, and may issue such orders as may be necessary to enforce said visitation rights.

Id. at § 34-1211.1.

112. *Id.* at § 56-215(b).

113. *Id.* at § 56-215(a)(1).

114. *Id.* at § 56-215(b).

tation rights or right to petition for visitation. To illustrate, if John and Mary get divorced with John getting custody of the children, the ability of Mary's parents to receive visitation rights with the children would depend upon whether Mary died prior to a step-parent adoption. If Mary were still alive when a step-parent adoption took place, the adoption would terminate the legal relationship between Mary's parents and the grandchild and subsection (b) would not apply. However, if Mary died prior to the adoption, then subsection (b) would apply because she would have died without the "relationship of parent and child having been previously terminated"[115] and therefore her parents could petition the court in the adoption proceeding for visitation rights.

2. *California*: California gives grandparents the right to petition for visitation after the death of a parent[116] and also the right to petition the court of visitation in any proceeding where custody of the child is at issue.[117] The scope of the latter right is unclear. The language of section 4601 states:

> Reasonable visitation rights shall be awarded to a parent unless it is shown that such visitation would be detrimental to the best interests of the child. In the discretion of the court, *reasonable visitation rights may be granted to any other person* having an interest in the welfare of the child.[118]

This statute is found in the California Civil Code Chapter dealing with custody of children. In *Gabois v. Superior Court*,[119] the California Supreme Court stated that this section applies to any proceeding where the custody of a minor child is at issue. It is unclear whether grandparents are given the right to initiate a separate proceeding that will deal exclusively with whether a petition for visitation rights should be allowed. From the *Gabois* case and the language of the statute, it appears that no independent right to petition the court is created and that grandparents must make a petition for visitation during the pendency of a child custody proceeding.

California uses both the custody and occurrence methods of triggering a right to petition for visitation. After the death of a

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115. *Id.*
116. CAL. CIV. CODE § 197.5.
117. *Id.* at § 4601.
118. *Id.*
119. 126 Cal. App. 3d 653, 179 Cal. Rptr. 19 (1981).

parent, only the parents of the deceased parent receive a right to petition for visitation. The occurrence of a custody proceeding, however, triggers the right to petition for visitation granted by section 4601; both sets of grandparents are allowed to petition the court without regard to custody.

Finally, the issue of step-parent or grandparent adoption is discussed, but only in terms of the right given to petition the court after the death of a parent.[120] Section 197.5 states that the right to petition the court for visitation or any rights previously granted for visitation are terminated by an adoption. An adoption by a step-parent or by another grandparent does not affect the rights of grandparents.

3. *Colorado*: In Colorado,[121] grandparents are given the right to petition for visitation in four situations: after the dissolution of a marriage; after a legal separation; where a third party has been given custody of the grandchild; or where a parent dies. Colorado uses both the occurrence and custody methods of triggering the right to petition for visitation. After the death of a parent, the custody method is used and only the parents of the deceased parent are given a right to petition for visitation. However, after the dissolution of a marriage or legal separation, or where a third party has custody, the right to petition is triggered by the occurrence and both sets of grandparents can petition for visitation.

The right to petition for visitation when a third party has received custody of the child is limited. The statute excludes from this right any right to petition for visitation after a child has been either placed for adoption outside the home or where the adoption has been finalized. Thus, if a grandchild is placed in a foster home, then the grandparents would receive the right to petition for visitation. However, if the child is placed for adoption, then the grandparents would receive no right to petition for visitation.[122]

4. *Florida*: The Florida statute has been recently revised. During the 1984 legislative session, the grandparent visitation statute was repealed[123] and replaced with new legislation that states ex-

120. CAL. CIV. CODE § 197.5(c).

121. COLO. REV. STAT. § 19-1-116.

122. The language of the statute specifically excludes the situation where "any child . . . has been placed for adoption or whose adoption has been legally finalized" from those situations that give grandparents the right to petition for visitation. *Id.* at § 19-1-114(b).

123. 1984 Fla. Laws ch. 84-64, § 2 (repealing FLA. STAT. ANN. § 68.08).

pressly the circumstances that trigger a right to petition for visitation.[124] Under the new statute, a grandparent is given the right to petition for visitation after the dissolution of marriage, the death of a parent, or when a parent has deserted the child.[125] Any grandparent can petition for visitation after the occurrence of the event affecting the marriage. The new statute also states that a step-parent adoption does not affect either previously granted visitation rights or the right of the grandparents to petition for visitation.[126]

5. *Georgia*: Georgia gives grandparents the right to petition for visitation after a divorce, after the commencement of a divorce action, during any suit regarding the guardianship of a child, after the death of a parent, during any suit regarding custody of a child, and after the termination of the parental rights of either parent.[127] The right to petition is triggered by the occurrence of these events and does not depend upon which parent receives custody. A 1980 amendment[128] to the statute provides that a step-parent adoption does not affect the right of a grandparent to petition for visitation.[129] Previous to this amendment, the Georgia Supreme Court had ruled in *Sachs v. Walzer*[130] that a step-parent adoption created a new family relationship and therefore terminated any visitation order previously granted to the family of the child's natural parents.[131]

6. *Iowa*: Iowa allows grandparents the right to petition for visitation after a divorce, after the filing of a petition for dissolution of marriage, after the death of a parent, or after a child has been placed in a foster home.[132] Iowa uses the occurrence method of triggering the right to petition for visitation.

In 1980, the Iowa Supreme Court determined the affect of an

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124. *Id.* at § 1. This Act will be placed in the Florida Statutes at FLA. STAT. ANN. § 61.1301.

125. 1984 Fla. Laws ch. 94-64, § 1(1)(a), (b) & (c).

126. *Id.* at § 1(2) & (3).

127. GA. CODE ANN. § 19-7-3.

128. 1980 Ga. Laws p. 936, § 1.

129. GA. CODE ANN. § 19-7-3(a).

130. 242 Ga. 742, 251 S.E.2d 302 (1978) (adoption of child by step-mother terminates the grandparents' standing to petition for visitation).

131. Thus, if Mary was killed in a plane crash after Mary's parents were granted visitation rights with the grandchildren, the adoption of the children by John's new spouse would have terminated the existing right to visitation. After the amendment, however, this step-parent adoption would not affect the visitation rights.

