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Peter Zablotsky
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TO GRANDMOTHER'S HOUSE WE GO: GRANDPARENT VISITATION AFTER STEPPARENT ADOPTION

PETER A. ZABLOTSKY†

I. INTRODUCTION

During the past decade, legislatures, courts, and commentators have been coming to terms with the question of grandparent visitation rights. Although differences of opinion still persist regarding the appropriate scope of grandparent visitation rights,¹ virtually all authorities now agree that grandparent visitation can be in the best interest of a child.² In fact, forty-nine state legislatures have enacted statutes recognizing grandparent visitation rights in certain circumstances.³

There is far less agreement on the more specific issue of grandparent visitation after stepparent adoption. Thus far, thirty states have addressed this issue by statute or judicial decision.⁴ Although there is a partial consensus among authorities on the issue of grandparent visitation rights generally, such agreement is absent on the issue of grandparent visitation rights after stepparent adoption. Two

† Coordinator of the Legal Writing and Research Program, New York Law School. B.A. 1977, Pennsylvania State University; J.D. 1980, Columbia University.

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1. See *infra* notes 20-31 and accompanying text.

2. See *infra* notes 20-31 and accompanying text. See, e.g., *Roberts v. Ward*, ___ N.H. ___, 493 A.2d 478 (1985). Despite the fact that N.H. REV. STAT. ANN. § 458.17 VI (1983) provides for grandparent visitation only upon divorce of custodial parents, the *Roberts* court concluded that visitation rights could be granted notwithstanding the literal mandate of the statute. ___ N.H. at ___, 493 A.2d at 481. The court held that the best interest of the child provides the beacon by which to determine whether grandparents should be awarded visitation rights. *Id.*

3. Only Nebraska has yet to enact a grandparent visitation statute.

4. See *infra* notes 35-82 and accompanying text.

divergent views have developed. Some states terminate grandparent visitation upon stepparent adoption. Others, reasoning that grandparent visitation and stepparent adoption are not necessarily incompatible, allow decisions regarding grandparent visitation after stepparent adoption to be made on a case by case basis. While the trend is toward the latter position, the debate over the propriety of grandparent visitation after stepparent adoption continues.

This Article proposes that the best interest of the child is the only relevant and useful standard in analyzing grandparent visitation rights after stepparent adoption and that this consideration mandates that grandparent visitation rights not be automatically terminated upon stepparent adoption. The Article begins with a fifty-state survey of the current law on grandparent visitation rights. It next outlines and critiques the analytical framework that has been employed in a largely unsuccessful attempt to resolve clearly the issue of grandparent visitation after stepparent adoption. Finally, the Article examines the relevant policy considerations, including a review of the sociological data regarding the effect of continued contact between grandparents and grandchildren.

II. CURRENT LAW

A. *Background—The Apparent Conflict Between Grandparent Visitation Statutes and Effect-of-Adoption Statutes*

Recognizing that adoption can be in the best interest of a child,⁵ all states have enacted statutes creating adoption rights and establishing adoption procedures.⁶ Provisions describing the effect of the

5. See *infra* notes 156-62 and accompanying text. For a discussion of issues relating to adoption and the best interest of the child, see generally Amadio & Deutsch, *Open Adoption: Allowing Adopted Children to "Stay in Touch" with Blood Relatives*, 22 J. FAM. L. 59 (1983-84) [hereinafter cited as Amadio & Deutsch, *Open Adoption*]; Chemerinsky, *Defining the "Best Interests": Constitutional Protection in Involuntary Adoptions*, 18 J. FAM. L. 79 (1979-80); Presser, *The Historical Background of the American Law of Adoption*, 11 J. FAM. L. 443 (1971); Zainaldin, *The Emergence of Modern American Family Law: Child Custody, Adoption, and the Courts, 1796-1851*, 73 Nw. U.L. REV. 1038 (1979).

6. ALA. CODE §§ 26-10-1 to -10, 26-10-20 to -30 (1975 & Supp. 1985); ALASKA STAT. § 25.23.010-.240 (1983); ARIZ. REV. STAT. ANN. §§ 8-101 to -128 (1974); ARK. STAT. ANN. §§ 56-101 to -137 (1971 & Supp. 1985); CAL. CIV. CODE §§ 221-230.7 (West 1982 & Supp. 1985); COLO. REV. STAT. §§ 19-4-101 to -116 (1978 & Supp. 1984); CONN. GEN. STAT. ANN. §§ 45-61 to -69 (West 1981 & Supp. 1985); DEL. CODE ANN. tit. 13, §§ 901-956 (1981 & Supp. 1984); FLA. STAT. ANN. §§ 63.011-.291 (West 1969 & Supp. 1985); GA. CODE ANN. §§ 74-401 to -418 (Harrison 1981 & Supp. 1985); HAWAII REV. STAT. §§ 578-1 to -17 (1976 & Supp. 1984); IDAHO CODE §§ 16-1501 to -1512 (1979 & Supp. 1985); ILL. ANN. STAT. ch. 40, §§ 1501-1529 (Smith-Hurd 1980 & Supp. 1985); IND.

adoption on the parties involved (i.e., effect-of-adoption provisions) are found in every scheme.⁷ Virtually all effect-of-adoption provisions invest the adopting parents with, and divest the natural parents of, care and custody rights. Most also address those inheritance and succession rights which are affected by adoption.

Specifically, the effect-of-adoption provisions in every state⁸ but

CODE ANN. §§ 31-3-1-1 to -12 (West 1979 & Supp. 1985); IOWA CODE ANN. §§ 600.1-.25 (West 1981 & Supp. 1985); KAN. STAT. ANN. §§ 59-2101 to -2105 (1983); KY. REV. STAT. §§ 199.010-.990 (1982 & Supp. 1984); LA. CIV. CODE ANN. art. 214-214.8 (West 1952 & Supp. 1985); ME. REV. STAT. ANN. tit. 19, §§ 531-538 (1981 & Supp. 1984); MD. FAM. LAW CODE ANN. §§ 5-301 to -330 (1984); MASS. ANN. LAWS ch. 210, §§ 1-14 (Law. Co-op. 1981 & Supp. 1985); MICH. COMP. LAWS ANN. §§ 710.21-.70 (West Supp. 1985); MINN. STAT. ANN. §§ 259.10-290.45 (West 1982 & Supp. 1985); MISS. CODE ANN. §§ 93-17-1 to -31 (1973 & Supp. 1984); MO. ANN. STAT. §§ 453.010-.170 (Vernon 1977 & Supp. 1985); MONT. CODE ANN. §§ 40-8-101 to -128 (1983); NEB. REV. STAT. §§ 43-101 to -146 (1984); NEV. REV. STAT. §§ 127.005-.310 (1979, 1981 & 1983); N.H. REV. STAT. ANN. §§ 170-B:1-:26 (1978 & Supp. 1983); N.J. STAT. ANN. §§ 9:3-37 to -56 (West Supp. 1985); N.M. STAT. ANN. §§ 40-7-1 to -28 (1983); N.Y. DOM. REL. LAW §§ 109-117 (McKinney 1977 & Supp. 1984); N.C. GEN. STAT. §§ 48-1 to -38 (1984); N.D. CENT. CODE §§ 14-15-01 to -23 (1981 & Supp. 1983); OHIO REV. CODE ANN. §§ 3107.01-.43 (Page 1980 & Supp. 1985); OKLA. STAT. ANN. tit. 10, §§ 60.1-.23 (West 1966 & Supp. 1984); OR. REV. STAT. §§ 109.305-.410 (1981); 23 PA. CONS. STAT. ANN. §§ 2101-2910 (Purdon Supp. 1985); R.I. GEN. LAWS §§ 15-7-1 to -26 (1981 & Supp. 1984); S.C. CODE ANN. §§ 20-7-1650 to -1890 (Law. Co-op. 1985); S.D. CODIFIED LAWS ANN. §§ 25-6-1 to -20 (1984); TENN. CODE ANN. §§ 36-1-101 to -140 (1984 & Supp. 1984); TEX. FAM. CODE ANN. §§ 16.01-.55 (Vernon 1975 & Supp. 1985); UTAH CODE ANN. §§ 78-30-1 to -15 (1977 & Supp. 1983); VT. STAT. ANN. tit. 15, §§ 431-54 (1974 & Supp. 1985); VA. CODE §§ 63.1-220 to -238 (1980 & Supp. 1985); WASH. REV. CODE ANN. §§ 26.32.010-.910 (Supp. 1985); W. VA CODE §§ 48-4-1 to -15 (Supp. 1985); WIS. STAT. ANN. §§ 48.81-.975 (West 1979 & Supp. 1984); WYO. STAT. §§ 1-22-101 to -114 (1977).

7. See *infra* notes 8-19 and accompanying text.

8. ALA. CODE § 26-10-5(b) (Supp. 1985); ALASKA STAT. § 25.23.130(a)(2) (1983); ARIZ. REV. STAT. ANN. § 8-117(A) (1974); ARK. STAT. ANN. § 56-215(a)(2) (Supp. 1985); CAL. CIV. CODE § 227(a) (West 1982); COLO. REV. STAT. § 19-4-113(1) (1978); CONN. GEN. STAT. ANN. § 45-64(a)(1) (West Supp. 1985); DEL. CODE ANN. tit. 13, § 919(a) (1981); FLA. STAT. ANN. § 63.151 (West 1969); GA. CODE ANN. § 74-413(a)(2) (Harrison Supp. 1985); HAWAII REV. STAT. § 578-16 (1976); IDAHO CODE § 16-1508 (1979); IND. CODE ANN. § 31-3-1-9 (West 1979); IOWA CODE ANN. § 600.13(4) (West 1981); KAN. STAT. ANN. § 59-2103(b) (1983); KY. REV. STAT. § 199.520(2) (1982 & Supp. 1984); LA. CIV. CODE ANN. art. 214 (West Supp. 1985); ME. REV. STAT. ANN. tit. 19, § 535 (1981); MD. FAM. LAW CODE ANN. § 5-308(b)(1) (1984); MASS. ANN. LAWS ch. 210, § 6 (Law. Co-op. 1981 & Supp. 1985); MICH. COMP. LAWS ANN. § 710.60(2) (West Supp. 1985); MINN. STAT. ANN. § 259.29 (West 1982); MISS. CODE ANN. § 93-17-13 (1973); MO. ANN. STAT. § 453.090(1) (Vernon 1977 & Supp. 1985); MONT. CODE ANN. § 40-8-125(1) (1983); NEB. REV. STAT. § 43-110 (1984); NEV. REV. STAT. § 127.160 (1981); N.H. REV. STAT. ANN. § 170-B:20(I) (1978); N.J. STAT. ANN. § 9:3-50(b) (West Supp. 1985); N.M. STAT. ANN. § 40-7-15(A)(2) (1983); N.Y. DOM. REL.

Illinois⁹ directly and plainly invest the adopting parent with all the rights, duties, and obligations of a natural parent. In addition, the effect-of-adoption provisions in every state¹⁰ but Michigan, Pennsylvania, Tennessee, and Texas directly and plainly divest the natural parents of any rights with respect to the child. The Michigan, Pennsylvania, and Texas provisions accomplish divestment indirectly. The Michigan effect-of-adoption provision refers, by cross-reference, to other statutory sections dealing with termination of the rights of

LAW § 117(1) (McKinney 1977); N.C. GEN. STAT. § 48-23(1) (1984); N.D. CENT. CODE § 14-15-14(1)(b) (1981); OHIO REV. CODE ANN. § 3107.15(A)(2) (Page 1980); OKLA. STAT. ANN. tit. 10, § 60.16(1) (West 1966 & Supp. 1984); OR. REV. STAT. § 109.041 (1981); 23 PA. CONS. STAT. ANN. § 2902(a) (Purdon Supp. 1985); R.I. GEN. LAWS § 15-7-16 (1981); S.C. CODE ANN. § 20-7-1770(a) (Law. Co-op. 1985); S.D. CODIFIED LAWS ANN. § 25-6-16 (1984); TENN. CODE ANN. § 36-1-126 (1984); TEX. FAM. CODE ANN. § 16.09(a) (Vernon 1975); UTAH CODE ANN. §§ 78-30-9 to -10 (1977); VT. STAT. ANN. tit. 15, § 448 (1974); VA. CODE § 63.1-233 (1980); WASH. REV. CODE ANN. § 26.33.260 (Supp. 1985); W. VA. CODE § 48-4-11(a) (Supp. 1985); WIS. STAT. ANN. § 48.92(1) (West 1979); WYO. STAT. § 1-22-114(b) (1977).

9. The Illinois effect-of-adoption statute divests natural parents of all rights with respect to the child, but does not address the rights of adopting parents. ILL. ANN. STAT. ch. 40, § 1521 (Smith-Hurd 1980).

10. ALA. CODE §§ 26-10-5(b) (Supp. 1985); ALASKA STAT. §§ 25.23.130(a)(1) (1983); ARIZ. REV. STAT. ANN. § 8-117(B) (1974); ARK. STAT. ANN. § 56-215(a)(1) (Supp. 1985); CAL. CIV. CODE § 229 (West 1982); COLO. REV. STAT. § 19-4-113(2) (1978); CONN. GEN. STAT. ANN. § 45-64(a)(5) (West Supp. 1985); DEL. CODE ANN. tit. 13, § 919(b) (1981); FLA. STAT. ANN. § 63.151 (West 1969); GA. CODE ANN. § 74-413(a)(1) (Harrison Supp. 1985); HAWAII REV. STAT. § 578-16 (1976); IDAHO CODE § 16-1509 (1979); ILL. ANN. STAT. ch. 40, § 1521 (Smith-Hurd 1980); IND. CODE ANN. § 31-3-1-9 (West 1979); IOWA CODE ANN. § 600.13(4) (West 1981); KAN. STAT. ANN. § 59-2103(b) (1983); KY. REV. STAT. § 199.520(2) (1982 & Supp. 1984); LA. CIV. CODE ANN. art. 214 (West Supp. 1985); ME. REV. STAT. ANN. tit. 19, § 535 (1981); MD. FAM. LAW CODE ANN. § 5-308(b)(2) (1984); MASS. ANN. LAWS ch. 210, § 6 (Law. Co-op. 1981 & Supp. 1985); MINN. STAT. ANN. § 259.29 (West 1982); MISS. CODE ANN. § 93-17-13 (1973); MO. ANN. STAT. § 435.090(1) (Vernon 1977 & Supp. 1985); MONT. CODE ANN. § 40-8-125(2) (1983); NEB. REV. STAT. §§ 43-111 (1984); NEV. REV. STAT. § 127.160 (1981); N.H. REV. STAT. ANN. § 170-B:20(II) (1978); N.J. STAT. ANN. § 9:3-50(a) (West Supp. 1985); N.M. STAT. ANN. § 40-7-15(A)(1) (1983); N.Y. DOM. REL. LAW § 117(1) (McKinney 1977); N.C. GEN. STAT. § 48-23(2) (1984); N.D. CENT. CODE § 14-15-14(1)(a) (1981); OHIO REV. CODE ANN. § 3107.15(A)(1) (Page 1980); OKLA. STAT. ANN. tit. 10, § 60.16(2) (West 1966 & Supp. 1984); OR. REV. STAT. § 109.041 (1981); 23 PA. CONS. STAT. ANN. §§ 2901, 2902(a) (Purdon Supp. 1985); R.I. GEN. LAWS § 15-7-17 (1981); S.C. CODE ANN. § 20-7-1770(b) (Law. Co-op. 1985); S.D. CODIFIED LAWS ANN. § 25-6-17 (1984); TENN. CODE ANN. § 36-1-126 (1984); TEX. FAM. CODE ANN. § 16.08 (Vernon Supp. 1985); *id.* § 16.09(a) (Vernon 1975); Utah Code Ann. § 78-30-11 (1977); VT. STAT. ANN. tit. 15, § 448 (1974); VA. CODE § 63.1-233 (1980); WASH. REV. CODE ANN. § 26.33.260 (Supp. 1985); W. VA. CODE § 48-4-11(b) (Supp. 1985); WIS. STAT. ANN. § 48.92(2) (West 1979 & Supp. 1984); WYO. STAT. § 1-22-114(a) (1977).

natural parents;¹¹ the Pennsylvania effect-of-adoption statute provides that no decree of adoption may be entered unless the natural parents' rights have been terminated;¹² and the Texas effect-of-adoption provision authorizes the court to terminate the relationship between the child and the natural parent if the adopting parents so request and if termination is in the best interest of the child.¹³ Finally, Tennessee addresses the issue more narrowly. Although the Tennessee effect-of-adoption provision invests the adopting parents with all rights, including inheritance rights, with respect to the child, it divests the natural parents only of inheritance rights.¹⁴

Forty-one state effect-of-adoption provisions also address inheritance and succession matters, either directly or by cross-reference to state probate codes.¹⁵ Typically, these provisions effect one or more of the following: invest the child and the adopting parents with the right to inherit from one another;¹⁶ divest the natural parents of the right to inherit from the child;¹⁷ continue, under a variety

11. The statute states: "[a]fter the entry of the order of adoption, an adopted child shall no longer be an heir at law of a parent whose rights have been terminated under this chapter or chapter XIIA" MICH. COMP. LAWS ANN. § 710.60(2) (West Supp. 1985).

12. 23 PA. CONS. STAT. ANN. § 2901 (Purdon Supp. 1985).

