GRANDPARENTS, PARENTS AND GRANDCHILDREN: ACTUALIZING INTERDEPENDENCY IN LAW

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I. INTRODUCTION

Many modern American grandparents, having raised their own children and worked long enough to retire, live their own lives most of the time. Contact with their grandchildren is gratifying and pleasurable, but not the central focus of their lives or of the lives of their grandchildren. For a growing number of American grandparents, however, contact with their grandchildren is a daily event. These are the grandparents whose grandchildren live near them or with them, sometimes in three-generation households including grandparents, parents and children, and sometimes in skipped-generation households of grandparents and grandchildren.¹ These grandparents are parenting or co-parenting grandchildren for reasons that are becoming more common. As the result of divorce,

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1. In 1980, the Census Bureau counted 859,000 single parents living in households headed by others; in 1990, the number was 2.1 million, an increase of roughly 60%, after correction for the differences in the ways in which families were defined for the purpose of counting. Approximately 75% of these single parents live with relatives, usually their parents. Barbara Vobedka, Single Parents’ Double Bind: Multi-Generational Households Help with Economics, Child Care, WASH. POST, Apr. 26, 1992, at A3. The Census Bureau also reported a 40% increase in the number of children living with relatives other than their parents over the last decade. According to the 1990 census, approximately 3.2 million children were living with their grandparents. In at least a third of these homes, neither parent is present, suggesting that grandparents are serving as the sole or primary caregiver. GRANDPARENTS: NEW ROLES AND RESPONSIBILITIES, A BRIEFING BY THE CHAIRMAN OF THE SUBCOMMITTEE ON HUMAN SERVICES OF THE SELECT COMMITTEE ON AGING, HOUSE OF REPRESENTATIVES, COMM. PUB. NO. 102-876, 102d Cong., 2d Sess., 39 (1992) (statement of Danylle J. Rudin).
impoverishment, AIDS, and substance abuse, parents frequently need the assistance of grandparents to perform basic tasks of parenthood. In addition, the extended education needed to prepare for modern employment means that many people become parents before completing their education or entering employment. Finally, single parenthood is a more common and acceptable way to raise a child. Grandparents are often needed to help with the grandchildren while parents devote energy to education, employment, and adult relationships.

Functionally, a co-parenting grandparent is hard to distinguish from a parent. The grandparent, most often a grandmother, may take the child to the doctor for a checkup, or to a school for registration. She may decide what friends a child will play with, or what lawyer to use if the child gets into trouble. She may decide whether the father or his family sees the child. Just like the divorced noncustodial parent, the formerly co-residential grandmother usually would not want to lose contact with a grandchild who later lives with his mother in a separate household.

The grandmother also may bear a level of financial responsibility that resembles the financial duty of a parent. For example, federal law requires that, where grandparents, parent, and grandchild share a household and the parent is under the age of eighteen and engaged in certain educational programs, income of the grandparents can be deemed available to the grandchild. The grandchild, as a result, may be found ineligible for Aid to Families with Dependent Children ("AFDC") or, in some states, state-funded public assistance. In addition, a state may

4. In a decreasing number of states, all grandparents, whether or not living with their grandchildren, are charged, along with parents, with a duty of support of their indigent minor grandchildren. See Daniel R. Mandelker, Family Responsibility under the American Poor Laws, 54 MICH. L. REV. 497 (1956). In addition, where the grandparent is acting in loco parentis, in some states the grandparent may be charged with financial support for a grandchild just as the parent would be charged if one were present. Finally, at least one state has experimented with a grandparent responsibility statute under which the grandparents are charged with the duty to support the child of their minor child. See HARRY D. KRAUSE, FAMILY LAW: CASES, COMMENTS, AND QUESTIONS 1038 (3d ed. 1990).
define a child of a minor mother who lives with her parents as a dependent member of the grandparent’s household for the purposes of awarding AFDC, even where the minor mother is the person exclusively caring for the child. The theory is that the grandmother’s responsibility for her minor daughter extends to her grandchild so long as the daughter is a minor.

If the co-parenting grandmother had the same legal recognition as the legal or biological father of the grandchild, she would share with the mother the legal authority to do all the things a parent could do. In addition, she would enjoy the right to visitation if the mother establishes a separate household for herself and the child. Because she is the grandmother, however, under traditional family law principles, she may exercise parental authority only if the parent’s authority is reduced to the same degree. So, typically, she may not consent to nonemergency

qualifying for “home relief,” a state-funded public assistance program, properly may include consideration of grandparent income where the grandparent, parent, and grandchild share a household.


8. The same theory has been rejected when the caretaker relative was an aunt rather than a grandmother. In a number of states, a foster parent who is related to a foster child, such as a grandparent fostering a grandchild, is ineligible for foster-care payments to assist with the expenses of caring for the child. In upholding the distinction between related and unrelated foster care parents, a California court made the analogy between the related foster parent and the biological or legal parent. According to the court, “A natural parent’s responsibility to its child may stem from a legal duty, whereas a related foster parent’s duty is moral, but in either case the result will generally be the same: the parent or relative is likely to care for the child.” King v. McMahon, 186 Cal. App. 3d 648, 688 (1986); see generally TASK FORCE ON PERMANENCY PLANNING FOR FOSTER CHILDREN, INC., Kinship Foster Care: The Double Edged Dilemma (Oct. 1990).

9. Grandparents share their non-recognition status with many other people who live with and care for children, including nonadoptive stepparents and the nonbiological or nonlegal parent in a lesbian or gay relationship. David L. Chambers, Stepparents, Biologic Parents, and the Law’s Perceptions of “Family” after Divorce, in DIVORCE REFORM AT THE CROSSROADS 102 (Stephen D. Sugarman & Herma Hill Kay eds., 1990); Nancy D. Polikoff, This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families, 78 GEO. L.J. 459 (1990); The co-guardianship contract proposed here as a form of legal recognition for the grandparent-parent-grandchild relationship may be adaptable as well to these other relationships. At an ideological level, the groups are similar. The adults in all of the groups need legal recognition as family so that their relationships with the children with whom they are living with and for whom they provide care would no longer be ignored, denied, or defeated by the absence of legal recognition. At the operational level, however, the needs of members of two-generation households may be quite different from the needs of members of three-generation households. Without further investigation, therefore, it is premature to claim that the co-guardianship contract is the best course.

In addition to the lifestyle and behavioral differences, the two groups are distinguished legally in a number of ways. One example is the availability of stepparent adoption to all het-
medical care for the child, unless the mother’s rights to medical guardianship have been foreclosed. She may not enroll the child in school. She will have a hard time qualifying the child for public benefits. Finally, she may be evicted from public housing because the grandchild living with her is legally in the custody of an absent parent. In other words, a grandparent and a parent cannot simultaneously be on the same legal footing in terms of their rights in and responsibilities toward the child. Similarly, if a formerly co-parenting grandmother seeks visitation after the mother and child set up a separate household, in general, she stands in the same relationship to the child as any other grandparent seeking visitation, even if the other grandparent previously had seen the grandchild only once a year.

Because simultaneous co-guardianship is essentially unavailable, coparenting parents and grandparents who need to protect a child from legal vulnerability have only untenable choices. One choice is to leave

erosexual and some lesbian parents, assuming that the second biologic parent is no obstacle. Uniform Adoption Act § 14(a)(1) (“except with respect to a spouse of the petitioner . . . [a decree of adoption] relieve[s] the natural parents of the adopted individual of all parental rights and responsibilities”). See Chambers, supra, at 118-21; Adoption of Tammy, 619 N.E.2d 315 (Mass. 1993) (parental rights of biological parent not terminated when child adopted by parent’s lesbian partner; stepparent adoption rule applied); Adoptions of B.L.V.B. and E.L.V.B., 628 A.2d 1271 (Vt. 1993). Unlike grandparent adoption, which extinguishes the rights of the biological parents, stepparent adoption permits the biological parent who is the partner of the adopting parent to retain parental rights. Thus, stepparent adoption is a nonexcluding alternative which does not exist as a possibility for grandparents who are co-parenting with parents.


11. Id.
12. Id.
13. Naomi Karp, Kinship Care: The Legal Problems of Grandparents and Other Relative Care Givers, 27 CLEARINGHOUSE REV. 585 (Oct. 1993). In addition, for the purpose of being eligible as a dependent for Social Security benefits, it is not sufficient that a grandchild live with and be dependent upon a grandparent. It is also required that the grandchild’s parent be dead or disabled, or that the grandparent has adopted the grandchild. 42 U.S.C. § 416(e).


The legal disabilities experienced by stepparents have been well documented. See Sarah H. Ramsey, Stepfamilies and Law Reform: Goals and Compromises, Speech presented at the North American Conference of the International Society of Family Law, Jackson Hole, Wyoming (June 1993) (copy on file with author); MARGARET M. MAHONEY, STEPFAMILIES AND THE LAW (forthcoming 1994). Essentially the same disentitlements appear where the co-parent figure is a grandparent rather than a stepparent.
exclusive parental rights with an ill or disabled parent. When that parent’s illness or disability prevents him or her from exercising parental rights for the benefit of the child, however, the child may be denied medical care, admission to school, or legal assistance because no person with parental authority can act on the child’s behalf. A second choice is to move the exclusive parental rights to the grandmother, either by adoption, or by an award of custody or guardianship. Adoption is not possible unless the legal parent’s rights are terminated, either by consent or by a finding that the parent has deserted, abandoned, or otherwise harmed the child. In most states, custody or guardianship cannot be placed in a third party non-parent unless the parent is found to be unfit. Seeking a full or partial termination of the parental rights of an already terminally-ill parent is not a course that most grandmothers are willing to pursue, however, because the emotional cost is so great. The result, however, leaves the children legally vulnerable. A third option is to place the child in the foster care system and have the grandmother named as foster parent. While this course leaves residual parental rights in the parent, it is far from satisfactory for the grandmother, who becomes an employee of the state. Her employment status permits significant state intervention and jeopardizes the long term stability of the relationship with the grandchild, who can be removed whenever the foster care system deems that proper.\textsuperscript{15}

The alternatives available to co-parenting parents and grandparents are crabbed, restrictive, and unsatisfactory. What is needed instead is legal recognition for co-parenthood rights exercisable by a parent and grandparent simultaneously. I propose in this Article that we create this legal recognition in certain circumstances, and call it the co-guardianship contract.

The prerequisite for a co-guardianship contract would be a co-parenting relationship between a grandparent and a parent. Co-parenthood has two aspects. First, the grandparent does the same sorts of things as the parent: meets the child’s physical needs, attends to the child’s emotional state, and fosters the child’s development through support, encouragement, and discipline. Second, the grandparent’s caregiving is undertaken in conjunction with the parent’s caregiving, not in opposition to or substitution for the parent.

I suggest that a contract is the proper grounding for the co-guard-

\textsuperscript{15} Madeline Kurtz, \textit{The Purchase of Families into Foster Care: Two Case Studies and the Lessons They Teach}, 26 CONN. L. REV. 1453 (1994).
ianship for several reasons. First, the parent and grandparent need to be able to structure the co-parenting arrangements in response to their specific needs. Some parents will need help from the grandparent only in obtaining routine medical care for the child. Others will need help with multiple daily acts. In addition, a contractual approach would permit people to enter into a co-guardianship without judicial involvement. This element is central to the conceptualization, because judicial involvement tends to place people in opposing positions, while co-parenthood needs to be cooperative.

At least in theory, co-guardianship contracts support and foster interrelationships between grandparents, parents, and grandchildren by permitting the responsible adults to structure their legal responsibilities to the dependent child in ways that serve their needs and the child’s needs. Permitting this to be done by contract removes the requirement, presently imposed, that the grandparent sue the parent, or seek to have the parent declared unfit, neglectful, or abusive, before the grandparent can be empowered to perform ordinary daily tasks for the benefit of the grandchild living under the same roof: seeing school records, consenting to routine medical care, applying for public benefits, and the like. By removing the requirement that a finding of neglect or abuse or the placement of a child into foster care precede the sharing of legal rights, co-guardianship contracts empower parents to seek the level of assistance they need from the grandparents, without losing rights with respect to the child or their own self-respect. Having the possibility of a co-guardianship contract, furthermore, relieves the grandparent of having to conclude that the parent is beyond redemption before seeking assistance for the grandchild, a difficult conclusion for a grandparent to draw about his or her own child.

The child is protected from the parents and grandparents exercising their co-parental authority in ways that are detrimental to the child, because a co-guardianship contract would not preclude the state from intervening under the authority of laws prohibiting neglect and abuse. At the same time, co-guardianship contracts enhance the analogy be-

16. Cf. Jana B. Singer, The Privatization of Family Law, 1992 Wis. L. Rev. 1443, 1504-05 (1992) (mediation of custody disputes extends the preference expressed in no-fault divorce regimes of placing the responsibility to decide the financial and parenting consequences of the decision to divorce on the parents); id. at 1533-35 (among the benefits of privatization may be greater freedom from gendered conceptions of family roles, greater acceptance of diverse definitions of families and roles within families, and increased degree of control over important aspects of one’s life).
between co-guardians and parents because they can be viewed as a part of the trend in modern custody law to require divorcing parents to resolve custody disputes by mediation and contracts, and to turn to courts only as a last resort.\footnote{17}

Creating the legal possibility of co-guardianship contracts requires a paradigm shift. Family law as presently constituted values parental exclusivity and autonomy. Few doors are open to norms of mutual respect and shared responsibility. The paradigm shift I propose would elevate the value of interdependency to the same level as parental exclusivity and autonomy. What I mean by valuing interdependency, in brief, is that legal rules would be evaluated according to whether they promote the possibility that people could engage in joint caregiving activities for a dependent person, without inordinately sacrificing those aspects of

\footnote{17. See Mary Ann Glendon, The Transformation of Family Law: State, Law, and Family in the United States and Western Europe (1989); Singer, supra note 16 and accompanying text.}

The movement toward privatization is not without problems, particularly where bargaining parties do not share equivalent bargaining power. See, e.g., Singer, supra note 16, at 1540-48; Carol S. Bruch, And How are the Children? The Effects of Ideology and Mediation on Child Custody Law and Children's Well-Being in the United States, 2 INT'L J.L. & FAM. 105 (1988); Trina Grillo, The Mediation Alternative: Process Dangers for Women, 100 YALE L.J. 1545 (1991). As Professor Singer notes, however, greater freedom is likely to be found in a move toward privatization where the opposing force is the state rather than another private individual. Singer, supra note 16, at 1537. In the context of grandparent-parent contractual co-guardianship, the more salient barrier to private ordering is the state's requirement that judicial clearance is required before a parent can share authority with a non-parent. Further, the other private party, whether parent or grandparent, is unlikely to wield an unequal degree of power. Both parties may suffer detriments in bargaining power, and their detriments may prove to be complementary. That is, the parent, while disabled in some way from conducting herself or himself fully as a parent, nonetheless retains full parental rights. He or she ordinarily is under no compulsion to enter into an agreement to share these rights. At the same time, the grandparent enjoys a complementary source of power arising out of his or her status as the parent's parent, a role that placed the grandparent in the superior and the parent in the inferior position for a number of years before the birth of the grandchild. The parent-child relationship of the grandparent and parent may work to place the parent in a dependent position in the negotiation.