132. IOWA CODE ANN. § 598.35.

adoption upon a grandparent's right to petition for visitation.[133] In *Gardiner*, the maternal grandparents of a child had been granted the right to visit with a grandchild after that child had been adopted. The adoptive parents of the child appealed the decision and the supreme court reversed, stating that the adoption court had no authority to grant visitation to a relative of the child's natural parents.[134] The court based its decision on the fact that the adoption had terminated any legal relationship between the child and his or her natural parents or relatives.[135] Later, in dicta, the court stated that any adoption would terminate grandparental rights, therefore implying that a step-parent adoption would terminate any rights possessed by the parents of a non-custodial parent.[136]

7. *Louisiana*: Both the Louisiana civil code[137] and statutes[138] address the issue of a grandparent's right to petition for visitation. The right to petition for visitation is given after a dissolution of marriage, after a legally decreed separation, or upon the death of a parent.[139] Furthermore, the parents of a deceased parent receive a right to petition for visitation when a grandchild's parents are unmarried at the time of the child's birth and remain unmarried.[140]

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133. *In re* Adoption of Gardiner, 287 N.W.2d 555 (Iowa 1980) (statute that terminated the rights of the natural parents also terminated the rights of that parent's parents to petition for visitation); *but see In re* Guardianship of Ankeney, 360 N.W.2d 733 (Iowa 1985) (probate court has power to give grandparents visitation rights regardless of step-parent adoption if it determines that best interests of the child would be served by visitation).

134. *Gardiner*, 287 N.W.2d at 556.

135. *Id.* at 558.

136. *Id.* at 559.

137. La. Civ. Code Ann. art. 157.

138. La. Rev. Stat. Ann. § 9.572.

139. The language of the statute is that:

> A. If one of the parties to a marriage dies, or the obligation to live together is terminated by an action of separation from bed and board or the marriage is terminated by divorce, and there is a minor child or children of such marriage, the parents of the deceased, or separated, or divorced party without custody of such minor child or children, may have reasonable visitation rights to the child or children . . . if the court in its discretion finds that such visitation rights would be in the best interests of the child or children.

Id. at § 572(A).

140. The statute states:

> C. When the parents of a minor child or children live in concubinage and one of the parents dies, the parents of the deceased party may have reasonable visitation rights to the child or children during their minority, if the court in its discretion finds that the grandparents have been unreasonably denied visitation rights and such visitation rights would be in the best interests of the child or children.

To illustrate this right to petition: John and Mary have a child while they are not married. After the birth, John and Mary continue to live together but decide not to get married. If John dies, his parents could petition the court for visitation with the grandchild. Since Louisiana uses only the custody method of triggering the right to petition for visitation, Mary's parents would not receive a right to petition because she retains custody of the child.

Louisiana also specifically provides that the parents of a deceased parent may petition for visitation regardless of whether the child is subsequently adopted.[141] Thus, if John and Mary's marriage is dissolved by the death of either or both parents, the parents of the deceased parent(s) may petition for visitation even if the child is subsequently adopted. This right to petition for visitation is limited to situations where the marriage ends due to the death of a parent. In contrast, if the marriage was ended by a divorce, the adoption provisions of the Louisiana civil code[142] apply and an adoption of the grandchild would terminate a grandparent's right to petition for visitation.[143]

8. *New York*: Grandparents can petition for visitation in New York during any action to dissolve a marriage, to obtain a separation or to determine custody or parental visitation rights.[144] This right to petition for visitation is triggered by the occurrence of any of the above proceedings. It is unclear whether the right is limited to the right to intervene in a proceeding previously filed by the grandchild's parents. The statutory language does not appear to give grandparents an independent right to file a petition with the court requesting visitation rights.[145]

Id. at § 572(C).

141. *Id.* at § 572(B).

142. LA. CIV. CODE ANN. art. 214 (West Supp. 1984).

143. A grandparent whose child retains custody of the child after a step-parent adoption would be unaffected by the adoption and would be entitled to petition for visitation if the second marriage broke up.

144. N.Y. DOM. REL. LAW § 240.

145. The language of the statute states that:

> 1. In any action or proceeding brought . . . (4) to obtain, by a writ of habeas corpus or by petition and order to show cause, the custody of or right to visitation with any child of a marriage, the court . . . may provide for reasonable visitation rights to the maternal and/or paternal grandparents of any child of the parties.

Id. at § 240(1). By reference to the word "parties," the statute appears to limit the right to initiate a suit to the parents of the child. The section allowing the initiation of a habeas corpus proceeding, however, does not limit the initiation of such actions to the parents.

New York has another statute, however, that gives grandparents the right to petition for visitation after the death of a parent or "where circumstances show that conditions exist which equity would see fit to intervene . . . ."[146] This statute has recently been interpreted by a New York Family Court as giving grandparents a right to petition for visitation under any set of circumstances.[147] In that case, the judge ruled that the language of section 72, which allows a judge to hear visitation petitions where "equity would see fit to intervene," allows a court to hear and grant a petition for visitation despite the fact that the grandchild's family is still intact.[148]

9. *Pennsylvania*: Pennsylvania allows grandparents to petition for visitation after the death of a parent,[149] during any proceeding for dissolution of marriage, after any dissolution of marriage,[150] or when the grandchild has lived with the grandparents for at least twelve months.[151] Both the occurrence and custody methods of triggering the right to petition for visitation are used. After the death of a parent, the custody method is used and in proceedings or subsequent to proceedings for dissolution of marriage, the occurrence method is used. Thus, if John has custody of his and Mary's child, his parents would be able to petition for visitation if the marriage ended because of divorce but would not receive a right to petition for visitation if the marriage ended because Mary died. The triggering mechanism used when the grandchild has lived with a grandparent is also custody related because only the grandparent who had lived with the child for at least twelve months is given the right to petition for visitation.

Finally, Pennsylvania specifically addresses the issue of step-parent adoptions. Section 1015 of title 23 provides that an adoption by a person other than a step-parent or grandparent terminates both the rights given to grandparents to petition for visitation and any rights previously given by a court to visitation.[152]

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146. *Id.* at § 72.

147. Francis E. v. Peter E., 479 N.Y.S.2d 319 (Fam. Ct. 1984).

148. *Id.* at 321.

149. PA. STAT. ANN. tit. 23, § 1012.

150. *Id.* at § 1013.

151. *Id.* at § 1014. Note that the right to petition given in this section in independent of whether the parents remained together or dissolve their marriage. Thus, if John and Mary's child resided with Mary's parents for a year, Mary's parents could petition for visitation even if John and Mary stay happily married.