13. TEX. FAM. CODE ANN. § 1609(b) (Vernon 1975).

14. TENN. CODE ANN. § 36-1-126 (1984).

15. See *infra* notes 16-19 and accompanying text.

16. ALA. CODE § 26-10-5(b) (Supp. 1985); ALASKA STAT. § 25.23.130(a)(2) (1983); ARIZ. REV. STAT. ANN. § 8-117(a) (1974); ARK. STAT. ANN. § 56-215(a)(2) (Supp. 1985); CONN. GEN. STAT. ANN. § 45-64a(2)(4) (West Supp. 1985); DEL. CODE ANN. tit. 13, § 920(b) (1981); FLA. STAT. ANN. § 63.151 (West 1969); GA. CODE ANN. § 74-413(a)(2) (Harrison Supp. 1985); HAWAII REV. STAT. § 578-16 (1976); IDAHO CODE § 16-1508 (1979); KAN. STAT. ANN. § 59-2103(b) (1983); KY. REV. STAT. § 199.520(2) (1982 & Supp. 1984); LA. CIV. CODE ANN. art. 214 (West Supp. 1985); ME. REV. STAT. ANN. tit. 19, § 535 (1981); MD. FAM. LAW CODE ANN. § 5-308(b)(3) (1984) (by cross-reference to MD. EST. & TRUSTS CODE ANN. § 1-207(a) (1974)); MASS. ANN. LAWS ch. 210, § 7 (Law. Co-op. 1981 & Supp. 1985); MICH. COMP. LAWS ANN. § 710.60(2) (West Supp. 1985); MINN. STAT. ANN. § 259.29(1) (West 1982); MISS. CODE ANN. § 93-17-13 (1973); MO. ANN. STAT. §§ 453.090(2)-(4) (Vernon 1977 & Supp. 1985); MONT. CODE ANN. § 40-8-125(1) (1983); NEV. REV. STAT. § 127.160 (1981); N.H. REV. STAT. ANN. § 170-B:20(IV) (1978); N.J. STAT. ANN. § 9:3-50(b) (West Supp. 1985); N.M. STAT. ANN. § 40-7-15(A)(2) (1983); N.Y. DOM. REL. LAW § 117(1) (McKinney 1977); N.C. GEN. STAT. § 48-23(1) (1984); N.D. CENT. CODE § 14-15-14(1)(b) (1981); OHIO REV. CODE ANN. § 3107.15(A) (Page 1980); OKLA. STAT. ANN. tit. 10, § 60.16(1) (West 1966 & Supp. 1984); 23 PA. CONS. STAT. ANN. § 2902(a) (Purdon Supp. 1985); R.I. GEN. LAWS § 15-7-16 (1981); S.C. CODE ANN. § 20-7-1770(a) (Law. Co-op. 1985); TENN. CODE ANN. § 36-1-126(b)-(c) (1984); TEX. FAM. CODE ANN. § 16.09(b)-(c) (Vernon 1975); VT. STAT. ANN. tit. 15, § 448 (1974); WASH. REV. CODE ANN. § 26.33.260 (Supp. 1985); W. VA. CODE § 48-4-11(b) (Supp. 1985); WIS. STAT. ANN. § 48.92(3) (West 1979); WYO. STAT. § 1-22-114(b) (1977).

17. ALASKA STAT. § 25.23.130(a)(1) (1983); ARIZ. REV. STAT. ANN. § 8-

of circumstances, the right of the child to inherit from the natural parents;¹⁸ provide that when adoption is by a spouse of a natural parent (i.e., a stepparent), the inheritance rights between that natural parent and the child remain unchanged by an adoption decree.¹⁹

More recently, recognizing that continued contact with grandparents can also be in the best interest of a child,²⁰ forty-nine states have enacted grandparent visitation statutes²¹ authorizing court or-

117(B) (1974); ARK. STAT. ANN. § 56-215(a)(1) (Supp. 1985); CONN. GEN. STAT. ANN. § 45.64a(6) (West Supp. 1985); DEL. CODE ANN. tit. 13, § 920(a) (1981); GA. CODE ANN. § 74-413 (a)(1) (Harrison Supp. 1985); HAWAII REV. STAT. § 578-16 (1976); IDAHO CODE § 16-1509 (1979); KAN. STAT. ANN. § 59-2103(b) (1983); KY. REV. STAT. § 199.520(a) (1982 & Supp. 1984); LA. CIV. CODE ANN. art. 214 (West Supp. 1985); MD. FAM. LAW CODE ANN. § 5-308(b)(3) (1984) (by cross-reference to MD. EST. & TRUSTS CODE ANN. § 1-207(a) (1974)); MICH. COMP. LAWS ANN. § 710.60(2) (West Supp. 1985); MINN. STAT. ANN. § 259.29(1) (West 1982); MISS. CODE ANN. § 93-17-13 (1973); MONT. CODE ANN. § 40-8-125(2) (1983); NEV. REV. STAT. § 127.160 (1981); N.H. REV. STAT. ANN. 170-B:20(III) (1978); N.J. STAT. ANN. §§ 9:3-50(a) (West Supp. 1985); N.M. STAT. ANN. § 40-7-15(A)(1) (1983); N.Y. DOM. REL. LAW § 117(1) (McKinney 1977); N.D. CENT. CODE § 14-15-14(1)(a) (1981); OHIO REV. CODE ANN. § 3107.15(A)(1) (Page 1980); OKLA. STAT. ANN. tit. 10, § 60.16(2) (West 1966 & Supp. 1984); S.C. CODE ANN. § 20-7-1770(a) (Law. Co-op. 1985); TENN. CODE ANN. 36-1-126(c) (1984); VT. STAT. ANN. tit. 15, § 448 (1974); W. VA. CODE § 48-4-11(a) (Supp. 1985); WIS. STAT. ANN. § 48.92(3) (West 1977).

18. FLA. STAT. ANN. § 63.151 (West 1969); GA. CODE ANN. § 74-413(b) (Supp. 1985); LA. CIV. CODE ANN. art. 214 (West Supp. 1985); N.J. STAT. ANN. § 9:3-50(a) (West Supp. 1985); N.M. STAT. ANN. § 40-7-15(B)(2) (1983); R.I. GEN. LAWS § 15-7-17 (1981); VT. STAT. ANN. tit. 15, § 448 (1974).

19. ALASKA STAT. § 25.23.130(b) (1983); ARIZ. REV. STAT. ANN. § 8-117(B) (1974); CAL. CIV. CODE § 226.12 (West Supp. 1985); CONN. GEN. STAT. ANN. § 45.64(8) (West Supp. 1985); DEL. CODE ANN. tit. 13, § 920(c) (1981); HAWAII REV. STAT. § 578-16 (1976); KAN. STAT. ANN. § 59-2103(b) (1983); KY. REV. STAT. § 199.520(2) (1982 & Supp. 1984); LA. CIV. CODE ANN. art. 214 (West Supp. 1985); MD. FAM. LAW CODE ANN. § 5-308(b)(3) (1984) (by cross-reference to MD. EST. & TRUSTS CODE ANN. § 1-207(a) (1974)); MASS. ANN. LAWS ch. 210, § 7 (Law. Co-op. 1981 & Supp. 1985); MINN. STAT. ANN. § 259.29(1a) (West 1982); MISS. CODE ANN. § 93-17-13 (1973); N.H. REV. STAT. ANN. § 170-B:20(V) (1978); N.Y. DOM. REL. LAW § 117(1) (McKinney 1977); N.D. CENT. CODE § 14-15-14(2) (1981); OHIO REV. CODE ANN. § 3107.15(B) (Page 1980); VT. STAT. ANN. tit. 15, § 448 (1974); WASH. REV. CODE ANN. § 26.33.260 (Supp. 1985); W. VA. CODE § 48-4-11(b) (1985); WIS. STAT. ANN. § 48.92(2) (West 1977 & Supp. 1984).

20. See *infra* notes 198-204 and accompanying text.

21. See *infra* notes 22-31 and accompanying text; 131 CONG. REC. E698 (daily ed. Feb. 28, 1985) (statement of Rep. Mario Biaggi). For a discussion of grandparent visitation rights, see generally Foster & Freed, *The Child's Right to Visit Grandparent*, 20 TRIAL 38 (March, 1984) [hereinafter cited as Foster & Freed, *The Child's Right*]; Foster & Freed, *Grandparent Visitation: Vagaries and Vicissitudes*, 23 ST. LOUIS U.L.J. 643 (1979) [hereinafter cited as Foster & Freed, *Vagaries and Vicissitudes*]; Ingulli, *Grandparent Visitation Rights: Social Policies*, 87 W. VA. L. REV. 295 (1985) [hereinafter cited as Ingulli, *Grandparent Visitation Rights*]; Note, *Statutory*

dered visitation between grandparents and grandchildren under certain circumstances. These circumstances vary from state to state. Although forty-one of the states with grandparent visitation statutes make some mention of the child's best interest,²² only six state statutes—those of Alaska, Kansas, Kentucky, Montana, North Dakota, and Vermont—authorize grandparent visitation on that basis alone.²³ Similarly, Delaware provides for “reasonable” grandparent visitation rights,²⁴ and New York authorizes grandparent visitation whenever “equity so requires.”²⁵ South Carolina simply vests the courts with jurisdiction, and presumably, discretion to order grandparent visitation.²⁶

Other states authorize grandparent visitation under somewhat narrower circumstances. For example, nine states authorize grandparent visitation in at least three of the following circumstances: death of a parent, divorce or dissolution of the parents' marriage, desertion by a natural parent, termination of natural parental rights, abuse or neglect of the child, incompetency of a parent, incarceration of a parent, placement of the child in a foster home or other custody by a third party, and prior residence of the child with the grandparents.²⁷

Visitation Rights of Grandparents: One Step Closer to the Best Interest of the Child, 26 CATH. U.L. REV. 387 (1977) [hereinafter cited as Note, *One Step Closer*]; see also Zaharoff, *Access to Children: Toward a Model Statute for Third Parties*, 15 FAM. L.Q. 165 (1981).

22. All grandparent visitation statutes except those of Alabama, Delaware, Idaho, Indiana, North Carolina, Oregon, Rhode Island, and South Carolina mention the best interests of the child. See *infra* notes 23-31.

23. ALASKA STAT. § 25.24.150 (1984); KAN. STAT. ANN. § 38-129(a) (Supp. 1984); KY. REV. STAT. § 405.021 (1984); MONT. CODE ANN. § 40-9-102 (1983); N.D. CENT. CODE § 14-09-05.1 (Supp. 1983); VT. STAT. ANN. tit. 15, § 1013 (Supp. 1985).

24. DEL. CODE ANN. tit. 10, § 950(7) (Supp. 1984).

25. N.Y. DOM. REL. LAW § 72 (McKinney 1977) (parent deceased or equity so requires).

26. S.C. CODE ANN. § 20-7-420(33) (Law. Co-op. 1985).

27. COLO. REV. STAT. § 19-1-116 (Supp. 1984) (marriage dissolved, parent deceased or third party custody); FLA. STAT. ANN. § 752.01 (West Supp. 1985) (marriage dissolution, parent deceased, or parental desertion); *id.* § 61.13(2)(b)2c (best interests of child); GA. CODE ANN. § 74-112 (Harrison Supp. 1985) (marriage dissolved, parent deceased, or parental rights terminated); IOWA CODE ANN. § 598.35 (West 1981) (marriage dissolved, parent deceased, or child in foster home); MICH. COMP. LAWS ANN. § 722.27b (West Supp. 1985) (marriage dissolved, parent deceased, child in foster home or child in third party custody); MINN. STAT. ANN. § 257.022 (West 1982) (marriage dissolved, parent deceased, or child formerly resided with grandparents); OKLA. STAT. ANN. tit. 10, § 5 (West Supp. 1984) (marriage dissolved, parent deceased, or parental rights terminated); 23 PA. CONS. STAT. ANN. §§ 1012-1014 (Purdon Supp. 1985) (marriage dissolved, parent deceased, or child formerly resided with grandparents); TEX. FAM. CODE ANN. § 14.03(e)

Additionally, seventeen states authorize grandparent visitation only when either the parents' marriage has been dissolved or a parent has died.²⁸ Seven states provide for visitation only when the parents' marriage has been dissolved,²⁹ and Ohio provides for visitation only where a parent has died.³⁰ Finally, Hawaii and North Carolina premise their statutes upon the existence of a child custody dispute.³¹

An apparent conflict between grandparent visitation statutes and effect-of-adoption provisions arises when a natural parent with cus-

(Vernon Supp. 1985) (marriage dissolved or pending dissolution, parent deceased, parent incompetent, parent incarcerated, child abused or neglected, parental rights terminated, child in need of supervision, or child formerly resided with grandparents).

28. ALA. CODE § 30-3-4 (1983); ARIZ. REV. STAT. ANN. § 25-337.01 (Supp. 1984); ARK. STAT. ANN. §§ 34-1211.2-.3 (Supp. 1985); CAL. CIV. CODE § 197.5 (West 1982); *id.* § 4351.5(b) (West 1983 & Supp. 1985) (citing *id.* § 4601 (West 1983)); ILL. ANN. STAT. ch. 40, § 607(b) (Smith-Hurd Supp. 1985) (best interest of child under Marriage and Dissolution Act); *id.* ch. 110.5, § 11-7.1 (Smith-Hurd 1978) (parent deceased); IND. CODE ANN. §§ 31-1-11.7-2 (West Supp. 1985); LA. REV. STAT. ANN. § 9:572(A) (West Supp. 1985); MASS. ANN. LAWS ch. 119, § 39D (Law. Co-op. 1975 & Supp. 1985); MO. ANN. STAT. §§ 452.400(3), .402 (Vernon Supp. 1985); NEV. REV. STAT. §§ 123.123(1), (3) (1979); N.J. STAT. ANN. § 9:2-7.1 (West 1976); N.M. STAT. ANN. §§ 40-9-1 to -3 (1983); OR. REV. STAT. § 109.121(1)(a), (b) (1981) (parent deceased or domestic relations suit pending); S.D. CODIFIED LAWS ANN. § 25-4-53 (1984) (parent deceased or parents' marriage dissolved or pending); *id.* § 25-4-52 (best interest of the child); TENN. CODE ANN. § 36-6-301(a) (1984) (parent deceased or parents' marriage dissolved or pending dissolution); UTAH CODE ANN. §§ 30-5-1(2), -2 (1984); WYO. STAT. ANN. § 20-2-113(c) (Supp. 1985).

29. CONN. GEN. STAT. ANN. § 46b-5a (West Supp. 1985) (marriage dissolution implied); IDAHO CODE § 32-1008 (1983) (reasonable visitation); *id.* § 32-1005 (separation of parents); MD. FAM. LAW CODE ANN. § 9-102 (1984); N.H. REV. STAT. ANN. § 458:17(VI) (1983) (*but see* Roberts v. Ward, ___ N.H. ___, 493 A.2d 478 (1985)); VA. CODE § 20-107.2 (1983 & Supp. 1985); WASH. REV. CODE ANN. § 26.09.240 (Supp. 1984) (best interest of child within section on dissolution of marriage); WIS. STAT. ANN. § 767.245(4) (West 1981) (best interest of child implying dissolution of marriage).

30. OHIO REV. CODE ANN. § 3109.11 (Page 1980).

31. HAWAII REV. STAT. § 571-46(7) (1976 & Supp. 1984) (dissolution of marriage or any proceeding where custody is at issue); N.C. GEN. STAT. § 50-13.5(j) (1984) (custody dispute and showing of changed circumstances under Divorce and Alimony section).

Each of the four remaining states with grandparent visitation statutes authorize visitation under unique circumstances. ME. REV. STAT. ANN. tit. 19, § 214(6) (Supp. 1984) (parents apart); *id.* § 581(6) (spouse deserted); *id.* § 752(b) (divorce); MISS. CODE ANN. §§ 93-16-3, -5 (Supp. 1984) (parent deceased or parental rights terminated); R.I. GEN. LAWS § 15-5-24.1 (1981); *id.* § 15-5-24.2 (Supp. 1984) (parent deceased or divorce pending and parent fails to exercise visitation rights or such rights denied); W. VA. CODE § 48-2B-1 (1980) (deceased parent); *id.* § 48-2-15 (Supp. 1985) (parent fails to appear at divorce or annulment proceeding or parent's whereabouts unknown).

tody of the child remarries, and the child is then adopted by his stepparent. The specific issue raised by this conflict is whether the grandparent visitation statutes entitle the parents of the noncustodial natural parent to bring an action for visitation, notwithstanding the fact that, by operation of the effect-of-adoption provisions, the child is considered for all purposes the legitimate child of the adopting parent.³²

Faced with the apparent conflict between the rights of grandparents and the rights of adopting parents, some states have enacted statutory provisions specifically authorizing grandparent visitation after stepparent adoption. Others, making no provision for grandparent visitation after stepparent adoption, apparently deny post-adoptive visitation.³³ Still other states have left the resolution of this conflict to the courts, producing a similar dichotomy. Some state courts have held that the rights created by the grandparent visitation statutes and adoption statutes are not contradictory. By contrast, other state courts have interpreted their effect-of-adoption provisions as terminating all of the natural family's rights with respect to the child, including those created by the grandparent visitation statutes, even when the adoption is by a stepparent.³⁴

B. Statutes Addressing Grandparent Visitation After Adoption

To date, eighteen state legislatures have specifically addressed grandparent visitation after stepparent adoption in their grandparent visitation or effect-of-adoption provisions.³⁵ These states recognize that adoption and grandparent visitation statutes are not necessarily incompatible and provide for grandparent visitation after stepparent adoption. No state statute specifically prohibits grandparent visitation after stepparent adoption.

While expressly authorizing grandparent visitation after stepparent adoption, these statutes vary as to the circumstances under which such visitation may be awarded. The broadest rights for grandparents are found in Montana, North Dakota, Texas, and Vermont. These states authorize grandparent visitation after stepparent adoption when it is in the best interest of the child.³⁶ Similarly,

32. *See, e.g.*, *Roquemore v. Roquemore*, 275 Cal. App. 2d 912, 913-14, 80 Cal. Rptr. 432, 433-34 (1969); *Dripps v. Dripps*, 366 So. 2d 544, 546 (La. 1979); *Graziano v. Davis*, 50 Ohio App. 2d 83, 361 N.E.2d 525 (1976).

33. *See infra* notes 35-59 and accompanying text.

34. *See infra* notes 60-82 and accompanying text.

35. *See infra* notes 36-38.

36. MONT. CODE ANN. § 40-9-102(5) (1983) (inapplicable if adopted by a nonstepparent); N.D. CENT. CODE § 14-09-05.1 (Supp. 1983) (inapplicable if adopted by a nonstepparent); TEX. FAM. CODE ANN. § 14.03(e) (Vernon Supp. 1985); *id.*

the statutes in Alabama and Michigan provide that upon stepparent adoption grandparents may seek a visitation order under circumstances presumably left to the court's discretion.³⁷ The twelve remaining states that statutorily address grandparent visitation after stepparent adoption—Arkansas, California, Georgia, Kansas, Louisiana, Minnesota, Missouri, Oklahoma, Pennsylvania, South Dakota, Tennessee, and Wyoming—authorize postadoptive visitation under one or more of the following circumstances: death of a parent, dissolution of the parents' marriage, termination of parental rights, custody of the child with the surviving parent, and prior residence of the child with the grandparents.³⁸ Although some of these states grant visitation rights under limited circumstances, others are more generous in creating visitation rights for grandparents after stepparent adoption, in most situations when they would be sought.³⁹

Statutorily addressing the issue of grandparent visitation after stepparent adoption is a fairly recent phenomenon. In 1971, Tennessee and California were the first states to enact statutes creating grandparent visitation rights after stepparent adoption. Later that decade, Louisiana, Minnesota, and Montana enacted statutes. The trend accelerated in the 1980's, with thirteen states addressing the issue by statute between 1980 and 1985.⁴⁰

In eleven of these states, court decisions addressing the issue preceded statutory enactments. Ten of the state statutes—those of

§ 14.07 (Vernon 1975 & Supp. 1985); VT. STAT. ANN. tit. 15, §§ 1011-1015 (Supp. 1985) (inapplicable if adopted by a nonstepparent).