The other problem with privatizing co-guardianship between a parent and grandparent is that the interests of third parties, namely children, are involved. See Singer, supra note 16, at 1553-55. Unlike the situations considered in Singer's article, surrogacy, custody and adoption, co-guardianship involves increasing the number of people who are permitted to agree to the sharing of responsibility for a child's needs. It is not a process that limits or terminates the adult's interests in the child. Further, the contemplated co-guardianship addresses only a limited number of decisions, not the full parental powers which are involved in a surrogacy or adoption decision. While a child may be harmed by a parent's decision to enter into an unwise co-guardianship contract, the risk to the child should be minor compared to the potential benefits. At the same time, the potential benefits are likely to be nonexistent if privatization is not allowed because of the limited access impoverished grandparents and parents have to courts and their unwillingness to use whatever access might be available because of the emotional costs.
freedom and autonomy that adults hold dear. Family law has taken some tentative steps toward valuing interdependency. As I will discuss, the developing law of grandparent visitation is one such step in that it devalues parental exclusivity and autonomy in favor of nurturing the relationship of the grandparent and grandchild. Unfortunately, grandparent visitation law as it now exists fails to incorporate norms of mutual respect and shared responsibility among the adults. Several other innovative changes in family law, most notably the Children Act of Great Britain, provide useful models of ways to incorporate such norms into family law for the benefit of three-generation families.

In this Article, I first discuss the social-psychological evidence about three-generation families. Second, I discuss the ways in which the law of grandparent visitation can be used and should be avoided when developing a legal grounding for the co-guardianship contract. Third, I discuss the ways in which other innovative changes in family law provide analogies for incorporating norms of mutual respect and shared responsibility into the concept of the co-guardianship contract. The fourth section of the Article explores my premise that family law needs to pay more attention to the interrelationship of the members of a family. What the law of grandparent visitation demonstrates is that it is not sufficient to pay equal attention to the needs of each member of a family. Nor does it work to regard the needs of one family member, such as a child, as more deserving than the needs of the other family members. Rather, what should be valued in law are social practices permitting and encouraging people to rely upon one another as needed and to be independent from one another as needed. When applied to the law affecting three-generation families, interrelationship theory supports a version of the co-guardianship contract, but it supports very few versions of court-ordered grandparent visitation. Further, I argue that creating the co-guardianship contract without simultaneously diminishing opportunities for court-ordered grandparent visitation impedes the changes needed in family law to increase the value accorded to interrelationship. What I propose, therefore, will increase the legal rights that may be called upon by members of co-residential three-generation families to care for their members, while the legal rights of members of non-co-residential three-generation families will decline.

II. GRANDPARENTS, PARENTS, AND GRANDCHILDREN

In the words of the New Jersey Supreme Court,

Grandparents ordinarily play a very different role [from parents]
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.

....

It is biological fact that grandparents are bound to their grandchildren by the unbreakable links of heredity. It is common human experience that the concern and interest grandparents take in the welfare of their grandchildren far exceeds anything explicable in purely biological terms. A very special relationship often arises and continues between grandparents and children. The tensions and conflicts which commonly mar relations between parents and children are often absent between those very 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.18

A popular book on grandparents and grandchildren asserts:

Every time a child is born, a grandparent is born too ....

Emotional attachments between grandparents and grandchildren are unique. The normal conflicts that occur between children and parents simply do not exist between grandchildren and grandparents. This is because grandparents, no matter what they were like as parents, are exempt from the emotional intensity that characterizes parent-child relationships .... In short, grandparents and grandchildren do not have to do anything to make each other happy. Their happiness comes from being together ....

The emotional attachment between grandparents and grandchildren, in sum, confers a natural form of social immunity on children that they cannot get from any other person or institution.19

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The conviction is held by many judges, legislators, and legal scholars that all grandparents benefit their grandchildren emotionally and spiritually, that they provide an irreplaceable connection, and that the relationship should be fostered in almost every circumstance. Psychosocial research, however, does not support these beliefs. Instead, what researchers are finding is that some grandparents have beneficial relationships with their grandchildren. These grandparents are the ones who actively foster grandchildren with whom they are intensely involved in a quasi-parental or even substitute parental role. They live with or near the grandchildren, are with them frequently, and engage in parent-like conduct with them. For most other grandparents and for most other grandchildren, while the connection may be sentimentally important and pleasurable, it confers no lasting benefit on the grandchild.

At the conclusion of their unique study of a large sample of grandparents, Professors Andrew Cherlin and Frank Furstenberg described the typical grandparent of modern America:

[T]he increasing independence of the generations promotes the growth of the companionate style of interaction between grandparents and grandchildren. Informal, affectionate, warm relations are more likely when grandparents and grandchildren are relatively equal in social status . . . . Thus, the greater independence of grandparents—their reluctance to assume responsibility except in times of crisis, their exclusion by parents from decision-making, their overall lack of authority—leads to a greater emphasis on personal intimacy and emotional satisfaction with grandchildren. Here again . . . their behavior mirrors that of Americans in general. Grandparents, newly freed from the constraints of economic dependence, blessed with longer lives, and imbued with American values, have joined their juniors in the pursuit of sentiment. The new American grandparent wants to be involved in her grandchildren’s lives, but not at the cost of her autonomy.20

About four percent of grandparents in the Cherlin and Furstenberg sample shared a household with their grandchild.21 More than a third of the other grandparents in the sample saw their grandchild at least

21. Id. at 238.
once a week. Slightly less than a third saw the grandchild less than once a quarter or not at all.

According to Cherlin and Furstenberg, the typical grandparent enjoys a “companionate” relationship with his or her grandchild, which involves spending time with the grandchild on a regular basis. Typical companionate grandparents saw their grandchildren at least once a quarter. They engaged in activities with their grandchildren characterized by “pleasurable interaction and affection,” such as joking, watching TV, giving money, talking about the grandparent’s past, or giving advice. Few companionate grandparents became involved in issues between the grandchild and parent, such as helping to settle a disagreement. Most reported subscribing and adhering strictly to a norm of nonintervention in the parent-grandchild relationship.

Another pair of researchers assert that grandparents choose to engage in typical, companionate relationship with their grandchildren, rather than develop relationships of greater connection:

The overwhelming majority of grandparents we visited elected not to become closely involved with their grandchildren...

Most had not moved away from their grandchildren...

Nor is their emotional detachment from their grandchildren sufficiently explained by the increased mobility of their children...

[W]ith modern modes of transportation and communication, today’s grandparents can remain in close if not intimate contact with their grandchildren if they so choose. The salient fact is that the majority choose to keep their distance without altogether severing their family connections. In other words, they acknowledge their biological connections but they do not, for the most part, vitalize those connections.

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22. Id. at 72. According to a 1986 Census Bureau study, “nearly 25 percent of children under age 5 who are not supervised by a father while the mother works are in the charge of a grandparent.” Ruth Duskin Feldman, Grandparents Help Out, New Choices, Feb. 1991 at 33, 35.

23. CHERLIN & FURSTENBERG, supra note 20, at 72.

24. Id. at 55-64. Another study of 300 grandchildren found that the “overwhelming majority” of children (not further specified) have intermittent or sporadic contact with their grandparents. KORNHABER & WOODWARD, supra note 19, at 29. Of the 300 grandparents interviewed for the same study, only 30 reported having a relationship other than an intermittent one, similar to the companionate relationship described by Cherlin and Furstenberg. Id. at 100.

25. CHERLIN & FURSTENBERG, supra note 20, at 55-64. 74.

26. Id. at 74.

27. Id. at 75-76.

28. KORNHABER & WOODWARD, supra note 19. at 88-89.
Cherlin and Furstenberg distinguish companionate grandparents from two other categories of grandparents: "remote" and "involved." "Involved" grandparents, comprising about sixteen percent of the sample, saw their grandchildren more often and engaged more frequently in parentlike behaviors, such as disciplining the grandchild or consulting with the parent about the grandchild.\(^{29}\) They also engaged more frequently in a pattern of exchanging services with their grandchildren, such as helping each other with errands or chores.\(^{30}\)

"Remote" grandparents, comprising twenty-nine percent of the sample, tended to see their grandchildren more rarely. Their relationship with their grandchildren was more symbolic than interactive or quasi-parental.\(^{31}\)

Involved grandparents differed from companionate and remote grandparents in a variety of ways. Often they lived either with the grandchild or in very close proximity, and saw the grandchild either every day or nearly every day.\(^{32}\) They tended to be younger than companionate or remote grandparents.\(^{33}\) Also, they were more likely to be African-American.\(^{34}\) Finally, they were more likely to be the maternal grandparents of children whose parents were divorced.\(^{35}\)

The African-American grandparents in the study, predominantly grandmothers, saw their role as "protectors of the family, bulwarks against the forces of separation, divorce, drugs, crime—all of the ills low-income black youth can fall prey to."\(^{36}\) By a nearly two-to-one margin, they were more likely to discipline their grandchildren and to

\(^{29}\) Cherlin & Furstenberg, supra note 20, at 64-69, 76-77. Another study of 300 children found that only five percent of the children had a close or intimate relationship with at least one grandparent. Kornhaber & Woodward, supra note 19, at 9. An intimate relationship was one where the child "knows his grandparent in many dimensions—including how he thinks and what he feels." Id. at 8. These grandparents either live with the grandchild or live close enough for frequent contact, and the child has "free access" to the grandparent. Id.

\(^{30}\) Cherlin & Furstenberg, supra note 20, at 75.

\(^{31}\) Id. at 53-54, 77. Nearly a third of the children in the Kornhaber study had only second-hand knowledge of their grandparents, who they saw rarely or never. Kornhaber & Woodward, supra note 19, at 32-33.

\(^{32}\) Cherlin & Furstenberg, supra note 20, at 118-19.

\(^{33}\) Id. at 119-20.

\(^{34}\) Id. at 120. Other studies have found similarly high rates of involvement among grandparents who are members of other ethnic groups, such as Native Americans, Hispanics, and Amish. Vira R. Kivett, The Grandparent-Grandchild Connection, in Families: Intergenerational and Generational Connections 278-79 (Susan K. Pfeifer & Marvin B. Sussman eds., 1991).

\(^{35}\) Cherlin & Furstenberg, supra note 20, at 120.

\(^{36}\) Id. at 129.
more readily take on a parental role than were white grandparents.\textsuperscript{37} They were also more than twice as likely to have shared a home with a grandchild for three months or more and were nearly twice as likely to have an involved relationship with a grandchild than were white grandparents.\textsuperscript{38} African-American grandmothers reported to the researchers that they felt the need to be like a second parent to their grandchildren because so many of them lacked a second parent in the home.\textsuperscript{39} Interestingly, the same attitudes were reported by African-American grandmothers regardless of class.\textsuperscript{40}

In another study of African-American adolescent mothers, researchers found that grandmothers or grandmother surrogates played roles ranging from mentor to substitute mother in the families of 95 percent of the newborns whose mothers could be interviewed.\textsuperscript{41} In every case, the grandmother or grandmother-surrogate lived with or had daily contact with the mother and child. In slightly more than half the cases, the grandmother's role was to regularly share the work of parenting the grandchild.\textsuperscript{42} In a study asking African-American and Euro-American grandchildren to describe their relationships with their grandparents, the African-American grandchildren painted a picture of a grandparent as a surrogate parent.\textsuperscript{43} A longitudinal study of predominantly African-American adolescent mothers showed that nearly 75 percent lived with their parents at the time of the birth of the grandchild, and nearly 25 percent of them resided in their parents' households for the better part of the grandchild's minority.\textsuperscript{44}

\textsuperscript{37} Id. at 128; Carol B. Stack, \textit{All Our Kin: Strategies for Survival in a Black Community} 47-49 (1974).

\textsuperscript{38} Cherlin \& Furstenberg, \textit{supra} note 20, at 130-31; see Kivett, \textit{supra} note 34, at 279.

\textsuperscript{39} Cherlin \& Furstenberg, \textit{supra} note 20, at 129-30.

\textsuperscript{40} Id. at 131.

\textsuperscript{41} The researchers interviewed 76 percent of the total population of African-American first-time mothers age 18 or younger in New Haven, Connecticut during the period of 1979-80. Of these, 95 percent identified a biological grandmother or another person who acted as a mother to the new mother. Nancy H. Apfel \& Victoria Seitz, \textit{Four Models of Adolescent Mother-Grandmother Relationships in Black Inner-City Families}, 40 Fam. Rel. 421, 422 (1991). Other studies have confirmed that "the majority of adolescent mothers bring their infants home to families where grandmothers provide consistent care and support." Sr. Mary Jean Flaherty, \textit{Seven Caring Functions of Black Grandmothers in Adolescent Mothering}, \textit{Maternal-Child Nursing} J. 191, 192-93 (1988) (citations omitted). At the same time, it is clear that many African-American grandmothers, just like their European-American counterparts, do not welcome the status of grandparenthood or the entry of grandchildren into their homes. \textit{See id.} at 192.

\textsuperscript{42} Apfel \& Seitz, \textit{supra} note 41, at 423-24.