152. This section states that "[the right to petition for visitation created by this Act]

10. *South Dakota*: South Dakota allows a grandparent to petition the court for visitation after a divorce or legal separation, after the commencement of an action for divorce or separation maintenance, and after the death of a parent.[153] Both the occurrence and custody triggering mechanisms are used. After the death of a parent, only the parents of the deceased parent are given a right to petition for visitation. However, in all other circumstances where a right to petition for visitation is granted, it is the occurrence of the event which triggers the right to petition for visitation; both sets of grandparents can petition for visitation. The South Dakota statute also allows grandparents to file a petition for visitation independent of any other action. Thus, the grandparents do not have to wait for the parents to file a suit in order to intervene for the purpose of petitioning for visitation; the grandparents have standing to file an independent petition for visitation.

11. *Wisconsin*: In Wisconsin, grandparents are given the right to petition the court for visitation after the death of a parent.[154] The grandparents may also petition the court for visitation during any action affecting marriage.[155] Wisconsin uses only the occurrence method of triggering the right to petition for visitation. Therefore, any grandparent can petition for visitation under the above circumstances regardless of which parent receives custody.

12. *Minnesota*: Minnesota allows a petition for visitation after the death of a parent,[156] when a divorce action has been commenced or after the dissolution of a marriage,[157] or where a grandchild has lived with his or her grandparents for at least twelve months and the parents have subsequently removed the child from the grandparent's home.[158] After the death of a parent, the statute gives a right to petition for visitation to the parents of the deceased parent only. However, when a marriage is dissolved

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shall not apply if the child has been adopted by a person other than a stepparent or grandparent. Any visitation rights granted pursuant to this section prior to the adoption of the child shall be automatically terminated upon such adoption." *Id.* at § 1015.

153. S.D.CODIFIED LAWS § 25-4-53.

154. WIS. STAT. ANN. § 880.155.

155. *Id.* at § 767.245(4). Although the language of this section does not expressly state these circumstances, the Historical Note following the section quotes 1977 Wis. Laws ch. 105, § 62 states: "(1) This act applies to all actions affecting marriage, and to all actions for modification or enforcement of previously entered orders in actions affecting marriage. . . ."

156. MINN. STAT. ANN. § 257.022(1).

157. *Id.* at § 257.022(2).

158. *Id.* at § 257.022(2a).

or is being dissolved, the occurrence method is used and both sets of grandparents may petition for visitation.

Minnesota also specifically addresses the issue of step-parent adoption. Although an adoption acts to terminate any rights granted to grandparents to visit with their grandchildren, if the child is adopted by a step-parent or by another grandparent, there is no effect upon grandparental rights to visitation.[159]

13. *Oregon*: Not only does the Oregon statute[160] give a list of circumstances under which a grandparent may petition for visitation,[161] it also gives the grandparents the option to choose *when* to petition. Under subsection (b) of the statute, any grandparent may petition the court for visitation after commencement of a domestic relations suit.[162] Thus, if John and Mary commence divorce proceedings, either set of grandparents may petition for visitation during the pendency of the divorce action. The grandparents must file the petition prior to the issuance of the final divorce decree. If the grandparents wait until after the court issues the final divorce decree, then only the parents of the non-custodial parent would receive standing to petition for visitation. The right to petition for visitation, therefore, is triggered by the occurrence of the domestic relations suit *while* the suit is pending. Once the final decree from the suit is filed, however, the triggering mechanism becomes the determination of which parent retains custody.

The statute fails to address whether the grandparents would lose a right to visitation gained during the pendency of a domestic relations action if their child retains custody of the grandchild.[163]

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159. *Id.* at § 257.022(3).

160. OR. REV. STAT. §§ 109.121, .123.

161. The Oregon visitation statute allows grandparents to intervene in proceedings brought under various statutes for the purpose of petitioning for visitation. Intervention is allowed under: OR. REV. STAT. §§ 107.510 (actions for the dissolution of marriage, annulment or separation); 108.110 (actions for the support of spouse and children); 109.100 (child support actions); 109.103 (actions for child support when the child was born out of wedlock when paternity has been established); 109.125 (paternity suits); 419.513 (child support actions within the jurisdiction of the juvenile court) (1981).

162. The statute states that "[a]fter the commencement of a domestic relations suit . . . and before a decree or final order therein, any grandparent of a minor child of the party or parties may petition the court in which the suit is filed for an order providing for visitation rights of the grandparent." *Id.* at § 109.121(b).

163. The statute states that the proceedings upon the visitation petition may be held either as a part of the domestic relations suit or as a separate proceeding. *Id.* at § 109.121(4). The statute also states that any decree ordering visitation rights in this circumstance may be incorporated into the final divorce decree. *Id.* After a divorce decree is en-

In other words, if Mary's parents petition for visitation during the pendency of a divorce action and are granted visitation rights, it is unclear whether they would retain those rights if Mary is given custody of the children. The language of the statute does not require the court to terminate visitation rights that have been given to the parents of the custodial parent. Without terminating the visitation rights, however, the two sections of the statute become counterproductive because they would reward the grandparents for early intervention in a domestic relations suit.

Oregon also gives grandparents the right to petition for visitation after the death of a parent.[164] This right to petition is given only to the parent of the deceased parent.

14. *Michigan*: The Michigan statutes[165] have an interesting history. The Michigan legislature passed a statute in 1971 that included specific language giving grandparents a right to petition the court for visitation after the death of a parent.[166] In 1980, the legislature rewrote the statute to give grandparents the right to petition the court for visitation during any child custody suit.[167] The rewritten statute, however, failed to provide grandparents with an express right to petition for visitation after the death of a parent. The Michigan Attorney General implicitly recognized a right to petition for visitation after the death of a parent when he issued an opinion stating that the parents of a deceased parent were entitled to petition for visitation even though another parent had adopted the grandchild.[168]

Recently, the Michigan statute was again revised.[169] The wording of the new statute expressly recognizes a right to petition for visitation after the death of a parent.[170] This right is triggered by custody, and therefore is given only to the parents of the deceased

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tered, visitation may only be granted to the parents of the non-custodial parent. This implies that any order for visitation that is made part of the final divorce decree would also be limited to the parents of the non-custodial parent.

164. *Id.* at § 109.121(1)(a).

