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Koshko v. Haining: Does a Heightened Standard for Grandparent Visitation Really Protect Children's Best Interests?

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KOSHKO v. HAINING: DOES A HEIGHTENED STANDARD FOR GRANDPARENT VISITATION REALLY PROTECT CHILDREN'S BEST INTERESTS?

In *Koshko v. Haining*,[1] the Court of Appeals of Maryland articulated a "best interests plus" standard for visitation determinations under the Maryland Grandparent Visitation Statute.[2] This standard requires courts to find, as a threshold matter, parental unfitness or exceptional circumstances suggesting current or future harm to the child if visitation is denied before courts may analyze the child's best interests.[3] The court's standard is properly aimed at strengthening the fundamental right to parent, but it does not adequately discourage litigation that is detrimental to children.[4] Because trial courts need some flexibility in making visitation determinations, the *Koshko* court's "best interests plus" standard is best applied to the Maryland Grandparent Visitation Statute as a judicial gloss.[5] While the Maryland General Assembly need not codify the court's holding, the legislature could strike a better balance between parents' liberty interests and the best interests of children by requiring mandatory mediation of third party visitation disputes.[6]

I. The Case

John and Maureen Haining are the parents of Andrea Koshko.[7] Andrea and her husband, Glen Koshko, are the custodial parents of three minor children.[8] In October 2003, following a dispute between Maureen Haining and Glen Koshko, the Koshkos informed the Hainings that they would no longer be permitted to see their grandchildren.[9] This particular conflict was the latest manifestation of long-standing tension between Andrea and her parents.[10]

Following several turbulent years in her parents' home, Andrea left Middletown, New Jersey at age eighteen to live with her boyfriend

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1. 398 Md. 404, 921 A.2d 171 (2007).
2. *See id.* at 444–45, 921 A.2d at 195.
3. *Id.*
4. *See infra* Part IV.A.
5. *See infra* Part IV.B.
6. *See infra* Part IV.C.
7. *Koshko*, 398 Md. at 408, 921 A.2d at 173.
8. *Id.*
9. *Id.* at 409–10, 921 A.2d at 174.
10. *Id.* at 408, 921 A.2d at 173.

in Florida.[11] In 1994, after being abandoned by her boyfriend, a pregnant Andrea returned to New Jersey to live with the Hainings and gave birth to a daughter, Kaelyn.[12] Until 1997, Andrea raised Kaelyn in her parents' home, where they took an active role in Kaelyn's care.[13]

While living with the Hainings, Andrea became romantically involved with Glen Koshko.[14] Andrea and Kaelyn eventually moved to Glen's home in nearby Point Pleasant, and Andrea and Glen married in 1998.[15] While the Hainings and the Koshkos resided in New Jersey, Maureen Haining visited her granddaughter often.[16] In 1999, the Koshkos moved to Baltimore County, Maryland and subsequently had two more children.[17] Despite their geographical separation, the Hainings and Koshkos visited each other monthly, and the Hainings and their grandchildren exchanged telephone calls and letters.[18]

After Glen's opposition to visitation in 2003, the Hainings made several unsuccessful attempts to reconcile with the Koshkos.[19] Four months passed largely without communication between the Koshkos and the extended Haining family.[20] Finally, in early 2004, in response to a letter from the Hainings' attorney suggesting mediation, the Koshkos offered to allow the Hainings one visit with their grandchildren.[21] They left open the possibility of future visits.[22] However, the Hainings rejected this offer and demanded that they be able to resume regular visits with their grandchildren.[23]

When the Koshkos refused to accommodate this request, the Hainings filed a grandparent visitation petition in the Circuit Court for Baltimore County on April 19, 2004.[24] After a protracted period of motions and discovery, the trial judge ruled in favor of the Hainings.[25] The trial court concluded that the Hainings had rebutted the presumption in favor of the parents' determination of their children's

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11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.* Haley Koshko was born in 1999 and Aiden Koshko was born in 2002. *Id.*
18. *Id.* at 409, 921 A.2d at 173–74.
19. *Id.* at 409–10, 921 A.2d at 174. After Andrea confirmed with John Haining that she and Glen would no longer allow the Hainings to visit their grandchildren, John Haining threatened to come to Maryland and assault Glen. *Id.* at 410, 921 A.2d at 174.
20. *Id.* at 410, 921 A.2d at 174.
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*

best interests, and entered an order granting the petition for visitation upon a finding that visitation was in the grandchildren's best interests.[26] The Koshkos's motion for a new trial was denied, and they appealed to the Court of Special Appeals of Maryland.[27]

The Court of Special Appeals affirmed the trial court's decision.[28] In reaching its conclusion, the court rejected the Koshkos's argument that the Maryland Grandparent Visitation Statute (the GVS)[29] was unconstitutional.[30] The Court of Special Appeals relied on the Court of Appeals's decision in *Fairbanks v. McCarter*,[31] which held that an award of visitation under the GVS did not require a showing of exceptional circumstances given that a visitation decision is "'a considerably less weighty matter'" than a custody decision.[32] Therefore, the appellate court concluded that a trial court could grant an award of visitation without a threshold showing of harm to the grandchildren from the parents' visitation decision.[33]

On appeal, the Koshkos also argued that the trial court had misapplied the presumption favoring the parents' determination of their children's best interests.[34] The Court of Special Appeals rejected this argument, finding that the Hainings had presented sufficient evidence at trial to rebut the presumption in favor of the parents.[35] The Court of Appeals subsequently granted certiorari to decide (1) whether the GVS violates due process, given that it lacks an express rebuttable presumption in favor of parents' determinations of their children's best interests; and (2) whether due process requires a threshold finding of parental unfitness or exceptional circumstances before a court may undertake the best interests inquiry.[36]

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26. *Id.*

27. *Id.* at 411, 921 A.2d at 174–75.

28. Koshko v. Haining, 168 Md. App. 556, 587, 897 A.2d 866, 884 (Ct. Spec. App. 2006).

29. MD. CODE ANN., FAM. LAW § 9-102 (LexisNexis 2006).

30. *Koshko*, 168 Md. App. at 559, 576–77, 897 A.2d at 868, 878.

31. 330 Md. 39, 622 A.2d 121 (1993), *overruled in part by Koshko*, 398 Md. 404, 921 A.2d 171.

32. *Koshko*, 168 Md. App. at 583–84, 897 A.2d at 882 (quoting *Fairbanks*, 330 Md. at 48, 622 A.2d at 126).

33. *Id.* at 583, 897 A.2d at 882.

34. *Id.* at 584–85, 897 A.2d at 883.

35. *Id.* at 585–86, 897 A.2d at 883–84.

36. *Koshko*, 398 Md. at 407–08, 412, 921 A.2d at 172–73, 175.

II. LEGAL BACKGROUND

In custody cases, the Court of Appeals has long presumed that parents act in their children's best interests.[37] However, prior to its decision in *Koshko*, the court decided third party visitation cases and third party custody cases using different standards.[38] Nevertheless, the relatively recent decision of the Supreme Court of the United States in *Troxel v. Granville*,[39] highlighting the parental liberty interest, has influenced the Maryland courts' adjudication of both custody and visitation cases.[40]

A. Maryland Courts Apply a Rebuttable Presumption Favoring Parents' Determinations as to Their Children's Best Interests in Custody Cases

Ross v. Pick[41] was the first Maryland case to clearly acknowledge that parents are presumed to act in their children's best interests. In *Pick*, the Court of Appeals recognized that mothers and fathers are equally entitled to custody of their minor children.[42] However, the court acknowledged that this right is not absolute, and that it may be lost when parental unfitness or exceptional circumstances make parental custody harmful to a child's best interests.[43] Thus, in deciding a custody dispute between a set of adoptive parents and a biological mother,[44] the *Pick* court applied a presumption that the child's welfare would be best served by his mother's care, but found that the adoptive parents had successfully rebutted this presumption, which entitled them to custody.[45]

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37. *See infra* Part II.A.
38. *See infra* Part II.B.
39. 530 U.S. 57 (2000) (plurality opinion).
40. *See infra* Part II.C.
41. 199 Md. 341, 86 A.2d 463 (1952).
42. *Id.* at 350–51, 86 A.2d at 468.
43. *Id.* at 351, 86 A.2d at 468.
44. There was an issue as to whether the Rosses were legally the adoptive parents of the child given that the West Virginia statute under which they had adopted the child did not explicitly require notice of the adoption to the child's biological mother because she was divorced and had not received custody of the child. *Id.* at 344–46, 350, 86 A.2d at 465–66, 468. To avoid having to determine the validity of the West Virginia statute, the court assumed that no proper adoption occurred and proceeded "as though the question were only one of custody unaffected by any question of adoption." *Id.* at 350, 86 A.2d at 468.
45. *Id.* at 351–52, 354, 86 A.2d at 468–70. In reaching this conclusion, the court considered the mother's alcohol use and lack of interest in church. *Id.* at 352–53, 86 A.2d at 469. The court further noted the fact that the adoptive parents had raised the child for nearly ten years and that the biological mother was married to a sailor who had no permanent home. *Id.*

In *Ross v. Hoffman*,[46] the Court of Appeals noted the *Pick* court's distinction between custody disputes involving a third party and a parent, and those involving two parents.[47] *Hoffman* concerned a custody dispute between Mrs. Ross and Mr. and Mrs. Hoffman, the "babysitters" who had cared for Mrs. Ross's daughter for more than eight years, during which time Mrs. Ross "became involved with drugs and had several abortions."[48] The court explained that the presumption that the child's best interests would be served by parental custody is overcome by a showing of parental unfitness or exceptional circumstances.[49] Thus, the court continued, before the best interests inquiry could be reached, a third party seeking custody had to rebut the parental presumption by showing parental unfitness or exceptional circumstances.[50]

Perhaps anticipating the difficulty lower courts would have with applying the heightened standard, the *Hoffman* court went on to enumerate a list of factors that bear on the determination of whether exceptional circumstances exist, including:

> [T]he length of time the child has been away from the biological parent, the age of the child when care was assumed by the third party, the possible emotional effect on the child of a change of custody, the period of time which elapsed before the parent sought to reclaim the child, the nature and strength of the ties between the child and the third party custodian, the intensity and genuineness of the parent's desire to have the child, [and] the stability and certainty as to the child's future in the custody of the parent.[51]

Although the *Hoffman* court attempted to reaffirm and clarify the standard set forth in *Pick* to govern third party custody cases,[52] contradic-

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46. 280 Md. 172, 372 A.2d 582 (1977).