37. ALA. CODE § 26-10-5(b) (Supp. 1985) (after final order of adoption entered); MICH. COMP. LAWS ANN. § 710.606(3) (West Supp. 1985) (during pendency of stepparent adoption proceeding).

38. ARK. STAT. ANN. §§ 34-1211.2-.3 (Supp. 1985) (parent deceased or marriage dissolved); CAL. CIV. CODE § 197.5 (West 1982) (parent deceased); GA. CODE ANN. § 74-112 (Harrison Supp. 1985) (parent deceased); KAN. STAT. ANN. § 38-129(b) (Supp. 1984) (parent deceased); LA. REV. STAT. ANN. § 9:572(B) (West Supp. 1985) (parent deceased); MINN. STAT. ANN. § 257.022(3) (West 1982) (parent deceased, marriage dissolved, or child formerly resided with grandparents; inapplicable if adopted by a nonstepparent); MO. STAT. ANN. § 452.402 (Vernon Supp. 1985) (parent deceased); OKLA. STAT. ANN. tit. 10, §§ 5(B), (C), 60.16(3) (West Supp. 1984) (parent deceased, marriage dissolved, or parental rights terminated); 23 PA. CONS. STAT. ANN. §§ 1011-1015 (Purdon Supp. 1985) (parent deceased, marriage dissolved, or child formerly resided with grandparents; inapplicable if adopted by a nonstepparent); S.D. CODIFIED LAWS ANN. § 25-4-54 (1984) (parent deceased, marriage dissolved, or parents separated; inapplicable if adopted by a nonstepparent. *See Faust v. Messinger*, 497 A.2d 1351 (Pa. Super. Ct. 1985)); TENN. CODE ANN. § 36-6-301(b) (1984) (parent deceased or marriage dissolved; inapplicable if adopted by a nonstepparent); WYO. STAT. ANN. § 20-2-113(c) (Supp. 1985) (parent deceased *and* child in custody of surviving parent; surviving parent's marital status irrelevant).

39. *See supra* note 38.

40. *See supra* notes 36-38.

Alabama,⁴¹ Arkansas,⁴² Georgia,⁴³ Kansas,⁴⁴ Louisiana,⁴⁵ Michigan,⁴⁶ Minnesota,⁴⁷ Missouri,⁴⁸ Oklahoma,⁴⁹ and Texas⁵⁰—superseded case law terminating grandparent visitation rights upon stepparent adoption. The other statute—that of California—codified case law holding

41. ALA. CODE § 26-10-5(b) (Supp. 1985) (superseding *Bronstein v. Bronstein*, 434 So. 2d 780 (Ala. 1983)).

42. ARK. STAT. ANN. § 34-1211.2-.3 (Supp. 1985) (codifying *Hensley v. Wist*, 270 Ark. 1004, 607 S.W.2d 80 (Ark. App. 1980), and superseding *Wilson v. Wallace*, 274 Ark. 48, 622 S.W.2d 164 (1981), and *Woodson v. Kilcrease*, 7 Ark. App. 252, 648 S.W.2d 72 (1983)).

43. GA. CODE ANN. § 74-112 (Harrison Supp. 1985) (superseding *Sachs v. Walzer*, 242 Ga. 742, 251 S.E.2d 302 (1978), and *Houston v. Houston*, 156 Ga. App. 47, 274 S.E.2d 91 (1980)); see also *Smith v. Finstod*, 247 Ga. 603, 277 S.E.2d 736 (1984).

As the Georgia grandparent visitation statute specifically authorizes grandparent visitation after stepparent adoption only in cases of death of a natural parent, its substantive impact on the holdings of *Lockey v. Bennett*, 244 Ga. 339, 260 S.E.2d 56 (1979) (maternal grandparents lacked standing to intervene in adoption proceedings after natural parents consented to the adoption of the child by the paternal grandparents), and *Mead v. Owens*, 149 Ga. App. 303, 254 S.E.2d 431 (1979) (paternal grandparents lacked standing to petition for visitation after natural father's parental rights were forfeited subsequent to divorce from natural mother, and child was adopted by subsequent husband of natural mother) is unclear. For a discussion of grandparent visitation rights in Georgia, including grandparent visitation rights after stepparent adoption, see Comment, *Grandparents' Visitation Rights in Georgia*, 29 EMORY L.J. 1083 (1980).

44. KAN. STAT. ANN. § 38-129(b) (Supp. 1984) (superseding *Browning v. Tarwater*, 216 Kan. 501, 524 P.2d 1135 (1974)).

45. LA. REV. STAT. ANN. § 9:572(B) (West Supp. 1985) (superseding *Smith v. Trosclair*, 303 So. 2d 926 (La. App. 1974)).

46. MICH. COMP. LAWS ANN. § 710.60 (West Supp. 1985) (superseding *Bikos v. Nobliski*, 88 Mich. App. 157, 276 N.W.2d 541 (1979)).

47. MINN. STAT. ANN. § 257.022(3) (West 1982) (superseding in part *In re Niskanen*, 301 Minn. 53, 223 N.W.2d 754 (1974)). *Niskanen* held that after the parental rights of both natural parents were terminated upon adoption, the visitation rights of a natural grandparent are within the discretion of the adoptive parents.

48. MO. STAT. ANN. § 452.402 (Vernon Supp. 1985) (superseding *Aegerter v. Thompson*, 610 S.W.2d 308 (Mo. App. 1980)). For a discussion of the historical development of the grandparent visitation law in Missouri, see Casenote, *Family Law: Aegerter v. Thompson: Divesting Grandparents of Statutory Grandchild Visitation Rights by Stepparent Adoption*, 50 UMKC L. REV. 231 (1982).

49. See *infra* note 52 and accompanying text.

50. TEX. FAM. CODE ANN. § 14.03(e) (Vernon Supp. 1985) (superseding *Ex parte Pepper*, 544 S.W.2d 836 (Tex. Civ. App. 1976) (after the divorce of the children's natural parents, remarriage of the mother, and adoption of the children by her new husband, prior order granting visitation rights to the natural parental grandparents was invalid) and *Deweese v. Crawford*, 520 S.W.2d 522 (Tex. Civ. App. 1975) (after the divorce of the children's natural parents, death of the natural father, subsequent remarriage of the natural mother and adoption of the children by her new husband, natural grandparents were not "grandparents" within the meaning of the grandparent visitation statute)).

that grandparent visitation rights were not automatically terminated after stepparent adoption.⁵¹ By contrast, no state has codified a court decision terminating grandparent rights upon stepparent adoption.

Although superseded, these cases illustrate the conflicts that arise not only between courts of different states, but also between courts and legislatures of the same state, over the issue of grandparent visitation after stepparent adoption.⁵² In most jurisdictions, legis-

51. CAL. CIV. CODE § 197.5(c) (West 1982) (codifying *Roquemore v. Roquemore*, 275 Cal. App. 2d 912, 80 Cal. Rptr. 432 (1969) (grandparents could maintain an action for visitation after stepparent adoption)).

52. Oklahoma provides an excellent example of the tension that can arise between courts and legislatures over the issue of grandparent visitation rights after stepparent adoption. The Oklahoma legislature in 1975, while authorizing grandparent visitation in cases where a natural parent was deceased or the parents were divorced, did not address the stepparent adoption issue. See *Leake v. Grissom*, 614 P.2d 1107, 1109-10 (Okla. 1980) (citing OKLA. STAT. ANN. tit. 10, § 60.16(3) (1971)). In 1977, the Supreme Court of Oklahoma denied visitation to a maternal grandmother after her grandchildren were adopted by the paternal grandparents. See *In re Fox*, 567 P.2d 985 (Okla. 1977). The natural father consented to the adoption after the children's mother died. *Id.* at 986. The court held that continued visitation was within the sole discretion of the adoptive grandparents, reasoning that the adoption decree severed previous family ties. *Id.* at 987.

In response to the *Fox* decision, the Oklahoma legislature amended the effect-of-adoption provision to allow courts to award visitation rights to grandparents if consent to adoption was executed to a blood relative. *Leake*, 614 P.2d at 1109 (citing OKLA. STAT. tit. 10, § 60.16 (Supp. 1978)). The legislature further responded by amending the grandparent visitation statute to provide that if one natural parent died and the other remarried, the visitation rights of the decedent's parents would not be terminated by a subsequent adoption proceeding, absent a court order. 614 P.2d at 1110 (citing OKLA. STAT. ANN. tit. 10, § 5 (Supp. 1978)). In *Leake v. Grissom*, 614 P.2d 1107 (Okla. 1980), the Oklahoma Supreme Court denied visitation to the children's paternal grandparents after their natural parents were divorced. Subsequently, the natural father's parental rights had been terminated, the natural mother remarried, and the children were adopted by the mother's second husband. The court interpreted the 1978 amendment narrowly, stating, "[t]he remedy fashioned after *Fox* by [the Oklahoma grandparent visitation statute] is limited to factual situations similar to the one presented in *Fox*" (i.e., death of a parent followed by a consent adoption). *Id.* at 1110. The dissent argued that in amending the effect-of-adoption and grandparent visitation statutes, the legislature intended to give grandparents statutory standing whenever a child remained with at least one blood relative, as in the case of divorce and remarriage of the parent with custody. *Id.* at 1111. The dissent claimed that the majority rested its holding on an "unacceptably narrow construction of the legislative language." *Id.* at 1110.

Apparently in response to *Leake*, the legislature once again amended Oklahoma's effect-of-adoption provision to provide that when one or both of the natural parents are deceased or divorced, and a consent to adoption is executed to a natural parent's spouse, any grandparent who is the parent of the child's deceased or divorced natural parent may be granted reasonable visitation rights in accordance with the Oklahoma grandparent visitation statute. OKLA. STAT. ANN. tit. 10, § 60.16(3) (West Supp. 1984). Subsequently, the Oklahoma Supreme Court decided *In re*

latures have been more willing than courts to accommodate the policies of both grandparent visitation statutes and effect-of-adoption provisions.⁵³

In addition to the eighteen states with statutes authorizing, under certain circumstances, grandparent visitation after stepparent adoption, five state statutes contain general language arguably encompassing the stepparent adoption situation. Four of these five statutes apparently prohibit such visitation. For example, the Arizona and Mississippi grandparent visitation statutes indicate that all rights granted under the statutes either automatically terminate or do not apply when a minor child is adopted.⁵⁴ The Colorado statute authorizes grandparent visitation when legal custody of the child has been awarded to a nonparent or the child has been placed outside of his parents' home, unless the child has been placed for adoption or adopted.⁵⁵ Similarly, the New Mexico grandparent visitation statute provides that when parental rights are relinquished or terminated in statutory adoption proceedings, the statute is inapplicable.⁵⁶ Grandparents may petition for visitation with a child whose parent is deceased only when the child is in the custody of a person other than an adoptive parent in New Mexico.⁵⁷ These statutes do not distinguish between stepparent and stranger adoptions, despite the

K.S., 654 P.2d 1050 (Okla. 1982). In *In re K.S.*, the children's maternal grandparents sought visitation rights after the parental rights of their natural mother were terminated and the children were adopted by third parties. *Id.* at 1050. Citing no authority in support of its interpretation, the court strictly construed the amendment:

[I]n so amending, the legislature was specific in defining conditions which give this right of visitation [to] *deceased* or *divorced* parents Expanding the statutory authority, by judicial decree to apply for visitation to include *all* grandparents in any given situation, or merely to include grandparents whose children's parental rights have been terminated, would be to read something into the law that was clearly beyond the intention of the legislature.

Id. at 1051-52 (emphasis in original).

As a result, the Oklahoma legislature once again amended the Oklahoma grandparent visitation statute, this time to allow grandparent visitation when parental rights are terminated so long as one natural parent retains custody. Additionally, the amendment provided that these grandparent visitation rights are not terminated by subsequent adoption proceedings. OKLA. STAT. ANN. tit. 10, § 5(c) (West Supp. 1984). For a further discussion of the historical development of grandparent visitation rights in Oklahoma, see Note, *Adoption: Visitation Rights of Natural Grandparents*, 32 OKLA. L. REV. 645 (1979).

53. See *supra* notes 41-50 and accompanying text.

54. ARIZ. REV. STAT. ANN. § 25-337.01 (Supp. 1984); MISS. CODE ANN. § 93-16-7 (Supp. 1984).

55. COLO. REV. STAT. § 19-1-116(b) (Supp. 1984).

56. N.M. STAT. ANN. § 40-9-4 (1983).

57. *Id.* § 40-9-2.

differences between these two adoption situations.⁵⁸ As a result, the broad language may be read as terminating grandparent visitation after all adoptions, including stepparent adoption under the circumstances described above.

Finally, the Connecticut statute provides that a court may terminate visitation rights upon adoption.⁵⁹ On its face, this statute neither authorizes the court to award grandparent visitation after stepparent adoption nor mandates that visitation rights be terminated upon adoption.

In summary, eighteen states have statutorily authorized grandparent visitation after stepparent adoption, while four state statutes contain general language arguably prohibiting such visitation. One state statute grants courts discretion to prohibit grandparent visitation after adoption.

C. *Jurisdictions Where Case Law is Controlling*

Of the twenty-seven states which have not statutorily addressed the issue of grandparent visitation after stepparent or third party adoption, seven have decided cases directly on point. Specifically, in *Patterson v. Keleher*,⁶⁰ the Iowa Supreme Court awarded visitation rights to a maternal grandparent following the death of the child's mother, the remarriage of the child's father, and the adoption of the child by the father's subsequent wife. In awarding visitation rights, the court held that a decree of adoption did not automatically sever grandparent visitation rights awarded in a separate court decree. The Iowa grandparent visitation statute authorizes visitation when a parent dies, the parents' marriage is dissolved, or the child is placed in a foster home.⁶¹

58. See *infra* notes 176-84, and accompanying text.

59. CONN. GEN. STAT. §§ 46b-59 (Supp. 1985).

60. 365 N.W.2d 22 (Iowa 1985). In *Patterson*, the grandchild had been living with his mother and grandmother when their house caught fire and his mother died in the blaze. Plaintiff grandmother had custody of the grandchild until his father was awarded legal custody. *Id.* at 23.

61. IOWA CODE ANN. § 598.35 (West 1981). In *In re Gardiner*, 287 N.W.2d 555 (Iowa 1980), a case analogous to a stepparent adoption case, the Iowa Supreme Court reversed a lower court order allowing visitation by maternal grandparents following the death of the child's mother, termination of the parental rights of the father, and adoption of the child by a paternal uncle and his wife. The court held that the Iowa grandparent visitation statute did not empower Iowa courts to grant grandparent visitation in adoption decrees. The broad language used by the court in *Gardiner* did not distinguish among blood relative, stepparent, and third party adoptions and thus arguably precluded grandparent visitation after stepparent adoption. However, the same court in *Patterson* specifically declined to extend the holding of *Gardiner* to the stepparent adoption situation. The court reasoned that the policy of giving a child a "fresh start" upon adoption, free from past family ties, is far

In *Morse v. Daly*,⁶² the Nevada Supreme Court held that adoption does not automatically sever natural family ties, and affirmed a district court's adoption decree which included a provision for further consideration of visitation by the adopted child's step-grandmother.⁶³ Despite the fact that the Nevada grandparent visitation statute provides that the termination of parental rights also terminates the visitation rights of persons related to the parent,⁶⁴ the court ruled that ordering grandparent visitation after stepparent adoption is within the court's inherent equitable power when continuing the relationship is in the adopted child's best interest and does not unduly infringe on the adoptive parent.⁶⁵ The Nevada grandparent visitation statute authorizes visitation in cases of divorce or death of a child's parent.⁶⁶

In the seminal case of *Mimkon v. Ford*,⁶⁷ the New Jersey Supreme Court reinstated visitation rights to a maternal grandmother following the death of the child's mother, the remarriage of the child's father, and the adoption of the child by the father's subsequent wife, pending a hearing to determine whether continued visitation was in the best interest of the child. The court held that the New Jersey effect-of-adoption provision did not terminate the power of the court to award visitation rights to natural grandparents pursuant to the New Jersey grandparent visitation statute.⁶⁸ At the time *Mimkon* was decided, New Jersey authorized grandparent visitation in cases involving the death of a parent.⁶⁹ The statute has since been amended and currently authorizes grandparent visitation when the parents are divorced or separated as well.⁷⁰ Similarly, in *Graziano v. Davis*,⁷¹ the Ohio Court of Appeals awarded visitation rights to paternal grandparents fol-

less compelling when the child is adopted by a stepparent. 365 N.W.2d at 25 (distinguishing *In re Gardiner*, 287 N.W.2d 555 (1980)). Cf. *Grandparent Visitation Rights*, *supra* note 21, at 315 n.119.

62. 11 Fam. L. Rep. (BNA) 1543 (Nev. Sup. Ct. No. 16054, Aug. 20, 1985).

63. *Id.* at 1543.

64. NEV. STAT. ANN. § 123.123 (1979)

65. 11 Fam. L. Rep. (BNA) at 1543-44.

66. NEV. STAT. ANN. § 123.123 (1979).

67. 66 N.J. 426, 332 A.2d 199 (1975).

68. *Id.* at 433, 332 A.2d at 202.

69. *Id.* at 431, 332 A.2d at 201. The court reasoned in part:

[G]randparent 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 . . . does not clash with the policies apparently embodied in the adoption statute.

Id. at 436, 332 A.2d at 204.

70. N.J. STAT. ANN. § 9:2-7.1 (West 1976).

71. 50 Ohio App. 2d 83, 361 N.E.2d 525 (1976).

lowing the death of the children's father, the remarriage of the children's mother, and the adoption of the children by the mother's new husband. As in *Mimkon*, the court held that the Ohio effect-of-adoption provision does not terminate the discretionary power of the court to award visitation rights to the natural grandparents pursuant to the Ohio grandparent visitation statute.⁷²

Finally, in *Layton v. Foster*,⁷³ the New York Court of Appeals awarded visitation rights to paternal grandparents after the child's parents divorced, the mother remarried, and the father consented to the child's adoption by the stepfather. The court stated that the New York grandparent visitation statute, which authorizes visitation when a parent is deceased or when equity so requires, promotes the continuation of the familial relationship between the natural grandparents and the adopted child when it is in the best interest of the child. In applying the statute, the court held that the natural father's consent to adoption by the stepfather did not terminate the visitation rights of the natural father's parents, even though the father had relinquished his parental rights.⁷⁴

By contrast, the Florida District Court of Appeals, in *In re K.A.M.*,⁷⁵ reversed a lower court order granting visitation rights to

72. *Id.* at 89, 361 N.E.2d at 530. The Ohio grandparent visitation statute authorizes visitation rights for relatives in cases involving the death of a parent. OHIO REV. CODE ANN. § 3109.11 (Page 1980). However, soon after the *Graziano* ruling, the Ohio legislature amended the effect-of-adoption provision so that adoption terminates "all legal relationships between the adopted person and his relatives . . . so that the adopted person is a stranger to his [natural] relatives for all purposes." *Id.* § 3107.15(A)(1).