165. MICH. COMP. LAWS §§ 722.27, 27b (MICH. STAT. ANN. §§ 25.312(7), .312(7b)).

166. MICH. COMP. LAWS § 722.27a (1971).

167. The Amended Child Custody Act, Public Act No. 161, House Bill 4597 (amending MICH. COMP. LAWS § 722.27 (1980)).

168. Op. Mich. Atty. Gen., May 15, 1981, No. 5903.

169. MICH. COMP. LAWS § 722.27b (MICH. STAT. ANN. § 25.312(7b)).

170. "If a natural parent of an unmarried child is deceased, a parent of the deceased parent may commence an action for visitation." *Id.* at § 722.27b (MICH. STAT. ANN. § 25.312(7b)).

parent. Grandparents are also given the right to petition the court for visitation during the pendency of any suit to dissolve a marriage, to decree a legal separation, or to grant legal custody to any party other than the child's parents.[171] Since the right to petition under these circumstances is triggered by the occurrence of the suit, any grandparent can petition for visitation.

III. Current Deficiencies in Statutory Language

The language of many of the grandparents visitation statutes fails to address certain issues such as the effect that a step-parent adoption or the termination of parental rights has upon the rights of the grandparents. The failure to address these issues can cause confusion for a practitioner and conflicts between statutes. This section first addresses the issue of step-parent adoptions and then discusses the termination of parental rights. For the purposes of this section, the term "grandparent visitation" refers to both the right of a grandparent to *petition* for visitation and to any right of visitation that has already been given to a grandparent by a court.

A. *Step-parent Adoptions*

A frequently litigated issue involving grandparent visitation is whether a step-parent adoption affects grandparent visitation. The failure of many states to specifically address the effect of step-parent adoptions contributes to this large amount of litigation. Out of the forty-eight states that have grandparent visitation statutes,[172] only seventeen expressly address the affect that a step-parent adoption has upon grandparent visitation.[173] These seventeen states specifically provide that a step-parent adoption, under certain circumstances, will not affect grandparent visitation only if the first marriage ended by the death of a parent.[174] Since the statutory provisions were discussed in detail in Part II of this Note

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171. *Id.*

172. *See supra* note 35.

173. Ark. Stat. Ann. § 56-215(b); Cal. Civ. Code § 197.5(c); Fla. Stat. Ann. § 61.1301(2), (3); Ga. Code Ann. § 19-7.3(a); Kan. Stat. Ann. § 38-129(b); La. Rev. Stat. Ann. § 9-572(B); Mass. Ann. Laws ch. 119, § 39D; Mich. Comp. Laws § 722.27b(1) (Mich. Stat. Ann. § 25.312(7b)(1)); Minn. Stat. Ann. § 257.122(3); Mont. Code Ann. § 40-9-102(5); N.D. Cent. Code § 14-09-05.1; Okla. Stat. Ann. tit. 10, §§ 5, 60.16; Pa. Stat. Ann. tit. 23, § 1015; S.D. Codified Laws § 25-4-54; Tenn. Code Ann. § 36-6-301(b); Tex. Fam. Code Ann. § 14.03(e); Vt. Stat. Ann. tit. 15, § 1016.

174. *See, e.g.*, La. Rev. Stat. Ann. § 9-572(B).

and since that discussion included an examination of the statutory provisions related to step-parent adoption, this section focuses upon those states that do not specifically address step-parent adoptions.

To understand why the failure to address step-parent adoptions may create problems, it is first necessary to look at the effect that an adoption has upon a parent-child relationship. The adoption statutes of most states terminate all relationships between an adopted child and his or her natural parents and relatives.[175] The purpose of this termination is to allow the child to make a fresh start with his or her new parents.[176] But this fresh start rationale does not apply with equal force when the child is adopted by a step-parent or by another natural relative. For example, in *Mimkon v. Ford*,[177] the New Jersey Supreme Court stated that:

> [The termination of the relationship between a child and his natural relatives] is principally concerned with adoptions by persons other than relatives of children "placed for adoption" because their parents are unwilling or unable to care for them . . . . In that context defendant's contention that the adoption statute was intended to protect the relationship between the adopted child and the adopting parents from interference from the natural parents is undeniably sound . . . . [The natural parents] can be most detrimental to the child's well-being if permitted to interfere in the adoptive home . . . .
>
> [However, a step-parent adoption] is not a case in which the child was "placed for adoption" by strangers, nor [does] the adoption involve transfer of physical custody of the child. In such a case, . . . the policy of insulating the adoptive child from his natural parents is not so clearly compelling as it would be in other situations.[178]

If a step-parent adoption *does* terminate any relationship that exists between a child and a non-custodial or deceased parent and that parent's relatives,[179] then grandparent visitation rights could

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175. *See, e.g.*, MICH. COMP. LAWS § 710.60 (1980) (MICH. STAT. ANN. § 27.3178(555.60)).

176. *See In re* Adoption of Gardiner, 287 N.W.2d 555, 556-59 (Iowa 1980).

177. 66 N.J. 426, 332 A.2d 199.

178. *Id.* at ____, 332 A.2d at 203.

179. In addition to checking the visitation statutes to see if they deal specifically with step-parent adoptions, a practitioner should also check a state's adoption laws to determine if step-parent adoptions are distinguished from other statutes. For example, N.J. STAT. ANN. § 9:3-50(A) (Supp. 1984-85) provides that a step-parent adoption is distinguishable from other adoptions. A review of the adoption provisions of the states, however, is beyond the

be terminated. The termination of grandparent visitation because of a step-parent adoption can be a hardship on both the grandparents and the grandchild. To illustrate, if John and Mary divorce with Mary receiving custody,[180] a step-parent adoption by Mary's new spouse would terminate grandparent visitation rights possessed by John's parents. Thus, even if John's parents had a mutually beneficial relationship with the child, this relationship could be broken off at the whim of Mary and her new spouse.

Courts in many states have held that step-parent adoptions terminate the grandparent visitation rights of the parents of the non-custodial parent because the adoption statutes preempt the power of the courts to grant visitation under the grandparent visitation statutes. For example, the Michigan Court of Appeals, in *Bikos v. Nobliski*,[181] adopted this reasoning.

In *Bikos*, the natural mother of the grandchildren died and the natural father remarried. The father's new spouse adopted the children of the first marriage. Subsequent to this adoption, the natural maternal grandparents petitioned the court for visitation rights. The court of appeals reversed the lower court decision and denied the visitation rights. The court stated that the Michigan Adoption Code[182] controlled and that it acted to terminate any right given under the visitation statute.[183] The court relied on the provision in the adoption statute which terminated any relationship between the adopted child and the relatives of the natural parent whose parental rights had been terminated by the adoption.