\textsuperscript{44} Frank F. Furstenberg \textit{et al.}, \textit{Adolescent Mothers in Later Life} 33, 83 (1987)
When parents divorce, grandparents are more likely to become involved grandparents, particularly if they are the parents of the custodial parent, most often the mother. Immediately after the breakup, “custodial grandparents” see the grandchild more often.\footnote{Cherlin \& Furstenberg, \textit{supra} note 20, at 143; see Corinne Wilks \& Catherine Melville, \textit{Grandparents in Custody and Access Disputes}, 13 \textit{J. Divorce} 1 (1990).} Several years after the breakup, they were three times more likely than “noncustodial grandparents” to live with their grandchild (twelve versus four percent) or to live very nearby (ten versus two percent).\footnote{Id.} Nearly two-fifths saw their grandchild no less than once a week, while that was true for only sixteen percent of noncustodial grandparents.\footnote{Id. note 20, at 146.} Nearly half of noncustodial grandparents saw the grandchild less than once a quarter,\footnote{Id. at 147.} and 40 percent lived more than 100 miles away from their grandchildren.\footnote{Id. at 152; see Jeanne L. Thomas, \textit{The Grandparent Role: A Double Bind}, 31 \textit{Int'l. J. Aging \& Hum. Dev.} 169, 174-76 (1990) (separated and divorced mothers valued grandparents for their help/support more than did married mothers; both groups of mothers described grandparental childrearing advice and interference in childrearing as the worst thing about grandparents).} Like the African-American grandparents, maternal grandparents of grandchildren whose parents divorced engaged in more parentlike behavior than other grandparents.\footnote{Cherlin \& Furstenberg, \textit{supra} note 20, at 152. Grandparental support at the time of divorce has its costs as well as its benefits. According to one study, supporting grandparents could become overly involved in the family, resulting in less privacy and independence for the parent. Colleen Leahy Johnson, \textit{Active and Latent Functions of Grandparenting During the Divorce Process}, 28 \textit{The Gerontologist} 185 (1988). In another study, single parents were more disinclined than other parents to involve grandparents in family therapy. The researchers speculated that the single parents may have been reacting to their greater dependency on and consequent vulnerability to their parents. Berit Ingersoll-Dayton \& Margaret B. Neal, \textit{Grandparents in Family Therapy: A Clinical Research Study}, 40 \textit{FAM. REL.} 264 (1991).} In addition, they were likely to be providing financial support to the child’s parent.\footnote{Kennedy, \textit{supra} note 43, at 706.}

Even after the custodial parent remarries, the relationship between the grandchild and the maternal grandparents may stay close. In one study, children in stepfamilies were found to be unusually close to their grandparents, and to have spent considerable time with a grandparent who they related to as a surrogate parent.\footnote{Id. at 152. Grandparental support at the time of divorce has its costs as well as its benefits. According to one study, supporting grandparents could become overly involved in the family, resulting in less privacy and independence for the parent. Colleen Leahy Johnson, \textit{Active and Latent Functions of Grandparenting During the Divorce Process}, 28 \textit{The Gerontologist} 185 (1988). In another study, single parents were more disinclined than other parents to involve grandparents in family therapy. The researchers speculated that the single parents may have been reacting to their greater dependency on and consequent vulnerability to their parents. Berit Ingersoll-Dayton \& Margaret B. Neal, \textit{Grandparents in Family Therapy: A Clinical Research Study}, 40 \textit{FAM. REL.} 264 (1991).}

The more involved the grandparent, the more likely it will be that the grandchild will see the grandparent as an important person in his or
her life. For example, when grandchildren were asked whom they would turn to for help, who they considered to be a parent, and who belonged in their family, they were most like to include a grandparent in the response when the grandparent lived nearby or provided moral support or practical assistance to the child’s parent. As Cherlin and Furstenberg summarized the data: “[G]randparents play an important role in the child’s life when they live close by and have a functional role in the family. When they do, a very sizable proportion of children include grandparents as family members or regard them as parentlike figures.”

Playing an important role, however, does not mean that grandparents necessarily have a long term positive impact on the lives of their grandchildren. Cherlin and Furstenberg could detect no measurable effect in terms of grandparental influence on attitudes, on the grandchild’s behavior, or on the grandchild’s emotional well-being, no matter what the level of the grandparent’s involvement, although they did not seek to measure effect where the grandparent lived with the grandchild. What they did find, however, is that grandparents may assist the parents rather than the grandchildren when things are going badly for the grandchildren, and, as a result of this assistance, the parents may be able to assist the grandchildren not to do worse. In other words, typical grandparents can be effective in bettering the lives of their grandchildren when they are acting behind the scenes. At the same time, when a potentially difficult event occurs, such as divorce or single-parenthood, grandparents can take center stage as co-parents to their grandchildren.

In his earlier study on adolescent mothers, Furstenberg found that living in a three-generation household or sharing caretaking of the child was not necessarily positive for the mother or the child. Children in his

53. CHERLIN & FURSTENBERG, supra note 20, at 171; see Gary L. Creasey & Patricia J. Koblewski, Adolescent Grandchildren’s Relationships with Maternal and Paternal Grandmothers and Grandfathers, 14 J. ADOLESCENCE 373, 382-83 (1991) (Grandchildren who had more visual and phone contact with grandparents tended to report more supportive relationships with grandparents as opposed to grandchildren who reported infrequent contact. In this study of adolescent grandchildren, about half of the grandchildren reported frequent contact with grandparents, defined as two or three times a month or more, while the other half reported less frequent or no contact. The same study found that most grandchildren “do not perceive their grandparents as chief sources of support regarding personal issues.” Id. at 381.)

54. CHERLIN & FURSTENBERG, supra note 20, at 171.

55. Id. at 172-84.

56. Id. at 182-83.

57. Id. at 184, 197.
study whose mothers were unmarried and who experienced shared caregiving, most often with a parent and grandparent, exhibited higher preschool cognitive scores than children whose single mothers cared for them alone.\textsuperscript{58} Over the long term, however, there was no evidence of positive or negative effects arising out of shared child-care.\textsuperscript{59} The child may have benefitted indirectly, however, for Furstenberg’s data also shows that adolescent mothers who remained in the households of their parents for up to two years after the birth of the baby were more likely to remain in school and to avoid contracting a “hasty and ill-considered marriage.”\textsuperscript{60} On the other hand, mothers who stayed longer (more than two years out of the first five of the baby’s life) were less likely to achieve economic security later in life than mothers who moved out of their parents’ households.\textsuperscript{61}

Other authors take issue with Cherlin and Furstenberg on the question of grandparental impact on children. Some argue that involved grandparents play a vital emotional role, supporting their grandchild’s sense of security and self-worth,\textsuperscript{62} while uninvolved grandparents can do long term harm by making a child feel rejected or abandoned by people to whose love the child feels entitled.\textsuperscript{63} Others argue that the impact is more varied and mixed, with some positive and some negative results, perhaps depending on the sex and age of the grandchild and the presence or absence of a stepfather.\textsuperscript{64}

Interestingly, none of the studies suggest that a typical grandparent makes much of a positive difference. Grandparents who have the potential to confer a substantial benefit on their grandchildren are those who work at the relationship, those who become involved in their grandchildren’s lives, living with them or seeing them frequently, and engaging in parentlike behaviors with them.\textsuperscript{65} In the abstract, any

\begin{itemize}
\item \textsuperscript{58} Adolescent Mothers, supra note 44, at 142.
\item \textsuperscript{59} Id.
\item \textsuperscript{60} Id. at 126, 136.
\item \textsuperscript{61} Id.
\item \textsuperscript{62} Kornhaber & Woodward, supra note 19, at 38.
\item \textsuperscript{63} Id. at 41.
\item \textsuperscript{64} See, e.g., James H. Bray & Sandra H. Berger, Noncustodial Father and Paternal Grandparent Relationships in Stepfamilies, 39 Fam. Rel. 414, 418 (1990) (finding that, after the remarriage of the custodial mother, boys and girls in regular contact with paternal grandparents sometimes demonstrated better behavioral adjustment and self-esteem, and sometimes did not).
\item \textsuperscript{65} From the perspective of grandchildren questioned in one study, “grandmothers and grandfathers labeled ‘apportioned’ participated in more activities with their grandchildren, contributed more to their grandchildren’s value development, and had a stronger relationship with their grandchildren than grandparents designated as ‘remote.’” Karen A. Roberto & Johanna Stroes,
grandparent is good; in the world of the child, however, only those who want to vitalize the role will make a long term, positive difference.

III. GRANDPARENT VISITATION

At common law, grandparents were generally not considered to have a right to visit grandchildren. However, most states now provide for grandparent visitation by statute. In general, such statutes permit visitation where it is found to be in the best interest of the grandchild. In moving away from the common law tradition that parents enjoyed the exclusive right to determine who could spend time with their children, legislators and courts have been developing two main principles with one subprinciple: parental autonomy isn’t everything (and peace treaties are possible), and relationships unlock doors. In this section, I examine the parameters, applications, and limitations of these principles.

A. Parental Autonomy Isn’t Everything

Grandparent visitation statutes authorize courts to enter orders that restrict parental autonomy to decide with whom the child will associate and spend time. At common law, third party infringements of parental control were permitted only where the parent was found to be unfit. Eschewing the necessity for the negative assessment, grandparent visitation statutes focus instead on the best interests of the child as the standard under which parental autonomy can be curtailed. Where a court determines that the grandchild’s best interests would be served by visitation with the grandparents, the court may enter an order providing for visitation over the parent’s or parents’ objections.

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Grandchildren and Grandparents: Roles, Influences, and Relationships, 34 INT’L J. AGING & HUM. DEV. 227, 237 (1992). In the study the grandchildren perceived their grandparents as having influence on their value development, with grandmothers, who were described as more involved, exerting more influence than did grandfathers. Id.

The impact of co-residency and closeness to grandchildren on the grandparents is explored in Margaret P. Jendroko, Grandparents Who Parent Their Grandchildren: Effects on Lifestyle, 55 J. MARRIAGE & FAM. 609 (1993).

66. On rare occasions, courts have entered grandparent visitation orders where the child is living with both of his or her married, biological parents, and one legislature authorized such orders for a brief period of time before the statute was repealed. See also King v. King, 828 S.W.2d 650, (Ky. 1992), cert. denied, 113 S. Ct. 378 (1992). Ordinarily, however, courts and legislatures deny grandparents the authority to seek visitation orders against “intact” or two parent married families, on the rationale that such interventions into family life are illegitimate. See Herron v. Seizak, 468 A.2d 803 (Pa. Super. Ct. 1983).
A good example of "parental autonomy isn't everything" is the case of *In re Desjardins*. The parents objected to the grandparents' petition for visitation on the ground that the grandparents had refused to cooperate with the parents. Examples included their refusal to return the child from a visit when he was ill, their "spoil[ing]" the child, and their obtaining dental treatment for the child without the parents' permission. According to the California Court of Appeals, neither the testimony of the parents nor the statutory presumption against ordering grandparent visitation over the parents' objection was convincing evidence that visitation in this case was not in the child's best interests.

A second example of "parental autonomy isn't everything" is the case of *Shadders v. Brock*. The paternal grandparents had been awarded visitation for two weeks a year for the purpose of taking their grandchild on a trip. When the child turned twelve, she was misbehaving at home. For disciplinary purposes, the custodial mother wanted to deny the grandchild the privilege of going on the trip with her grandparents. The grandparents sued to enforce visitation and prevailed. According to the court, the mother's authority did not extend beyond the fifty weeks a year that the child was in her sole custody.

Some courts are less articulate about the claim that parental autonomy isn't everything, but the result is the same. In one case, for example, grandparents sought an order of visitation prior to a hearing. The court held that they were entitled to the order because the mother failed to advance concrete reasons against visitation. In other words, her opinion that she did not think visitation would be in the best interests of the children was not sufficient ground to temporarily deny visitation until a hearing could be held, even where the grandparents had presented no evidence that visitation would be in the best interests of the children. In another case, the paternal grandmother was awarded visitation over the objections of the custodial mother. Although the non-custodial father had been awarded visitation, the grandmother was entitled to her own visitation order because she had "demonstrated an interest and desire to establish a relationship with her grandson," and the

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72. Id. at 478.
mother had frustrated her attempts. The court says nothing about why the mother objected to the involvement of the paternal grandmother. The silence of the court suggests, as a rhetorical matter, that the mother was just being unreasonably obstructionist. Equally possible, however, is a scenario in which the mother had valid reasons for not wanting the father's mother to be involved with the grandchild or for not wanting the child to spend nearly every weekend with the father's family, assuming two weekends a month with the father and one with the grandmother. Under this scenario, a court could be willing to respect her decisional autonomy by considering her reasons before ordering grandparental visitation.

Not every court is persuaded by the principle that parental autonomy isn’t everything. These cases demonstrate both the limits of the principle and some of the reasons for questioning the validity of the present scope of grandparent visitation. For example, a court ruled for a custodial father objecting to visitation by the maternal grandmother who, although 80 years old and in a wheelchair, had excellent relationships with her other grandchildren. In addition, she had been the person who had told the father that the grandchild's mother had been neglectful of her. The father's arguments against visitation were that the child had adjusted well to life with the father and his wife, that visitation would be disruptive, and that the grandmother could not supervise the child. The denial of visitation to the grandmother was upheld in light of the "special circumstances," which the court did not specify.

In an Iowa case, the custodial mother objected to visitation by the paternal grandmother on the ground that she exhibited mental instability and focused on her own needs rather than the needs of the grandchildren. The father, who was the joint custodian, joined the case to support the custodial mother, and visitation was denied. Similarly, in Texas, a jury verdict awarding grandparent visitation was overturned where the custodial mother was joined by the noncustodial father in arguing that the grandmother had the potential to harm the child psychologically.

Sharp factual differences do not distinguish these cases from those in which grandparent visitation was ordered. Instead what distinguishes these groups of cases from each other is the gender of the objecting

74. Id. at 996.
parent. In defining the best interests of children in the custody of a single mother, courts frequently ignore a mother's opinions about the people with whom the child should spend time. In effect, a silent presumption that the single custodial mother is not fully fit to exercise parental authority seems to be in the background of many grandparent visitation statutes.\textsuperscript{77} The unarticulated presumption becomes visible when cases involving mothers who oppose grandparent visitation are contrasted with cases involving fathers opposing grandparent visitation and cases where the custodial mother is joined by the noncustodial father in opposing grandparent visitation. Just as in the cases discussed earlier, when fathers object to grandparent visitation, courts more carefully consider and often find persuasive the parent's or parents' reasons for denying the grandparents visitation.