73. 61 N.Y.2d 747, 460 N.E.2d 1351, 472 N.Y.S.2d 916 (1984).

74. *Id.* at 749, 460 N.E.2d at 1342, 472 N.Y.S.2d at 917. Essentially, *Layton* applied the holding of New York *ex rel.* Sibley v. Sheppard, 54 N.Y.2d 320, 429 N.E.2d 1049, 445 N.Y.S.2d 420 (1981) (visitation rights awarded to maternal grandparent after the death of both natural parents and adoption of child by paternal grandparents), to the stepparent adoption situation. Prior to *Layton* and *Sheppard*, the lower New York courts were divided on the issue of grandparent visitation after stepparent adoption. Compare, e.g., *Scranton v. Hutter*, 40 A.D.2d 296, 339 N.Y.S.2d 708 (1973) (visitation rights awarded to maternal grandparents after stepparent adoption), with *Geri v. Fanto*, 79 Misc. 2d 947, 361 N.Y.S.2d 984 (Fam. Ct. 1974) (visitation rights of paternal grandparent revoked after adoption of child by stepfather where relationship between grandparents and parents was hostile), *New York ex rel. Herman v. Lebovits*, 66 Misc. 2d 830, 322 N.Y.S.2d 123 (Sup. Ct. 1971) (visitation rights of paternal grandparents revoked after adoption of child by stepmother), and *New York ex rel. Levine v. Rado*, 54 Misc. 2d 843, 283 N.Y.S.2d 483 (Sup. Ct. 1967) (maternal grandmother's visitation rights revoked after adoption of child by paternal aunt and uncle). For a discussion of the historical development of the New York case law, see Note, *Grandparents' Statutory Visitation Rights and the Rights of Adoptive Parents*, 49 BROOKLYN L. REV. 149 (1982); Foster & Freed, *The Child's Right*, *supra* note 21, at 664-68.

75. 367 So. 2d 744 (Fla. Dist. Ct. App. 1979).

a paternal grandparent following the death of the child's parents and the adoption of the child by a maternal aunt and her husband (i.e., a blood relation adoption). The court held that the Florida grandparent visitation statute does not contain authority for awarding visitation rights in adoption cases. In so holding, the court made no distinction among adoption involving stepparents, blood relatives, and strangers.⁷⁶ Given the analogous nature of blood relative and stepparent adoptions, the decision arguably precludes grandparents' visitation after a stepparent adoption.⁷⁷

The law is least clear in Illinois. In *In re Schumacher*,⁷⁸ the Second District of the Illinois Appellate Court vacated that portion of an adoption order allowing visitation by the paternal grandparents following the divorce of the child's parents, the remarriage of the child's mother, and the adoption of the child by the mother's subsequent husband. The court held that adoption terminates grandparents' visitation rights despite the existence of statutory provisions authorizing grandparent visitation.⁷⁹ The following year, however, in *Lingwall v. Hoener*,⁸⁰ the Fourth District of the Illinois Appellate Court affirmed an order granting visitation rights to natural grandparents following a stepparent adoption. The *Lingwall* court held that the Illinois grandparent visitation statute permits visitation after stepparent adoption when visitation is in the best interest of the child.⁸¹ The Illinois Supreme Court has yet to resolve the conflict between the appellate courts.⁸²

76. *Id.* at 744.

77. *But see supra* note 61 (faced with a similar situation, the Iowa Supreme Court refused to extend the holding of a case dealing with a blood relative adoption to a case involving stepparent adoption).

78. 120 Ill. App. 3d 50, 458 N.E.2d 94 (1983).

79. *Id.* at 53, 458 N.E.2d at 97.

80. 124 Ill. App. 3d 986, 464 N.E.2d 1248 (1984).

81. *Id.* at 990, 464 N.E.2d at 1250.

82. The *Schumacher* court compounded the confusion by holding that, "the majority view is that an adoption terminates a grandparent's visitation rights despite the existence of such statutory provisions authorizing grandparent visitation." 120 Ill. App. 3d at 53, 458 N.E.2d at 97. The danger here is that reliance on old notions of the "majority" position will result in faulty analysis and perpetuate archaic notions of what is in the child's best interest.

Contrary to this claim, a majority of states have addressed the issue either by statute or case law, and most allow grandparent visitation after stepparent adoption. In support of its holding, the *Schumacher* court cited *Wilson v. Wallace*, 274 Ark. 48, 622 S.W.2d 164 (1981); *In re Gardiner*, 287 N.W.2d 555 (Iowa 1980); *Poe v. Case*, 263 Ark. 488, 565 S.W.2d 612 (1978); *In re Fox*, 567 P.2d 985 (Okla. 1977); *Browning v. Tarwater*, 215 Kan. 501, 524 P.2d 1135 (1974); *Bikos v. Nobliski*, 88 Mich. App. 157, 276 N.W.2d 541 (1979); *Ex parte Pepper* 544 S.W.2d 836 (Tex. Civ. App. 1976), *error dismissed*, 548 S.W.2d 884 (Tex. 1977). The *Schumacher* court failed to recognize, however, that in every case cited

Thus, the highest courts in Iowa, Nevada, New Jersey, and New York, and the Ohio Court of Appeals have determined that the rights created by the grandparent visitation statutes do not terminate upon stepparent adoption. Conversely, the Supreme Court of Florida has held that the operation of the adoption statutes preempts rights created by grandparent visitation provisions. Finally, in Illinois, the intermediate appellate courts are divided and the Illinois Supreme Court has yet to rule on the issue.

D. *The Constitutional Dimension*

Current case law has noted that there is no constitutional impediment to awarding grandparent visitation after stepparent adoption. This is so even though it is well settled that under the fourteenth amendment to the United States Constitution parents generally have a right to raise their families free from state interference.⁸³ As stated by the Supreme Court in *Prince v. Massachusetts*,⁸⁴ "the custody, care and nurture of the child [should] reside first in the parents, whose primary function and freedom include preparation for obligations

by the court as reflecting the majority view, the results have apparently been superseded by subsequent statutes, amendments, or case law authorizing grandparent visitation after adoption and embodying the current majority view that such visitation is in the best interest of the child.

The situation in North Carolina is as unclear as the situation in Illinois. In *Acker v. Barnes*, 33 N.C. App. 750, 236 S.E.2d 715 (1977), the court found that a paternal grandmother had no cause of action for visitation rights with her grandchildren when the children's parents were divorced and the natural father consented to their adoption by their stepfather. However, *Acker* was decided prior to the enactment of the North Carolina grandparent visitation statute, N.C. GEN. STAT. § 50-13.5(j) (1984) (effective as of 1981), which grants grandparents standing to assert visitation rights in custody disputes.

83. See *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) ("the Constitution protects the sanctity of the family [which] is deeply rooted in this Nation's history"); *Griswold v. Connecticut*, 381 U.S. 479 (1965) ("privacy surrounding the marriage relationship [is] older than the Bill of Rights"); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (state did not violate the fourteenth amendment of the United States Constitution when it applied its child labor law to a guardian who permitted his minor ward to distribute religious literature); *Pierce v. Society of Sisters*, 268 U.S. 510 (1924) (parents may send their children to religious schools despite a state requirement that all children attend public school); *Meyer v. Nebraska*, 262 U.S. 390 (1922) (the state may not encroach on the child's right to receive instruction in a foreign language); see also *Odell v. Lutz*, 78 Cal. App. 2d 104, 177 P.2d 628 (1947); *New York ex rel. Sibley v. Sheppard*, 54 N.Y.2d 320, 429 N.E.2d 1049, 44 N.Y.S.2d 420 (1981); *Deweese v. Crawford*, 520 S.W.2d 522 (Tex. Civ. App. 1975). For an analysis and critique of parental rights, see Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family has Failed*, 70 VA. L. REV. 879 (1984).

84. 321 U.S. 158 (1944).

the state can neither supply nor hinder.”⁸⁵ The Supreme Court has also suggested that adopting parents stand in the same position as natural parents.⁸⁶ Despite this constitutional protection, however, it is equally clear that the rights of parents are limited, and that parental activity may be regulated in certain circumstances.⁸⁷

If the state does act to regulate parental activity, the action must be reasonably related to that which is within the competency of the state.⁸⁸ The few courts which have considered the constitutional dimension when awarding or denying grandparent visitation after stepparent adoption have held that the state has a sufficient interest in the family relationship and the child to justify legislation in the area of grandparent visitation after stepparent adoption.⁸⁹ Specifically, some courts have held that permitting grandparent visitation over the adopting parent’s objection does not unconstitutionally impinge upon the integrity of the adoptive family. These courts have maintained that the state, in its role as *parens patriae*, may determine that grandparents should have continuing contact with the child when it is in the child’s best interest.⁹⁰

85. *Id.* at 166.

86. “Adoption, for example, is recognized as the legal equivalent of biological parenthood.” *Smith v. Organization of Foster Families*, 431 U.S. 816, 844 n.51 (1977) (citing N.Y. DOM. REL. LAW § 110 (McKinney 1977)).

87. As the Court stated in *Prince*, “the family itself is not beyond regulation in the public interest.” 321 U.S. at 166. However, this is not to suggest that it would be permissible, under the United States Constitution, for the federal government to legislate in the area of grandparent visitation after stepparent adoption. In fact, “even if Congress wanted to act, it does not appear to have the constitutional authority to mandate standards for child custody or visitation.” *Grandparents: The Other Victims of Divorce and Custody Disputes: Hearings Before the Subcomm. on Human Services of the House Select Comm. on Aging*, 97th Cong., 2d Sess. 77 (1982) (statement of Professor Areen) [hereinafter cited as *Hearings*]; see also Foster & Freed, *supra* note 21, at 39. Nevertheless, some congressional action concerning grandparent visitation has been suggested as constitutionally permissible. These activities include: publicizing the problems regarding grandparent visitation and grandparent visitation after stepparent adoption, interacting with the states and private groups interested in the issue, establishing a national clearinghouse to facilitate the sharing of relevant information among the states, and amending the Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A (1982), to protect grandparent visitation rights in interstate disputes. See Foster & Freed, *The Child’s Right*, *supra* note 21.

88. Foster & Freed, *The Child’s Right*, *supra* note 21, at 39.

89. See *New York ex rel. Sibley v. Sheppard*, 54 N.Y.2d 320, 429 N.E.2d 1049, 445 N.Y.S.2d 420 (1981); *Leake v. Grissom*, 614 P.2d 1107 (Okla. 1980); *Deweese v. Crawford*, 520 S.W.2d 522 (Tex. Civ. App. 1975).

90. See *Sheppard*, 54 N.Y.2d at 327, 429 N.E.2d at 1052, 445 N.Y.S.2d at 423. The constitutionality of visitation statutes has also been upheld. See, e.g., *New York v. Sheridan*, 98 Misc. 2d 328, 332, 414 N.Y.S.2d 83, 85 (N.Y. Sup. Ct. 1979). For a discussion of the constitutionality of visitation statutes, see *Vagaries and Vicissitudes*, *supra* note 21, at 650-51; Zaharoff, *Access to Children: Toward a Model Statute for Third Parties*, 15 FAM. L.Q. 165, 177-78 (1981).

There is an additional justification for legislative intervention in the stepparent adoption situation. As the New York Court of Appeals stated in *New York ex rel. Sibley v. Sheppard*,⁹¹ the adoptive relationship is solely a statutory creation, and the adoptive family arises out of the state's concern for the best interest of the child.⁹² Having created the adoptive relationship, the state may determine to what extent the child's contact with his natural family will continue.⁹³ Despite the fact that adopting parents generally hold the same rights and stand in the same legal position as natural parents,⁹⁴ "[c]ompletion of the adoption process does not oust the State of all power to continue its supervision of the child's best interest, at least insofar as the question of the natural grandparents' access to the child is concerned."⁹⁵

III. ATTEMPTS TO RESOLVE THE CONFLICT BETWEEN GRANDPARENT VISITATION STATUTES AND EFFECT-OF-ADOPTION PROVISIONS

Despite the recent trend allowing grandparent visitation after stepparent adoption, there continues to be great disagreement as to whether effect-of-adoption provisions terminate statutory rights of grandparent visitation after stepparent adoption. The potential for continued disagreement remains. Although forty-nine states have passed grandparent visitation statutes and all fifty have enacted effect-of-adoption statutes,⁹⁶ only twenty-three have statutorily addressed the issue of grandparent visitation after stepparent adoption, and only seven have addressed the issue by case law.⁹⁷

91. 54 N.Y.2d 320, 429 N.E.2d 1049, 445 N.Y.S.2d 420 (1981).

92. *Id.* at 328, 429 N.E.2d at 1052, 445 N.Y.S.2d at 423-24.

93. *Id.* at 329, 429 N.E.2d at 1053, 445 N.Y.S.2d at 424.

94. *See supra* note 82 and accompanying text; *see also Sheppard*, 54 N.Y.2d at 328, 429 N.E.2d at 1052, 445 N.Y.S.2d at 423.

95. *Sheppard*, 54 N.Y.2d at 329, 429 N.E.2d at 1053, 445 N.Y.S.2d at 424.

96. *See supra* notes 8-19 & 22-31 and accompanying text.

97. *See supra* notes 36-60 and accompanying text. Additionally, the potential for conflict between grandparent visitation and adoption statutes is enhanced by recent demographic trends. In a 1982 congressional hearing, Congressman Biaggi stated:

Today in America, approximately 70 percent of older people in the United States have grandchildren. Statistics reveal that women become grandmothers at approximately 50 years of age, and men become grandfathers around age 52. Based on current life expectancy, this can leave as much as a 20 to 30-year period for the development of meaningful relations between grandparents and grandchildren. That is the positive side of the coin. On the negative side, over 1 million children a year experience the divorce of their parents; a startling 48 percent of those who married in 1970 will eventually divorce. Most people who get divorced

The options available to the states yet to address the issue are perhaps best examined in light of the various analytical approaches taken by courts and commentators in their attempt to resolve the apparent conflict between grandparent visitation statutes and effect-of-adoption provisions. Authorities have most frequently attempted to resolve this apparent conflict by: (i) classifying adoption statutes as either status or succession; (ii) relying on statutory maxims and notions of legislative intent; (iii) relying on the theory of derivative rights; (iv) applying the concept of the best interest of the child; or (v) adopting some combination of these analytical approaches. With the exception of the best interest of the child, none of these approaches is useful in the analysis. Rather than helping to resolve the conflict between the statutes, their use has compounded it.

A. *The Classification Analysis*

Some judges and commentators have analyzed the issue of grandparent visitation after stepparent adoption by classifying effect-of-

will remarry in many instances within 3 years. These contemporary shifts in divorce and remarriage are radically changing the character and structure of the family as we know it. In 1978, 10 million children lived in a household with one natural parent and one stepparent. Today we have far more than the traditional grandparenting. We now have the step-grandparent and multiple grandparent family.

Hearings, supra note 87, at 1-2 (statement of Congressman Biaggi). In that same hearing, Congressman Shumway stated:

The problem with grandparent visitation rights occurs primarily in the event of death, divorce or separation of the parents. The rapid rise in the divorce rate during the last decade, especially in families with young children, results in injustices to the victims—old and young alike. Before 1940, the divorce rate was approximately 2 per 1,000 in population. It reached a historic level of 5.1 per 1,000 in 1978. There were 1.1 million divorces and 2.2 million marriages in that year. It is not surprising that if this rate of divorce continues on a lifetime basis, the proportion of marriages ending in divorce may be close to 40 percent. The impact of divorce is significant: the number of children involved in divorce tripled in two decades from 361,000 in 1956 to 1,117,000 in 1976. The impact of the divorce rate has a great impact on the basic family unit. Since 1960, there has been a far more rapid increase in the number of 1 parent families than two parent families. By 1978, 19 percent of all families with sons and daughters under 18 years of age was maintained by 1 parent, 17 percent by the mother and 2 percent by the father.

Id. at 9 (statement of Congressman Shumway). Finally, Dr. Kornhuber stated:

If social theorists and government planners are to be believed, many grandparents have shed their identities and joined the ranks of the "aged," all the more tragic because there are more grandparents alive today than ever before. In the next sixty years, demographers predict, the over-65 population will double.

Id. at 50 (statement of Dr. Arthur Kornhuber).

adoption provisions as either status or succession statutes and, based on this classification, drawing conclusions regarding grandparent visitation rights. Under this approach, effect-of-adoption provisions which appear to focus on investing adopting parents with the rights of natural parents, and divesting the parental rights of the natural parents, are classified as status adoption statutes (i.e., the status of the child with respect to the adopting and natural parents). Proponents of this analytical approach presume that legislatures enacted this type of effect-of-adoption provision to promote the policy of strengthening the newly created family over all other policies, and consequently deny visitation to the natural grandparents.⁹⁸ On the other hand, effect-of-adoption provisions which appear to focus on the inheritance and succession rights flowing from or affected by adoption are called succession statutes. Legislatures enacting this type of effect-of-adoption provision are, under the classification approach, presumed to be less concerned with status issues. Therefore, grandparent visitation is allowed if it is in the best interest of the child.⁹⁹

Courts in Arkansas, Illinois, Kansas, Michigan, and Texas have determined that their effect-of-adoption provisions emphasize status. Based in part on that classification, these courts have concluded that stepparent adoption terminates the visitation rights of natural grandparents.¹⁰⁰ On the other hand, California and New York courts have

98. See, e.g., *Graziano v. Davis*, 50 Ohio App. 2d 83, 361 N.E.2d 525 (1976). The *Graziano* court noted:

One explanation for the divided opinion advanced by counsel for defendants rests upon the wording and apparent thrust of the adoption statutes. Some are quite similar to R.C. 3107.13 and refer to the "status" of an adopted child with respect to his adoptive parents and natural parents. Based in part upon that type of wording, the courts of Kansas, Louisiana, and Texas, in the cases cited, have held that adoption terminates the rights of those claiming through the natural parent.