The court also stated that the legislature did not have to specifically mention step-parent adoptions in the grandparent visitation statute for the adoption to terminate the rights given under the visitation statute.[184] Since the adoption code specifically provided that the adopting parent stands in the place of the natural parent in all respects, the natural maternal grandparents were no

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scope of this Note.

180. This illustration would reach the same result if the marriage had terminated by a death. The termination of grandparental rights by a step-parent adoption in no way depends upon the reason behind the termination of parental rights. Thus, even if John's parents had a very close beneficial relationship with their grandchild, their right to petition the court for visitation would be terminated by the step-parent adoption.

181. 88 Mich. App. 157, 276 N.W.2d 541 (1979).

182. MICH. COMP. LAWS § 710.60 (1980) (MICH. STAT. ANN. § 27.3178 (555.60)).

183. *Bikos*, 88 Mich. App. at ____, 276 N.W.2d at 544.

184. *Id.*

longer considered to be the legal grandparents of the child.[185] Therefore, the natural maternal grandparents had no standing to petition for visitation.[186] The parents of the adoptive mother became the legal grandparents of the child. Thus, if the second marriage ended in divorce or death, the adoptive grandparents would have standing to petition for visitation while the natural maternal grandparents would not.

The termination of grandparent visitation rights by a stepparent can create inequitable and unusual results that are not in the best interests of a grandchild. For example, John and Mary's parents have a close relationship with their grandchild. But if John dies and the child is adopted by Mary's new spouse, John's parents would have their grandparent visitation rights terminated. Furthermore, the adoptive spouse's parents would receive a right to petition for visitation even if the second marriage had been short lived and they had not developed a firm relationship with the child. The best interests of the child in this case would be served by allowing John's parents to petition for visitation rights. Allowance of the petition would give the court greater information to use in its decision regarding how best to serve the interests of the child.[187]

B. *Termination of Parental Rights*

Parents may have their parental rights[188] towards a child terminated either voluntarily[189] or involuntarily.[190] One effect of terminating parental rights is to dissolve any legal relationship between the parent and the child. Whether the termination will also affect grandparental visitation rights is an issue rarely addressed. A different way of phrasing this question is to ask whether the

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185. *Id.*

186. *Id.*

187. For an extended discussion of the adoption issue in terms of grandparent visitation see Note, *Grandparents' Statutory Visitation Rights and the Rights of Adoptive Parents*, 49 BROOKLYN L. REV. 149 (1982).

188. The term "termination of parental rights" shall be used to mean the situation where a parent is relieved of all legal rights, obligations and duties toward a child. The parent is stripped of any legal relationship with a child.

189. Two examples of voluntary termination of parental rights are: (1) where a noncustodial parent consents to the adoption of his or her children by the spouse of the custodial parent; and (2) where a mother voluntarily places her child up for adoption at birth.

190. An example of an involuntary termination of parental rights is where a parent has his or her parental rights terminated by judicial decree because of abuse, neglect or abandonment of a child.

source of grandparent visitation is independent of, or dependent upon, the relationship of the grandparent to the parent.

Only three states—Texas,[191] Georgia,[192] and Nevada[193]—specifically address this question in their grandparent visitation statues. In Texas, the statute allows grandparents to petition for visitation if one of the child's parents has their parental rights terminated, as long as the child still has one natural parent as a legal parent.[194] The standing of grandparents to petition for visitation is not based on their relationship to the parent whose rights were terminated. Conceivably, the parent retaining custody could be the child of the grandparent petitioning for visitation rights. In other words, this Texas statute triggers a right to petition for visi-

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191. TEX. FAM. CODE ANN. § 14.03(e).

192. GA. CODE ANN. § 19-7-3(b)(3).

193. NEV. REV. STAT. § 123.123(3).

194. TEX. FAM. CODE ANN. § 14.03(e). In 1983, the Texas legislature amended subsection (e) of section 14.03 twice without reference to the fact that two amendments occurred. 1983 Tex. Gen. Laws ch. 304, § 1 amended subsection (e) to read:

> (e) In a suit affecting the parent-child relationship, including a suit brought for the sole purpose of seeking relief authorized by this subsection . . . the court may issue and enforce orders granting to a grandparent of the child reasonable access to the child if a parent of the child is, at the time that the relief is requested, a natural parent of the child, if access to the child is in the best interests of the child, and if:
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> (1) the grandparent seeking access [is related to the grandchild through a] parent of the child [that] has been incarcerated in jail or in prison during the three month period preceding the filing of the petition . . .
>
> (2) the child has been abused or neglected by a parent of the child; or
>
> (3) the child has been adjudicated to be a child in need of supervision or a delinquent child . . .
>
> (4) the grandparent seeking access to the child is the parent of a person whose parent-child relationship with the child has been terminated by court decree;. . . .

1983 Tex. Gen. Laws ch. 304, § 1.

1983 Tex. Gen. Laws ch. 402, § 4 amended subsection (e) to read:

> (e) If the court finds that it is in the best interest of the child . . . the court may grant reasonable access rights to either the maternal or paternal grandparents of the child; and to either the natural maternal or paternal grandparents of the child whose parent-child relationship has been terminated or who has been adopted . . . . This relief may not be granted unless one of the child's legal parent at the time the relief is requested is the child's natural parent.

1983 Tex. Gen. Laws ch. 402, § 4.

Since neither of these amendments refer to the other one, it is unclear what final form this statute will take. The requirement that the child have a natural parent as a legal parent, however, is present in both forms of the statute.

tation upon the occurrence of the termination of either parent's rights. Thus, if John had his parental rights terminated and Mary retained her status as a legal parent, both John and Mary's parents would receive a right to petition for visitation.

The Georgia statute addresses the effect of the termination of parental rights upon grandparental visitation rights in a different manner.[195] This statute allows only those grandparents whose child's parental rights were terminated to petition for visitation. The provision differs from the Texas statute in that it conditions the right to petition for visitation upon the custody determination. If Mary's parental rights were terminated and John retained custody, only Mary's parents would receive the right to petition for visitation.

The Nevada legislature had addressed this issue differently.[196] In Nevada, termination of a parent's parental rights would completely bar the granting of visitation rights to the parents of that parent. Thus, Nevada also uses the custody determination as the triggering mechanism.