A similar bias in favor of the male parent's autonomy is found in the two-parent cases. With few exceptions, grandparents may not petition for visitation where the parents are married and living together.\textsuperscript{78} Upon declaring unconstitutional a statute permitting grandparent visitation where the parents were married and living together, one court said that overriding parental autonomy to permit grandparent visitation could not be permitted without evidence of harm to the child, and no harm could be presumed where the parents are married and living together.\textsuperscript{79} The court speculated that the same problem would not arise in a single-parent case because the discontinuity that the child would experience at

\textsuperscript{77} Of course, grandparent visitation cases are not the sole site of negative claims about single motherhood, so it is no surprise to find them there. \textit{See} Martha L. Fineman, \textit{Images of Mothers in Poverty Discourses}, 1991 DUKE L.J. 274, 285-89; Dorothy E. Roberts, \textit{Racism and Patriarchy in the Meaning of Motherhood}, 1 AM. U. J. GENDER & L. 1, 22-29 (1993).

\textsuperscript{78} Possible exceptions include Connecticut, New York, Oklahoma and Kentucky. \textit{See} Frances E. v. Peter E., 479 N.Y.S.2d 319 (Fam. Ct. 1984); King v. King, 828 S.W.2d 630 (Ky. 1992), \textit{cert. denied}, 113 S. Ct. 378 (1992); Melissa L. Moore, Note, King v. King: \textit{The Best Interest of the Child: A Judicial Determination for Grandparent Visitation}, 20 N. Ky. L. REV. 815 (1993); Cheryl S. Gan, Note, \textit{Grandparental Visitation Rights in Oklahoma}, 26 TULSA L.J. 245, 246 (1990). \textit{But see} Emanuel S. v. Joseph E., 16 FAM. L. REP. (BNA) 1577 (N.Y. App. Div. 1990) (denying grandparent visitation where parents married and living together on ground that, absent the death of a parent or parents, grandparent visitation permitted only where an established grandparent-grandchild relationship has been disrupted by, for example, a change in the status of the nuclear family). For a brief time, Illinois' grandparent visitation statute provided for visitation orders when the child was living with his or her married parents, but the provision has been amended. \textit{See} Burns, \textit{supra} note 68, at 75; Robert J. Levy, \textit{Rights and Responsibilities for Extended Family Members?}, 27 FAM. L.Q. 191 (1993).

\textsuperscript{79} Hawk v. Hawk, 19 FAM. L. REP. (BNA) 1418 (Tenn. Sup. Ct. 1993); \textit{see} Gan, \textit{supra} note 78, at 246 (statute permitting grandparent visitation where child living with two married parents would be unconstitutional).
the breakup of his or her parents could constitute (apparently presumptively) evidence of harm. Distinguishing single-parent from two-parent families on the basis of disruption to the child is nonpersuasive, however, because grandparent visitation is available regardless of the degree of disruption the child is experiencing so long as the child is living with a single parent. Thus, harm to the child from disruption is presumed even where the grandchild’s living circumstances have never been disrupted because he or she has always, or for many years, lived in a single-parent household. Since disruption cannot be the source of “harm” in these cases, an alternative explanation for the court’s caveat about the appropriateness of grandparent visitation where the parent is single must be found. In ordering grandparent visitation where the child was living with both parents, a New York court speculated that the alternative explanation is that single parents are presumed to be unfit as a matter of law. 80 Since the presumption is unfounded, the distinction between the availability of grandparent visitation based on the number of parents in the grandchild’s household cannot be sustained.

Although thus far largely limited in its applicability to mothers, the principle that parental autonomy isn’t everything might serve the needs of some grandchildren whose mothers and fathers are interfering with contact with grandparents who might provide significant and long lasting benefits to their grandchildren. At present, the principle is not likely to serve that purpose because it is not applied consistently in a way that distinguishes between grandparents who are likely to provide such a benefit from grandparents who are not likely to do so. Instead, courts again may rely on parental gender to determine whose autonomy should be respected and whose ignored.

As described earlier, the only evidence of permanent benefit that ordinarily is found to accrue to a grandchild from a relationship with the grandparent is in situations where the grandparent is unusually heavily involved with the grandchild, such as sharing a residence or living close by, seeing the grandchild every day or frequently, and acting in a quasi-parental role. Very few grandparents meet this description. Nonetheless, courts and legislatures rarely make substantial involvement a prerequisite for limiting parental autonomy. For example, in one case the court said that animosity between the grandparents and custodial mother was an insufficient reason to refuse grandparent visita-

80. Frances E. v. Peter E., 479 N.Y.S.2d 319 (Fam. Ct. 1984); see also Fineman, supra note 77.
tion. The child had lived with both parents and the paternal grandparents before the separation and with the father and paternal grandparents for a time after the parents separated until the mother successfully sued for custody. 81 Nothing in the appellate opinion suggests that the period of co-residency should be a determinative factor in deciding whether visitation would serve the best interests of the child. Instead, the court focused on how the parent should not be permitted to deny the grandparents access to the children. In another animosity case, the court relied on the need of the grandchild to maintain ties with the family of his deceased father to justify visitation with the paternal grandparents over the mother’s objection. 82 What the court overlooked was that the paternal grandparents had lived next door to the grandchild and had had frequent contact before the death of the father.

A higher level of justification seems to be required, however, when it is the father’s autonomy which will be restricted by grandparent visitation. In such cases, the courts often look to whether the grandparents cohabited or were otherwise closely involved with the child before ordering visitation. For example, where a custodial father was ordered to permit maternal grandparent visitation despite their “strained and hostile” relations, the court justified its decision in large measure on the fact that the maternal grandparents had cared for the children during the mother’s terminal illness. 83 In another case, two boys had shared a household with their mother and maternal grandparents for most of their childhood. After the mother’s death, the father obtained custody. Visitation was ordered for the maternal grandparents because of their devo-

83. Cockrell v. Sittason, 500 So. 2d 1119 (Ala. Civ. App. 1986); see also Benner v. Benner, 248 P.2d 425 (Cal. Ct. App. 1952) (maternal grandmother awarded visitation over objection of custodial father in light of her long cohabitation with child); Dougherty v. Dougherty, 482 P.2d 762 (Or. Ct. App. 1971) (after mother’s abandonment of children and divorce from father, the maternal grandparents were awarded custody. When the father remarried and was awarded custody, the grandparents were awarded visitation); Looper v. McManus, 581 P.2d 487, 488 (Okl. Ct. App. 1978) (mother left family after the child was born; the child was cared for by the father, stepmother, and maternal grandparents. The court justified grandparent and stepmother visitation orders as “permitting partial continuation of an earlier established close relationship”); In re Marriage of Weddel, 553 N.E.2d 213 (Ind. Ct. App. 1990) (grandparent visitation award of 108 days a year upheld over father’s objection that time awarded was somewhat excessive on ground that children had lived with or on same property with grandparents for 2 years between their birth and their mother’s murder). But see Olepa v. Olepa, 391 N.W.2d 446 (Mich. Ct. App. 1986) (paternal grandfather cared for child for 7 years while father in rehabilitation for alcoholism; after losing custody to father, grandfather sued for visitation and lost because of his “attitude” of litigiousness with father, with whom he was in great conflict).
tion to the boys.84

Gendered thinking about autonomy also provides incentives for paternal grandparents to use courts to invade the autonomy of custodial mothers, while paternal grandparents generally are not encouraged to prevail on their noncustodial sons to let them see their grandchildren. Courts do this by not asking, in many cases where paternal grandparents are awarded visitation in suits against custodial mothers, whether the noncustodial father has visitation rights to the same children or whether he is exercising those rights.85

In addition, some grandparent visitation statutes and some courts impose same-line limitations on the availability of grandparent visitation, and thereby provide an incentive for paternal grandparents to place their demands on the custodial mother rather than on the noncustodial father, their son. A “same-line” limitation occurs where, by its terms or as interpreted, a grandparent visitation statute authorizes a grandparent to sue for visitation only “across the line,” that is, where the grandchild is in the control of the parent who is not the grandparent’s child. Where the grandchild is under the control of the grandparent’s child, whether as custodian or noncustodial visitor, and that child is preventing contact with the grandchild, the grandparent is not authorized to seek judicial relief. In Indiana, for example, the grandparent visitation statute precludes grandparents from petitioning where the grandchild is in the custody of the grandparents’ child.86 As a result, the parents of a father who had joint custody and primary physical custody of his child lacked standing to sue the father for visitation.87

In states where “same-line” grandparent visitation is limited or precluded, paternal grandparents seek the security of an order by suing the custodial mother to gain access to the grandchild, even where the noncustodial father has visitation rights, because access through the noncustodial father cannot be enforced as of right, while access through the custodial mother can.88 For example, in an Oregon case, the paternal grandparents sought a visitation order against the custodial moth-

87. Id.
88. In addition, grandparent visitation suits are sometimes brought jointly by the paternal grandparents and the noncustodial father in an effort to, in effect, increase the visitation time enjoyed by the noncustodial father’s family.
er.  The father permitted the grandparents to see the child when the child was with him, but they also wanted an independent order providing for separate visitation periods. Over a dissent criticizing grandparents being allowed to intervene into the parent-child relationship, the court held that the father’s permitting his parents access to the child does not preclude a separate order of visitation being entered.

Although the principle that parental autonomy isn’t everything frequently seems to be applied in gender-biased ways, some courts have applied the principle to reject same-line limitations. Other courts have accomplished almost the same result by remitting grandparents to their own child for relief and denying relief against the nonrelated parent. The courts say that the noncustodial father can provide sufficient contact with the child to the paternal grandparents. By insisting that grandparents rely first on their own children to foster the relationship with the grandchild, these courts are, simultaneously, placing limits on the father’s decisional autonomy about the people with whom his child will spend time and protecting the mother’s autonomy with respect to her time with the child. The needs of the parents, however, are not usually the stated focus of the decisions. Instead, the courts focus on the child’s entire family constellation and insist on responsible parenting behavior on the part of all the adult members, rather than solely on the part of the custodial mother.

For example, a South Carolina court refused to order the mother to permit visitation by the paternal grandparents where the noncustodial father regularly saw the child and made the child accessible to his parents. According to the court, awarding visitation time to the paternal grandparents would amount to a split custody arrangement, which would be harmful and confusing for the child. Thus, while focusing on the parenting conduct of the father, and without mentioning the mother’s needs, the court protected the mother from having to comply with two visitation orders. In a Tennessee case, the court ordered the noncustodial father to take his children to his parents’ home during some of his visitation periods. The father objected that the trips

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90. Id. at 1019.
92. Id.
93. Acree v. Acree, 447 S.W.2d 108 (Tenn. Ct. App. 1969); see also Warman v. Warman, 496 S.W.2d 286, 289 (Mo. Ct. App. 1973) (where custodial father and child lived with grandparents for long period, grandparents awarded visitation over father’s objection in light of
would interfere with his medical practice. However, the appellate court, noting that the father, mother, and children had lived with the grandparents during the father’s medical training, upheld the order for the purpose of protecting the grandparent-grandchild relationship. By requiring the father to foster the ongoing relationship of the grandchildren with their grandparents, the court was holding him to a standard often reserved for the custodial mother. Finally, an Alabama court required a paternal grandmother to demonstrate that she could not visit the grandchild during the noncustodial father’s periods of visitation before it would consider ordering the mother to permit grandparent visitation.94 The mother’s authority to control the time she had with the children, therefore, would not be reduced unless the paternal grandmother could not have contact with the children through the usually-expected route of the cooperation of her own child.

When courts do not apply the principle that parental autonomy isn’t everything to put same-line grandparent visitation ahead of in-law orders, usually the result will be that the father’s family will be awarded more time with the grandchild at the expense of the mother and her family. Both the mother and the maternal grandparents pay a price in terms of loss of time with the child. Justifying this result on the ground that it serves the best interests of the grandchildren is difficult, since most of the evidence about grandparent-grandchild relationships points to the maternal grandparents as being more involved with the grandchildren, both before and after the separation or divorce of the parents. Where the parents have divorced, maternal grandparents are known to provide significant support, both emotional and material, to the mother as she proceeds through the transition from married parent to single custodial parent. Where the parents never married, the mother is likely to have lived with the child in a home with or near her parents, who provide significant assistance.

While giving primacy to same-line grandparent visitation can concurrently protect maternal autonomy and enhance maternal grandparent connections with grandchildren, it need not accomplish both goals in every case. Where the mother decides to limit access by her kin to the grandchild, limitations on same-line grandparent visitation can preclude

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some involved maternal grandparents from using the courts to gain access to the grandchild. For example, in a Washington case, the mother was unmarried when the child was born, and her mother assisted her with regular daycare and other forms of support.95 The grandmother and grandchild grew close. When the mother married and her husband adopted the child, they cut off the grandmother from the grandchild. The court refused to order grandparent visitation, saying:

Although we decry the gross deterioration of the relationship between the child’s natural mother and maternal grandmother to the extent that both may not share the child’s life and development, nevertheless, there are significant reasons why even natural grandparents should not be granted visitation rights over the objection of the child’s parents.96

In the situation where maternal grandparents are refused access to grandchildren, a second factor in addition to same-line limitations can be at work: the divorce trigger of the grandparent visitation statutes may preclude petitions for visitation by the grandparents of nonmarital grandchildren.97 Most grandparent visitation statutes use the occasion of the divorce or separation of the parents as the trigger point for allowing visitation. As a result, most do not provide explicitly for the situation where the grandchild is born to unmarried parents.98 The few courts considering the question have split. In several states, the divorce trigger has been applied literally, with the result that judicially-mandated visitation is not available to grandparents of nonmarital grand-

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96. Id. at 837; see also Olds v. Olds, 356 N.W.2d 571 (Iowa 1984) (no entitlement to grandparent visitation where grandchild is in custody of petitioner’s child). At least one court, however, relying on the literal language of the grandparent visitation statute, which did not distinguish between same-line and cross-line grandparents, has refused to invoke a same-line limitation to deny access by the maternal grandmother to a grandchild in her daughter’s custody. Hill v. Divecchio, 19 Fam. L. Rep. (BNA) 1210-11 (Pa. Super. Ct. 1993).
97. Of course, paternal grandparents can be denied visitation by reason of the divorce trigger as well. As Professor Carol Stack documented in All Our Kin, marital disconnection is not necessarily related to father-child alienation in poor, African-American neighborhoods, where a man who acknowledges a nonmarital child gains recognition as the child’s father and where the paternal family often takes on a large degree of responsibility for the child. An assumption that nonmarital paternal grandparents would, by reason of nonmarital status, have less connection to their grandchildren than marital paternal grandparents is without foundation. It remains true, however, that it is more likely for a nonmarital grandchild to have connections with his or her mother’s family, just as most grandchildren have more connections with their mother’s family, whether during a marriage or following a divorce.
98. See Burns, supra note 68, at 73.
children. In a few other states, despite divorce trigger language in the applicable statute, courts found no reason to distinguish between the visitation rights of grandparents of nonmarital and marital children. The principle that parental autonomy isn’t everything would support the latter interpretation since parental marital status has nothing to do with whether parental decisional autonomy is exercised appropriately.