47. *Id.* at 177–78, 372 A.2d at 586–87.

48. *Id.* at 179, 181–82, 372 A.2d at 587–89.

49. *Id.* at 178–79, 372 A.2d at 587. The *Hoffman* court determined that Mrs. Ross's long separation from her daughter, the child's strong emotional connection to the Hoffmans, and other facts constituted exceptional circumstances that would make Mrs. Ross's custody detrimental to the child's best interests. *Id.* at 192, 372 A.2d at 594.

50. *See id.* at 178–79, 372 A.2d at 587. Specifically, the court stated:

> [I]n parent-third party disputes over custody, it is only upon a determination by the equity court that the parent is unfit or that there are exceptional circumstances which make custody in the parent detrimental to the best interest of the child, that the court need inquire into the best interest of the child in order to make a proper custodial disposition.

Id. at 179, 372 A.2d at 587.

51. *Id.* at 191, 372 A.2d at 593.

52. *Id.* at 177–79, 372 A.2d at 586–87.

tory language in the opinion led to confusion among lower courts that persisted for nearly three decades.[53]

B. *Prior to* Koshko, *the Court of Appeals Viewed Visitation as a Form of Temporary Custody, but Did Not Apply the Best Interests Plus Standard Found in Custody Cases*

The Court of Appeals has also analyzed the standards governing third party visitation cases and has specifically examined legislation that permits grandparents the opportunity to seek visitation rights. In 1984, the General Assembly recodified the statute concerning grandparent visitation, placing it within the Family Law Article.[54] The current text of the GVS provides that "[a]n equity court may: (1) consider a petition for reasonable visitation of a grandchild by a grandparent; and (2) if the court finds it to be in the best interests of the child, grant visitation rights to the grandparent."[55]

In 1993, the Court of Appeals, in *Fairbanks v. McCarter*,[56] had occasion to interpret the GVS.[57] After their daughter's divorce, a set of maternal grandparents petitioned for visitation, seeking to compel the children's father to give them more time with the children.[58] The trial court emphasized the importance of considering the children's best interests and explained that exceptional circumstances must exist before a grandparent will be awarded custody over a parent, and that this rule may also apply in visitation cases.[59] The trial court ultimately denied the petition, finding no evidence to justify an award of visitation.[60] The Court of Appeals noted that the Court of Special Appeals had previously suggested that the same principles should govern custody disputes and visitation disputes.[61] However, the Court of Appeals, in *Fairbanks*, explained that "[v]isitation is a considerably less

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53. *See infra* Part II.C.1. Specifically, the *Hoffman* court stated that "the best interest of the child standard is always determinative in child custody disputes," while simultaneously announcing that the court need not inquire into the best interests of the child in third party custody disputes without a showing of parental unfitness or exceptional circumstances. *Hoffman*, 280 Md. at 178–79, 372 A.2d at 587.

54. Act of May 15, 1984, ch. 296, tit. 9, subtit. 1, § 9-101, 1984 Md. Laws 1847, 2089 (codified as amended at MD. CODE ANN., FAM. LAW § 9-102 (LexisNexis 2006)).

55. FAM. LAW § 9-102.

56. 330 Md. 39, 622 A.2d 121 (1993), *overruled in part by* Koshko v. Haining, 398 Md. 404, 921 A.2d 171 (2007).

57. At the time of *Fairbanks*, the GVS only applied when a marriage had been terminated by divorce, annulment, or death. *Id.* at 42–43, 622 A.2d at 123.

58. *Id.* at 43, 622 A.2d at 123.

59. *Id.* at 44, 622 A.2d at 123–24.

60. *Id.*

61. *Id.* at 48, 622 A.2d at 126 (citing Skeens v. Paterno, 60 Md. App. 48, 61, 480 A.2d 820, 826 (Ct. Spec. App. 1984)).

weighty matter than outright custody of a child, and does not demand the enhanced protections, embodied in the exceptional circumstances test, that attend custody awards."[62]

Looking to the plain language of the statute, the *Fairbanks* court concluded that the GVS did not require a showing of exceptional circumstances by grandparents petitioning for visitation.[63] Loathe to read additional requirements into the statute, the court held that the GVS conferred upon grandparents a separate right to file a petition for visitation with their grandchildren, and that an award of visitation did not need to be supported by a showing of exceptional circumstances.[64]

In *Beckman v. Boggs*,[65] the Court of Appeals applied the best interests standard in a case involving adoption.[66] In *Beckman*, a father allowed his daughter's maternal grandparents to adopt her following his ex-wife's death.[67] The paternal grandparents filed a visitation petition pursuant to the Maryland GVS to compel the custodial grandparents to allow them time with their granddaughter.[68] The *Beckman* court concluded that the paternal grandparents had a right to petition for reasonable visitation and affirmed the decision below that such visitation was in the child's best interests.[69]

Although the *Beckman* court upheld grandparent visitation rights under the best interests standard, in *Maner v. Stephenson*,[70] the Court of Appeals explicitly refused to confer upon grandparents a rebuttable presumption in favor of visitation.[71] *Maner* involved an "'intact nuclear family[ ]'" and a set of maternal grandparents who had petitioned for visitation with their grandchildren even though the chil-

62. *Id.*

63. *Id.* at 47–48, 622 A.2d at 125–26.

64. *Id.* at 47, 49, 622 A.2d at 125–26.

65. 337 Md. 688, 655 A.2d 901 (1995), *overruled in part by* Koshko v. Haining, 398 Md. 404, 921 A.2d 171 (2007).

66. *Id.* at 694, 703–04, 655 A.2d at 904, 908–09. Before *Beckman*, the General Assembly had amended the GVS by eliminating the introductory phrase that limited the statute's application to cases where a marriage had been terminated by divorce, annulment, or death. *Id.* at 692 n.3, 655 A.2d at 903 n.3.

67. *Id.* at 694, 655 A.2d at 904.

68. *Id.* at 694–95, 655 A.2d at 904.

69. *Id.* at 703–04, 655 A.2d at 908–09.

70. 342 Md. 461, 677 A.2d 560 (1996), *overruled in part by Koshko*, 398 Md. 404, 921 A.2d 171.

71. *Id.* at 470, 677 A.2d at 564 (noting that "[n]othing in the language of the statute or the legislative history supports such a presumption" in favor of grandparent visitation).

dren's parents remained married.[72] The *Maner* court noted that courts should apply a totality of the circumstances test to determine whether visitation would be in a child's best interests.[73] The court further explained that this test applies to all grandparent visitation cases because the language of the GVS does not differentiate between cases where a parental marriage does or does not exist.[74]

In *Wolinski v. Browneller*,[75] the Court of Special Appeals examined the GVS in yet another instance of family discord when the paternal grandparents of a child born to parents who were never married petitioned for visitation.[76] The *Wolinski* court found that because visitation proceedings infringe upon the fundamental right to parent to a lesser degree than custody proceedings, the GVS was not subject to strict scrutiny review, but rather, only rational basis review.[77]

The *Wolinski* court acknowledged that there is a presumption that parents act in their children's best interests.[78] While the *Wolinski* court extended this presumption to visitation cases, it noted that the presumption in such cases was not strong enough to require a showing of parental unfitness or exceptional circumstances for rebuttal.[79] Thus, at this point, the court recognized a presumption in favor of parental visitation decisions, but third parties seeking visitation could theoretically rebut that presumption by making general arguments about the child's best interests.[80]

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72. *Id.* at 462–64 & n.1, 677 A.2d at 560–61 & n.1 (defining a "'nuclear family'" as "'essentially a couple and their dependent children[ ]'" (quoting Moore v. City of E. Cleveland, 431 U.S. 494, 500 (1977) (plurality opinion))).

73. *Id.* at 469–70, 677 A.2d at 564.

74. *Id.* Additionally, the court raised *Fairbanks* and stated that it stood for the proposition that a showing of exceptional circumstances is not necessary before grandparents will receive visitation rights. *Id.* at 468, 677 A.2d at 563.