In the states where the grandparent visitation statutes have not specifically addressed this issue, the courts have been forced to determine whether the termination of parental rights acts to bar grandparents from receiving visitation rights.[197] State courts have resolved this issue in several ways.[198]

In *Mimkon v. Ford*,[199] the Supreme Court of New Jersey found that the grandparent visitation statute gave to grandparents an independent right to petition for visitation. In *Mimkon*, a child's parents were separated prior to her birth and were divorced soon after. The mother was given custody and went to reside with her mother, the child's maternal grandmother. When the child's mother died a few years later, the child's father received custody

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195. GA. CODE ANN. § 19-7-3(b)(3).

196. NEV. REV. STAT. § 123.123(3).

197. Some other states have addressed this issue solely in terms of adoption. These states can be distinguished from the states listed in note 173 because they do not refer specifically to step-parent adoption but only to adoption. These states are: ARIZ. REV. STAT. ANN. § 25-337.01(D); COLO. REV. STAT. § 19-1-116(b); CONN. GEN. STAT. ANN. § 46b-59; and N.M. STAT. ANN. § 40-9-2.

198. *See, e.g.*, People *ex. rel.* Sibley v. Sheppard, 54 N.Y.2d 320, 429 N.E.2d 1049 (1981) (visitation permitted despite termination of parental rights by adoption); Krieg v. Glassburn, 419 N.E.2d 1015 (Ind. App. 1981) (adoption terminated grandparents' standing to petition for visitation).

199. 66 N.J. 426, 332 A.2d 199 (1975).

and the child went to live with the father and his new spouse. The child was adopted by her step-mother. After the adoption, the natural maternal grandmother was denied visitation and petitioned for visitation rights.

The parents argued that the adoption by the step-mother terminated any right that the grandmother may have had to receive visitation rights from the court.[200] In other words, the step-parent adoption was in and of itself a sufficient reason for the court to reject a visitation petition by the parent of the mother. The court rejected this argument, however, stating that "[t]he statute creates an independent action in the grandparent. In no way does the right asserted by plaintiff depend on continued relations through the deceased daughter."[201] The court did recognize that the effect of the adoption statute upon the grandparent visitation statute had to be addressed.

The court stated that the adoption statute and the grandparent visitation statute should be read *in pari materia*.[202] In other words, the court recognized that the purpose behind both the adoption statutes and the visitation statutes was to help the child and thus the statutes should be construed together. Construing the statutes together allowed the court to examine the situations which each statute was designed to deal with and to determine whether the legislature intended the adoption statute to automatically terminate grandparent visitation rights.

The court interpreted the adoption statute to be "primarily concerned with adoptions by persons other than relatives of children 'placed for adoption' because their parents are unwilling or unable to care for them."[203] Because the facts of this case presented a different situation — the child retained a natural parent as a legal parent — the policy behind the adoption statute did not compel the termination of the relationship between the grandmother and the grandchild. Further, the court stated that:

> Grandparents ordinarily play a very different role in the child's life [than the parents]; they are not authority figures

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200. *Id.* at ____, 332 A.2d at 202.

201. *Id.* at ____, 332 A.2d at 201-02. The adoption statute that is referred to in the text is N.J. STAT. ANN. § 9:3-30(A) which terminates the relationship between a natural, noncustodial parent and a child after the adoption of the child.

202. *Mimkon*, 66 N.J. at ____, 332 A.2d at 202.

203. *Id.* at ____, 332 A.2d at 203.

> and do not possessively assert exclusive rights to make parental decisions. At best, they are generous sources of unconditional love and acceptance, which compliments rather than conflicts with the roles of parents.
>
> Thus, grandparent visitation involves a much lesser risk of threat to the physical or psychological well-being of the child or to the development of a healthy and natural relationship between the child and the adopting parents than might continued contact by the natural parent. To this extent, grandparent visitation, in the context of the facts of this case, does not clash with the policies apparently embodied in the adoption statute.[204]

Thus, the court found that a grandparent could still receive visitation rights with a grandchild after the child had been adopted. Of course, the visitation had to be in the best interests of the child. The importance of this decision comes from the broad language used by the court in allowing visitation after a step-parent adoption. By declaring that the visitation statute created an independent right to petition for visitation, the court declared that a case by case method of examining visitation petitions would be used. In other words, if a grandparent wishes to petition for visitation after a grandchild has been adopted, whether by a step-parent or otherwise, the court is directed by *Mimkon* to examine the facts of the specific case to determine how to best serve the policies behind the relevant statutes and thus to serve the best interests of the child.[205]

In contrast to the case by case method adopted by *Mimkon*, the Oklahoma Supreme Court in *In re K.S.* has stated that the termination of parental rights serve as an absolute bar against a grandparent having standing to petition for visitation.[206] The court looked at the language of the visitation statute and noticed that it gave grandparents a right to petition for visitation only under specific circumstances. Since the statute did not include termination of parental rights as a circumstance that triggered a right to peti-

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204. *Id.* at ____, 332 A.2d at 204.

205. Subsequent superior court decisions in New Jersey have not followed the broad interpretation of *Mimkon's* language. *See* J. v. M., 157 N.J. Super. 478, 385 A.2d 240 (A.D. 1978) (right of a grandparent to petition for visitation can rise no higher than those of natural parents); D.Y.F.S. v. D.T., 171 N.J. Super. 520, 410 A.2d 79 (Juv. & Dom. Rel. 1979) (right of a grandparent to petition can rise no higher than those of natural parent); *In re* Adoption of Child by M., 140 N.J. Super. 91, 355 A.2d 211 (Ch. 1976).

206. 654 P.2d 1050 (Okla. 1982).

tion, the court refused to interpret the statute in such a way as to include the right to petition after the termination of parental rights.[207] In fact, the court saw the termination of parental rights as cutting off any pre-existing right that a grandparent may have had to petition for visitation.[208] Thus, even though there had been a divorce in *K.S.* prior to the termination of parental rights, the termination of the parental rights also terminated the right to petition for visitation that had been created by the divorce.

The courts of both Illinois[209] and New York,[210] have interpreted grandparent visitation statutes as allowing a grandparent to petition for visitation after the termination of parental rights because the effect of the termination of parental rights is not addressed by the legislature; the legislature would have expressly excluded grandparents from petitioning for visitation after the termination of parental rights if that had been their intention. Because the legislature did not address this issue, the termination of parental rights would have no effect upon a grandparent's right to petition for visitation.[211]

Finally, one other option was used by the Iowa Supreme Court in *In re Guardianship of Ankeney*.[212] In this case, the court found that, despite an earlier decision that had held that the adoption of a child terminated any right that a grandparent had to petition for visitation,[213] a probate court acted within its power when it granted visitation rights to a parent of a deceased parent even though the grandchild had been adopted by a step-parent. The basis for this grant of visitation rights was the child's best interests.[214] The court stated that "[i]f the best interests of the child dictates visitation, we hold that there is no logical reason to prevent visitation merely because the party seeking visitation is not entitled to it of right."[215] It must be noted, however, that this case is of limited application because it would allow visitation based on

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207. *Id.* at 1051-52.