Maternal grandparents most vulnerable to the combination of same-line limitations and the divorce trigger are those whose grandchildren are nonmarital. Nonmarital children are more likely to be born to the less affluent in the society. They also are more likely to be African-American. The typical pattern of such a family is for the grandmother to provide a home for the new parent and child or to live nearby. After the parent marries or otherwise leaves to establish her own household, the grandmother often stays closely involved, providing support and assistance. The studies discussed earlier demonstrate that African-American grandparents are most likely to have close relationships with their grandchildren, to provide homes for them, and to act as substitute parents for them. Of all grandparents, then, they are the ones whose absence is most likely to hurt their grandchildren. Nonetheless, they are among the least favored petitioning grandparents.

B. (And Peace Treaties Are Possible)

In ordering grandparent visitation over the objection of a parent who says the relationship is marked by hostility, anger, or tension, a number of courts have applied a principle I call “peace treaties are possible.” Such courts say that animosity between the custodial parent and the petitioning grandparents is insufficient reason to deny visitation.

100. Skeens v. Paterno, 480 A.2d 820 (Md. Ct. Spec. App. 1984), cert. denied, 484 A.2d 274 (Md. 1984); F.H. & B.H. v. K.L.M., 740 P.2d 1005 (Colo. Ct. App. 1987). Given that the status of nonmarital children increasingly has been assimilated to that of marital children, while the status of nonmarital fathers increasingly has been assimilated to that of marital fathers, it is difficult to imagine a convincing rationale for distinguishing between grandparents of marital and grandparents of nonmarital children.
101. Although nonmarital births are happening more frequently in all segments of the society, they are still more common among African-American families and more likely in poorer families than in wealthier families.
103. See Cherlin & Furstenberg, supra note 20, at 131.
As one court put it: "It is almost too obvious to state that, in cases where grandparents must use legal procedures to obtain visitation rights, some degree of animosity exists between them and the party having custody of the child or children. Were it otherwise, visitation could be achieved by agreement."104

Although the principle that peace treaties are possible is accepted by many courts, few explain why. Most of the judicial attention is paid to the grandparents who would be denied contact with their grandchildren in the absence of the principle. It is not hard to empathize with grandparents who face animosity from the parent who has custody of a grandchild. Losing contact with the grandchild can be a grievous event. In addition, if the child is young, the loss may be permanent.

From the perspective of a parent, animosity can also signal loss and grief. A custodial parent might have reason to believe that antagonistic grandparents, for example, might demean the parent to the grandchildren or that the grandparents might in other ways undermine the authority of the parent. Grandparents might influence children to blame the parent for the disruption between the grandparents and parent. If the custodial parent is not the child of the grandparents, the custodial parent might also have concerns about whether the grandparents would use their visitation contact to make demands that the grandchildren exhibit greater loyalty to the noncustodial parent or perhaps take the side of that parent in conflicts with the custodial parent.

From the perspective of the children, parental conflict has been found to impede post-divorce adjustment.105 Although the research is not yet available, it seems reasonable to suspect that conflict among parental surrogates, such as grandparents, would have similar negative consequences for children.

Courts are not unaware of the potential that conflict and animosity have for harming children. In deciding that visitation with her maternal grandparents was not in the best interests of a two-year-old child who had been close with her grandparents before the death of her mother, the Pennsylvania Supreme Court said,

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104. LoPresti v. LoPresti, 355 N.E.2d 372, 374 (N.Y. 1976); see also Baker v. Perkins, 774 S.W.2d 129, 129 (Ky. Ct. App. 1989) ("Presumably the custodial parent is similarly opposed in every instance in which this statute is invoked; otherwise the statute would be unnecessary.").

We are aware that a child's relationship with his or her grandparents is a special one and that the love, trust, security and companionship which comprise such a relationship may greatly enrich a child's life. Nevertheless, we must face the reality that such relationships are not always welcomed by a child's parent, either because the parent and the grandparents disagree over the care of the child, or because one of the parties, either parent or grandparent, wishes to retaliate against the other for behavior unrelated to the child . . . . Psychologically, the effects of a rivalry between the child's parents and grandparents for his affection has been termed "devastating." 106

What appears clear from the cases, however, is that the courts apply the principle that peace treaties are possible differently depending on the sex of the custodial parent. Usually, animosity is found to be insignificant where the custodial parent is a mother and the petitioning grandparents are paternal. Where the custodial parent is a father and the petitioning grandparents are maternal, the animosity often is found to be determinative.

For example, a mother objected to visitation by the paternal grandmother on the ground that she was using visitation to undermine her and to continue the relationship of the children with their father, whose parental rights had been terminated because of his violence toward the children. 107 The court advised the mother to work out her problems through limitation orders and refused to deny visitation altogether. In another case, a widowed mother came into conflict with her in-laws over the deceased husband's estate, and she objected to being ordered to allow the paternal grandparents visitation with the child. 108 The court ordered visitation. In another case, a New York court denied visitation where the mother and paternal grandparents were in severe conflict. The court grounded its decision in the negative reaction of one of the children to the grandparents, not in the mother's contention that the animosity was too great. 109

Evidence of animosity between a custodial father and maternal grandparents, on the other hand, is given substantial weight. 110 For

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110. Compare Commonwealth ex rel. Zaffarano v. Genaro, 455 A.2d 1180 (Pa. 1983) and
example, in a case where the court found that the animosity between the custodial father and the maternal grandparents was a sufficient reason to terminate grandparent visitation, the court gave no weight to the fact that the children had lived for several years with the maternal grandparents while their mother was mentally ill and their father was in school.111 After the mother committed suicide and the father remarried, the father successfully sued for custody, moved with the children to another state, and successfully petitioned the court in the second state to terminate the grandparental visitation order.

Apparent judicial willingness to credit animosity as a reason to deny grandparent visitation when the child is in the custody of a father and to ignore the animosity when the child is in the custody of a mother mirrors widely-held social beliefs about the ways in which men and women differ in relation to anger and emotional disruption. Women, as a general principle, are expected to nurture relationships and smooth over angry feelings; to help people to get along with one another. Men, on the other hand, are not expected to work at keeping people in relationships. Instead, they are permitted to express their anger, even with violence on occasion, and even if the anger destroys or diminishes the relationship.112

In her book about the different views on moral development held by men and women in late-twentieth century America,113 Carol Gilligan interpreted the results of one study on moral development as follows:

If aggression is tied, as women perceive, to the fracture of human connection, then the activities of care, as their fantasies

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Kudler v. Smith, 643 P.2d 783 (Colo. Ct. App. 1981) with Barry v. Barrale, 598 S.W.2d 574 (Mo. Ct. App. 1980); Johansen v. Lanphear, 464 N.Y.S.2d 301 (App. Div. 1983) and Lo Presti v. Lo Presti, 355 N.E.2d 372 (N.Y. 1976). Contra Cockrell v. Sittason, 500 So. 2d 1119, 1120 (Ala. Civ. App. 1986) (relationship of surviving father and maternal grandparents so “strained and hostile” that grandchildren would rarely see grandparents in absence of order). Where paternal grandparent animosity toward the custodial mother influences the court, it usually is in cases where the father had been extremely violent toward the mother. In one such case, the father raped the mother in the presence of the child, Drennen v. Drennen, 557 N.E.2d 149 (Ohio Ct. App. 1988), and in another, he shot her while she was holding the child, Hughes v. Hughes, 463 A.2d 478 (Pa. Super. Ct. 1983). In both cases, the court was concerned mainly with the risk that the father posed to the grandchildren, were he permitted to see them during visitation with the grandmother.

112. I stress that what I am describing here is how men and women are viewed, not how individual men and women behave.
suggest, are the activities that make the social world safe, by avoiding isolation and preventing aggression rather than by seeking rules to limit its extent. In this light, aggression appears no longer as an unruly impulse that must be contained but rather as a signal of a fracture of connection, the sign of a failure of relationship. From this perspective, the prevalence of violence in men’s fantasies, denoting a world where danger is everywhere seen, signifies a problem in making connection, causing relationships to erupt and turning separation into a dangerous isolation.  

A leading theoretician on the psychology of women once wrote,

In our culture . . . serving others is a basic principle around which women’s lives are organized; it is far from such for men . . . . [I]t is of extreme importance to stress that women have been led to feel that they can integrate and use all their attributes if they use them for others, but not for themselves. They have developed the sense that their lives should be guided by the constant need to attune themselves to the wishes, desires, and needs of others. The others are the important ones and the guides to action . . . . Conflict has been a taboo area for women and for key reasons. Women were supposed to be the quintessential accommodators, mediators, the adapters, and soothers.  

In contrast to the notion that women are socialized to be peacemakers and experts at social connections is the notion that men are socialized to resolve conflicts through the use of violence. One theoretician asserts:

Men’s violence is not just a psychological problem that torments individuals. Although there are bad men, men aren’t bad. We aren’t born to kill. We are the products of societies led by men in which violence is institutionalized at all levels of social, political, cultural and economic life. It should be no surprise that such societies produce some men who are particularly violent and many others whose lives have been touched by violence. Violence is the preferred means to settle international and

individual disputes among men.\textsuperscript{116}

Despite the sex-based stereotypes about men’s anger and women’s diplomacy, the evidence that men and women differ significantly in their capacities to resolve conflicts is exceptionally weak. Men are capable of diplomacy, just as women are capable of persistent hostility. If a court assumes that no father will work out problems with his former in-laws, while any mother will work things out with hers, the court would overlook the particular strengths and weaknesses of the parties in court. The best interests of a child cannot be well served if a court assumes that every angry mother will resolve problems with grandparents, while no angry father can.

Assuming courts can distinguish accurately between those parents and grandparents who have the capacity to resolve their disputes and those who do not, the question remains whether the grandchild stands to benefit from being under an order of visitation in a situation of conflict. Theoreticians and clinicians working with families do not agree on whether a child should spend time with both parents after a divorce if the parents are in serious conflict. While there seems to be little doubt that the child suffers from being exposed to interparental conflict, there is little agreement about whether the harm would be greater or less if the child and parent stopped seeing each other altogether.\textsuperscript{117} When the visiting relative is a grandparent rather than a parent, there seems less reason to take the risk that the value to the child of contact with the relative will outweigh the cost of exposing the child to adults who are angrily contending with one another. An exception may arise, however, in situations where the grandparents were, in effect, co-parents with the parent or parents. In that case, the analogy to parents becomes stronger, and the interests that animate parental contact have greater weight.

C. \textit{Relationships Unlock Doors}

Many states are moving toward permitting grandparent visitation after the grandchild has been adopted by a stepparent who replaces the grandparents’ child. This movement runs counter to the traditional ap-
proach that an adoptive parent becomes the legal parent in every way and takes on all the rights and responsibilities of the biological parent for whom he or she is the substitute. The child's relationship with the biological parent and the family of his or her biological parent is ended completely.

Despite the tradition of substitution of parental line by adoption, courts have increasingly permitted grandparent visitation after a stepparent adoption. The rationale is grounded in the recognition that the relationship of a biologically related grandparent and grandchild cannot be terminated in fact by a termination in law. In other words, the factual relationship unlocks the legally-closed door.

The leading case of *Mimkon v. Ford*¹¹⁸ was decided by the New Jersey Supreme Court. New Jersey's adoption statute, following traditional norms, provided that the adoptive parent legally replaces the biological parent for all purposes. New Jersey's grandparent visitation statute was silent on the question of whether the parent of the replaced biological parent could invoke the law. In harmonizing the two statutes, the court reasoned that the legislature would not have meant to exclude biological grandparents from visitation where the grandchild had been the subject of a stepparent adoption. According to the court, the grandparent-grandchild tie is of enduring and incalculable importance to the grandchild. Thus, although the adoption formally substitutes a new family line for the old, a developed connection between a grandchild and a grandparent does not in fact end when the adoption becomes final. The need to preserve this enduring human relationship should determine the outcome, according to the court, not the formality of the adoption.

The centrality of the relationship rationale is demonstrated by the attention paid by the *Mimkon* court to the question of whether a biological parent should be allowed access to a child after adoption on the same terms as a biologically-related grandparent. When addressing the question, the court strayed far from the facts before it, because the biological parent there, the mother, had died after the divorce but before the father remarried. Thus, the adopting parent, the stepmother, was not a substitute for a living mother, and no biologically-related mother existed to threaten the stepmother's relationship with the child. Even though the case presented no issue of open adoption in the form of post-adoption visitation by a biological parent, the court distinguished

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the grandparent’s ties to the grandchild from the ties that a parent would have. The court concluded that permitting post-adoption visitation by a parent would have different consequences from permitting post-adoption visitation by a grandparent, because the child would not be subjected to the same conflicting feelings of loyalty, nor would the grandparent be as likely to intervene in the adoptive parent’s exercise of parental authority. Eager to make its point about the need to protect the grandparent’s ongoing relationship with the grandchild, the court ignored the fact that the biological grandmother in the case had been very much like a mother to the grandchild, who had lived with her both before and after the death of her mother. The court also dismissed the father’s complaint that the grandmother’s presence would engender loyalty conflicts in the child precisely because of their previously close relationship.