75. 115 Md. App. 285, 693 A.2d 30 (Ct. Spec. App. 1997), *overruled in part by Koshko*, 398 Md. 404, 921 A.2d 171.

76. *Id.* at 291, 293–95, 693 A.2d at 33–35.

77. *Id.* at 305–07, 693 A.2d at 39–41 (quoting Fairbanks v. McCarter, 330 Md. 39, 48, 622 A.2d 121, 126 (1993), *overruled in part by Koshko*, 398 Md. 404, 921 A.2d 171). Courts review a statute that substantially curtails a fundamental right using strict scrutiny, which requires the statute to "be narrowly tailored to serve a compelling public interest." *Id.* at 301, 693 A.2d at 37 (citing Roe v. Wade, 410 U.S. 113, 155 (1973)). Rational basis review, however, only requires that a statute be rationally related to a legitimate state interest. *Id.* at 307, 693 A.2d at 40 (quoting Campbell v. Campbell, 896 P.2d 635, 644 (Utah Ct. App. 1995)).

78. *See id.* at 311, 693 A.2d at 42 ("[T]hat parents are presumed to act in their children's best interests . . . informs all analyses involving parental autonomy and the effect parents' wishes should have on the future of their children.").

79. *Id.* at 311–12, 693 A.2d at 42–43 (quoting *Fairbanks*, 330 Md. at 48, 622 A.2d at 126).

80. *See id.* ("[A] court may award visitation rights to grandparents over the parents' objections even in the absence of exceptional circumstances.").

C. *The Supreme Court's Affirmation of a Fundamental Right to Parent in* Troxel v. Granville *Influences Maryland Grandparental Visitation and Custody Cases*

In the seminal case of *Troxel v. Granville*,[81] a plurality of the Supreme Court determined that Washington's third party visitation statute had been unconstitutionally applied, in violation of due process, and affirmed the Supreme Court of Washington's judgment on that basis.[82] The Court noted that it had long been settled that the Due Process Clause of the Fourteenth Amendment guarantees parents a fundamental liberty interest "in the care, custody, and control of their children."[83] Writing for the plurality, Justice O'Connor found the Washington statute "breathtakingly broad" because its wording permitted any third party to petition for visitation and gave courts the discretion to grant visitation whenever they deemed it to be in the best interests of the child, without any deference to the parent's choice in the matter.[84]

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81. 530 U.S. 57 (2000) (plurality opinion).

82. *Id.* at 60, 75. Justice Souter, concurring in the judgment, would have affirmed the state court's judgment based on its facial invalidation of the statute. *Id.* at 75 (Souter, J., concurring in the judgment). Justice Thomas also wrote a separate opinion, concurring in the judgment, to explain that he would have reviewed the statute using strict scrutiny, and would have affirmed the state court's decision because the State "lack[ed] even a legitimate governmental interest—to say nothing of a compelling one—in second-guessing a fit parent's decision regarding visitation with third parties." *Id.* at 80 (Thomas, J., concurring in the judgment).

83. *Id.* at 65–66 (plurality opinion) (quoting Washington v. Glucksberg, 521 U.S. 702, 720 (1997); Santosky v. Kramer, 455 U.S. 745, 753 (1982); Parham v. J. R., 442 U.S. 584, 602 (1979); Quilloin v. Walcott, 434 U.S. 246, 255 (1978); Wisconsin v. Yoder, 406 U.S. 205, 232 (1972); Stanley v. Illinois, 405 U.S. 645, 651 (1972); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925); Meyer v. Nebraska, 262 U.S. 390, 399, 401 (1923)). The remaining Justices, while disagreeing with the plurality on various other aspects of its decision, also recognized the Court's prior case law concerning the parental liberty interest. *See id.* at 77 (Souter, J., concurring in the judgment) ("We have long recognized that a parent's interests in the nurture, upbringing, companionship, care, and custody of children are generally protected by the Due Process Clause of the Fourteenth Amendment."); *id.* at 80 (Thomas, J., concurring in the judgment) (noting that "this Court's recognition of a fundamental right of parents to direct the upbringing of their children resolves this case"); *id.* at 86–87 (Stevens, J., dissenting) ("Our cases leave no doubt that parents have a fundamental liberty interest in caring for and guiding their children . . . ."); *id.* at 92 (Scalia, J., dissenting) ("[T]hree holdings of this Court rest in whole or in part upon a substantive constitutional right of parents to direct the upbringing of their children . . . ."); *id.* at 95 (Kennedy, J., dissenting) (recognizing that Fourteenth Amendment due process protects the parental right to determine a child's upbringing and education).

84. *Id.* at 67 (plurality opinion). Similarly, Justice Souter found the statute facially unconstitutional because of its broadness. *Id.* at 76–77 (Souter, J., concurring in the judgment).

As a result, the plurality determined that, as applied, the statute violated the Due Process Clause by infringing upon the fundamental right to parent.[85] In reaching this conclusion, Justice O'Connor reasoned that the superior court had applied a presumption favoring the third party and impermissibly burdened the parent by requiring rebuttal of the presumption that visitation was in the best interests of the child.[86] Without articulating a precise standard that would meet the requirements of due process, the plurality indicated that requiring a showing of parental unfitness might be sufficient.[87]

*1. Post-*Troxel *Custody Cases*

The influence of *Troxel*'s recognition of the fundamental right to parent has extended to Maryland's third party custody cases. In one such case, *Shurupoff v. Vockroth*,[88] the Court of Appeals addressed whether rebuttal of the presumption set forth in *Ross v. Hoffman*[89] had to be found by clear and convincing evidence, or a simple preponderance, to sufficiently protect the parental liberty interest.[90] The *Shurupoff* court noted that the *Hoffman* court had stated that "'the best interest of the child standard [was] always determinative in child custody disputes.'"[91] However, the *Shurupoff* court continued, the *Hoffman* court proceeded to "muddy the waters a bit" by indicating that a court only needed to inquire into the best interests of the child when there is a showing of parental unfitness or exceptional circumstances.[92]

In an attempt to clarify, the *Shurupoff* court restated the presumption that parental custody is in the best interests of the child.[93] The *Shurupoff* court further made clear that the best interests standard is "the ultimate, determinative factor," in part because the effect of requiring a third party to show parental unfitness or exceptional circumstances is to demonstrate that parental custody is not in the best

85. *Id.* at 66–67 (plurality opinion).

86. *Id.* at 69.

87. *See id.* at 68–69 (observing that there is a presumption that fit parents act in the best interests of their children and that as long as a parent is fit, the State has no reason to question the parent's child-rearing decisions).

88. 372 Md. 639, 814 A.2d 543 (2003).

89. *See supra* note 49 and accompanying text.

90. *Shurupoff*, 372 Md. at 649–50, 814 A.2d at 549–50. On this point, the court concluded that a standard requiring clear and convincing evidence was unnecessary and inappropriate for an analysis under *Hoffman*. *Id.* at 660, 814 A.2d at 556.

91. *Id.* at 661, 814 A.2d at 556 (quoting Ross v. Hoffman, 280 Md. 172, 178–79, 372 A.2d 582, 587 (1977)).

92. *Id.* at 661–62, 814 A.2d at 557 (quoting *Hoffman*, 280 Md. at 179, 372 A.2d at 587).

93. *Id.* at 662, 814 A.2d at 557.

interests of the child.[94] Thus, the *Shurupoff* court effectively made the analysis of parental unfitness and exceptional circumstances a component of the best interests test, essentially requiring consideration of those factors in a totality of the circumstances approach to determining the best interests of the child.[95]

Any clarification achieved in *Shurupoff*, however, was arguably erased by the Court of Appeals's 113-page opinion in *McDermott v. Dougherty*.[96] The *McDermott* court held that the exceptional circumstances or parental unfitness test was a prerequisite to the best interests analysis in third party custody cases.[97] The court then reiterated the exceptional circumstances factors enumerated in *Ross v. Hoffman*.[98] Reviewing the lower court's application of these factors, the Court of Appeals held that the fact that the child's father was a merchant marine, which required him to be away from home for months at a time, did not constitute exceptional circumstances that would justify awarding custody to the maternal grandparents.[99] Without a finding of exceptional circumstances or parental unfitness, the *McDermott* court never engaged in a best interests analysis.[100]

2. *Post-*Troxel *Visitation Cases*

After *Troxel*, the Maryland courts routinely focused on the parental liberty interest when reviewing the constitutionality of the GVS. In *Brice v. Brice*,[101] for instance, the Court of Special Appeals held that a trial court unconstitutionally applied the Maryland GVS when it awarded visitation to the child's paternal grandparents over the objec-

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94. *Id.*

95. *See id.*

96. 385 Md. 320, 869 A.2d 751 (2005).

97. *Id.* at 418–19, 869 A.2d 808–09. However, in custody disputes between two fit parents who each have a fundamental constitutional right to raise the child, the *McDermott* court noted that the best interests of the child were still determinative. *Id.* at 418, 869 A.2d at 808 (quoting *Shurupoff*, 372 Md. at 662, 814 A.2d at 557).

98. *Id.* at 419, 869 A.2d at 809; *see supra* note 51 and accompanying text.

99. *McDermott*, 385 Md. at 431–32, 435, 869 A.2d at 816, 819.