208. *Id.*

209. Lingwall v. Hoener, 124 Ill. App. 3d 986, 464 N.E.2d 1248 (1984).

210. People *ex. rel.* Sibley v. Sheppard, 54 N.Y.2d 320, 429 N.E.2d 1049 (1981).

211. For example, the court stated in *Sibley* that "[t]his court declines to ascribe to the Legislature an intention to proscribe maintenance [of grandparent/grandchild] ties simply because the grandchild has been placed for adoption." *Id.* at 325, 429 N.E.2d at 1051.

212. 360 N.W.2d 733 (Iowa 1985).

213. *In re* Adoption of Gardiner, 287 N.W.2d 555 (Iowa 1980).

214. *Ankeney*, 360 N.W.2d at 737.

215. *Id.*

a child's best interests *only* where the probate court already has jurisdiction over a child. In *Ankeney*, the court had continuing jurisdiction over the child because of the guardianship.

C. *Generally*

Other ambiguities created by some visitation statutes exist. For example, it is unclear in many states whether grandparents receive the right to initiate an action solely for the purpose of petitioning the court for visitation rights or whether a petition for visitation must be brought during another suit.[216] An examination of these less pervasive ambiguities, however, is beyond the scope of this Note. The need for a uniform system of establishing jurisdiction and for enforcing visitation rights granted by another jurisdiction is the final area to be discussed.

In today's mobile society, custodial parents often move out of state after an event affecting the marriage. If the parent moves out of state, jurisdictional issues may arise. Specifically, there are issues such as which state(s) has authority to order grandparent visitation, which state's grandparent visitation statute should be used, and what effect the move has upon already existing grandparent visitation rights. To illustrate: John and Mary live in California and get divorced. Mary retains custody of their children and both John and his parents are granted visitation rights. Mary, however, decides to return home to Mississippi and once there, she decides that she will no longer comply with the California court order granting John's parents visitation with their grandchildren. Since Mississippi does not have a statute giving grandparents a statutory right to petition for visitation, the grandparents may have problems getting a Mississippi court to enforce the visitation petition. Also, a Mississippi court may decide that Mississippi law should apply and therefore terminate the existing visitation rights.

On the other hand, if Mary decided to terminate John's visitation rights, he would be able to use the Uniform Child Custody Jurisdiction Act[217] in order to get the visitation decree enforced. The creation of the Uniform Child Custody Jurisdiction Act by the National Conference of Commissioners on Uniform State Laws was an effort to develop a uniform system of enforcement and jurisdic-

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216. *See, e.g.*, the discussion of the New York statute *supra* text accompanying notes 144-48.

217. MISS. CODE ANN. §§ 93-23-3 to -23-47 (Supp. 1984).

tion of child custody determinations.[218] One beneficial aspect of its passage by most states is the elimination of jurisdictional squabbles and a more consistent enforcement by states of the custody decrees of other states.[219]

If the National Conference of Commissioners on Uniform State Laws created a Uniform Grandparent Visitation Statute, its passage by the states would help relieve some of the ambiguities currently present in grandparent visitation statutes. The uniform statute could address the issues of enforcement of visitation decrees by other states and the effect of adoptions and termination of parental rights upon visitation rights. It could also create uniformity in grandparents' rights to petition for visitation.[220] Even if a uniform statute were not adopted by every state, it would provide a model for comparison.

The House of Representatives has called for the creation of a Uniform State Statute. In 1983, the House passed a concurrent resolution urging the National Conference of Commissioners on Uniform State Laws to create a model statute on grandparent visitation.[221] This resolution, however, was never reported out of committee in the Senate and died without being voted on.

IV. The Vermont Grandparent Visitation Statute

In 1984, Vermont passed a grandparent visitation statute.[222] The statute is quite broad in scope and allows grandparents to petition for visitation in any court proceeding that is considering the custody or visitation of a minor child.[223] The statute also allows grandparents to petition for visitation if a parent of the child is deceased, physically or mentally incapable of making a decision, or has abandoned the child.[224]

The statute provides an express list of factors to be considered by the court in determining whether the best interests of the child

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218. *See* Bodenheimer, *Progress Under the Uniform Child Custody Jurisdiction Act and Remaining Problems: Punitive Decrees, Joint Custody, and Excessive Modification*, 65 Calif. L. Rev. 978, 982-85 (1977).

219. *Id.*

220. For one proposed version of a model statute, see Zaharoff, *supra* note 8 at 189-203.

221. H.R. Con. Res. 45, 98th Cong., 1st Sess. (1983).

222. Vt. Stat. Ann. tit. 15, §§ 1011-1016 (Supp. 1984).

223. *Id.* at § 1011(a).

224. *Id.* at § 1012.

would be served by allowing the grandparents visitation rights.[225] Although the factors give courts a great deal of discretion, the list helps practitioners by listing some factors that courts are required to consider. Also, because the statute allows the court discretion to consider any other factors considered relevant, a court has the freedom to consider any unique circumstance that may be present in a specific case.

The Vermont statute uses the occurrence method of triggering the right to petition for visitation. Thus, any grandparent is given the right to petition for visitation after the occurrence of any of the events listed in the statute regardless of whether the petitioning grandparent's child retains custody of the grandchild. The statute also specifically addresses the issue of step-parent adoption.[226] The statute states that any order for grandparent visitation is automatically terminated by an adoption, unless the adopting parent is a step-parent, grandparent, or other relative of the child.[227]

V. Suggested Amendments

Although the Vermont statute gives grandparents an extensive right to petition the court for visitation rights, changes could be made in order to avoid potential problems. The following discussion suggests areas where problems may develop and suggests

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225. *Id.* at § 1013(b). The language of this section is:

> (b) In determining the best interests of the child, the court shall consider the following factors:
>
> (1) the love, affection and other emotional ties existing between the grandparents involved and the child;
>
> (2) the capacity and disposition of the parties involved to give the child love, affection and guidance;
>
> (3) the nature of the relationship between the petitioner and the grandchild and the desirability of maintaining that relationship;
>
> (4) the moral fitness of the parties;
>
> (5) the mental and physical health of the parties;
>
> (6) the reasonable preference of the child, if the court deems the child to be of sufficient age to express a preference;
>
> (7) the willingness and ability of the petitioner to facilitate and encourage a close and continuing relationship between the child and other parties; and
>
> (8) any other factor which the court considers to be relevant to a just determination regarding visitation or access.