In the nearly two decades since Mimkon, many courts have interpreted adoption and visitation statutes to permit visitation by the biologically-related grandparents of a grandchild adopted by a stepparent.\(^{119}\) Most courts have followed the Mimkon rationale that, for the good of the child, certain ongoing relationships must be permitted to trump the legal parenthood created by adoption in which the adoptive parent is an exclusive and complete substitute for the biological parent. Where courts decide not to permit grandparent visitation after a stepparent adoption, the rationale typically is that the adoption statute, when harmonized with the visitation statute, does not permit post-adoption visitation. The nature of the relationship or potential relationship between grandparent and grandchild is rarely discussed.

The persuasiveness of the relationship rationale may be related in part to the gender of the parties to the stepparent adoption cases. In about half the cases where post-stepparent adoption visitation is allowed, the adopting parent is the stepmother, as in Mimkon. In nearly every case where post-stepparent adoption visitation is not allowed, on the other hand, the adopting parent is the stepfather.\(^{120}\) The differences in the two cases may turn in part, once again, on the different ways in which men’s autonomy is valued, while women’s perceived superiority in supporting relationships is also valued. Thus, adopting stepfathers

\(^{119}\) See, e.g., In re Adoption/Guardianship, 622 A.2d 150 (Md. 1993); Lofton v. Smith, 590 So. 2d 323 (Ala. Civ. App. 1991); Lingwall v. Hoener, 483 N.E.2d 512 (Ill. 1985); In re A.C. & L.C., 438 N.W.2d 297 (Iowa 1988); see also Peter A. Zablotsky, To Grandmother’s House We Go: Grandparent Visitation after Stepparent Adoption, 32 WAYNE L. REV. 1 (1985).

\(^{120}\) See, e.g., Wilson v. Wallace, 622 S.W.2d 164 (Ark. 1981).
who object to grandparent involvement are more likely to prevail than stepmothers, because courts are more likely to view the need of a father to control his family as an important interest. Adopting stepmothers, on the other hand, are more likely to be seen as capable of handling a difficult relationship involving her husband’s former in-laws, her husband, and her stepchild. Of course, in these, as in the earlier cases, if the court is wrong about the specific talents or deficits of the particular parties before it, the cost to the child may be great.

Another distinguishing factor between the cases where visitation is permitted and those where it is denied is the fate of the parent who is being replaced by the adopting stepparent. In most cases permitting visitation, as in Minyon, the biological parent died before the stepparent adoption. The relationship rationale is appealing in such cases, because it is not difficult to empathize with grandparents who have lost a child and are struggling to maintain ties with a grandchild, nor is it difficult to imagine how a grandchild would benefit from continuing contact with the family of a deceased parent. As a result, it is rare to find a case where post-adoption visitation by grandparents is denied where the biological parent had died.

Grandparent visitation is often denied where the parental rights of the biological parent had been terminated for bad conduct, such as possible sexual abuse of the child and nonpayment of child support, and the adoption took place without his consent. Denial is also common where the biological father was distant from the child or consented to the termination of his parental rights. Courts seem to find that the relationship rationale loses its persuasive value when the sanctioned relationship would be with the family of an abusive or, at best, neglectful parent.

121. See, e.g., Hicks v. Enlow, 764 S.W.2d 68 (Ky. 1989); Snipes v. Carr, 526 So. 2d 591 (Ala. Civ. App. 1988); Beard v. Hamilton, 512 So. 2d 1088 (Fla. Dist. Ct. App. 1987); Chavis v. Witt, 328 S.E.2d 74 (S.C. 1985); Graziano v. Davis, 361 N.E.2d 525 (Ohio Ct. App. 1976). An exception is State ex rel. Grant & Keegan, 836 P.2d 167 (Or. Ct. App. 1992), where the court, over the dissent of one judge, interpreted the adoption statute to preclude finding the biological grandfather to be a grandfather qualified to sue for visitation, because the statute said that the relationship of the adopted person to the natural parent “and kindred” shall be as if the adopted person had not been born to the natural parent. As the court noted, however, language very similar to that in the Oregon statute was present in many of the statutes interpreted to permit grandparent visitation after a stepparent adoption.


The difficulty with these decisions is not that the relationship rationale is not a good one; it is that the rationale is applied without evidence. The fact that a grandparent’s child dies does not mean that the grandparent is the kind of person who relates well to his or her grandchild, or that the grandparent has a history of being a good nurturer, or that the grandparent possesses a talent for maintaining positive emotional ties with relatives. Nor does the fact that a grandparent’s child proves to be neglectful or abusive mean that the grandparent is equally bad for the grandchild. Indeed, that grandparent may have been the saving grace for the grandchild during hard times.\textsuperscript{124} For the relationship rationale to work, it must be based on evidence of actual relationships between grandparents, parents, and grandchildren, which is a more complex and difficult task than applying stereotypes about which grandparents are good or bad or which parents deserve respect for autonomy and which ones are going to foster relationships.

IV. REFOCUSING THE CHALLENGING PRINCIPLES

The principles that parental autonomy isn’t everything (and peace treaties are possible) and that relationships unlock doors have animated significant changes in the visitation rights of grandparents. Whether these principles can be used to create grandparent-parent co-guardianship is not clear, however, because they are based on views of relationships that reward competitiveness over cooperation and that require giving one group in the family primacy over the other groups. For co-guardianship contracts to succeed, interrelationships must be valued along with independence, and the norms of shared responsibility and mutual respect must be present. Otherwise, parents or grandparents could use the co-guardianship contract mechanism as a contest for control over the child. The child’s legal vulnerability cannot be solved, however, unless the parent and grandparent can come to terms about sharing responsibility. Sharing of tasks relating to the upbringing of a child is never simple, and the absence of mutual respect makes the task nearly impossible.

As the development of grandparent visitation law demonstrates,

\textsuperscript{124} See Ryback v. Cobb County Dep’t of Fam. & Children Servs., 293 S.E.2d 563 (Ga. 1982) (grandmother cared for grandchild after her mother abused her; mother regained custody and moved to another state, where grandchild removed from her because of her abuse; when grandmother later found grandchild and sought visitation, court acknowledged her positive assistance to grandchild, but denied visitation because child’s life had been so traumatic she could not bear to be reminded of her past).
traditional family law concepts can be modified, but the risk is that the modifications will embed social practices of competition and control to the exclusion of social practices of cooperation and mutual respect. Several limited counterexamples have appeared in recent years, however. Although incomplete and in some ways unsatisfactory, these counterexamples are worth exploring in light of the need to change norms for the purpose of creating co-guardianship contracts. The counterexamples are parental delegation of medical decision-making, parental appointment of a guardian when the parent is terminally ill, and the most comprehensive approach, the Child Act of Great Britain.

An unusual medical decisionmaking delegation statute was enacted in 1993 in California. Under its provisions, a parent may authorize a person who is caring for the child to consent to medical care. In several respects, the statute is similar to what would be necessary to create parent-grandparent co-guardianship contracts. First, the parent may exercise the power of delegation without prior judicial review. The parent and delegee are, therefore, regarded in a way that is similar to the unreviewed "natural" co-guardianship exercisable by married parents, a co-guardianship into which the state will not intervene in the absence of neglect or abuse. Second, to be a delegee, the person must be caring for the child. Like the co-parenting grandparent, the delegee becomes entrusted with power to care for the child only because of the responsibility for care that the delegee has undertaken.

The California statute, while helpful as an analogy, is insufficient to meet all the requirements of a parent-grandparent co-guardianship. First, the delegation may occur only with respect to medical decision-making, not with respect to the other legal decisions that need to be made on a daily basis on behalf of a child. Second, the statute, while ambiguous, does not appear to permit the parent to exercise medical decision-making concurrently with the delegee. Instead, it appears to come into effect when the parent is not able or available to care for the child. The parent-grandparent co-guardianship, on the other hand, needs to exist in the three-generation as well as in the skipped-generation household, because the co-resident parent or grandparent may be living together in response to a temporary, intermittent, or progressive disabling

126. The statute permits medical decision-making to be delegated to a person "into whose care the child has been entrusted." Id. While this may mean a person who is jointly caring for the child with the parent, the more likely interpretation of the language is that the legislature had in mind a situation where the child is no longer in the care of the parent.
condition. Each needs the authority to exercise whatever legal power is consistent with the degree of caregiving he or she is able to provide the child at that point.

A second analogy may be found in the springing guardianship statutes enacted in New York and Illinois, and under consideration in other states.\textsuperscript{127} Under such statutes, a parent who is terminally ill and facing imminent death may designate a guardian for his or her child. The guardian becomes entitled to exercise parental rights once the parent becomes too ill to care for the child and to become the child's custodian immediately upon the death of the parent.\textsuperscript{128} The purpose of these statutes is to provide some security and continuity of care to the child who is about to be orphaned as well as some certainty to the parent who is dying.

From the perspective of the parent-grandparent co-guardianship, the springing guardianship statutes provide promising analogies. First, they define at least one situation in which a parent and nonparent can jointly exercise legal power on behalf of a child. Second, they provide an example of a statute developed in light of the interdependent needs of three parties: the child, who needs security and continuity of care; the parent, who wants to remain with the child as long as possible and exercise some control over the selection of the child's caregiver after her death; and the substitute caregiver, who needs to know where the child will be in order to provide and plan for the child's care.

While essential to assist families of people with AIDS or other terminal illnesses, springing guardianship statutes do not fully respond to the issues raised by the parent-grandparent co-guardianship. First, the situation in which the springing guardianship may be created is too limited: while some three-generation households and skipped-generation households are formed due to the impending death of the parent, many

\textsuperscript{127} See In re Estate of Herrod, 626 N.E.2d 1334 (Ill. App. Ct. 1993) (based on standby guardianship statute, trial court has broad discretion to appoint a standby guardian while a child's custodial parent is still living and competent. HIV mother sought to have her sister appointed as standby guardian, with the actual transfer to custody to be effective when mother became unable to care for children).


\textsuperscript{128} Id.
exist because the parent is only disabled or ill, or is merely temporarily financially dependent. The child in such a household may suffer legal vulnerability regardless of the source of the parent’s situation or the reason the three-generation or skipped-generation household was formed.

Second, the springing guardianship statutes retain the traditional 
*parens patriae* approach of requiring a court order to establish the guardianship. The judicial proceeding is less adversarial than the traditional action by a third party against a parent because the statutes do not require a finding of parental unfitness before entering a springing guardianship order. Nonetheless, going to court is not a process that many parents and grandparents willingly engage in, and many will lack the financial resources to gain access in any event. Although sanctioned by tradition, judicial process should not be required unless it serves some important purpose. Its purpose in this context is to ensure that the parent’s choice as guardian serves the child’s best interests. As the California statute demonstrates, however, the parent can be entrusted to make decisions that are in the best interests of the child. Indeed, most parental decisions—other than delegation decisions—are immune from judicial review, in the absence of parental neglect or abuse. Even delegation decisions are beyond review so long as one parent is making the delegation to the other parent, and the parents are not separated or divorced. Where the parent and proposed delegee are jointly caring for a child, and where both agree to the scope of the proposed delegation, the case for prior judicial review is quite weak, since the parent and delegee are engaging in conduct which, if they were both legal parents, no court could second-guess. The state’s power still can be invoked, obviously, if the delegee fails to provide care and the child is neglected or abused.

The third analogous statute is the most comprehensive. Enacted in England, it is called the Children Act of 1989.\(^\text{129}\) Under the Act, a person married to a custodial parent or a person who cohabits with a custodial parent may obtain a “residence order” from a court which permits him or her to exercise certain parental powers concurrently with the custodial and noncustodial parent. The powers include those that are necessary for the daily care of the child. Powers which fundamentally

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alter the existence of the parent-child relationship, such as adoption or testamentary guardianship, are excluded from the scope of a residence order.

The Children Act is an important effort to replace norms of shared responsibility and mutual respect for traditional norms of exclusive and individualistic parental rights. First, it rewards the acceptance of responsibility by empowering the person who cares for a child. Second, it accepts the possibility that multiple adults may simultaneously provide care for a child and need legal empowerment; "it increases the number of persons with these responsibilities." At the same time, it does not contemplate awarding a nonparent rights that undermine the parent's fundamental legal relationship to the child. Third, it permits adults access to court if they come into conflict over the exercise of their simultaneously-held powers, so it incorporates the reasonable expectation that perfect agreement will not always be achieved.

The Act also has some shortcomings. First, it does not empower persons other than those in a marital or sexual relationship with the custodial parent. Thus, no three-generation or skipped-generation families are included. Second, prior judicial approval is required. Third, the custodial parent is given little voice in the decision whether to award a residence order, although it would appear antithetical to the spirit of the Act to issue an order over the objection of the custodial parent.

What the California medical decision-making delegation statute, the springing guardianship statutes, and the Children Act demonstrate is that increasing attention to shared responsibility and mutual respect, while reducing parental autonomy and exclusivity, is within the realm of legal imagination in appropriate circumstances. Judged through the lens of interdependency needs of three-generation and skipped-generation families, none of the three is a complete solution, but all offer significant possibilities for reform.

V. PUTTING IT ALL TOGETHER: INTERDEPENDENCY THEORY

This section attempts to articulate interdependency principles on which to base a redefinition of the rights and duties of members in three-generation and skipped-generation families. As Professor Minow noted in a recent article, the trick to being catholic in one's definition of family is simultaneously remaining fundamentalist in one's definition of family duties. The trick is tough when only two generation fami-

130. Id.
131. Martha Minow, All in the Family and In All Families: Membership, Loving, and Owing,
lies are at issue. Trying to conceptualize duties for three-generation and skipped-generation families pose additional complexities that, I argue, require us to look beyond individual needs to sustain and support mutual interdependencies.

The degree to which judicially sanctioned grandparent involvement with grandchildren is appropriate may be evaluated from at least four perspectives. One may ask what degree of involvement offers the greatest benefit, or the least cost, to children. The same question may be asked about the parents, and about the grandparents. One may also ask whether there is a way to evaluate judicially-sanctioned grandparental involvement from all three perspectives simultaneously, or whether the three potential beneficiary groups must be ranked.

By framing the questions in this way, I have indicated one of my biases. If one perspective must be ranked higher than the others, the interests of the grandchild should be given primacy. As Professor Barbara Woodhouse has argued persuasively, the history of family law has been to put the parents first, with sometimes questionable and sometimes negative results for the children. She proposes instead that the search for the child’s view be undertaken before and given priority over the desires of the adults. Another way of giving primacy to the child’s perspective would be to see the child as a fully or partially dependent member of a group composed of the child and one or more adults. Using this approach, one would prefer policy choices which tend to maximize the child’s opportunity to be cared for within the group.