100. *See id.* at 418–19, 435, 869 A.2d at 808–09, 818–19 (stating that the best interests inquiry is only to be undertaken if the parent is unfit or exceptional circumstances exist, and further explaining that no showing of parental unfitness or exceptional circumstances had been made in *McDermott*). In his concurrence, Judge Wilner criticized the majority for suggesting that the best interests standard is inapplicable in third party custody disputes, but then inherently requiring it by demanding that a third party demonstrate parental unfitness, or "exceptional circumstances *which would make parental custody detrimental to the child's best interest*." *Id.* at 439–40, 869 A.2d at 821–22 (Wilner, J., concurring).

101. 133 Md. App. 302, 754 A.2d 1132 (Ct. Spec. App. 2000).

tions of the mother.[102] Following *Troxel*'s lead, the court did not hold that the GVS constituted a per se due process violation, but instead held that it had been unconstitutionally applied because there had been no finding that the mother was an unfit parent.[103] Therefore, the Court of Special Appeals reversed the trial court's decision because it had afforded no deference to the mother's determination that court-ordered visitation was not in her child's best interests.[104]

In evaluating a sibling visitation dispute, the Court of Special Appeals again looked to *Troxel v. Granville* in the case of *In re Tamara R.*[105] Reviewing the *Fairbanks* standard, the Court of Special Appeals concluded that *Troxel* required courts to supplement the best interests standard with a presumption favoring a parent's determination of whether visitation was in the child's best interests.[106] *In re Tamara R.* involved a father who opposed regular visitation by his daughter, who was in the custody of the Department of Social Services, with her siblings still in his care.[107] The Court of Special Appeals remanded the case upon concluding that the parental presumption may have been rebutted in the case given evidence that suggested the potential harm that the child would face if cut off from her siblings.[108]

Most recently, in *Herrick v. Wain*,[109] the Court of Special Appeals decided a grandparent visitation case and reiterated its understanding that a rebuttable presumption in favor of a custodial parent's decisions about visitation exists.[110] In *Herrick*, a maternal grandmother filed a visitation petition to compel the father to allow visitation following the death of his ex-wife.[111]

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102. *Id.* at 303–05, 754 A.2d at 1133–34 (citing Troxel v. Granville, 530 U.S. 57 (2000) (plurality opinion)). It should be noted that the mother did not oppose or deny visitation with the grandparents; she simply objected to court-ordered visitation. *Id.* at 305, 754 A.2d at 1134.

103. *Id.* at 308–09, 754 A.2d at 1135–36.

104. *See id.* at 308–10, 754 A.2d at 1135–36 (explaining the *Troxel* reasoning and noting that there had been no finding of parental unfitness here, that the mother had acknowledged that it was in her daughter's best interest to have contact with her paternal grandparents, and that the child's mother had only opposed court-ordered visitation).

105. 136 Md. App. 236, 248, 764 A.2d 844, 850 (Ct. Spec. App. 2000) ("We cannot evaluate this issue without examining the Supreme Court's recent decision in *Troxel v. Granville* . . . .").

106. *Id.* at 251–52, 764 A.2d at 852–53.

107. *Id.* at 240–41, 764 A.2d at 846. Specifically, the father contended that court-ordered visitation "would interfere with his constitutional rights to raise his own children as he saw fit." *Id.* at 241, 764 A.2d at 846.

108. *Id.* at 259–60, 764 A.2d at 856–57.

109. 154 Md. App. 222, 838 A.2d 1263 (Ct. Spec. App. 2003), *overruled in part by* Koshko v. Haining, 398 Md. 404, 921 A.2d 171 (2007).

110. *Id.* at 228, 240, 838 A.2d at 1266, 1273.

111. *Id.* at 226, 228, 838 A.2d at 1265–66.

The *Herrick* court began by noting that the GVS did not require grandparents to make a threshold showing of exceptional circumstances to succeed on a petition for visitation.[112] The Court of Special Appeals ultimately held that sufficient evidence had been introduced to rebut the presumption that the father's decisions about visitation were in his children's best interests.[113] Specifically, the *Herrick* court found that the father was "more concerned about *his* need to be respected than the children's right to love even those whom he does not love" and, therefore, he was unable to put his children's best interests before his own.[114] Thus, at this point, the Court of Special Appeals viewed the best interests of the child as the "'exclusive determinant'" in grandparent visitation cases.[115]

III. THE COURT'S REASONING

In *Koshko v. Haining*, the Court of Appeals held that under the GVS there must be a threshold finding of parental unfitness or exceptional circumstances before a court inquires into whether grandparent visitation is in the child's best interests.[116] In so holding, the court expressly overruled portions of several Maryland cases that did not require a finding of parental unfitness or exceptional circumstances before they analyzed whether visitation would be in the child's best interests.[117]

Judge Harrell began the majority opinion by acknowledging that the arguments presented in this case raised questions about the validity of several Maryland precedents in the context of the GVS.[118] In particular, the court noted that the Koshkos had suggested that *McDermott* implicitly overruled *Fairbanks* and that it required a threshold showing of parental unfitness or exceptional circumstances in visitation cases.[119] The court then engaged in an extensive review of Maryland jurisprudence, including case law concerning grandparent visitation, grandparent custody, and non-grandparent third party visitation.[120]

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112. *Id.* at 231, 838 A.2d at 1268 (citing Fairbanks v. McCarter, 330 Md. 39, 48, 622 A.2d 121, 126 (1993), *overruled in part by Koshko*, 398 Md. 404, 921 A.2d 171).

113. *Id.* at 240, 838 A.2d at 1273.

114. *Id.* at 229, 838 A.2d at 1267.

115. *Id.* at 231–32, 838 A.2d at 1268 (quoting *Fairbanks*, 330 Md. at 48–49, 622 A.2d at 126).

116. 398 Md. 404, 444–45, 921 A.2d 171, 195 (2007).

117. *Id.*

118. *Id.* at 412, 921 A.2d at 175.

119. *Id.* at 411, 921 A.2d at 175.

120. *Id.* at 412–20, 921 A.2d at 176–80.

Although the court first emphasized that the present case was decided primarily based on Maryland family law, it then turned to the Supreme Court's plurality opinion in *Troxel v. Granville* because of its impact on subsequent Maryland cases.[121] The court noted that the Supreme Court had recognized that federal due process confers upon parents a liberty interest in "the 'care, custody, and control' of their children."[122] The court further observed that the concurring opinions in *Troxel* had endorsed a presumption in favor of parents' decisions about their children's best interests.[123]

This parental liberty interest formed the basis of the court's analysis in *Koshko*.[124] The court reasoned that a presumption favoring parents' choices with respect to third party visitation or custody of their children flowed from their parental liberty interest.[125] The court observed that grandparents do not have the benefit of a similar liberty interest in visiting their grandchildren.[126] Thus, according to the court, grandparents may only attain visitation against parental wishes by judicial order and pursuant to a valid statute granting such a right.[127]

Next, the court acknowledged the Koshkos's argument that the GVS did not contain sufficient due process safeguards to protect parents' constitutional interests.[128] However, the court applied the canon of constitutional avoidance, which attempts to interpret statutes so that they do not directly conflict with the Constitution.[129] According to this principle, the court avoided declaring the GVS facially unconstitutional by reading into it a presumption that parents' decisions concerning their children are valid.[130]

Although the court found that the GVS was not facially invalid, it went on to examine whether the statute had been unconstitutionally applied.[131] The court explained that it had to review the Maryland

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121. *Id.* at 420, 921 A.2d at 180.

122. *Id.* at 421, 921 A.2d at 180–81 (quoting Troxel v. Granville, 530 U.S. 57, 65–66 (2000) (plurality opinion)).

123. *Id.* at 422, 921 A.2d at 181 (citing *Troxel*, 530 U.S. at 79 (Souter, J., concurring in the judgment); *id.* at 80 (Thomas, J., concurring in the judgment)).

124. *See id.* at 422–23, 921 A.2d at 181–82 (citing, among other cases, *In re* Samone H., 385 Md. 282, 300, 869 A.2d 370, 380 (2005)).

125. *Id.* at 423, 921 A.2d at 182.

126. *Id.*

127. *Id.* (citing McDermott v. Dougherty, 385 Md. 320, 353, 869 A.2d 751, 770 (2005)).

128. *Id.* at 424, 921 A.2d at 182–83.

129. *Id.* at 425–26, 921 A.2d at 183–84 (quoting *In re* James D., 295 Md. 314, 327, 455 A.2d 966, 972 (1983)).

130. *Id.*

131. *Id.* at 428, 921 A.2d at 185.

GVS using the strict scrutiny standard.[132] Additionally, the court disagreed with the argument that third party visitation determinations do not require the heightened standards used in third party custody cases because third party visitation does not interfere with the fundamental right to parent to the same extent as an assignment of custody.[133] Instead, the court found—in part due to the restriction on the Koshkos's parental autonomy and the forced interaction between the parties as a result of court-ordered counseling—that the GVS directly and substantially interfered with the Koshkos's fundamental right to make decisions about the control of their children.[134]

When analyzing a statute under strict scrutiny, the court noted that "a statute may be validated only if it is deemed to be suitably, or narrowly, tailored to further a compelling state interest."[135] Identifying one of the State's interests as ensuring the well-being of children, the court acknowledged the importance of promoting grandparents' beneficial contributions to their grandchildren's lives.[136] However, the court questioned whether the GVS was sufficiently narrowly tailored to further this interest.[137] The court's main concern was that even after reading a parental presumption into the statute, fit parents could still be forced into litigation to defend their decisions about visitation, without any showing of parental unfitness or exceptional circumstances.[138] To address this concern, the court applied a judicial gloss to the GVS and required that grandparents show prima facie evidence of parental unfitness or exceptional circumstances demonstrating that the lack of grandparent visitation harms the child, before the best interests analysis may be reached.[139]

To justify its holding, the court relied on the standard set forth in *McDermott* to govern third party custody cases.[140] The court also relied

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132. *Id.* at 432, 921 A.2d at 187.