Id. at 88, 361 N.E.2d at 529.

99. "Other adoption statutes seem to place more emphasis on the inheritance and succession rights flowing from or affected by adoption. Based in part on that situation, the courts of California and New Jersey, in the cases cited, have held that the visitation rights survive the adoption." *Id.* at 89, 361 N.E.2d at 529.

100. See, e.g., *Wilson v. Wallace*, 274 Ark. 48, 50, 622 S.W.2d 164, 165 (1981) ("the effect of an adoption decree . . . is 'to terminate all legal relationships between the adopted individual and his relatives, including his natural parents, so that the adopted individual thereafter is a stranger to his former relatives for all purposes.'") (quoting ARK. STAT. ANN. § 56-215(a)(1) (Supp. 1981) (emphasis added by the court)); *Woodson v. Kilcrease*, 7 Ark. App. 252, 253-54, 648 S.W.2d 72, 73 (1983); *In re Schumacher*, 120 Ill. App. 3d 50, 52, 458 N.E.2d 94, 96-97 (1983) ("Given the statutory scheme for the complete severance of the relationship between the child and his or her natural parents upon adoption it follows that adoption also terminates any legal rights and interests of the natural parent's relatives in the

classified their effect-of-adoption provisions as succession statutes. Consequently, these courts have held that stepparent adoption does not preclude grandparent visitation.¹⁰¹

The problem with this approach is that virtually all effect-of-adoption provisions are part of fairly complete statutory schemes which address status as well as succession and inheritance issues. Classification of the provisions as either status or succession is misleading.

As the fifty-state survey indicates, every state effect-of-adoption provision contains language that would qualify it as a status statute under this approach. Specifically, every state but Illinois vests the adopting parent with all the rights, duties, and obligations of a natural parent. In addition, every state but Tennessee expressly divests the natural parents of all rights with respect to the child.¹⁰² Thus, every state effect-of-adoption provision has one section, and all but those of Illinois and Tennessee have two sections, emphasizing the status of the adopted child.

At the same time, the survey indicates that all but nine state

child.” (citations omitted)). The court in *Schumacher* noted, but attached no significance to the fact, that adopted children may inherit from their natural parent. *See also* *Browning v. Tarwater*, 215 Kan. 501, 505, 524 P.2d 1135, 1139 (1974) (“Where the adoption statute, as here, gives the adopted child the status of a natural child [courts may not] include in the adoption decree a grant of visitation privileges to the natural parent or members of the natural parents’ family.” (citation and emphasis omitted)); *Bikos v. Nobliski*, 88 Mich. App. 157, 276 N.W.2d 541 (1979); *Ex parte Pepper*, 544 S.W.2d 836, 839 (Tex. Civ. App. 1976) (“the legal effect of the adoption decree was . . . to sever old legal ties and create new legal relationships”), *appeal dismissed*, 548 S.W.2d 884 (Tex. 1977).

The court in *Bikos*, interpreting a provision of the Michigan effect-of-adoption provision MICH. COMP. LAWS ANN. § 710.60(1) (West Supp. 1985), stated:

The effect of the statute is to make the adopted child as much as possible a natural child of the adopting parents, and to make the adopting parents as much as possible the natural parents of the child. The statute specifically provides that the adopting parents “stand in the place of the parent . . . in all respects as though the adopted person had been born to the adopting parents” and are “entitled to all the rights of parents.”

88 Mich. App. at 162, 276 N.W.2d at 544. The Michigan effect-of-adoption provision has since been amended to provide that it shall not be construed to prohibit the entry of an order for grandparent visitation. MICH. COMP. LAWS ANN. § 710.60(3) (West Supp. 1984-85).

101. *See, e.g.*, *Roquemore v. Roquemore*, 275 Cal. App. 2d 912, 916, 80 Cal. Rptr. 432, 435 (1969) (section 257 of the probate code is a succession statute and does not regulate the status of a minor child for purposes of precluding grandparent visitation); *New York ex rel. Sibley v. Sheppard*, 54 N.Y.2d 320, 323, 429 N.E.2d 1049, 1051, 445 N.Y.S.2d 420, 422 (1981) (section 117 is a succession statute which does not discourage or prohibit continued contact between an adopted child and his or her natural grandparents).

102. *See supra* notes 8-14 and accompanying text.

effect-of-adoption provisions do one or more of the following: (i) invest the child and the adopting parents with the right to inherit from one another; (ii) divest the natural parents of the right to inherit from the child; (iii) continue, under certain circumstances, the right of the child to inherit from the natural parents; or (iv) provide that when adoption is by a parent's spouse, the inheritance rights between that natural parent and the child remain unchanged by an adoption decree.¹⁰³ Therefore, the effect-of-adoption provisions in forty-one states have language which would also warrant their classification as succession statutes.

Thus, the homogeneity of effect-of-adoption provisions—almost all contain language divesting the rights of natural parents, vesting the rights of adopting parents, and addressing the effects of adoption on inheritance and succession—makes it impossible to classify them as either status or succession statutes. This is illustrated by the classification analysis of the courts in *Bikos v. Nobliski*¹⁰⁴ and *Roquemore v. Roquemore*.¹⁰⁵

In *Bikos*, the Michigan Court of Appeals held that stepparent adoption terminates grandparent visitation rights, in part because it determined that the Michigan effect-of-adoption provision was a status statute. Although the court referred to the inheritance and succession language in the statute,¹⁰⁶ it concluded that the provision

103. See *supra* notes 15-19 and accompanying text.

104. 88 Mich. App. 157, 276 N.W.2d 541 (1979). Although *Bikos* has been superseded by statute, see *supra* note 100, it is useful as an example in analyzing grandparent visitation after stepparent adoption.

105. 275 Cal. App. 2d 912, 80 Cal. Rptr. 432 (1969).

106. 88 Mich. App. at 161 & n.1, 276 N.W.2d at 543 & n.1. The statute provided:

(2) After entry of the order of adoption there shall not be any distinction between the rights and duties of natural progeny and adopted persons, and the adopted person shall become an heir at law of the adopting parent or parents, and an heir at law of the lineal and collateral kindred of the adopting parent or parents. After entry of the order of adoption, the adopted person shall no longer be an heir at law of his or her natural parents, except that a right, title, or interest vesting before entry of the final order of adoption shall not be divested by that order.

MICH. COMP. LAWS ANN. § 710.60 (West 1974), amended by, MICH. COMP. LAWS ANN. § 710.60 (West Supp. 1985).

The court noted that:

[s]ubsection 2 of this statute primarily deals with an adopted person's rights as an heir. The effect-of-adoption statute was amended in 1974, as part of an extensive revision of the Michigan Adoption Code. 1974 PA 296. Upon amendment, the Legislature divided the statute into two subsections and eliminated an adopted person's status as an heir of the natural parents after adoption.

88 Mich. App. at 161, 276 N.W.2d at 543 (footnote omitted).

was a status statute because it "provide[d] that the adopting parents 'stand in the place of a parent . . . in all respects as though the adopted child had been born to the adopting parents.'" ¹⁰⁷ The problem with the classification of the Michigan effect-of-adoption provision as a status provision is that the provision devotes an entire subsection to inheritance rights,¹⁰⁸ and thus, like effect-of-adoption statutes in most other states, is both a "status" and "succession" statute.

The *Bikos* court justified its classification by distinguishing the Michigan statute from effect-of-adoption provisions in California, New Jersey, New York, and Ohio. The court stated that the provisions from the latter states were succession statutes which, unlike the Michigan provision, did not contain language specifically severing the relationship between adopted children and their natural parents.¹⁰⁹ However, this conclusion is not supported by a reading of the statutory provisions of those states. The provisions from those states, like provisions from every other state, contain severance language equal in degree and scope to that found in the Michigan provision.

Specifically, the Michigan effect-of-adoption provision states that adopting parents "stand in the place of a parent . . . as though the adopted person had been born to the adopting parents and shall thereafter be . . . entitled to all the rights of parents."¹¹⁰ Similarly, the California provision states that "[t]he parents of an adopted child are, from the time of the adoption, relieved of all parental duties towards, and all responsibility for, the child so adopted, and have no right over it."¹¹¹ The Ohio provision states that the adoption

107. 88 Mich. App. at 162-63, 276 N.W.2d at 544 (quoting MICH. COMP. LAWS ANN. § 710.60(1) (West Supp. 1979)).

108. MICH. COMP. LAWS ANN. § 710.60(2) (West Supp. 1985).

109. 88 Mich. App. at 161-64, 276 N.W.2d at 543-45. The court concluded that New York's effect-of-adoption provision had a different focus from that of the Michigan provision because the New York provision focused on descent and succession while the Michigan effect-of-adoption provision focused on more than succession. The court thought it was relevant that the Michigan statute included specific language terminating the rights of natural parents, and concluded that such language was absent from the New York and California statutes. *Id.* at 162-63, 276 N.W.2d at 544.

110. MICH. COMP. LAWS ANN. § 710.60(1) (West Supp. 1985).

111. CAL. CIV. CODE § 229 (West 1982). In addition, California's adoption laws have recently been amended. CAL. CIV. CODE § 227(a) (West Supp. 1985) provides in part:

If satisfied that the interest of that child will be promoted by the adoption, the court may thereupon make and enter a decree of adoption of the child by the adopting parent or parents, and the child and the adopting parents shall thereupon and thereafter sustain toward each other the legal relationship of parent and child and have all the rights and be subject to all the duties of that relation.

decree shall "relieve the biological or other legal parents of the adopted person of all parental rights and responsibilities, . . . terminate all legal relationships between the adopted person and his relations,"¹¹² and "create the relationship of parents and child between the petitioner and the adopted person, as if the adopted person were the legitimate blood descendent of the petitioner, for all purposes"¹¹³ Finally, the New Jersey¹¹⁴ and New York¹¹⁵ provisions contain similar language which terminate the relationship between an adopted child and his parents while creating relationships, rights, and duties between the child and the adopting parents as if the child were the natural child of his new parents.

The *Bikos* court is not alone in its attempt to support a status classification by overemphasizing status language and minimizing or ignoring succession or inheritance language. This approach also has been followed by the courts in Arkansas, Illinois, Kansas, and Texas.¹¹⁶

Courts that allow grandparent visitation after stepparent adoption also have imposed artificial classifications. For example, in *Roquemore*, the California Court of Appeals held that grandparents were entitled to maintain an action for visitation, in part because it determined that the California adoption provision was a succession statute.¹¹⁷ In this case, the court ignored the language in the California effect-of-adoption provision which divests the natural parents of all rights with respect to the child.¹¹⁸ It should be noted that courts in New

112. OHIO REV. CODE ANN. § 3107.15(A)(1) (Page 1980).

113. *Id.* § 3107.15(A)(2).

114. N.J. STAT. ANN. § 9:3-50 (West Supp. 1985).

115. N.Y. DOM. REL. LAW § 117(1) (McKinney 1977). The New York provision states:

After the making of an order of adoption the natural parents of the adoptive child shall be relieved of all parental duties toward and of all responsibilities for and shall have no rights over such adoptive child or to his property by descent or succession, except as hereinafter stated.

. . . .

The adoptive parents or parent and the adoptive child shall sustain toward each other the legal relation of parent and child and shall have all the rights and be subject to all the duties of that relation including the rights of inheritance from and through each other and the natural and adopted kindred of the adoptive parents or parent.

116. *See supra* note 100.

117. 275 Cal. App. 2d 912, 80 Cal. Rptr. 432 (1980). The court stated: "Section 257 of the Probate Code [relates] to succession and inheritance rights, and it is 'limited by its express terms to matters of succession.' It is a succession statute and it does not appear to regulate the status of a minor child for all purposes." *Id.* at 914, 80 Cal. Rptr. at 433-34.

118. CAL. CIV. CODE § 229 (West 1982).

York also have overemphasized succession and inheritance language while minimizing or ignoring status language.¹¹⁹

Given the homogeneity of the effect-of-adoption provisions, the classification system based on succession and status should be abandoned as a tool for analysis in resolving the conflict between grandparent visitation statutes and effect-of-adoption provisions. The classification scheme is not even useful when the effect-of-adoption provisions are located in the probate code, as is the case in Connecticut, Idaho, Kansas, and Michigan. Rather, a reading of these provisions shows that they completely address the status of adopted minor children as well as their inheritance and succession rights, and thus cannot properly be classified as "succession" statutes alone.¹²⁰ In fact, the courts in Kansas and Michigan have classified their effect-of-adoption provisions as status statutes, despite their location in the probate code.¹²¹

B. *Legislative Intent and Maxims of Construction*

Some courts have attempted to analyze the issue of grandparent visitation after stepparent adoption by looking to legislative intent.¹²² This exercise appears similar to that of trying to determine the thrust of a statute for classification purposes, and is equally as futile. While reference to legislative intent may be valuable in other circumstances, it generally adds little to an analysis of the tension between effect-of-adoption provisions and grandparent visitation statutes. Rather, direct evidence of legislative intent regarding the relationship between the effect-of-adoption provisions and visitation statutes usually is unclear or totally absent.¹²³ It appears that the issue of grandparent

119. See, e.g., *New York ex rel. Sibley v. Sheppard*, 54 N.Y.2d 320, 429 N.E.2d 1049, 445 N.Y.S.2d 420 (1981); *Scranton v. Hutter*, 40 A.D.2d 296, 339 N.Y.S.2d 708 (App. Div. 1973).

120. CONN. GEN. STAT. ANN. § 45-64(a) (West Supp. 1985); IDAHO CODE §§ 16-1508, 1509 (1979); KAN. STAT. ANN. § 59-2103 (1983); MICH. COMP. LAWS ANN. § 710.60 (West Supp. 1985).

121. See *supra* note 101 and accompanying text.

122. See, e.g., *Smith v. Trosclair*, 303 So. 2d 926 (La. App. 1974); *Bikos*, 88 Mich. App. 157, 276 N.W.2d 541; *Mimkon v. Ford*, 66 N.J. 426, 332 A.2d 199 (1975); *Sheppard*, 54 N.Y.2d 320, 429 N.E.2d 1049, 445 N.Y.S.2d 420.

123. See, e.g., *Graziano v. Davis*, 50 Ohio App. 2d 83, 361 N.E.2d 525 (1976). The court stated:

We find that the legislative intent with regard to the relationship between the adoption statute, R.C. 3107.13, and visitation statutes, R.C. 3109.11, is not clear even though the same session of the Ohio legislature which enacted R.C. 3109.11 had occasion to review and amend R.C. 3107.13, providing for adoption in two situations: adoption by husband and wife, and adoption by stepparent.

Id. at 89, 361 N.E.2d at 529. See Note, *supra* note 21, at 393.

visitation after stepparent adoption simply was not considered by most legislatures when they initially enacted effect-of-adoption and grandparent visitation statutes.¹²⁴

As the New York case of *People v. Sheppard*¹²⁵ and the Michigan case of *Bikos v. Nobliski*¹²⁶ illustrate, attempts to presume legislative intent absent clear evidence complicate and confuse the issue of grandparent visitation rights. Both *Sheppard* and *Bikos* involved grandparents seeking visitation privileges with their grandchild after the death of the child's parent (i.e., the grandparent's child) and, either stepparent adoption, as in *Bikos*,¹²⁷ or foster parent adoption, as in *Sheppard*.¹²⁸ The grandparent visitation statutes in both states authorized grandparents to seek visitation after the death of their child.¹²⁹ As the *Bikos* court noted, "[t]he New York grandparent visitation statute is essentially the same as Michigan's."¹³⁰ In addition, both effect-of-adoption provisions divested the natural parents of parental rights, and invested the adopting parents with the rights of natural parents, including inheritance rights with respect to the child.¹³¹

Although New York and Michigan had similar statutory schemes, the cases reached opposite conclusions regarding legislative intent. Holding that the New York effect-of-adoption provision does not terminate grandparent visitation rights, the *Sheppard* court stated: "[h]ad the Legislature intended [the effect-of-adoption section] to limit [the grandparent visitation section], either or both sections could have expressly reflected that intention."¹³² Conversely, holding that the Michigan effect-of-adoption provision terminated grandparent visitation rights, the *Bikos* court reasoned: "[t]he Legislature did not have to expressly exempt adoption situations as the lower court concluded, if it did not want the visitation statute to apply to cases [of stepparent adoption]."¹³³ While the statutes did not differ in any legally significant way, contrary interpretations resulted because both courts ascribed intent to the legislature without clear evidence that the legislature considered the issue of grandparent

124. Note, *supra* note 21, at 393.

125. 54 N.Y.2d 320, 429 N.E.2d 1049, 445 N.Y.S.2d 420 (1981).

126. 88 Mich. App. 157, 276 N.W.2d 541 (1979).

127. *Id.* at 159, 276 N.W.2d at 542.

128. 54 N.Y.2d at 322, 429 N.E.2d at 1050, 445 N.Y.S.2d at 421.

129. MICH. COMP. LAWS ANN. § 722.27a (West 1971) (repealed 1980); N.Y. DOM. REL. LAW § 72 (McKinney 1977).

130. 88 Mich. App. at 162-63, 276 N.W.2d at 543.

131. MICH. COMP. LAWS ANN. § 710.60 (West Supp. 1985); N.Y. DOM. REL. LAW § 117 (McKinney 1977).

132. 54 N.Y.2d at 325, 429 N.E.2d at 1051, 445 N.Y.S.2d at 422.

133. 88 Mich. App. at 163, 276 N.W.2d at 544.

visitation after stepparent adoption. Neither court cited legislative history or other authority to support its interpretation of the statutes.¹³⁴

Attempts to ascribe notions of intent to a legislature in the absence of clear evidence of intent, or to rely on maxims of statutory construction, have produced some unique interpretations of grandparent visitation statutes. This is particularly the case when courts seek to terminate grandparent visitation rights after stepparent adoption. For example, the *Bikos* court interpreted language in the Michigan grandparent visitation statute which provided: “[i]f either the father or mother of an unmarried child is deceased, a parent of the deceased person may commence an action . . . for visitation.”¹³⁵ In denying visitation to a maternal grandparent whose grandchildren were adopted by their stepmother following their natural mother’s death, the court held that “once a child is adopted, the child has a parent,” and therefore, “the condition of the visitation statute that the child’s parent be deceased is not present as a matter of law, and the natural grandparent has no standing under the statute.”¹³⁶ Fortunately, this

134. *Id.* at 163-64, 276 N.W.2d at 544; *Sheppard*, 54 N.Y.2d at 325, 429 N.E.2d at 1051, 445 N.Y.S.2d at 422; *see also Smith* 303 So. 2d at 927 (without citation of legislative history, the court denied visitation after adoption to avoid partial repeal of effect-of-adoption provisions by visitation statute).