While persuasive in many ways, giving primacy to the interests of the grandchild is not an entirely satisfactory answer. Making the child’s perspective central is appealing because it appears to give the greatest value to the needs and views of the person whose present and future should be nurtured and protected. It opens the door to serious consideration of psychological and empirical research into the development and needs of children. Also, because of the vulnerability of children, the

135. Id.
approach invokes feelings of altruism and caring. This concept has its drawbacks, however. It is too easy to essentialize children: to think of them as all being the same and needing the same treatment. One need only examine the sorry history of the “best interests” concept to begin to understand that it is an empty vessel usually filled by the preconceptions of judges and legislators about what they imagine would be good for “children.” The fact is that children vary widely from each other in age, language competence, education, motor skill, and emotional maturity. In addition, they experience life as members of the different ethnic, class, and racial groups in which they live. Further, younger children do not, indeed cannot, live alone. How to give primacy to their interests without also giving consideration to the interests of those with whom they live is not only difficult; it may be detrimental to the lives of both the caregiver and the care-receiver.136

Court-ordered grandparent visitation provides an important example of the limitations of the theory that family law should give primacy to children’s interests. As it turns out, there is no clear answer as to whether grandchildren would gain more than they lose under a legal regime permitting judicially-mandated contact with grandparents. The benefits include, as discussed earlier, the possibility that grandparents may provide a continuity of family knowledge and investment to grandchildren who might otherwise lose a sense of their kinship and personal history, and who might then suffer a diminished sense of self-worth.137 Grandparents thus may offer a sort of counterweight to the isolated nuclear family. Grandparents, like other “third-parties,” may provide additional sources of caregiving to a child in need of more adult attention.138 Angry or vengeful parents will be prevented by court-ordered visitation from denying a grandchild contact with a grandparent for malicious reasons. The benefits may be more valuable to a younger child in certain circumstances than to an older child or a teenager.139 Also, the need for additional caregiving may vary depending on the degree of risk a child will experience without the additional adult attention, a risk that may vary depending on the child’s

137. See supra notes 62-63 and accompanying text.
138. See supra notes 41-50 and accompanying text.
139. CHERLIN & FÜRSTENBERG, supra note 20, at 160 (younger children more dependent on parents to facilitate relationship with grandparents than older children).
class, sex, or race.\textsuperscript{140}

Costs to a child from judicially-mandated contact with grandparents may arise out of diminished opportunities for contact with the custodial parent and his or her family. Since most of the benefit to grandchildren from extended family relationships arises somewhat indirectly out of the support the extended family provides for the custodial parent or parents, fewer opportunities for contact with this group can be a substantial cost.

Also, costs may arise out of the conflict that the grandparent and parent experience. It is fair to assume that most grandparents who must ask for judicial intervention in order to gain visitation have a distant and possibly hostile relationship with the child’s custodial parent or parents.\textsuperscript{141} If judicial intervention were unavailable, the hostility of the adults would not necessarily be a factor in the child’s household.

For example, if the grandparents did not live in the same neighborhood as the parent and grandchild, the grandchild would not see them or be exposed to their hostile feelings about being refused access to the grandchild. If the grandparents can bring the parent or parents to court, the child cannot escape knowing that something is happening to members of his immediate family. Obtaining a visitation order does not necessarily calm the storm, since families can continue to fight over access and return to court for modifications or enforcement of the order. At the same time, it is not unheard of that the entry of a grandparent visitation order opens the door for access and a new relationship between the grandparent, parent, and grandchild.

A concept with greater traditional acceptance than giving primacy to the child’s interests is giving primacy to the interests of parents.\textsuperscript{142} Underlying the tradition are two assumptions. First, parents ordinarily will be motivated to do what is best for their children. State intervention confuses the lines of authority within the family while promising no guarantee of better results for the children. Second, parents are entitled to exercise full authority since they are fully responsible for the

\textsuperscript{140} See supra notes 36-40 and accompanying text (African-American grandmothers more anxious about needs of their grandchildren for coping skills and self-protection).

\textsuperscript{141} See supra note 110 and accompanying text.

\textsuperscript{142} Indeed, several authors have argued that grandparent visitation statutes can be an unconstitutional infringement on parental rights to autonomy unless their exercise is appropriately limited. See Judith L. Shandler, Note, The Constitutional Constraints on Grandparents’ Visitation Statutes, 86 Colum. L. Rev. 118 (1986); Michael J. Minerva, Jr., Grandparent Visitation: The Parental Privacy Right to Raise Their “Bundle of Joy,” 18 Fla. St. U. L. Rev. 533 (1991).
children; the congruence between rights and duties is necessary.

Parental primacy has never meant exclusivity of parental rights, however. Even traditional interpretations of parental authority have recognized that parents do not always put the best interests of their children first. The state therefore holds the right to invoke its parens patriae authority to protect children who are neglected or abused or denied support, even by their parents. The question is not, therefore, whether parental interests should be given primacy, but whether the degree of primacy currently accorded their interests is appropriate.

A second question is whether it is possible to accord primacy to parental interests without also embedding further into family law a variety of practices that treat similarly situated parents in dissimilar ways. As a traditional matter, the greatest deference is accorded to those parents who live in married pairs and abide by traditionally-defined gender roles, with the man heading the household. As the grandparent visitation cases show, men and women occupy gendered territory in family law cases, and distinctions are made between them that are irrelevant to their parenting duties or skills. Single parents, as well, are subject to state interventions such as judicially-mandated grandparent visitation, when there is little evidence that single-parent households are, as a group, worse for children than two-parent households other than in their capacity to escape from poverty. If it were possible to envision parental primacy without the current biases about gender roles and marriage, a benefit to parents from denying grandparents the right to judicially-mandated access might be greater empowerment for single parents. This empowerment is especially important for single mothers, a group that has been under attack from many quarters. All parents would regain the right to decide with whom the grandchild spends time, and under what conditions. One cost to parents is that they may make bad decisions because of their anger toward the grandparents, and later experience guilt as well as deprivation for having deprived their children from having contact. Entrusting a court to decide these matters relieves the parent of independent responsibility, while still giving the

143. *Cf. Milton C. Riggin, Family Law and the Bonds of Intimacy* (1993) (central task of modern family law is to formulate norms for people who occupy particular roles, such as mother or father, husband or wife, without embedding in the newly created roles objectionable rights or duties associated historically with gender).

144. See Fineman, *supra* note 77.

145. The most publicized critic in recent years is, of course, Dan Quayle, but he has many allies. *See* Barbara Dafoe Whitehead, *Dan Quayle Was Right*, *The Atlantic*, Apr. 1993, at 47.
parent a forum in which to express his or her reasons for wanting to
deny the grandparent access to the grandchild.

The third group of claimants for primacy are grandparents who are
cut off from contact with their grandchildren. Outside of the realm of
grandparent visitation, few successful claims have been made that
grandparents or any other third parties should have primacy in policy
decisions with respect to children. Nonetheless, their claims are not
insubstantial.

The nature of a grandparent’s claim is affected by the nature of the
experience the grandparent has with the grandchild. As the research
summarized earlier suggests,146 two different types of experience are
most common. First are “typical” grandparents, those people whose
grandparenting experiences are characterized by relatively infrequent
contact, usually on ceremonial occasions. The grandparent’s relationship
with the grandchild is likely to be pleasant and rewarding to the grand-
parent. Losing contact with a grandchild may cause the grandparent to
endure a sense of loss on both an emotional and a symbolic level,
since the grandchild represents both a material relationship and the
symbolic connections of the blood tie and the tie to the future which
the grandparent will not live to see.

Second are grandparents who have a greater degree of contact with
their grandchildren. Some live together with their grandchildren; others
see their grandchildren on a daily basis and may provide daycare or
other regular parentlike services. For this kind of grandparent, loss of
contact with a grandchild has more than symbolic significance; it also
is likely to have substantial emotional impact. It may be experienced
similarly to the loss experienced by a noncustodial parent after separa-
tion from a child, a loss that can be experienced as a kind of death.
Further, the sacrifices made by such a grandparent for the grandchild is
akin to that of a parent caring for his or her child. In addition, one
must also take into account the added component of age or sur-
prise—often the grandchild arrives in the life of the grandparent after
the grandparent has finished raising his or her own children and is
preparing to begin a different kind of life.

The main benefit to a grandparent from according him or her ac-
tess to judicially-mandated contact with a grandchild is security: the
grandparent need not worry that an angry or alienated parent will cut
him or her off from a grandchild. Grandparents who are asked or who

146. See supra note 24 and accompanying text.
volunteer to go beyond the typical role of grandparents may need this sense of security more, perhaps to validate the sacrifice they have made, or perhaps to encourage them to enter into the closer relationship. On the other hand, more involved grandparents may face a smaller risk of being cut off from the grandchild, because their involvement may inhibit the parent from taking such a step and because the grandchild may be more inclined to resist parental barriers to the relationship. If this is true, the need for a judicial mandate may be greater for less involved grandparents, because the likelihood may be less that parents would permit or that grandchildren would seek voluntary contact.

A potential cost to a grandparent from according him or her access to judicially-mandated contact with a grandchild is that access to court may give the grandparent a sense of power that is detrimental to the grandparent’s long-term relationship with the grandchild. The typical grandchild, after all, lives with the parent and usually will experience a greater degree of loyalty to the person who is caring for him or her on a daily basis. For the grandparent to intervene forcefully into this relationship may undermine the grandchild’s sense of security. As a result the grandchild may react by rejecting the grandparent. If the grandparent were forced by the lack of judicial access to make his or her overtures directly to the custodial parent, the result might be a better relationship in the long run with both the parent and the grandparent. Again, this factor may be related to the degree of involvement the grandparent has had with the grandchild. If the grandparent has been deeply involved with the grandchild, the grandchild may welcome a lawsuit as a way to reopen the door to contact closed by the parent. A more typical grandparent will have less of a hold on a child’s affections, and the child will, therefore, be more likely to align fully with the parent.

Based solely on the relative benefits and detriments, no correct answer is apparent to the question of whether the interests of the grandparents, parents, or grandchildren should be given primacy. Each group has a claim, and each group would experience both gains and losses if accorded primacy. The children’s interests are the most uncertain: while some children may experience some benefits from having their parents required by court order to permit access by their grandparents, other children could suffer significant harm. Giving primacy to the parents’ interests, while sanctioned historically and potentially empowering to single parents, has not proven itself as a means for enhancing the parental authority of parents most in need. Because of the loss they may
suffer if cut off from their grandchildren, grandparents have a strong emotional claim, but their interests may be better served by nonjudicial means.

Determining whose interests should be preferred assumes that hierarchy is preferable or necessary. One might consider instead viewing the three groups as interrelated and attempt to think through what interrelationships are better served by creating judicial mandates and what interrelationships are better served by denying judicial access. Returning to the two groups of grandparents, typical versus involved, one might ask how each group is likely to relate to the parents and grandchildren involved and what legal consequences should be fashioned to flow from these interrelationships.

Involved grandparents are those who live with or provide daily care for their grandchildren, or see them nearly daily. They may live in a three-generation household of grandparent (or grandparents), parent(s), and grandchild(ren), or they may live in a skipped generation household of grandparent(s) and grandchild(ren). They sacrifice their independence and, sometimes, their financial security for the purpose of assisting their child to raise their grandchild or, possibly, for the purpose of actually raising their grandchild. The parent is dependent on the grandparent for nurturing support as a parent and, sometimes, for financial support as well. Depending on the parents’s circumstances, the grandchild may be dependent on both the parent and grandparent to act in parental roles, or that dependency may be on the grandparent alone.

The separation of the grandchild from the grandparent’s household may arise for positive reasons: the parent completes his or her education, becomes economically self-sufficient, gets married, or overcomes a dependency on addictive substances. The grandchild’s separation from the grandparent’s household may arise for negative reasons: the parent becomes frustrated at his or her dependency on the grandparent and tries to establish an independent household before he or she can provide for the child; or the parent is angry at the grandparent for insisting that the parent stop using drugs or alcohol; or the parent’s new spouse insists for his or her own reasons that the parent separate herself or himself from their parents.

Figuring out the legal consequences that should flow from these interdependent relationships is not problem-free. For example, the grandparent might argue that he or she should be entitled to court-ordered visitation because of his or her sacrifice for the grandchild, his or her ongoing concern for the child’s well-being, and his or her fear of losing symbolic ties to his or her descendant. The parent might be able
to argue that his or her dependency was exacerbated by the grandparent’s conduct, and she or he needs the empowerment that will come from possessing the authority to determine when and under what circumstances the grandchild will see the grandparent. From the grandchild’s perspective, the sacrifices made by the grandparent and the experience of dependency of the parent may be irrelevant to his or her wellbeing. What matters is whether he or she misses seeing the grandparent and whether she or he is cared for. Thus, the reasons for his or her separation from the grandparent’s household may be more important in determining whether grandparent visitation should be mandated. For example, the grandchild may be neglected by a drug-addicted parent living alone, while the grandchild could receive adequate care when the same drug-addicted parent is parenting together with a grandparent.

There are no right answers to this example. Instead, there are socially constructed answers about what is good parenthood and bad parenthood and what are the appropriate roles for the rule of law. One might value the grandparent’s experience of parenthood, for example, and accord her or him the same rights of access as a separated legal parent enjoys. If one values altruism in parental relationships, the grandparent’s claim would be enhanced by the sacrifice he or she voluntarily made when the grandchild and parent needed care. If the parent is caring adequately for the grandchild in the new household, the grandparent’s claim that she or he is still needed will have little weight unless parenting by a grandparent, or a quasi-two-parent household composed of grandparent and parent, is valued more highly than parenting by single parents.147 The child’s sense of loss if he or she is denied the opportunity to see the grandparent may be a persuasive reason to permit judicial intervention, but only if one believes that courts should not defer to the parent’s judgment about whether the child’s sense of loss is detrimental to the child’s wellbeing.