133. *Id.* at 430–31, 921 A.2d at 186 (noting that the "degree of intrusion" into parental rights caused by a visitation determination is not small enough to preclude the application of a rigorous standard).

134. *Id.* at 437–38, 921 A.2d at 190–91.

135. *Id.* at 438, 921 A.2d at 191 (citing Ehrlich v. Perez, 394 Md. 691, 717, 908 A.2d 1220, 1235 (2006); Montrose Christian Sch. Corp. v. Walsh, 363 Md. 565, 586, 770 A.2d 111, 123 (2001); Murphy v. Edmonds, 325 Md. 342, 356, 601 A.2d 102, 109 (1992); Broadwater v. State, 306 Md. 597, 603, 510 A.2d 583, 586 (1986)).

136. *Id.* at 438–39, 921 A.2d at 191 ("The State's interest in encouraging the salutary contributions grandparents make to the lives of their grandchildren is clearly a compelling one.").

137. *Id.* at 439, 921 A.2d at 191.

138. *Id.*, 921 A.2d at 191–92.

139. *Id.* at 440–41, 921 A.2d at 192–93.

140. *Id.* at 443, 921 A.2d at 194 ("Now that we conclusively have stated in *McDermott* that parental unfitness and exceptional circumstances shall be threshold considerations in

on *Troxel*'s suggestion that the State need not typically interfere with families and parental decisionmaking when a parent is fit.[141] In light of these considerations, the *Koshko* court concluded that the GVS had been unconstitutionally applied to the Koshkos given that there had been no threshold finding of parental unfitness or exceptional circumstances.[142]

In a brief dissent, Judge Eldridge criticized what he viewed as the majority's undue reliance on *Troxel* because that case had not commanded a majority of the Supreme Court.[143] Judge Eldridge also stated that he would have distinguished this case from *McDermott*, which was not a visitation case, and that if he had ruled on *McDermott*, he would have joined Judge Wilner's concurrence in that case.[144] For these reasons, Judge Eldridge would not have overruled the prior decisions of the court; however, he did agree with the majority that the GVS was not facially unconstitutional.[145]

IV. ANALYSIS

In *Koshko v. Haining*, the Court of Appeals announced a new standard to govern third party visitation cases.[146] This new standard is a departure from precedent in visitation cases, as it will require a threshold showing of parental unfitness or exceptional circumstances before a court will consider whether visitation is in the best interests of the child.[147] This approach may be described as a "best interests plus"[148]

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third party custody determinations, it is appropriate that we now also apply those considerations in third party visitation disputes." (footnote omitted)).

141. *Id.* at 440 n.18, 921 A.2d at 192 n.18 (quoting Troxel v. Granville, 530 U.S. 57, 68–69 (2000) (plurality opinion)).

142. *Id.* at 445, 921 A.2d at 195.

143. *Id.* at 446, 921 A.2d at 196 (Eldridge, J., dissenting).

144. *Id.*

145. *Id.*

146. *See id.* at 444–45, 921 A.2d at 195 (majority opinion) (holding that parental unfitness or exceptional circumstances revealing current or future harm to a child without grandparental visitation must be shown before courts may analyze the child's best interests, and overruling parts of previous Maryland cases to the contrary). Although the *Koshko* court's holding interprets the Maryland GVS, dicta strongly indicates that the same standard should be applied in all third party visitation cases. *Id.* at 440, 921 A.2d at 192 ("[I]f third parties wish to disturb the judgment of a parent, those third parties must come before our courts possessed of at least *prima facie* evidence that the parents are either unfit or that there are exceptional circumstances warranting the relief sought before the best interests standard is engaged.").

147. *Compare id.* at 443–45, 921 A.2d at 194–95, *with* Maner v. Stephenson, 342 Md. 461, 468–70, 677 A.2d 560, 563–64 (1996) (reiterating that a petition for grandparent visitation need not be supported by exceptional circumstances and stating that a court must ascertain a child's best interests by looking at the totality of the circumstances), *overruled in part by Koshko*, 398 Md. 404, 921 A.2d 171, Beckman v. Boggs, 337 Md. 688, 692–93, 655 A.2d

standard.[149] By articulating this standard, the court took necessary steps to protect and strengthen the constitutional right to parent, but may have done so at the expense of children's best interests.[150] Moreover, the court properly eliminated the distinction between the rules governing custody and visitation cases, and adequately preserved the parental liberty interest by applying this uniform standard as a judicial gloss to the GVS.[151] Although the *Koshko* court aimed to protect the constitutional right to parent, the harmful effects of grandparent visitation litigation on children suggest that mandatory mediation is needed to adequately safeguard the interests of the children involved.[152]

A. *The "Best Interests Plus" Standard Protects Parental Liberty at the Expense of Children's Best Interests*

In holding that grandparents must make a threshold showing of parental unfitness or exceptional circumstances when petitioning for visitation rights under the GVS, the court emphasized the importance

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901, 903 (1995) ("[E]xceptional circumstances, apart from what is in the child's best interest, need not be shown as a precondition justifying grandparental visitation."), *overruled in part by Koshko*, 398 Md. 404, 921 A.2d 171, Fairbanks v. McCarter, 330 Md. 39, 48, 622 A.2d 121, 125–26 (1993) (explaining that the court had to adhere to "the plain words of [§ 9-102], which give not the remotest indication that a trial court must first search for some special circumstance or exigency beyond the child's best interests, such as a parent's illness or unfitness, which might call for an award of visitation privileges to a grandparent"), *overruled in part by Koshko*, 398 Md. 404, 921 A.2d 171, Herrick v. Wain, 154 Md. App. 222, 231–32, 838 A.2d 1263, 1268 (Ct. Spec. App. 2003) (quoting *Fairbanks*, 330 Md. at 48–49, 622 A.2d at 126) (discussing the holding in *Fairbanks* that grandparents need not demonstrate exceptional circumstances to support a petition for visitation), *overruled in part by Koshko*, 398 Md. 404, 921 A.2d 171, *and* Wolinski v. Browneller, 115 Md. App. 285, 315, 693 A.2d 30, 44 (Ct. Spec. App. 1997) ("Our conclusion is consistent with the decision of the Court of Appeals in *Fairbanks* not to require grandparent petitioners to establish exceptional circumstances justifying visitation."), *overruled in part by Koshko*, 398 Md. 404, 921 A.2d 171.

148. *See* Lauren F. Cowan, Note, *There's No Place Like Home: Why the Harm Standard in Grandparent Visitation Disputes Is in the Child's Best Interests*, 75 FORDHAM L. REV. 3137, 3151, 3153 (2007) (internal quotation marks omitted) (using this term to refer to statutes that "recognize that the best interests standard alone grants insufficient protection to parental rights and, accordingly, . . . give greater weight to parental rights," but employing the term "harm standard" to label more stringent approaches that "require that grandparents show that the denial of visitation time would cause harm to the child").

149. This Note characterizes the *Koshko* court's approach as a "best interests plus" standard because it requires courts to address certain "plus factors," namely parental unfitness or exceptional circumstances, before they may undertake a best interests analysis, thereby offering greater protection to the parental liberty interest.

150. *See infra* Part IV.A.

151. *See infra* Part IV.B.

152. *See infra* Part IV.C.

of preserving the fundamental right to parent.[153] The court's holding, therefore, strengthens the presumption in favor of parents' decisions about who may visit their children.[154] In addition, requiring grandparents to challenge parental fitness or demonstrate exceptional circumstances as a prerequisite to receiving visitation rights may deter many from formally petitioning the courts for visitation.[155] However, the *Koshko* court's holding requires grandparents who do wish to petition for visitation to publicly challenge parental child-rearing decisions.[156] Thus, the court's new standard practically ensures that visitation litigation will be especially contentious, which may be damaging to children.[157]

1. *The New Standard Establishes a Strong Presumption in Favor of Parental Decisions About Visitation and May Decrease the Number of Grandparent Visitation Petitions Filed*

In an effort to protect parental liberty, the *Koshko* court's stringent new standard creates an enormous hurdle for grandparents seeking visitation against parental wishes. As the court recognized, this hurdle is justified because parents have a fundamental right to raise their children as they see fit, and grandparents possess no corresponding constitutional right to visitation.[158] Requiring the threshold showing properly protects parents' constitutional rights.

The court's new threshold may also enhance parents' rights by making the prospect of filing a petition for visitation less attractive to grandparents, who will be forced to publicly challenge parental fitness

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153. *See* Koshko v. Haining, 398 Md. 404, 439–40, 444–45, 921 A.2d 171, 192, 195 (2007) ("A proceeding that may result in a court mandating that a parent's children spend time with a third party, outside of the parent's supervision and against the parent's wishes, no matter how temporary or modifiable, necessitates stronger protections of the parental right.").