135. MICH. COMP. LAWS ANN. § 722.27a (West 1971) (repealed 1980), *construed in Bikos*, 88 Mich. App. at 160, 276 N.W.2d at 543.

136. 88 Mich. App. at 163, 276 N.W.2d at 544. Ironically, the court added that: “[t]his conclusion requires no sophisticated legerdemain. It follows from a straightforward reading of the statutes involved. To reach the opposite result, urged by plaintiff, would lead to some unusual situations which we doubt the Legislature intended.” *Id.*

It has been stated that:

[Grandparent visitation after stepparent adoption] was the problem that Michigan faced when a 1979 Court of Appeals decision (*Bikos v. Nobliski*, 88 Mich. App. 157 (1979)) was asked to interpret conflicting statutes dealing with this grandparent visitation statute and the Michigan Adoption Statute which provides as follows:

After entry of the order of adoption, there shall not be any distinction between the rights and duties of natural progeny and adopted persons, and the adopted person shall become an heir-at-law of the adopting parent or parents, and an heir-at-law of the lineal and collateral kindred of the adopting parent or parents. After entry of the order of adoption, the adopted person shall no longer be an heir-at-law of his or her natural parents, except that a right, title, or interest vesting before entry of the final order of adoption shall not be divested by that order. (MCLA 710.60).

The Michigan Court of Appeals in the *Bikos*, *supra*, case held that the Order of Adoption Statute took precedence over the Grandparent Visitation Statute which effectively made the natural grandparents of a minor child

interpretation has been superseded by statute,¹³⁷ and has been articulated by only one other judge.¹³⁸

C. *The Derivative Right Theory*

Some courts have used the derivative right theory in analyzing the issue of grandparent visitation after stepparent adoption. According to this theory, grandparent visitation statutes are derivative—grandparents only have rights through the parents. Thus, if the parents' rights are terminated by operation of the effect-of-adoption statute, grandparent visitation rights are also terminated.¹³⁹ This reasoning fails because grandparent visitation statutes usually confer independent rights on the grandparents, not simply derivative rights.¹⁴⁰ Grandparent rights therefore cannot simply be dismissed, like derivative rights, by operation of the effect-of-adoption statutes.

The notion that grandparent visitation rights are derivative probably stems from the fact that at common law grandparents had no visitation rights.¹⁴¹ In addition, the earliest statutes addressing the

who was adopted by a stepparent following the death of the natural parent, no longer the legal grandparent of that child. Obviously, this conflict created harsh results and in my opinion a tremendously unjust dilemma for grandparents throughout the State of Michigan.

Hearings, *supra* note 87, at 100 (statement of Richard S. Victor).

137. *See supra* notes 46 & 100 and accompanying text. For a general discussion of Michigan law addressing grandparent visitation, see *Hearings*, *supra* note 87, at 98-101 (statement of Richard S. Victor).

138. *Mimkon*, 66 N.J. at 439-42, 332 A.2d 199, 206-07 (Clifford, J., dissenting) ("I would conclude that upon the adoption of Jill by defendant Donald Ford's second wife, Adele, the infant thereupon had two 'parents' in every significant sense of the word. Therefore, the first condition precedent for triggering the statutes no longer existed and an action thereunder could not lie.").

139. *See, e.g., In re Gardiner*, 287 N.W.2d 555, 558 (Iowa 1980); *D.Y.F.S. v. D.T.*, 171 N.J. Super. 520, 410 A.2d 79 (Hudson County Ct. 1979); *J. v. M.*, 157 N.J. Super. 478, 385 A.2d 240 (App. Div. 1978); *In re M.*, 140 N.J. Super. 91, 355 A.2d 211 (Ch. Div. 1976). The court in *In re Nicholas*, ___R.I.___, 457 A.2d 1359, 1360 (1983), found that:

[The effect-of-adoption] provision makes it clear that the *parents* and those claiming under or through the parents whose rights are terminated shall have no further legal rights in respect to the adopted child. Consequently, the decision of the natural father not to contest the adoption petition was conclusive upon him and upon all who might claim by, through, or under him. This result would also be applicable to the grandfather.

See also Foster & Freed, Vagaries and Vicissitudes, *supra* note 21, at 659.

140. *See, e.g., Mimkon*, 66 N.J. at 431-32, 332 A.2d at 201-02 ("The [grandparent visitation] statute creates an independent action in the grandparent. In no way does the right asserted by [the grandparent] depend on continued relations through the deceased daughter."); *Foster & Freed, Vagaries and Vicissitudes*, *supra* note 21, at 659.

141. *See, e.g., In re Reiss*, 46 La. Ann. 347, 15 So. 151 (1894) (obligation of parents to allow grandparents to visit grandchild is a moral, not legal obligation).

issue required that one or both parents be deceased as a prerequisite to court ordered grandparent visitation.¹⁴² However, these historical developments are of little value to present day analysis. The common law concept of nonrecognition of grandparent visitation rights has been rendered largely obsolete by grandparent visitation statutes enacted in forty-nine states.¹⁴³ Moreover, the derivative nature of early statutes has given way to statutes authorizing visitation in many situations other than death of a parent. In fact, only Ohio limits grandparent visitation to situations where a parent is deceased.¹⁴⁴ As the survey of state grandparent visitation statutes indicates, the remaining forty-eight state statutes create independent grandparent visitation rights in a wide variety of other circumstances.¹⁴⁵

Thus, to the extent that the concept of derivative rights has any continuing relevance in the area of grandparent visitation rights, it is limited to the state of Ohio. Nonetheless, the Supreme Court of Iowa, in *In re Gardiner*,¹⁴⁶ failed to recognize the inapplicability of the concept of derivative rights. *Gardiner* involved maternal grandparents who sought visitation with their grandchild after the child's mother died, and the child was adopted by the father's brother and sister-in-law. The court held that it was not authorized to order visitation because of the operation of the effect-of-adoption provisions.¹⁴⁷ Refusing to recognize the independent nature of grandparent visitation rights, the court stated:

The grandparents' status as grandparents, and hence their right to visitation under § 598.35, arises by virtue of the child's relationship to the natural parents. When adoption terminates natural parents' rights in the child and thereby removes the basis for the grandparents' rights, the grandparents' rights also end.¹⁴⁸

Reiss is generally cited as the seminal case regarding grandparent visitation rights at common law. See also *Odell v. Lutz*, 78 Cal. App. 2d 104, 106, 117 P.2d 628, 629 (1947); *Gardiner*, 287 N.W.2d at 556 ("Adoption was unknown at common law; it is statutory."); *Mimkon*, 66 N.J. at 430-32, 332 A.2d at 201; *Deweese v. Crawford*, 520 S.W.2d 522, 525 (Tex. Civ. App. 1975). For a discussion and analysis of the common law, see *Zaharoff*, *supra* note 21, at 165-73; *Gault*, *Statutory Grandchild Visitation*, 5 ST. MARY'S L.J. 474 (1973); Note, *One Step Closer*, *supra* note 21, at 388-92.

142. Foster & Freed, *The Child's Right*, *supra* note 21, at 40.

143. See *supra* notes 22-31 and accompanying text.

144. See *supra* note 31 and accompanying text.

145. See *supra* notes 22-31 and accompanying text.

146. *Gardiner*, 287 N.W.2d 555.

147. *Id.* at 556-58.

148. *Id.* at 558.

The court's holding is difficult to justify. This is particularly true in light of the fact that Iowa has moved far from the historical derivative grandparent visitation statutes, which conditioned visitation on the death of a parent. Currently one of the broadest in any of the fifty states, the Iowa statute gives grandparents the right to petition for visitation when the parents' marriage is dissolved, a parent is deceased, or the child is placed in a foster home.¹⁴⁹

By contrast, several New Jersey courts have recognized the inapplicability of the concept of derivative rights to grandparent visitation statutes. For example, in *Mimkon v. Ford*,¹⁵⁰ a case dealing with grandparent visitation after stepparent adoption, the court held that the New Jersey grandparent visitation statute, by allowing grandparents to apply for visitation privileges when the parents are deceased, divorced, or separated "changes the common law rule as to the rights of grandparents" and "creates an independent action in the grandparent," which is in no way derivative.¹⁵¹

Similarly, in *Bennett v. Bennett*,¹⁵² the court held that the concept of derivative rights is irrelevant to a determination of the scope of the visitation rights of a paternal grandmother with her granddaughter after the child's parents are divorced. Rather, the court stated that the nature of the grandmother's visitation rights should be determined according to the best interest of the child.¹⁵³

By creating independent visitation rights in grandparents, it is clear that the current grandparent visitation statutes have altered

149. IOWA CODE ANN. § 598.35 (West 1981).

150. *Mimkon*, 66 N.J. 426, 332 A.2d 199.

151. *Id.* at 431-32, 332 A.2d at 201-02.

152. 150 N.J. Super. 509, 376 A.2d 191 (App. Div. 1977).

153. *Id.* at 513, 376 A.2d at 193. See also *New Jersey Div. of Youth and Family Servs. v. Torres*, 185 N.J. Super. 234, 447 A.2d 1372 (Camden County Ct. 1980), *aff'd*, 185 N.J. Super. 182, 447 A.2d 1343 (App. Div. 1982) (when grandparents and grandchildren have a close relationship, their rights exist independently of parental rights); *Globman v. Globman*, 158 N.J. Super. 338, 386 A.2d 390 (App. Div. 1978) (grandparent visitation rights exist independent of parental rights and create a presumption that visitation is in the child's best interest); *In re Nicholas*, ___R.I.___, 457 A.2d 1359 (1983). *Nicholas* involved a child born out of wedlock. The child's mother subsequently married a man who adopted the child. The child's natural father raised no objection to the adoption; the paternal grandfather sought visitation rights. The court held that to the extent the grandfather was claiming any rights under or through the father, i.e., derivatively, they were lost by operation of the effect-of-adoption statute when the rights of the child's father were terminated. Although visitation was denied because the statute authorized visitation only in very limited circumstances not present in the *Nicholas* case, i.e., under the Rhode Island grandparent visitation statute the grandfather would not have had visitation rights even in the absence of the adoption, the court recognized that the grandparent visitation statute created rights independent of the effect of adoption statute. *Id.*

the common law rules regarding grandparent visitation and have gone beyond the early derivative grandparent visitation statutes. Modern grandparent visitation statutes create rights independent of the natural parents. This is evidenced by the wide variety of circumstances under which courts may order visitation and is particularly evidenced in those statutes authorizing visitation after parental rights have been terminated.¹⁵⁴ Thus, the derivative rights concept is inapplicable when analyzing issues under current grandparent visitation statutes. As the analysis of the court in *Gardiner* illustrates, using the derivative right concept to resolve the conflict between effect-of-adoption and grandparent visitation statutes is confusing and indefensible.¹⁵⁵

D. *The Best Interest of the Child*

A final concept used by authorities to resolve the conflict between grandparent visitation and stepparent adoption statutes is, not surprisingly, the best interest of the child.¹⁵⁶ The applicability of the best interest of the child concept to an issue such as grandparent visitation after stepparent adoption would seem beyond dispute.¹⁵⁷ What is genuinely disputed, however, is whether grandparent visitation after stepparent adoption is in the best interest of the child.

Indeed, the best interest of the child issue appears to be at the heart of the controversy. None of the cases addressing the issue of grandparent visitation rights after stepparent adoption ground their decisions entirely on principles of statutory construction, classification, or derivative rights. Rather, the decisions ultimately focus on the policies behind the grandparent visitation statutes and effect-of-adoption provisions, and how those policies serve the best interest of the child.¹⁵⁸

Two well defined views have emerged from the debate and are reflected in the case law. One line of cases holds that stepparent

154. See *supra* note 27.

155. Accord Foster & Freed, *Vagaries and Vicissitudes*, *supra* note 21, at 659.

156. See *supra* note 22 and accompanying text.

157. See *infra* notes 159-97 and accompanying text. Judith Areen, Professor of Law, states:

As a general guide, I would urge adherence to that familiar standard of doing what is in the "best interests of the child." While it has been widely—and I would add appropriately—criticized for being too vague, the best interests standard does at least direct the focus of concern to the child who is the person likely to suffer most when there is a conflict between adult members of a family.

Hearings, *supra* note 87, at 73 (Statement of Professor Areen).

158. *Graziano*, 50 Ohio App. 2d at 94, 361 N.E.2d at 530; see also *infra* notes 159 and accompanying text.

adoption is one factor courts should consider as they make, on a case by case basis, the factual determination of what serves the best interest of the child.¹⁵⁹ These cases usually refer to the natural affection between grandparents and grandchildren and conclude that such relationships should not be terminated if they do not impede adoptive relationships or work against the best interest of the child. These decisions avoid any general judicial rules as to the child's best interest, and decide each case on its particular facts.

The other line of cases holds that, as a matter of law, the best interest of the child requires the termination of grandparent visitation rights upon stepparent adoption.¹⁶¹ Typically, these courts assert that the best interest of the child is served by totally insulating the adoptive family from all contact with the natural grandparents.¹⁶²

159. See, e.g., *Mimkon*, 66 N.J. 426, 332 A.2d 199; *Sheppard*, 54 N.Y.2d 320, 429 N.E.2d 1049, 445 N.Y.S.2d 420; *Graziano*, 50 Ohio App. 2d 83, 361 N.E.2d 525. In *Mimkon*, the New Jersey Supreme Court stated:

Where the grandchild has been adopted, it is proper, in considering the effect of a visitation order on the well-being of the child, to take into account the possibility that visitation by a particular grandparent might undermine the authority of the adoptive parents or otherwise create psychological conflict in the child. The policies underlying the adoption statute, although not categorically overriding those of the grandparent visitation statute, are to be taken into account in the exercise of judicial discretion in this area.

66 N.J. at 435, 332 A.2d at 205.

160. See, e.g., *Roquemore*, 275 Cal. App. 2d at 915, 80 Cal. Rptr. at 434; *In re Zook*, 62 Cal. 2d 492, 494-96, 399 P.2d 53, 56, 42 Cal. Rptr. 597, 600 (1965); *Lingwall v. Hoener*, 124 Ill. App. 3d 986, 464 N.E.2d 1248 (1984); *Mimkon*, 66 N.J. at 434-38, 323 A.2d at 203-05; *Layton v. Foster*, 95 A.D.2d 77, 78-79, 466 N.Y.S.2d 723, 724 (1983), *aff'd*, 61 N.Y.2d 747, 460 N.E.2d 1351, 472 N.Y.S.2d 916 (1984); *Sheppard*, 54 N.Y.2d at 326-29, 459 N.E.2d at 1052-53, N.Y.S.2d at 423-24; *Scranton v. Hutter*, 40 A.D.2d 296, 299, 399 N.Y.S.2d 708, 711 (1973); *Graziano*, 50 Ohio App. 2d at 87, 361 N.E.2d at 529-30; see also *Futral v. Henry*, 45 Ala. App. 214, 215, 228 So. 2d 827, 828 (1969); *Gardiner*, 287 N.W.2d at 558; *Globman*, 158 N.J. Super. at 345-49, 386 A.2d at 394-96; *Bennett v. Bennett*, 150 N.J. Super. 509, 512-13, 376 A.2d 191, 193 (App. Div. 1977).

161. See, e.g., *Poe v. Case*, 263 Ark. 488, 500, 565 S.W.2d 612, 614 (1978); *Woodson v. Kilcrease*, 7 Ark. App. 252, 257-58, 648 S.W.2d 72, 74 (1983); *In re K.A.M.*, 367 So. 2d 744 (Fla. Dist. Ct. App. 1979); *In re Schumacher*, 120 Ill. App. 3d 50, 52-53, 458 N.E.2d 94, 97 (1983); *Gardiner*, 287 N.W.2d at 557-59; *Browning v. Tarwater*, 215 Kan. 501, 506-07, 524 P.2d 1135, 1139-40 (1974); *Smith*, 321 So. 2d at 516; *Bikos*, 88 Mich. App. at 157-63, 276 N.W.2d at 544-45; *Aegerter v. Thompson*, 610 S.W.2d 308, 310 (Mo. App. 1980); *In re M.*, 140 N.J. Super. 91, 94-95, 355 A.2d 211, 213 (1976); *Levine v. Rodo*, 54 Misc. 2d 843, 845, 283 N.Y.S.2d 483, 486 (1967); *Acker v. Barnes*, 33 N.C. App. 750, 752, 236 S.E.2d 715, 716, *cert. denied*, 293 N.C. 360, 238 S.E.2d 149 (1977); *In re Fox*, 567 P.2d 985, 987 (Okla. 1977); see also *In re Nicholas*, 457 A.2d 1359 (R.I. 1983); *Ex parte Pepper*, 544 S.W.2d 836 (Tex. Civ. App. 1977); *Deweese*, 520 S.W.2d 522.

162. See also *Geri v. Fanto*, 79 Misc. 2d 947, 949-52, 361 N.Y.S.2d 984, 987-89 (Fam. Ct. 1974); *Graziano*, 50 Ohio App. 2d at 87, 361 N.E.2d at 529.

1. Rationales for Terminating Grandparent Visitation Rights

All courts have recognized that the policy imputed to the effect-of-adoption provisions¹⁶³ of strengthening the adoptive family is certainly an important one which sometimes justifies insulating the child from his or her natural family. Some authorities, however, feel that insulation is always necessary after adoption, including the stepparent adoption situation. These authorities argue that insulation is in the best interest of the child because it: (1) protects the parental authority of the adopting parent from outside interference; (2) avoids confusing the child with more than two sets of grandparents; (3) insulates the child from a parent who voluntarily gave the child up for adoption; (4) avoids exposing the child to existing animosity; and (5) facilitates the child's recovery from the trauma which necessitated the adoption. However, these considerations do not always apply in a stepparent adoption situation.

a. Protecting the adoptive family

One common justification for terminating the rights of the natural family is that termination is necessary to protect the relationship between the adopting parent and the child from interference which might undermine parental authority.¹⁶⁴ As the court in *Mimkon v. Ford*¹⁶⁵ pointed out, however, given the different roles played by parents and grandparents in the child's life, this rationale is far more compelling when applied to parents than it is when applied to grandparents. Grandparents usually have much less authority over a child than do parents. Thus, when grandparent visitation is allowed, children are not presented with potentially conflicting authorities since they know that their natural or adoptive parents are the final authority. As the court stated in *Mimkon*:

163. Several authorities claim that the original purpose and the effect of the adoption statute was, primarily, to resolve issues of inheritance. See, e.g., *Hearings, supra* note 87, at 75 (statement of Professor Areen); Presser, *The Historical Background of the American Law of Adoption*, 11 J. FAM. L. 443 (1971); Note, *One Step Closer, supra* note 21, at 393.