Id.

226. *Id.* at § 1016.

227. *Id.*

amendments to address these problems.

The statute, as it is now written, uses the occurrence method of triggering the right to petition for visitation.[228] The statute could be amended to allow any grandparent the right to petition for visitation at any time, as long as the grandparent had been denied access to a grandchild.[229] Such an amendment, combined with the description of the factors to be considered by the court in determining the best interests of the child and the retention of language that expressly states the effect of a step-parent adoption, would make the Vermont statute one of the broadest in the country, as well as one of the easiest to understand.

The second alternative triggering mechanism would be to limit standing to bring a petition for visitation to those grandparents whose child is deceased or is otherwise the non-custodial parent.[230] If the grandparent's child retains custody, then the grandparent would have no standing to petition the court for visitation. The rationale for such an amendment is consistency: if the legislature has determined that a grandparent should gain access through the parents when the nuclear family is intact, then that same analysis should apply when the petitioning grandparent is the parent of the custodial parent.

The statute fails to address the issue of whether the termination of parental rights also acts to terminate a grandparent's right

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228. *See supra* text accompanying notes 36-41 for a discussion of the positive and negative factors associated with each method.

229. The wording for such an amendment could be:

> § 1011 Jurisdiction
>
> (a) Any grandparent who has been denied reasonable access to a grandchild or grandchildren may petition the superior court for visitation rights with such grandchildren. Such petition shall be granted if the court deems the visitation to be in the child's or children's best interests as determined by the factors set forth in § 1013(b).

If this amendment were adopted, it would replace the current § 1011(a). It would have no effect upon the continued use of § 1016.

230. The wording for this amendment could be: In § 1011 add a subsection (e) that would read:

> (e) No grandparent may petition the court for visitation in any proceeding described in this section unless that grandparent's child has been denied or has otherwise lost custody of the child or children.

Amend § 1012 to read:

> If a parent of a minor child is deceased, physically or mentally incapable of making a decision or has abandoned the child, a grandparent who is related to the grandchild through the deceased, incapable or abandoning parent may commence an action in superior court . . . .

to petition for visitation or to terminate visitation rights previously granted by the court. The Vermont statute provides that an adoption other than by a step-parent, grandparent or other relative, terminates visitation rights.[231] Grandparents, however, are allowed to petition for visitation after a child has been abandoned.[232] A more complete treatment of the effect of terminating parental rights, whatever the reason, would be helpful.

Grandparents can provide needed love and support for a child when a parent has been abusive. On the other hand, grandparents might exacerbate the situation either by disbelieving the child's story of abuse or by condoning the abuse. Grandparents might also seek visitation rights in order to allow an abusive parent to maintain a relationship with the child.[233] Despite such potential for abuse, the statute should be amended to allow grandparents to petition for visitation after the termination of a parent's parental rights.[234] Abuse would be avoided because the court could examine the petitioner's motives prior to granting the visitation rights. The court would grant the rights only if the best interests of the child were served. If the court discovered that a grandparent was abusing the visitation rights in any way—for example, by allowing the parent whose rights were terminated access to the grandchild—then the visitation rights could be terminated. Further, the court could place any restrictions upon the right to visitation necessary to protect the best interests of the child(ren).[235]

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231. VT. STAT. ANN. tit. 15, § 1016.

232. *Id.* at § 1012.

233. *See, e.g.*, J. v. M., 157 N.J. Super. 478, 385 A.2d 240 (1978) (maternal grandmother's petition for custody was filed on behalf of mother of child so mother could maintain relationship until released from jail).

234. One method of accomplishing this change would be to amend § 1016 by adding a subsection (b) which would state:

> (b) The termination of a parent's rights toward a minor child or children shall not serve to automatically terminate the rights of the grandparents who are related to such minor child or children through the parent whose rights have been terminated.

235. To expressly give the court power to impose such restrictions, § 1013 could be amended by adding subsection (c) and (d) which would read:

> (c) Any court in ordering visitation rights under this section shall have the authority to place any restrictions upon the visitation that it deems to be necessary to protect the best interests of the child or children. These may include but are not limited to:
>
> (1) restrictions upon the location of the visitation;
>
> (2) prohibiting the grandparent from bringing the child gifts or messages from a parent whose rights have been terminated;
>
> (3) restrictions upon the places that can be visited during the

CONCLUSION

Psychological studies have shown that a close personal relationship with a grandparent can be beneficial to a child.[236] This relationship takes on even greater significance when a child's life has been upended by the destruction of the nuclear family. It is during these troubled times that grandparents are most often denied the opportunity to continue the relationship with the child.[237] Statutes that allow court discretion to grant grandparents' visitation rights help serve the best interests of the child.[238]

The survey of the various state grandparent visitation statutes demonstrates that these statutes vary widely both in the scope of the rights given[239] and in clarity of language.[240] A lack of information regarding the enforcement of one state's visitation order by another state that grants visitation under different circumstances also exists. To clear up the potential for conflicts caused by the variations between the statutes, the National Conference of Commissioners on Uniform State Laws should create a Uniform Grandparent Visitation Statute that would function in a manner similar to the Uniform Child Custody Jurisdiction Act.

A major concern of many grandparents today is whether and when they can petition a court for visitation rights with a grandchild. The creation and the adoption of an unambiguous uniform act would be applauded by these grandparents. A clarification of the issues surrounding grandparent visitation would help the courts to better serve the interests of children.

Timothy Collins

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visitation; or

(4) restrictions upon mentioning a parent whose parental rights have been terminated.

(d) the violation of any restriction placed upon visitation shall be sufficient cause for the court to modify any court order granting visitation rights.

236. *See supra* text accompanying notes 1-4.

237. *See supra* text accompanying notes 7-9.

238. The grandparent visitation statutes do not give grandparents an absolute right to visitation. The statutes merely give grandparents standing to petition the court for visitation with a grandchild. The right to visit with the grandchild may be granted only if the court finds that the visitation is in the best interests of the grandchild. *See supra* text accompanying notes 49-51.

239. *See supra* text accompanying notes 35-171.

240. *See supra* text accompanying notes 172-221.