154. *See infra* Part IV.A.1.

155. *See infra* Part IV.A.1.

156. *See infra* Part IV.A.2.

157. *See infra* Part IV.A.2.

158. *Compare Koshko*, 398 Md. at 422–23, 921 A.2d at 181–82 (citing L.F.M. v. Dep't of Social Servs., 67 Md. App. 379, 386–88, 507 A.2d 1151, 1154–55 (Ct. Spec. App. 1986)) (noting this difference in constitutional rights between parents and grandparents), *with In re* Samone H., 385 Md. 282, 299–300, 869 A.2d 370, 380 (2005) (listing cases from the Court of Appeals of Maryland and the Supreme Court of the United States that have recognized the fundamental right of *parents* to raise their children), Maner v. Stephenson, 342 Md. 461, 470–71, 677 A.2d 560, 564 (1996) (explaining that despite the "great benefits" of the grandparent-grandchild relationship, visitation decisions are left to the discretion of the trial court), *overruled in part by Koshko*, 398 Md. 404, 921 A.2d 171, *and* Beckman v. Boggs, 337 Md. 688, 702, 655 A.2d 901, 908 (1995) (observing that the role grandparents play in a child's life "complements, rather than supplants, the position of the parent"), *overruled in part by Koshko*, 398 Md. 404, 921 A.2d 171.

in court.[159] In his *Fairbanks* concurrence, Judge McAuliffe noted that "[t]here is more than enough acrimony, heartbreak, expense, and suffering involved in child custody cases now . . . ."[160] Grandparent visitation cases involve many of these same elements that contribute to the harmful nature of custody cases.[161] As a result, if it is presumed that many grandparents desiring to visit their grandchildren have the children's best interests at heart, the new heightened standard may properly discourage them from resorting to an adversarial court proceeding to enforce their rights to reasonable visitation under the GVS.[162]

2. *Inviting Grandparents to Challenge Parental Fitness in Public Is Harmful to Children*

Unfortunately, most grandparent visitation cases do not arise in well-functioning families where the adults are dedicated to putting the children's interests before their own.[163] The *Koshko* case itself is a prime example of how a long-festering conflict between parents and grandparents can erupt into drawn-out litigation with the children in the middle.[164] Thus, under the court's new standard for visitation determinations, the resulting litigation will be inherently unpleasant because of the requirement that grandparents challenge parental fitness or demonstrate exceptional circumstances.[165]

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159. *See* Stephen A. Newman, *Five Critical Issues in New York's Grandparent Visitation Law After* Troxel v. Granville, 48 N.Y.L. SCH. L. REV. 489, 529 (2004) (noting that a more stringent standard of proof would discourage grandparents from filing suit to obtain visitation).

160. Fairbanks v. McCarter, 330 Md. 39, 51, 622 A.2d 121, 127 (1993) (McAuliffe, J., concurring), *overruled in part by Koshko*, 398 Md. 404, 921 A.2d 171.

161. *See id.* at 50, 622 A.2d at 127 (majority opinion) ("[T]he trial court should also be alert to the psychological toll the visitation dispute itself might exact on a child in the midst of contesting adults."); Stephen A. Newman, *Grandparent Visitation Claims: Assessing the Multiple Harms of Litigation to Families and Children*, 13 B.U. PUB. INT. L.J. 21, 28 (2003) (observing that in grandparent visitation litigation, children are at the center of their grandparents' and parents' personal attacks on one another).

162. *See* Newman, *supra* note 161, at 23 ("[G]randparents do not ordinarily sue their own adult children or sons- and daughters-in-law in order to gain access to their grandchildren.").

163. *See id.* ("Only in the context of serious family discord do family members resort to litigation.").

164. *See* Koshko v. Haining, 398 Md. 404, 408, 437–38, 921 A.2d 171, 173, 191 (2007) (observing that the roots of the present conflict were in "events long passed" and subsequently noting that two and one-half years of litigation were among the disruptions to the parents' liberty interests that the trial court's visitation order had caused).

165. Even without this high threshold, parties have introduced painfully personal evidence of family dysfunction. *See, e.g.*, Maner v. Stephenson, 342 Md. 461, 464, 677 A.2d 560, 561 (1996) (noting that the mother had characterized the maternal grandmother as a "'relationship destroyer'" and that the grandparents had testified that the mother was "difficult" during childhood and adulthood), *overruled in part by Koshko*, 398 Md. 404, 921 A.2d

Fault-based divorce provides an instructive example of the problems that can arise with this type of standard.[166] Fault-based divorce is based on the notion "that divorce involve[s] an innocent spouse pitted against a guilty spouse in an adversary proceeding, with a judgment of divorce as the prize for the innocent victor."[167] Similarly, under the new grandparent visitation scheme, grandparents will attempt to "win" visitation rights by facing off against parents in an adversarial proceeding, which will harm children in the process.

B. The Koshko *Court Properly Eliminated the Distinction Between Custody and Visitation Standards, but the Court's Holding Should Remain a Judicial Gloss*

Putting aside the potential impact of the heightened standard on resultant litigation, the *Koshko* court developed its new standard in furtherance of the legitimate goal of reinforcing parental rights. In effectively eliminating the distinction between the standards used in third party custody cases and third party visitation cases,[168] the court relied on *McDermott* and *Troxel* to develop a heightened standard that reinforces the presumption favoring parental visitation decisions.[169] Although the *Koshko* court's holding changed the interpretation of the GVS in this way, it is best applied as a judicial gloss and should not be codified.[170]

171; Herrick v. Wain, 154 Md. App. 222, 227–28, 838 A.2d 1263, 1266 (Ct. Spec. App. 2003) (explaining the parties' contentions as follows: "Wain alleges that Herrick involved his children in his dispute with her by telling them that she had 'stolen' money set aside for them by their mother in a trust" and "Herrick argues that Wain consistently contradicts the childrens' [sic] Jewish faith by telling them they are not Jewish, and sending them Christmas and Easter cards instead of a card celebrating the Jewish holidays"), *overruled in part by Koshko*, 398 Md. 404, 921 A.2d 171.

166. *Cf.* Donald C. Schiller, *Fault Undercuts Equity*, 10 FAM. ADVOC. 10, 14–15 (1987) ("[T]he adversarial nature of fault-based divorce proceedings fosters bitterness and acrimony which are detrimental to both parties and the children involved." (quoting Dixon v. Dixon, 319 N.W.2d 846, 851 (Wisc. 1982))).

167. Suzanne Reynolds et al., *Back to the Future: An Empirical Study of Child Custody Outcomes*, 85 N.C. L. REV. 1629, 1636 (2007).

168. *Compare* Ross v. Pick, 199 Md. 341, 351, 86 A.2d 463, 468 (1952) (recognizing that third party custody is appropriate where a parent is unfit, or where exceptional circumstances that make parental custody harmful to the child's best interests exist), *with Koshko*, 398 Md. at 442, 921 A.2d at 193–94 (acknowledging that it had borrowed the parental unfitness or exceptional circumstances rule from custody cases and observing that the standards used to determine visitation and custody cases had already been "nearly identical"). The *Koshko* court also emphasized that the same test applies in cases where a modification in custody or visitation is sought because of harm to the child. *Id.* at 443, 921 A.2d at 194 (citing Boswell v. Boswell, 352 Md. 204, 225, 721 A.2d 662, 672 (1998)).

169. *See infra* Part IV.B.1.

170. *See infra* Part IV.B.2.

1. *The* Koshko *Court's Holding Enhances the Presumption in Favor of Parental Child-Rearing Decisions*

The *Koshko* court departed from precedent in holding that visitation decisions should be made according to the same standards as custody decisions,[171] and strengthened the parental presumption as a result. While the court recognized that third party visitation decisions naturally involve less interference with the parental liberty interest than custody decisions, it nevertheless concluded that this distinction did not justify application of a more lenient standard of review.[172] Although the Court of Special Appeals has expressly applied a presumption favoring parents' decisions as to grandparent visitation since *Wolinski*, the practical application of that presumption was overpowered by grandparents' ability to rebut it without evidence of parental unfitness or exceptional circumstances.[173] In other words, prior to *Koshko*, grandparents could obtain visitation merely by arguing that it was in the child's best interests.[174] At long last, the court's heightened

171. *Compare Koshko*, 398 Md. at 443, 921 A.2d at 194 ("Now that we conclusively have stated in *McDermott* that parental unfitness and exceptional circumstances shall be threshold considerations in third party custody determinations, it is appropriate that we now also apply those considerations in third party visitation disputes." (footnote omitted)), *with* Fairbanks v. McCarter, 330 Md. 39, 48, 622 A.2d 121, 126 (1993) (holding that visitation and custody are not governed by the same standard), *overruled in part by Koshko*, 398 Md. 404, 921 A.2d 171.

172. *See Koshko*, 398 Md. at 430–31, 921 A.2d at 186 (noting that "[t]hough visitation decisions granting such privileges to third parties may tread more lightly into the protected grove of parental rights, they tread nonetheless").