Unfortunately, though, a number of these statutes have not yet addressed the problem of what should happen when a custodial parent remarries and the new spouse adopts the child. Adoption statutes, you understand, generally cut off all legal ties to a child's biological parent and family. Although these statutes were aimed primarily at resolving issues of inheritance, a number of courts—mistakenly, in my view—have construed them to cut off the visitation rights of the grandparents as well. *Hearings, supra* note 87, at 75 (statement of Professor Areen).

164. *Gardiner*, 287 N.W.2d at 558; *Browning v. Tarwater*, 215 Kan. 501, 505-06, 524 P.2d 1135, 1139 (1974).

165. 66 N.J. 426, 332 A.2d 199 (1975).

Interference by a natural parent with the relationship between the child and the adopting parents introduces alternative and conflicting authority figures in the child's life, creating tremendous emotional tension in the child and ultimately threatening to undermine the authority of the adoptive parents and their ability to make parental decisions. Grandparents ordinarily play a very different role in the child's life; they are not authority figures and do not possessively assert exclusive rights to make parental decisions. At best, they are generous sources of unconditional love and acceptance, which complements rather than conflicts with the roles of the parents.¹⁶⁶

Thus, grandparent visitation involves a much lesser risk 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 continued contact by the natural parent. To this extent, grandparent visitation does not clash with the policies embodied in the adoption statute.

The conclusion of the *Mimkon* court that grandparents play non-authoritative roles with respect to grandchildren is supported by several studies examining the roles of grandparents. Among these studies are two by Joan Robertson entitled *Grandmotherhood: A Study of Role Conceptions and Significance of Grandparents*. One study examined the role of grandmothers from the grandparents' perspective. The results indicated that eighty percent of the subjects described a "good" grandmother as one who did not interfere too much in her grandchildren's lives or parental upbringing.¹⁶⁷ The second study examined

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

167. Robertson, *Grandmotherhood: A Study of Role Conceptions*, 17 J. MARR. & FAM. 165 (1977) [hereinafter cited as Robertson, *Grandmotherhood*]. The Robertson study was designed to examine role conceptions of grandparents. The meaning of the role was investigated on both the personal and social dimension. These two variables were then correlated to form four role types: apportioned (those who scored high in both areas); remote (those who scored low in both areas); individualized (grandparents with high personal scores and low social scores); and symbolic (those with high social scores and low personal scores). The data reported in the text is based on the sample as a whole. *Id.* See also D. Zablotsky, *The Perceived Role of Great-Grandparenting* 13-16 (1982) (unpublished manuscript).

Research and literature dealing with grandfathers is lacking, possibly due to the fact that a much smaller sample size is available, because of the substantially disproportionate survival rate of women, and the statistically younger age of death for males. At least some researchers have suggested, however, that there are no distinctions between the way grandmothers and grandfathers are perceived by other family members. *Id.* at 18; see also Clavan, *The Impact of Social Class and Social Trends on the Role of Grandparents*, 27 FAM. COORDINATOR 351 (1978).

the role of grandparents as observed by grandchildren. This study found that grandchildren perceived the role of grandparents as different from and subordinate to parental authority.¹⁶⁸ According to the majority of young adult grandchildren participating in the study, the ideal grandparent was “one who loves and enjoys grandchildren, visits with them, shows an interest in them,” and “who helps grandchildren out when they can, when asked or needed.” In addition, respondents felt that the most ideal grandparent was loving and gentle, while the least ideal grandparent was one who served as a mediator between parent and child.¹⁶⁹

The conclusion that grandparent roles are nonauthoritative is also supported by a study conducted by Arthur Kornhaber and Kenneth C. Woodward.¹⁷⁰ According to that study, a grandparent's first role is that of ancestor model—future guide for the child's own grandpaternity. Later, a grandparent becomes a family historian and archivist. Finally, in close relationships, a grandparent becomes a friend or teacher.¹⁷¹ None of these grandparent roles are inconsistent with parents having ultimate authority regarding how the child is reared.

In addition, studies going beyond role conceptions and examining behavior suggest that grandparents recognize that the parents, not grandparents, are the significant authority figure in the child's life. For example, Robertson's study found that the three most reported activities engaged in by grandparents were babysitting (usually initiated by the parent), home recreational activities (usually initiated by the grandchild), and drop-in visits. Significantly, Robertson also found that grandmothers wished to engage in these activities more frequently with their grandchildren but failed to do so partially out

168. Robertson, *Significance of Grandparents: Perceptions of Young Adult Grandchildren*, 16 GERONTOLOGIST 137 (1976). The study was designed to examine grandchildren's perceptions of the degree of parental influence in their relationships with their grandparents; grandchildren's concept of the ideal grandparent; attitudes and expectations grandchildren hold regarding grandparents; grandchildren's perceptions of appropriate or expected grandparent behavior; and grandchildren's perceptions of their responsibilities toward grandparents. Data for this study were obtained from responses to a highly-structured group-administered instrument, and were measured by a series of Likert-type, range of choice, and yes/no items. The study population consisted of 86 young adult grandchildren ranging from ages 18 through 26. *Id.* at 137-38. Despite the age of the subject population, the study is relevant because of its reflective structure.

169. *Id.* at 139.

170. A. KORNHABER & K. WOODWARD, GRANDPARENTS/GRANDCHILDREN: THE VITAL CONNECTION (1981) (cited in *Hearings, supra* note 87, at 55-59 (statement of Dr. Arthur Kornhaber)). The study inquired into the nature of the relationship between grandparents and grandchildren. The data were based on interviews with over 1000 subjects, conducted over a period of seven years. *Hearings, supra* note 87, at 51, 56.

171. *Hearings, supra* note 87, at 57-58.

of fear that a high degree of interaction might be viewed by the parent as meddling, intrusive, or inappropriate. Additionally, Robertson found that grandparent-grandchild contact usually was initiated by the parents, possibly indicating that grandmothers interacted with their grandchildren only when it was sanctioned by the parent.¹⁷² According to Robertson, grandchildren also recognized that parents, as authority figures, determined the parameters of their relationship with their grandparents. Two-thirds of the participants in her study agreed that parents set the pace for grandparent-grandchild relationships. Twenty-two percent believed that parents make grandparent-grandchild interaction physically possible.¹⁷³

b. Consistent family structure

A second suggested justification for terminating grandparent visitation rights after adoption is that the insulation of the child from his natural grandparents is necessary to avoid confusing the child with more than two sets of grandparents.¹⁷⁴ This justification, however, ignores the fact that a healthy relationship between the child and the natural grandparents, and other members of the natural family, may be firmly established by the time the child is adopted. It may be in the child's best interest to continue a healthy relationship with his natural grandparents rather than sever that relationship for the sake of consistency. As stated by Judge Yetka in his concurring opinion in *Petition of Niskanen*:

I fully understand that in many, if not most, adoptions it is deemed wise that the natural parents and grandparents have no knowledge as to who the adoptive parents are. However, in a situation such as this, where the natural parents and grandparents do in fact know where their children are and who has adopted them, I would think it appropriate that the juvenile court have authority as a part of its adoption

172. See Robertson, *Grandmotherhood*, *supra* note 167; D. Zablotsky, *supra* note 167, at 16-17.

173. Robertson, *Grandmotherhood*, *supra* note 167.

174. See, e.g., *Bikos*, 88 Mich. App. at 163-64, 276 N.W.2d at 544. The court claimed that without termination of grandparent visitation rights after stepparent adoption, "a grandchild could easily end up with three sets of grandparents. If both natural parents died this could result in four sets of grandparents." *Id.* The latter situation, however, would involve a stranger rather than stepparent adoption. See also *In re Adoption of a Child*, 140 N.J. Super. 91, 355 A.2d 211 (Ch. Div. 1976) (visitation by grandparents should be derivative, otherwise the child could have up to six people competing for his company; his father, mother, and two sets of grandparents).

decree to include a provision giving the grandparents visitation rights.¹⁷⁵

Moreover, having several grandparents presumably would be less confusing when a child is adopted by a stepparent.

c. Protecting children placed for adoption

Termination of grandparent visitation rights is also supported by the belief that because the natural parents caused the child to be adopted, any contact between the natural and adoptive family would be detrimental to the child.¹⁷⁶ This may be a valid justification for terminating grandparent visitation when natural parents who are unable or unwilling to care for the child permit adoption by unrelated persons. In cases of stepparent adoption, however, children are not adopted by strangers. Rather, the adoption is generally preceded by the death of a natural parent or dissolution of the parents' marriage followed by the remarriage of the custodial parent.¹⁷⁷ Under these

175. *In re Niskanen*, 301 Minn. 53, 57, 223 N.W.2d 754, 757 (1974) (Yetka, J., concurring); *See also* New York *ex rel.* Sibley v. Sheppard, 54 N.Y.2d 320, 429 N.E.2d 1049, 445 N.Y.S.2d 420 (1981). In *Sheppard*, the New York Court of Appeals stated:

An adopted child may not in all respects be isolated from his or her natural family. Some may perceive an inconsistency in the termination of some rights, but not others, between the adoptive child and the natural family. If such exists, the desire for consistency in the law should not of itself sever the bonds between the child and the natural relatives.

Id. at 326, 429 N.E.2d at 1052, 445 N.Y.S.2d at 423. Additionally, in *Layton v. Foster*, 61 N.Y.2d 747, 460 N.E.2d 1351, 472 N.Y.S.2d 916 (1984), *aff'g* 95 A.D.2d 77, 466 N.Y.S.2d 723 (1983), the New York Court of Appeals stated:

Essentially, the problem arises out of the desire of the mother and adopted father that the child not be faced with the fact that he has three sets of grandparents and thus possibly have brought home to him his adoptive status. That, however, is a problem inherent in the legislative policy itself and absent evidence of exacerbation of the problem by the grandparents, furnishes no basis for denial of visitation by them with the child.

Id. at 749-50, 460 N.E.2d at 1352, 472 N.Y.S.2d at 917 (citation omitted).

176. *See, e.g., Gardiner*, 287 N.W.2d at 558.

177. *See, e.g., Wilson v. Wallace*, 274 Ark. 48, 622 S.W.2d 164 (1981) (remarriage of natural mother after death of natural father); *Woodson v. Kilcrease*, 648 S.W.2d 72 (Ark. Ct. App. 1983) (remarriage of natural mother after divorce and subsequent death of natural father); *Roquemore v. Roquemore*, 275 Cal. App. 2d 912, 80 Cal. Rptr. 432 (1969) (remarriage of natural mother after death of natural father); *Houston v. Houston*, 156 Ga. App. 47, 274 S.E.2d 91 (1980) (remarriage of natural mother after divorce from and death of natural father) (superseded by statute, *see supra* note 43); *Lingwall v. Hoener*, 124 Ill. App. 3d 986, 464 N.E.2d 1248 (1984) (remarriage of natural mother after divorce from natural father); *In re Schumacher*, 120 Ill. App. 3d 50, 458 N.E.2d 94 (1983) (remarriage of natural mother after dissolution of marriage to natural father);

circumstances, the policies behind insulating the child from his natural family in cases of stranger adoption may be inapplicable.

Unfortunately, some courts have failed to realize the distinction between stepparent and stranger adoptions. For example, in *In re Gardiner*,¹⁷⁸ the Supreme Court of Iowa held that the rights created by the Iowa grandparent visitation statute were terminated by the effect-of-adoption statute and that, therefore, the adoption court had no power to authorize grandparent visitation.¹⁷⁹ The court justified its decision by claiming, "that a parent gives a child in adoption does not necessarily mean the parent is evil. Many parents are compelled to do so by dire circumstances yet, except for the adopter's spouse, adoption 'terminates any parental rights.'"¹⁸⁰

The court correctly identified the policy behind the statute, but ignored the significant fact that the child's natural mother had died.¹⁸¹ She had never given her child for adoption, for reasons "evil" or otherwise. The *Gardiner* court's failure to realize the significance of the fact that the child's mother died led to a number of ironic results, which illustrate the need to distinguish between stepparent and stranger adoption. After the death of his wife, the natural father had given up his parental rights. The child was adopted by her father's brother, thus creating a situation similar to a stepparent adoption. Yet the maternal grandparents of the child were denied visitation, while the family of the natural parent who gave up his parental rights received unrestricted visitation with the child.¹⁸² In contrast, the *Mimkon* court¹⁸³ recognized the distinction between stranger and stepparent adoptions. That court relied upon this dis-

Browning v. Tarwater, 215 Kan. 501, 524 P.2d 1135 (1974) (remarriage of natural mother after death of natural father); Dripps v. Dripps, 366 So. 2d 544 (La. 1978) (remarriage of natural mother after death of natural father); *Bikos*, 88 Mich. App. 157, 276 N.W.2d 541 (remarriage of natural father after death of natural mother); Aegerter v. Thompson, 610 S.W.2d 308 (Mo. 1980) (remarriage of natural mother after dissolution of marriage to natural father); *Mimkon*, 66 N.J. 426, 332 A.2d 199 (remarriage of natural father after divorce from and death of natural mother); Layton v. Foster, 61 N.Y.2d 747, 460 N.E.2d 1351, 466 N.Y.S.2d 723 (1984) (remarriage of natural mother after divorce from natural father); Graziano v. Davis, 50 Ohio App. 2d 83, 361 N.E.2d 525 (1976) (remarriage of natural mother after death of natural father); Leake v. Grissom, 614 P.2d 1107 (Okla. 1980) (remarriage of natural mother after divorce from natural father); *Pepper*, 544 S.W.2d 836 (remarriage of natural mother after divorce from natural father); Dewese v. Crawford, 520 S.W.2d 522 (Tex. Civ. App. 1975) (remarriage of natural mother after divorce from and death of natural father).

178. 287 N.W.2d 555 (Iowa 1980).

179. *Id.* at 556.

180. *Id.* at 558.

181. *See id.* at 556.

182. *Id.*

183. 66 N.J. 426, 332 A.2d 199 (1975).

inction in permitting grandparent visitation after stepparent adoption.¹⁸⁴

d. Animosity

A fourth argument offered by supporters of termination is that it is necessary to avoid exposing the child to tension caused by animosity between the natural grandparents and the adopting parent.¹⁸⁵ The problem of animosity between the custodial parent and the noncustodial parent is not limited to situations involving grandparent visitation after stepparent adoption. Foster and Freed emphasize that one of the most controversial issues in visitation cases generally has been determining the proper weight courts should give to the existence of animosity.¹⁸⁶ Foster and Freed also point out that courts deciding

184. The *Mimkon* court noted:

[The effect of the adoption statute 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 defendants' contention that the adoption statute was intended to protect the relationship between the adopted child and the adopting parents from interference by the natural parents is undeniably sound. The natural parents caused the child to be placed in a position of adoptability; they can be most detrimental to the child's well-being if permitted to interfere in the adoptive home. That is why the judgment of adoption terminates all relationships between the child and his natural parents. The case before us, however, presents an entirely different situation—one which, perhaps, is far less common—that of a child born to parents later divorced, custody in the natural mother until death and then custody in the father, remarriage of the father, and an application by his new wife to adopt the child. This is not a case in which the child was "placed for adoption" by strangers, nor did the adoption involve transfer of physical custody of the child. In such a case, outside the zone of primary concern of the Legislature in enacting [the adoption statute], the policy of insulating the adoptive child from his natural parents is not so clearly compelling as it would be in other situations.

Id. at 434-35, 332 A.2d at 203 (citations omitted).

185. See, e.g., *Wilson v. Wallace*, 274 Ark. 48, 50, 622 S.W.2d 164, 166 (1981); *Bikos*, 88 Mich. App. at 166 n.6, 276 N.W.2d at 545 n.6; *Mimkon*, 66 N.J. at 438-39, 332 A.2d at 205-06 (Sullivan, J., concurring); *Geri v. Fanto*, 79 Misc. 2d 947, 951, 361 N.Y.S.2d 984, 988 (1974); *Hearings, supra* note 87, at 6 (statement of Dr. Andre Derdeyne) (citing A. FREUD, A. SOLNIT & J. GOLDSTEIN, *BEYOND THE BEST INTERESTS OF THE CHILD* (1973)).

If the parent who opposes contact with a grandparent is the child of that grandparent, by contrast, my sense is that the presumption should be against visitation. Why do I advocate a difference in result depending on which parent opposes? Because both presumptions reflect the common standard of allowing a parent to decide whether or not his parents should see his child. This standard in turn is a way of minimizing interference in a parent's rearing of his child, even by a former spouse.

Hearings, supra note 87, at 78 (statement of Professor Areen).

186. Foster & Freed, *Vagaries and Vicissitudes, supra* note 21, at 660-62.

this issue in the absence of statutory guidance hold that the custodial parent's opposition to visitation is sufficient reason to deny such visitation. On the other hand, where a party is entitled to visitation rights under a state statute, courts have generally held that the existence of animosity also does not justify a denial of visitation rights. Rather, animosity is one of several factors courts consider in awarding visitation.¹⁸⁷

Given that forty-nine states recognize grandparent visitation rights,¹⁸⁸ the approach which views animosity as one of the several relevant factors should apply. In cases involving stepparent adoption, this approach is desirable for several reasons. First, it comports with the generally accepted notion that the custodial parent should not have veto power over visitation, because decisions made out of bitterness may not be in the child's best interest. Second, it allows the court, particularly one served by professional social workers, to inquire into the cause of animosity and propose solutions, which may lead to conciliation. Finally, a possible incentive to express enmity is eliminated when animosity alone will not result in a denial of visitation.¹⁸⁹

e. Creating a stable environment

A final reason given in support of termination is that grandparent visitation after stepparent adoption will destabilize the child's life

187. *Id.*

188. *See supra* notes 22-31 and accompanying text.

189. Amadio & Deutsch, *Open Adoption*, *supra* note 5, at 77-78; Foster & Freed, *Vagaries and Vicissitudes*, *supra* note 21, at 660-62. Professor Areen has further stated:

I acknowledge that forced visitation may have very negative consequences for a child. But I also believe this proposed cure may be worse than the original problem. Thus as Judge Dembitz has observed, "the disquiet that may attend court ordered visitation must be weighed against the child's needs for the psychological assets of the parents and the child's feeling of confusion and rejection that may follow the disappearance of the noncustodial parent." Moreover, as Professor and Mrs. Strauss have written: ". . . [T]he social science data to support the proposition that a single official parent is preferable to two seems remarkably weak. . . . To be the child of a mother and father who dislike one another is, to be sure, an unfortunate life experience; and parents who would subject their children to conflicting loyalties, whether or not they remain married, are less than adequate to the task. Nonetheless, given a child with existing relationships to both, we know of no studies which show that the legal death of one parent, the complete subordination of the child to the other's possibly distorted view, is invariably the preferable step for its future development.