173. *See* Wolinski v. Browneller, 115 Md. App. 285, 319, 693 A.2d 30, 46 (Ct. Spec. App. 1997) ("[I]n light of the State's compelling interest in protecting the child's welfare and the minimal severity of the intrusion upon parental rights, the presumption in favor of [the parent's proposed visitation] schedule may be rebutted by affirmative evidence that the schedule would be detrimental to the child's best interests."), *overruled in part by Koshko*, 398 Md. 404, 921 A.2d 171. While the *Wolinski* court relied on the maxim that parents generally act in the best interests of their children, it also emphasized that judges possessed discretion to override a parent's wishes in cases where the "parent [was] obstinate or unreasonable in his or her proposal for [grandparent] visitation times, so that the proposal [would] not be in the child's best interests." *Id.* at 315, 693 A.2d at 44; *see also* Herrick v. Wain, 154 Md. App. 222, 240, 838 A.2d. 1263, 1273 (Ct. Spec. App. 2003) (explaining that even though the parent's proposed visitation schedule merited proper consideration, the child's best interests still dominated all other considerations), *overruled in part by Koshko*, 398 Md. 404, 921 A.2d 171.

The *Koshko* court's holding eliminates this judicial discretion to step in to protect the child's best interests in cases where no parental unfitness or exceptional circumstances are shown. *See Koshko*, 398 Md. at 439–40, 921 A.2d at 192 ("The importance of parental autonomy is too great and our reluctance to interfere with the private matters of the family too foreboding, whether it be in matters of custody or visitation, to allow parental decision-making to remain that vulnerable to frustration by third parties." (footnote omitted)).

174. *See* Beckman v. Boggs, 337 Md. 688, 703–04, 655 A.2d 901, 908–09 (1995) (upholding the lower court's grant of visitation based on the child's best interests and stating that

standard in *Koshko* gives some teeth to the parental presumption.[175] Now, parents cannot be forced to defend their parenting decisions against third party assailants without a prima facie showing of unfitness or exceptional circumstances.[176]

2. *The Legislature Should Not Modify the GVS in Response to the Court's Decision*

Not surprisingly, parents' rights advocates have rallied behind the *Koshko* court's holding.[177] Because the court's new standard effectively changes the way the GVS is applied, some groups have called for modification of the statute to reflect those changes.[178] However, not all supporters of the heightened standard believe that the GVS needs modification.[179]

The *Koshko* court had good reason to superimpose the "best interests plus" standard on the statutory text of the GVS without striking down the statute itself. The heightened standard may produce harsh results in cases where the trial judge perceives that visitation is in the best interests of the child, but is forced to defer to the parents' deci-

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visitation determinations should be left to the discretion of the trial court because "it is in the best position to assess the import of the particular facts of the case and to observe the demeanor and credibility of the witnesses"), *overruled in part by Koshko*, 398 Md. 404, 921 A.2d 171. However, the lower court in *Beckman* "believed that 'it [was] fundamentally in the best interests of any child to have contacts with his or her grandparents[,]'" which hardly seems to be a discretionary determination based on "particular facts" and the "demeanor and credibility of the witnesses." *See id.*

175. *See Koshko*, 398 Md. at 440, 921 A.2d at 192 (asserting that applying the heightened standard in visitation cases would provide the "safeguards" needed to protect the parental presumption from being "unduly placed in jeopardy by less significant familial disputes").

176. *Id.* (emphasizing that this showing must be made before third parties are permitted "to disturb the judgment of a parent" and obtain visitation rights over parental objections).

177. *See, e.g.*, American Civil Liberties Union of Md., ACLU of Md. Legal Docket, 2006–Present, http://www.aclu-md.org/aLegal/Legal.html (last visited May 5, 2008) (noting that the American Civil Liberties Union had filed an amicus brief in support of the Koshkos, and proclaiming the holding a "victory").

178. *See Top Court Narrows Visitation Law*, MD. FAM. L. MONTHLY, DAILY REC., Feb. 2007, at 1, 8, *available at* http://www.mddailyrecord.com/newsletters/_pdfs/MFLM%200207.pdf (quoting David R. Rocah of the ACLU calling for modification of the Maryland GVS "to conform it to constitutional limits"). Andrea Koshko has sponsored an online petition urging the Maryland Legislature to codify the court's holding in a "Parents' Rights" bill. Maryland's Grandparent Visitation Statute Must Be Codified for Parents Rights, http://www.thepetitionsite.com/takeaction/338454146 (last visited May 5, 2008).

179. *See, e.g.*, *Top Court Narrows Visitation Law*, *supra* note 178, at 8 (quoting Leigh Goodmark, professor at the University of Baltimore School of Law, who said that the court's holding "'makes perfect sense,'" and that the legislature need not modify the GVS).

sion absent parental unfitness or exceptional circumstances.[180] Applying the heightened standard as a judicial gloss, as opposed to codifying it in the GVS, alleviates these potentially harsh results by preserving the trial judge's ability to exercise discretion in performing the threshold analysis—determining whether parental unfitness or exceptional circumstances exist.[181] Visitation cases present trial courts with extremely complex and emotionally-fraught factual scenarios;[182] it is impossible to find a one-size fits all standard. Due to the varied circumstances in which grandparent visitation disputes arise, trial judges must retain some degree of discretion to reach a decision that best suits the particular interests involved in any given case.[183] Indeed, the sponsor of an earlier grandparent visitation bill emphasized that it was not designed to place any mandatory restrictions upon the trial judge's determination of visitation rights.[184] In light of these considerations, the new standard adequately protects parental rights because a threshold showing of parental unfitness or exceptional

180. *Cf. Koshko*, 398 Md. at 444–45, 921 A.2d at 195 (eliminating judicial discretion to examine the child's best interests by emphasizing that a finding of parental unfitness or exceptional circumstances is a prerequisite to the trial judge's best interests analysis).

181. In other words, trial judges would retain some amount of discretion because under a more flexible common law standard, they would approach this threshold inquiry informed by a larger body of case law, rather than restricted by narrow statutory language and cases interpreting that specific language.

182. *See, e.g.*, Maner v. Stephenson, 342 Md. 461, 464, 677 A.2d 560, 561 (1996) (describing a strained relationship between a mother and a maternal grandmother, which culminated in the parents cutting off visitation after the grandmother did not allow the parents and their children to attend a family gathering), *overruled in part by Koshko*, 398 Md. 404, 921 A.2d 171; Beckman v. Boggs, 337 Md. 688, 694–95, 655 A.2d 901, 904 (1995) (depicting, in a visitation case, a father who had consented to adoption of his daughter by her maternal grandparents because he did not want his own mother to be able to raise his child after his ex-wife died, given "bad memories of his own childhood"), *overruled in part by Koshko*, 398 Md. 404, 921 A.2d 171; Brice v. Brice, 133 Md. App. 302, 304, 754 A.2d 1132, 1133 (Ct. Spec. App. 2000) (discussing a daughter-in-law who refused to allow her mother-in-law, who was on psychiatric leave from her job following her son's death, to provide daycare for the child).

183. *See* Ross v. Hoffman, 280 Md. 172, 192–93, 372 A.2d 582, 594 (1977) (endorsing a trial judge's award of custody as a "sound exercise of judicial discretion" because the trial judge had appropriately analyzed the child's best interests to determine who should receive custody, and further noting that the court's prior decisions were different from the one at hand because this case involved nearly all of the factors set out through the court's jurisprudence on exceptional circumstances, while earlier cases had not); Ross v. Pick, 199 Md. 341, 353, 86 A.2d. 463, 469 (1952) (observing that in certain circumstances, the court should consult the desires of the child in a custody case to help the court "exercise its discretion wisely").

184. *See* Fairbanks v. McCarter, 330 Md. 39, 47, 622 A.2d 121, 125 (1993) (quoting Delegate Pica's explanation of House Bill 1205 to the House Judiciary Committee, and explaining that although that bill was not enacted, its language was substantively the same as § 9-102 and Delegate Pica's description of legislative intent, therefore, applied to § 9-102), *overruled in part by Koshko*, 398 Md. 404, 921 A.2d 171.

circumstances is required to rebut the presumption favoring parents' decisions about visitation, while still affording the trial judge a sufficient amount of discretion in making this threshold determination.[185] Thus, there is no need to codify the court's holding and, thereby, unduly restrict the ability of the trial judge to use discretion in applying this new threshold requirement.

C. *Requiring Mandatory Mediation in All Third Party Visitation Cases Would Protect Parental Rights While Reducing Children's Exposure to Harmful Litigation*

As discussed above, the *Koshko* court's protection of the parental liberty interest may come at the expense of a child being subjected to the harmful effects of grandparent-parent litigation.[186] There is little doubt, however, that requiring a threshold showing of parental unfitness or exceptional circumstances will extend greater protection to the parental liberty interest.[187] To address this tension, the Maryland General Assembly should amend the Maryland Rules to make mediation, which ensures that children's best interests are considered along with parental visitation preferences, mandatory in third party visitation cases.[188]

A number of other states have responded in a similar manner and made mediation mandatory in certain domestic relations cases, especially those concerning custody and visitation.[189] Currently, Ma-

185. *See Koshko*, 398 Md. at 440, 444–45, 921 A.2d at 192, 195.

186. *See supra* Part IV.A.

187. *See* Troxel v. Granville, 530 U.S. 57, 68 (2000) (plurality opinion) (finding a due process violation when the lower court's "order was not founded on any special factors that might justify the State's interference" with the fundamental right to parent, including the fact that no court had deemed the parent to be unfit).

188. *See infra* notes 189–201 and accompanying text.

189. *See, e.g.*, CAL. FAM. CODE § 3170 (West 2004) (mandating mediation of contested issues in custody and visitation cases, but allowing separate procedures in domestic violence cases); ME. REV. STAT. ANN. tit. 19-A, § 251(1)–(2) (1998) (permitting a court to order mediation in any domestic relations case and requiring mediation before a contested hearing in cases related to judicial separation, divorce, parental rights and responsibilities, and child support when minor children are involved, unless the court waives mediation for extraordinary cause); N.C. GEN. STAT. § 50-13.1(b)–(c) (2007) (requiring mediation of unresolved issues as to visitation and custody if minor children are involved and a program has been established, unless good cause exists for waiver of mandatory mediation); S.C. R. ADR 3(a)–(b) (stating, in relevant part, that all contested issues in domestic relations family court cases are subject to court-ordered mediation unless the parties agree to arbitrate, and that mediation is also not required if the South Carolina Department of Social Services initiated the case); S.D. CODIFIED LAWS § 25-4-56 (2004) (mandating courts to order mediation in custody or visitation disputes between parents unless the court determines that to do so would be inappropriate based on the facts of the case); UTAH CODE ANN. § 30-3-39(1)–(2), (5) (2007) (establishing a mandatory mediation

ryland courts are only required to enter an order directing the parties to mediate custody or visitation disputes if they deem mediation appropriate and if a properly qualified mediator is available.[190] The legislature in Maryland should, however, adopt mandatory mediation in all third party visitation cases.

While mediation is an excellent form of alternative dispute resolution for many types of cases, the flexibility it offers makes it particularly well-suited to visitation disputes, where sensitive family issues are involved.[191] Other benefits of mediation include encouraging cooperation between the parties, promoting settlement, and freeing up courts' dockets.[192] In visitation cases, simply requiring the parties to sit down together with a mediator to explain their positions may encourage them to come to an agreement during mediation or in the future.[193] The children need not be involved in the mediation process, and the parents may be less likely to bring the negativity and stress that can be generated by litigation into the family home.[194] A

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program requiring parties to a divorce to take part in at least one mediation session if any issue is contested after the filing of the answer to the divorce complaint, with an exception for good cause shown); W. VA. CODE ANN. § 48-9-202(a)–(b) (LexisNexis 2004) (mandating mediation if the parents cannot settle issues and agree to a parenting plan, unless the court, in its discretion, determines that mediation is inappropriate for certain reasons enumerated in the statute).

190. MD. R. 9-205(b). Mediation of child custody and visitation disputes is governed by Maryland Rule 9-205, of which section (b) provides:

> (1) Promptly after an action subject to this Rule is at issue, the court shall determine whether:
>
> (A) mediation of the dispute as to custody or visitation is appropriate and would likely be beneficial to the parties or the child; and
>
> (B) a properly qualified mediator is available to mediate the dispute.
>
> (2) If a party or a child represents to the court in good faith that there is a genuine issue of physical or sexual abuse of the party or child, and that, as a result, mediation would be inappropriate, the court shall not order mediation.
>
> (3) If the court concludes that mediation is appropriate and feasible, it shall enter an order requiring the parties to mediate the custody or visitation dispute. The order may stay some or all further proceedings in the action pending the mediation on terms and conditions set forth in the order.

Id.

191. *See* Alexandria Zylstra, *The Road from Voluntary Mediation to Mandatory Good Faith Requirements: A Road Best Left Untraveled*, 17 J. AM. ACAD. MATRIM. LAW. 69, 73 (2001) (observing that mediation allows for a degree of flexibility in considering "unique family dynamics" that is not available in litigation).

192. *Id.* at 73, 76.

193. *See id.* at 73 ("Even if the mediation fails to generate a parenting plan, mediation can be viewed as a success by assisting the parties to narrow the issues and potentially decrease tensions, thereby making future agreement more likely.").

194. *Cf. id.* at 71 ("Children are frequently the unknowing victims in the adversarial process, as the parents' anger and frustrations heighten, often resulting in using the children as bargaining chips for financial advantages.").

mediation approach, therefore, ensures that the parental visitation decision is given proper deference; the grandparents' interests in visitation, as well as their right to petition for visitation under the GVS, are not infringed; and, most importantly, children are not forced to endure the lasting emotional burdens of litigation.[195]

While a complete discussion of the advantages and drawbacks of mandatory mediation is beyond the scope of this Note, it should be noted that mandatory mediation requirements do face criticism, particularly from feminist scholars who argue that mediation produces results that are less favorable to women.[196] However, at least one recent study indicates that these concerns are overstated.[197] In addition, to the extent that third party visitation disputes are not necessarily divided along gender lines, as custody battles between two parents often are, the weight of the feminist critique of mediation is further diminished.[198]

The statutes concerning mandatory mediation vary from state to state. For instance, some statues require mediation in specific types of domestic relations cases, when certain conditions have been met, or when particular parties are involved.[199] However, virtually all mandatory mediation statutes provide opt-out provisions for good

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195. *See id.* at 69 (emphasizing that the adversary process creates a "polarizing effect" on litigants in family cases that persists even after the litigation ends).

196. *See* Reynolds et al., *supra* note 167, at 1629 (explaining that feminist critics have cautioned that mandatory mediation could force mothers to give in to pressure to agree to joint physical custody even if they deem it against their children's best interests).

197. *See id.* at 29–30 (analyzing custody outcomes under a mandatory mediation system in Forsyth County, North Carolina and finding that, contrary to the fears of critics, mothers actually gained sole physical custody at a higher rate than they did through settlement or litigation).

198. *See generally* Randy Frances Kandel, *Power Plays: A Sociolinguistic Study of Inequality in Child Custody Mediation and a Hearsay Analog Solution*, 36 ARIZ. L. REV. 879, 888 (1994) (explaining that one of the main feminist criticisms of mediation is that structural disempowerment leads mothers to defer too readily to the requests of fathers or the mediators).

199. The mandatory mediation statutes in California, North Carolina, and South Dakota expressly reference custody and visitation disputes. *See* CAL. FAM. CODE § 3170(a) (West 2004); N.C. GEN. STAT. § 50-13.1(b) (2007); S.D. CODIFIED LAWS § 25-4-56 (2004). Although it does not refer to custody or visitation by name, Maine's statute includes a cross-reference that makes clear that parental rights and responsibilities are among the issues that must be referred to mediation in contested cases. ME. REV. STAT. ANN. tit. 19-A, § 251(2) (1998). Utah's mandatory mediation statute does not explicitly refer to custody and visitation, but instead concerns another aspect of domestic relations law, divorce. *See* UTAH CODE ANN. § 30-3-39(1)–(2) (2007). South Dakota limits mandatory mediation to custody or visitation disputes between parents only. S.D. CODIFIED LAWS § 25-4-56 (2004). West Virginia's mandatory mediation statute similarly concerns unresolved issues and plans between parents. W. VA. CODE ANN. § 48-9-202(a)(3) (LexisNexis 2004).

cause, such as cases involving domestic violence.[200] For these reasons, instead of codifying the "best interests plus" standard, the Maryland General Assembly should make mediation mandatory in all third party visitation cases; doing so would strike the proper balance between parental liberty and children's best interests.[201]

V. CONCLUSION

In *Koshko v. Haining*, the Court of Appeals held that when seeking visitation rights under the Maryland Grandparent Visitation Statute, grandparents must make a threshold showing of parental unfitness or exceptional circumstances indicating current or future harm to the child if visitation is denied before courts may analyze the child's best interests.[202] Although the court's holding properly reinforced the presumption in favor of parental decisions about child-rearing, this "best interests plus" standard may not actually provide the best outcome for the children involved.[203] Because codification of the *Koshko* court's holding is unnecessary to protect parents' rights and could further endanger the protection of children's best interests, the Maryland General Assembly should not modify the GVS in response to *Koshko*.[204] Rather, a better legislative response would be to require mandatory mediation in third party visitation cases.[205]

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200. *See, e.g.*, W. VA. CODE ANN. § 48-9-202(a)–(b) (allowing for an exemption in certain cases of domestic violence, child abuse or neglect, actual or threatened duress or coercion, mental illness, or other circumstances); *see also supra* note 189.

201. Specifically, instead of merely requiring the trial court to order mediation if it deems mediation to be "appropriate and feasible," MD. R. 9-205(b)(3), the Maryland Rules should be amended to require courts to order mediation in all third party visitation cases. The provision exempting cases involving physical or sexual abuse from mediation, *id.* 9-205(b)(2), should be preserved. However, mediator availability should not factor into a court's decision about whether to order mediation. The implementation of such a scheme may mean that the Maryland court system will need to expand recruitment of certified mediators or provide more mediation training for trial judges, but the benefits of mediation to the parties, to the children involved, and to the judicial system outweigh these costs.

202. 398 Md. 404, 444–45, 921 A.2d 171, 195 (2007).

203. *See supra* Part IV.A.

204. *See supra* Part IV.B.

205. *See supra* Part IV.C.