Hearings, *supra* note 87, at 81 (statement of Professor Areen).

and delay his recovery from the shock of the death of his parent, the divorce of his parents, or whatever traumatic event precipitated the demise of his natural family.¹⁹⁰ This rationale is directly contradicted by several studies which have concluded that one of the nonauthoritative roles played by grandparents is that of supporter in times of crises. For example, Kornhaber concluded that grandparents give grandchildren “a sense of social immunity—a place to go apart from their parents and the peer group when they have problems. Grandparents offer grandchildren an emotional sanctuary from the everyday world.”¹⁹¹ Similarly, Dr. Andre Derdeyne, testifying before the House Subcommittee on Aging, stated that “grandparents may be in a unique position to provide their grandchildren a very necessary emotional haven” in certain circumstances surrounding divorce.¹⁹² Finally, Sylvia Clavan, in her study examining grandparent behavior, concluded that intervention in times of crises was one of the ways grandparents secured love and affection from their grandchildren.¹⁹³

Although not citing these studies, several courts addressing the issue of grandparent visitation after stepparent adoption have recognized the importance of maintaining contacts between grandparents and grandchildren during times of crises. To justify grandparent visitation after stepparent adoption, these courts have focused on the ordinary devotion of grandparents to grandchildren. Further, these courts have acknowledged that grandparents’ continuous love and attention help mitigate the feelings of guilt or rejection that a child might feel in cases of adoption following parental separation or death.¹⁹⁴

190. For example, in *Mimkon*, Judge Clifford noted in dissent: The tragedy visited upon a child by the death of a natural parent is too obvious to call for further expression here. Remarriage and adoption are wholesome steps toward reunification of a family unit broken by the unhappy event of death. Enforcing grandparental visitation over the parents’ objection in the circumstances before us can only frustrate defendants’ good-faith efforts to reconstruct the family and to bring stability into the daughter’s life.

66 N.J. at 441, 332 A.2d at 207.

191. *Hearings*, *supra* note 87, at 57 (statement of Dr. Kornhaber).

192. *Id.* at 71.

193. Clavan, *supra* note 167. In this article, Clavan noted that the behavior exhibited by grandparents has been interpreted and explained by researchers in a variety of ways. She concluded that grandparents’ motives can be reviewed in terms of role interpretation, psychological needs, external environmental influences, and conflicting priorities. *Id.* See also *Mimkon*, 66 N.J. at 437, 332 A.2d at 204-05; D. Zablotsky, *supra* note 167, at 11-12.

194. See, e.g., *Mimkon*, 66 N.J. at 437, 332 A.2d at 204-05.

f. Miscellaneous rationales

Several additional rationales have been advanced for terminating grandparent visitation rights after stepparent adoption. One state appellate court suggested that grandparent visitation after stepparent adoption would inhibit stepparent adoptions.¹⁹⁵ No evidence supports this contention. Rather, case law suggests that grandparents who would not otherwise oppose adoption are forced to contest them to insure visitation rights.¹⁹⁶

195. *In re Schumacher*, 120 Ill. App. 3d 50, 458 N.E.2d 94 (1983). In explaining its view that stepparent adoption terminates grandparent visitation rights, the court stated:

It is notable that before a court can enter an order for adoption, the court must find that the natural parents either consent or are unfit and that the adoption is in the best interest of the child. The original order for visitation by the [grandmother], entered in the dissolution action, implies a judicial determination that such visitation would be in the best interests of the Schumacher children. This finding would not be conclusive in a subsequent proceeding, contrary to [the grandmother's] argument, as orders concerning visitation are not final and are subject to modification upon a change in circumstances. However, the prior finding that contact with [the grandmother] was beneficial for the children might have suggested that adoption, which would have eliminated this contact, would not have been in the children's best interests.

Id. at 56, 458 N.E.2d at 99 (citations omitted).

196. *See, e.g., In re Nicholas*, ___R.I.___, 457 A.2d 1359 (1983). That case denied standing to a paternal grandfather who sought to intervene in the adoption of his illegitimate grandson by the natural mother's subsequent husband. The Rhode Island Supreme Court noted:

The grandfather's position in respect to the adoption is somewhat equivocal. He states in his brief that "[i]t is not his intention to necessarily prevent the adoption, but rather to participate in it so that the court can render a more intelligent decision which would hopefully provide for some visitation rights in the appellant."

Id. at ___, 457 A.2d at 1359. *See also In re K.A.M.*, 367 So. 2d 744 (Fla. Dist. Ct. App. 1979), where the court stated:

K.A.M. is five years old. Her parents died in an automobile accident three years ago. The appellees, the child's maternal aunt and her husband, have taken care of K.A.M. since that time under an order of guardianship. The guardianship order permitted appellants, the child's paternal grandparents, to have visitation rights. Appellees subsequently filed a petition to adopt K.A.M. Appellants opposed the adoption, not on grounds of the unfitness of appellees, but simply because they wished to maintain the status quo.

Id. at 744. In *Hearings*, *supra* note 87, Richard S. Victor notes that even an amended state statute does not eliminate the need to contest the adoption to preserve visitation rights:

[I]n 1980, the Michigan Child Custody Statute (MCLA 722.27) was amended to provide:

[That the court shall upon] petition consider the reasonable visitation of maternal or paternal grandparents and, if denied, shall

Another state supreme court suggested that grandparent visitation rights must be terminated after stepparent adoption to avoid imposing unrealistic conditions of visitation.¹⁹⁷ However, the fact that unreasonable conditions were imposed in a particular case suggests that visitation was not appropriate in that instance, and does not imply that grandparent visitation after stepparent adoption must always terminate as a matter of law.

2. *The Policy Behind Grandparent Visitation Statutes*

Grandparent visitation statutes are based on the assumption that contact between grandparents and grandchildren is in the best interest of the grandchild.¹⁹⁸ In fact, the benefits of a healthy grandparent-grandchild relationship already have been recognized in case law.¹⁹⁹

make a record of such denial.

On its face, one would think this amendment to the Michigan Child Custody Statute would solve the problems that grandparents would have when being denied visitation with their grandchildren. However, albeit the intent of the legislature was good, they placed this amended statute under a section of the Michigan laws which had a preamble. The preamble, or prerequisite to utilization of this amended statute, provided as follows:

If a *child custody dispute* has been submitted to a circuit court as an original action under this act or has arisen incidently from another action in a circuit court or a judgment of a circuit court, for the best interests of the child the court may: . . .

Therefore, in order for [grandparents] to attempt to utilize the statute which allows them to petition for consideration regarding visitation, there must either have been, or presently have, a child custody dispute involved. In the cases I have litigated, very rarely does a grandparent seek custody of their grandchild. They merely want visitation and, therefore, cannot avail themselves to the remedy which Michigan has provided.

Id. at 100-01 (statement of Richard S. Victor).

197. *Wilson v. Wallace*, 274 Ark. 48, 622 S.W.2d 164 (1981). In *Wilson*, paternal grandparents sought visitation after the child's natural father died and the child was adopted by the natural mother's subsequent husband. The lower court ordered visitation for the paternal grandparents, but prohibited the grandparents from referring to their deceased son in the child's presence, telling the child of her natural father, and referring to the child's original surname. Noting the situation's enmity, the Arkansas Supreme Court held that the adoption decree effectively terminated all legal relationships between the adoptee and her natural relatives. *Id.* at 50, 622 S.W.2d at 166.

198. *Mimkon*, 66 N.J. 426, 332 A.2d 199; *Sheppard*, 54 N.Y.2d at 420, 429 N.E.2d at 1053, 445 N.Y.S.2d at 424; *Graziano*, 50 Ohio App. 2d 83, 361 N.E.2d 525. For a full discussion on grandparent visitation statutes, including the issue of best interest of the child, see Foster & Freed, *The Child's Right*, *supra* note 21; Foster & Freed, *Vagaries and Vicissitudes*, *supra* note 21.

199. For instance, the court in *Mimkon* stated:

A very special relationship often arises and continues between grandparents and grandchildren. The tensions and conflicts which commonly mar relations between parents and children are often absent between those very

Sociological literature has documented and analyzed the benefits children receive from a healthy relationship with their grandparents.²⁰⁰ Contact with grandparents produces children who are rooted in and proud of their family and culture, emotionally secure, and highly socialized.²⁰¹ Additionally, interaction between grandparents and grandchildren mitigates ageism in children because older people love them, mitigates sexism because grandmothers and grandfathers do essentially the same thing, and eliminates fear of old age because grandparents serve as ancestor role models.²⁰² Finally, grandparents can give grandchildren "an emotional sanctuary from the everyday world."²⁰³ These findings are consistent with those of other experts on child development, who generally agree that it is important for children to maintain ongoing meaningful relationships.²⁰⁴

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

66 N.J. at 437, 332 A.2d at 204. See also *Browning v. Tarwater*, 215 Kan. 501, 508, 524 P.2d 1135, 1141 (1974), where Judge Fontron noted in dissent: "An adoption cannot alter or repeal the biological grandparent grandchild relationship. That relationship persists as a rule of nature no matter how much a court may strain to circumvent it."

200. See, e.g., A. KORNHABER & K. WOODWARD, *GRANDPARENTS/GRANDCHILDREN: THE VITAL CONNECTION* 1-48 (1981); Clavan, *The Impact of Social Class and Social Trends on the Role of Grandparents*, 27 *FAM. COORDINATOR* 351 (1978); Robertson, *Significance of Grandparents*, 16 *GERONTOLOGIST* 137 (1976); Robertson, *Grandmotherhood*, *supra* note 167. *Contra Grandparent Visitation Rights*, *supra* note 21, at 300 ("The Literature on the Significance of the grandparent-grandchild relationship is . . . devoid of conclusive findings.").

201. *Hearings*, *supra* note 87, at 57 (statement of Dr. Kornhaber).

202. *Id.*

203. *Id.* For a critique of Kornhaber's view, see Ingulli, *Grandparent Visitation Rights*, *supra* note 21, at 300-01.

204. See, e.g., *Hearings*, *supra* note 87, at 74 (statement of Professor Areen) ("Any presumption in favor of continued contact should be strengthened, moreover, in my view, when there is evidence that the grandchild has established a relationship with a particular grandparent."); accord Foster & Freed, *The Child's Right*, *supra* note 21, at 45. Foster & Freed state that:

Family system psychiatrists and psychologists study the entire family constellation in order to see its interrelationships. This approach is reflected in a short volume entitled *New Trends in Child Custody Determinations*, prepared by a committee of the Group for the Advancement of Psychiatry. The study, and the authorities cited in it, demonstrate the child's urgent need for the stability and continuity of meaningful relationships. If the best interests of children is a meaningful legal concept, it is clear that it is sound policy to nurture, rather than to sever, close relationships.

3. Practical Considerations

Several judges and commentators have suggested that courts have denied grandparent visitation after stepparent adoption because they are reluctant to perform a best interest analysis. This reluctance may stem from a judicial noninterventionist attitude, or insufficient judicial resources to perform a best interest analysis. However, a best interest analysis for grandparent visitation is similar to an analysis for custody, visitation, and adoption.²⁰⁵ Indeed, many authorities have suggested several relevant factors useful in determining whether contact with natural grandparents subsequent to a stepparent adoption should be allowed. These factors include: a prior relationship between the adopted child and the natural grandparent; mutual respect and affection between the child and the natural grandparent; animosity between the natural grandparent and the stepparent; the age of the child; the health of the child and the parties; and the desires of the child.²⁰⁶

Id. (citing GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, *NEW TRENDS IN CUSTODY DETERMINATIONS* 146-47 (1980)). See also Wallerstein & Kelly, *The Effect of Parental Divorce: The Adolescent Experience*, in 3 *THE CHILD IN HIS FAMILY: CHILDREN AT PSYCHIATRIC RISK* 479 (E. Anthony & C. Koupernik eds. 1974); Amadio & Deutsch, *Open Adoption*, *supra* note 5, at 65-70, 77-78 (citing Wallerstein & Kelly for proposition that following divorce, continued contact with biological parents can promote psychological adjustment of children); Foster & Freed, *Vagaries and Vicissitudes*, *supra* note 21, at 644 (citing J. Goldstein, A. Freud & A. Solnit, *BEYOND THE BEST INTERESTS OF THE CHILD* ch. 3 (1970)); Watson, *The Children of Armageddon: Problems of Custody Following Divorce*, 21 *SYRACUSE L. REV.* 55 (1969). Foster and Freed have argued that visitation rights should be extended to anyone having a meaningful relationship with the child: "There is no psychological justification for a limitation of non-parental visitation rights. Although the grandparent-grandchild relationship is the major example of a 'meaningful relationship' it is not the only one. Other relatives, neighbors, or even so-called 'strangers,' may be parties to such a relationship." Foster & Freed, *The Child's Right*, *supra* note 21, at 40. Some legislatures have codified this policy in their visitation statutes. For a summary of these statutes, see *id.*; Foster & Freed, *Vagaries and Vissitudes*, *supra* note 21, at 653; Zaharoff, *supra* note 21, at 165 n.2.

205. Victor suggests that allowing grandparents to petition for visitation after stepparent adoption will actually reduce the burden on the court. He theorizes that the ability of grandparents to seek court enforced visitations pursuant to legislative enactments creates incentives for the legal custodian and the grandparents to reconcile and to correct wrongs or injustices which may have been committed. *Hearings*, *supra* note 87, at 94-95 (statement of Richard S. Victor).

206. See ALASKA STAT. § 25.24.150(c) (1984); CAL. CIV. CODE § 197.5(b) (West 1982); CONN. GEN. STAT. ANN. §§ 46b-59 (West Supp. 1985); ME. REV. STAT. ANN. tit. 19, § 214(6) (Supp. 1984); FLA. STAT. ANN. § 61.13(2)(b)2c (West Supp. 1985); *Hearings*, *supra* note 87, at 106-08 (statement of Richard S. Victor); *id.* at 123-25 (statement of Doris Jones Freed, Chairperson, Committee on Child Custody, Section of Family Law); Zaharoff, *supra* note 21, at 189-203; Note, *Visitation Rights of Grandparent over the Objection of a Parent: The Best Interests of the Child*, 15 *J. FAM. L.* 51, 59-73 (1977).

IV. CONCLUSION: THE RESOLUTION OF THE CONFLICT

The apparent conflict between grandparent visitation statutes and effect-of-adoption provisions and the debate over the propriety of grandparent visitation after stepparent adoption are best resolved by applying the relevant statutes and awarding visitation on a case by case basis.²⁰⁷ The case by case approach recognizes that judicial discretion must be used to apply both the effect-of-adoption provisions and grandparent visitation statutes to serve the best interest of the child.²⁰⁸ Only the case by case approach allows the court the discretion to award grandparent visitation after stepparent adoption when it is in the best interest of the child, and to deny grandparent visitation when it is not in the child's best interest.²⁰⁹

The case by case approach also allows the court to consider the following social realities surrounding grandparent visitation after stepparent adoption. First, grandparent visitation after stepparent adop-

207. *Accord* Foster & Freed, *Vagaries and Vicissitudes*, *supra* note 21, at 660; Note, *Grandparents' Statutory Visitation Rights and the Rights of Adoptive Parents*, 49 BROOKLYN L. REV. 149, 169-71 (1982); Note, *One Step Closer*, *supra* note 21, at 399-400. In addition, Richard Victor asserts:

In no case do I believe that grandparental visitation is an absolute. Not all grandparents should be able to visit with their grandchildren. There may be many instances where in fact it would be detrimental to a child to be subjected to visitation with his or her grandparents given the proper factual setting. However, these decisions must be made on a case by case basis with one underlying theme or factor; and that is, *that the best interests of the child shall control.*

Hearings, *supra* note 87, at 95-96 (statement of Richard S. Victor) (emphasis in original)

208. *Accord Mimkon*, 66 N.J. 426, 332 A.2d 199. There, the New Jersey Supreme Court opined:

Where the grandchild has been adopted, it is proper, in considering the effect of a visitation order on the well-being of the child, to take into account the possibility that visitation by a particular grandparent might undermine the authority of the adoptive parents or otherwise create psychological conflict in the child. The policies underlying the adoption statute, although not categorically overriding those of the grandparent visitation statute, are to be taken into account in the exercise of judicial discretion in this area.

Id. at 437-38, 332 A.2d at 205. *See also Sheppard*, 54 N.Y.2d at 328, 429 N.E.2d at 1053, 445 N.Y.S.2d at 424 (best interests of the child means not impeding adoptive relationship).

209. *See Graziano*, 50 Ohio App. 2d at 90, 361 N.E.2d at 530, where the court stated:

We hold that where there is an adoption as herein stated, the application of [the grandparent visitation statute] and [the effect of adoption statute] should be applied on a case-by-case situation, giving the court power in its discretion to grant visiting rights or withhold visiting rights, with the criteria stated, in "the best interest of the child."

tion can be in the best interest of the child. If so, a healthy relationship between grandparents and grandchildren should be allowed to continue. Second, automatic and permanent termination of all contact between grandparents and grandchildren often works against the best interest of the child. An arbitrary severance of such a relationship may deny a child an important emotional sanctuary during a traumatic time. Third, families created by stepparent adoptions often do not need complete insulation from natural grandparents. In stepparent adoptions, children are not placed for adoption by strangers, nor does the adoption involve the transfer of physical custody of the child. Also, grandparents often play nonauthoritarian roles in the child's life and, consequently, do not generally pose a threat to parental authority. In addition, the case by case approach comports with the generally accepted view that neither consistent family structure nor the existence of animosity should be the controlling factor in decisions involving grandparent visitation.

Finally, the case by case approach is based on the only legal concept useful in an analysis of grandparent visitation rights after stepparent adoption—the best interest of the child. This approach avoids reliance on the plain meaning of statutory language and legislative intent, in the absence of evidence that state legislatures actually considered the issue of grandparent visitation after stepparent adoption when enacting grandparent visitation statutes and effect-of-adoption provisions. Similarly, it avoids reliance on a system of statutory classification which cannot effectively classify the vast majority of state adoption statutes, which address both status and succession issues. Finally, the approach avoids reliance on derivative rights. Such reliance has been rendered largely obsolete and inapplicable by grandparent visitation statutes which do not limit grandparent visitation to cases involving the death of a parent.