Since the competing values produce no clear answers, a different approach is needed. One possibility is to ask whether judicial intervention might serve—at least in the typical case—to preserve or enhance relationships among the grandparent, parent, and grandchild. In other words, can legal rights be used to enhance a sense of connection among the grandparent, parent, and grandchild in such a way that they are encouraged to continue a relationship with one another?148 If legal

147. Parental neglect of the child would not strengthen the grandparent’s claim, however, because the parent would be subject to a neglect charge under which her or his parenting would be supervised, or the child might even be removed from the parent’s care.
148. See Minow, supra note 131; Monica J. Evans, Stealing Away: Black Women, Outlaw
rights have such a potential, can they also be formulated in such a way that connection is not required if it becomes too burdensome or destructive? In other words, could the legal norms accord value to interrelationships based in shared responsibility while at the same time giving weight to the mutual respect required to permit people the independence and autonomy they need?

For example, would granting involved grandparents a right of visitation after a separate household is established by the parent for himself and the child enhance or inhibit the willingness of grandparents to help care for their grandchildren and the willingness of parents to seek such help? To the extent that legal entitlements ever influence decisions about family establishment or conduct, a somewhat questionable proposition, one probably can answer this question in the affirmative. Having a right to continuing contact would probably encourage grandparents to open their homes to parents and grandchildren because they would gain some security about their ability to stay in contact with their grandchildren for the long term. At the same time, the legal entitlement probably would not discourage parents from accepting help from the grandparents because their need for help at the time of the decision is so great and their optimism about their parents is probably at a high level.

The possibility that the mandated connection would become too burdensome or even destructive is real. The extension of visitation rights to grandparents, however, could be predicated on a finding that visitation is in the best interests of the grandchild and the reasonable desires of the parents. If they knew their needs would be respected, conscientious parents might not be discouraged from seeking shelter when they need it from grandparents.

If post-separation visitation is justifiable on security grounds where grandparents provide three-generation or skipped-generation homes for their children and grandchildren, can it also be justified in circumstances of typical grandparents? It would seem not. Typical grandparents do not make the same level of sacrifice for their grandchildren. Their grandchildren do not experience the same level of short-term or long-term benefit from the connection, and the parents do not receive the same level of support in time of need. If typical grandparents were to

\textit{Culture and the Rhetoric of Rights}, 28 Harv. C.R.-C.L. L. Rev. 263 (1993) (rights need not be “premised on individualistic self-absorption or even self-interest as such... For the clubwomen, the struggle for rights was incoherent without simultaneous nurturing of communal relationships predicated on a responsibility for racial uplift... The clubwomen simultaneously occupied spheres of rights and relationships.”).
receive the same right to judicially-mandated visitation as co-residential grandparents, no positive message would be sent to encourage grandparents to provide assistance when parents need it. At the same time, parents who receive no extraordinary help and children who receive no special benefit must alter their lives to provide judicially-mandated access to grandparents who have made no special sacrifice or emotional investment. The legal right thus would not enhance the creation or maintenance of close connections among grandparents, parents, and grandchildren. Rather, it would confirm that distant relationships will be rewarded equally with close relationships.\textsuperscript{149}

One rationale for equating formerly co-residential and non-co-residential grandparents might arise out of the fact that both types of grandparents share blood ties with the grandchild and both types of grandparents suffer a sense of loss when cut off from their descendants. Typical grandparents, furthermore, can make the claim that they have conformed to the social norm of not interfering in the lives of their children, and they should not be punished for conforming by being denied judicially-mandated visitation.\textsuperscript{150} When an unwed father demonstrates his blood ties and some typical paternal activity, he may be accorded the rights of fatherhood.\textsuperscript{151} By analogy, grandparents should be accorded rights upon a showing of blood ties and typical grandparent behaviors.

What is missing from these arguments is a sense of interrelationship. While it is possible that the grandparents will benefit from court-ordered visitation, it is impossible to see how the relationship of the grandparents, parents, and grandchildren will be enhanced. Blood ties, while important incentives for some people in deciding with whom to have relationships, are rarely a trump in family law.\textsuperscript{152} There is a val-

\textsuperscript{149} Cf. David Abraham, Are Rights the Right Thing? Individual Rights, Communitarian Purposes and America's Problems, 25 Conn. L. Rev. 947, 953 (1993) (reviewing Mary Ann Glendon, Rights Talk: The Impeachment of Political Discourse (1991)) (according to Abraham, Glendon believes that "[o]ur particular interests block out those of others and lead to both a quashing of habits of the heart and a disdain for politics which is, after all, about living with others.").

\textsuperscript{150} My thanks to Tricia O'Neill for suggesting that this scenario required more attention than I had given it in an earlier draft.


\textsuperscript{152} See Janet Dolgin, Just a Gene: Judicial Assumptions about Parenthood, 40 UCLA L. Rev. 637 (1993) (arguing that biology alone was insufficient basis for Supreme Court to find rights in unwed fathers; instead issue was relationship of father to mother and social connection to child, with greatest emphasis on similarity of relationship between mother and father being
id reason for this policy: relationships need more than blood to be meaningful; they also require work. The social norm of nonintervention is a powerful incentive for grandparents not to impose themselves on their children. However, it is also an important self-protection device for grandparents who do not want to give priority to building relationships with their grandchildren.153

Awarding judicially mandated visitation to grandparents who abide by the nonintervention norm gives equivalent rewards to grandparents who left their children alone because they were trying to be respectful of their children’s needs and grandparents who left their children alone because the grandparents wanted to concentrate on other people or activities. Permitting members of the latter group to change their minds when they realize that the cost of being left alone is staying alone seems to provide an incentive for people not to foster relationships. Further, grandparents who were keeping their distance out of respect for their children’s needs probably will have the least need for judicially mandated intervention because they will not alienate their children or even their in-laws, former in-laws or the equivalent, as the case may be, by making unwelcome interventions into their lives.154

The most frequent invocation of grandparent visitation rights visible in appellate reports is a suit by paternal grandparents against a custodial mother who previously was married to or had a relationship with the grandparents’ son. If only co-residential grandparents or their equivalents are permitted to sue, few of these suits would be successful. Interrelationship theory supports this result where the son is alive and entitled to exercise a right of visitation. In these situations nonjudicial efforts on the part of grandparents to have contact with their grandchildren are likely to lead to more supportive and respectful cross-generational contacts rather than fewer.

In the absence of a right to sue, grandparents do not have to lose contact with their grandchildren. The grandparents can appeal to the custodial parent, most often the mother. Given the overstuffed lives of many single parents, the mother’s cooperation is not unlikely, particularly if the grandparents are willing to cooperate in return by scheduling time with the child when the mother needs to attend to personal

similar to that of marriage).
153. See supra note 41.
chores. The child benefits two ways from the grandparent-parent interdependency: he or she has the opportunity to develop a relationship with grandparents and he or she may receive better parenting from a custodial parent who is receiving support from the grandparents. If the grandparents were entitled to sue the mother, on the other hand, the mother and child would suffer the financial loss of attorney’s fees. Also, the interpersonal gains associated with a supportive and mutually respectful interdependent relationship might be sacrificed.

If the custodial parent does not cooperate, interdependency theory still supports denying the grandparents a right to sue in most circumstances. Rather than looking to the custodial parent for opportunities to see the grandchildren, the grandparents would need to depend on their own child, who could, if they wished, make the grandchildren available to see the grandparents during the parents’ visitation times.

Grandparents who offer a cooperative, mutually supportive relationship with their child on behalf of the grandchild should enjoy the same degree of success as they would with a former in-law. Additionally, there is a further benefit to the grandchild. At present, approximately half of noncustodial fathers do not spend time with their children after their separation from the mother. If grandparents had to rely on their sons to provide access to their grandchildren, they probably would try to influence them not to lose contact and to see the grandchildren more frequently. Grandparents could provide a familiar and supportive setting where the father and child could try to make the difficult transition from living together to seeing each other less frequently.

Grandparents whose child is dead or whose child lacks visitation rights are in a different position. No alternative to the custodial parent is available to provide access, unless the grandchild is old enough and close enough to the grandparents to initiate visits independently. At

155. Although it seems unlikely, a cooperative relationship can arise even after bitter litigation, such as that evidenced in the appellate decisions in Skeens v. Paterno, 480 A.2d 820 (Md. Ct. Spec. App. 1984). While writing an article on the case, I interviewed the maternal grandfather, Mr. Skeens, who described the many ways in which the paternal grandparents had assisted his daughter over the years with the care of her son. Although she and the child’s father terminated their relationship even before the child was born, the child has had a close relationship with his paternal relatives apparently because—in large measure—the paternal grandparents were not insistent on compelling adherence to the court-ordered visitation schedule. Instead, they offered to assist the mother, who was trying, in addition to being a mother, to continue her education, nurture adult relationships, and stay employed.

present, grandparents whose child has died are treated favorably by many courts, while grandparents whose child’s parental rights have been terminated or limited are often treated unfavorably. 157

The different treatment seems to arise from assumptions about the benefits that will accrue to a child from continuing contact with the family of a dead parent. These benefits are assumed to be nonexistent if the parent is “bad.” These assumptions are meaningless in the absence of evidence. Under an interrelationship theory, it would make sense to grant visitation rights whenever a grandparent has no child who can provide access to the grandchild. The grandparent should not prevail, however, unless the grandparent can demonstrate that he or she has made reasonable—that is cooperative and respectful—efforts to persuade the grandchild’s custodian to permit access. Further, the burden should be on the grandparent to show how judicially mandated visitation will foster the grandchild’s sense of interdependency rather than the grandchild’s sense of being an object in a loyalty contest. In short, the court could be used to substitute for the parent who is dead or lacks visitation rights. However, the incentive should remain strong for grandparents to cooperate with the custodial parent before seeking to force her to help them.

In sum, a focus on the legal entitlements that enhance interrelationship should result in a shift in grandparent visitation law away from it being available to every grandparent, no matter what his or her investment in or sacrifice for the parent and grandchild, and toward it being available only to grandparents who lived with their grandchildren or exhibited a similar degree of involvement in their lives. This narrowing would be justified not on the basis that parents’ rights to autonomy are primary, but instead on the basis that the interrelationship of connection, assistance, and need should be fostered. By according legal rights to those who foster connection when needed, the legal system sends a message to all family members that altruism and responsibility are essential attributes of people who wish to invoke the legal system to enforce familial rights. 158

Using co-residency, or its equivalent of nearly daily contact, as the criterion on which to separate qualifying grandparents from nonqualifying grandparents is not problem free. The category is both over-inclusive and under-inclusive. Nonetheless, when viewed through an interre-

157. *See supra* notes 122-23 and accompanying text.

relationship model, the criterion works.

Framing the entitlement to judicially-mandated grandparent visitation in terms of co-residency or its equivalent is over-inclusive, because some co-residential grandparents do not act as co-parents with their co-residential grandchildren. In other words, even though they share a household, they do not share responsibilities with the parents for caregiving any more than most non-co-residential grandparents do. For example, they may be sharing a home solely for the purpose of providing a place for a temporarily-unemployed parent to stay with his or her children or for the purpose of making it easier for a parent to provide care for a temporarily-disabled grandparent. The co-residency criterion would entitle grandparents to obtain judicially-mandated visitation based solely on household composition, where the qualifying grandparent has made no parentlike contribution to the caregiving of the grandchild.

When one considers the needs and perquisites of the members of the three generations independently of one another, basing grandparent entitlement on co-residency alone and leaving out co-parenthood as a criterion seem wrong-headed. The parent will be required to limit his or her parental autonomy solely on the fact of co-residency without having gained any corresponding benefit from a felt commitment by the grandparent to share in the child’s care on a co-parental basis. The long term benefits to the grandchild of judicially-mandated contact with a grandparent who is not a parent substitute probably are too speculative to justify grandparent entitlement. Finally, a grandparent who does not engage in co-parental behavior probably experiences no greater sense of loss when deprived of contact with a grandchild than any other non-co-residential grandparent. In other words, the loss no doubt is significant, but it should not be determinative.

When one puts the three generations into the equation simultaneously and seeks a solution that fosters the interrelationship of the three generations, the answer changes. Such evidence that exists suggests strongly that co-residential grandparents typically are co-parenting grandparents. Even where the grandparent and parent may not have intended co-parenthood to arise out of the shared household arrangement, it is hard to envision a co-residential grandparent who does not share more meals, administer more discipline, tell more stories or give more baths than a non-co-residential grandparent.

It is similarly hard to envision a co-residential parent who does not become more dependent on the grandparent to share in the care of the grandchild. Given the probability that shared residency is strongly correlated with co-parenthood, the question becomes whether distinguishing
between co-residential co-parenting grandparents and co-residential non-co-parenting grandparents is a worthwhile endeavor. In other words, would drawing the distinction enhance or impede interrelationships? Overall, the answer appears to be that drawing the distinction would be a negative factor.

First, simple standards, such as evidence of co-residency, probably lead to clearer legal results, more settlements, and less litigation. Litigation around the sensitive and potentially competitive topic of who took a more active role in the care of a child is likely to leave deep tears in the relationship between the parent and grandparents. Further, it may place conflicting loyalty demands on the grandchild.

Second, a co-residency presumption reinforces an analogy between the co-parenthood experienced by two parents and the co-parenthood that may be experienced by a parent and a grandparent. That is, a noncustodial parent’s entitlement to seek visitation typically arises out of a simple test: evidence of the blood relationship or the legal tie called parenthood. Essentially, a nearly conclusive presumption arises from this evidence that visitation will be beneficial to the child. The legally-recognized parent seeking visitation need not show the particular nature of his or her relationship to the child in order to gain the entitlement. The entitlement is available even when the visiting parent and child have never shared a household and where the visiting parent has never demonstrated an ability or willingness to care for the child on a custodial basis. A similarly simple presumption favoring the co-residential grandparent evidences a belief or assumption that most co-residential grandparents act as co-parents. Therefore, continuing contact with the grandparent will benefit the grandchild, perhaps even if co-parenting did not occur. Requiring evidence of the particular nature of the co-parenthood, if it existed, burdens the court with making un-


160. See JOHN DE WITT GREGORY ET AL., UNDERSTANDING FAMILY LAW 390-391 (1993) (visitation is a “natural” right of the noncustodial parent and may not be denied unless necessary to prevent serious endangerment of the child).

161. A putative father who was not married to the mother at the time of the conception or birth of the child must first be legally recognized as a father before asserting rights to visitation, but once he is so recognized, his rights are equivalent to those of any other noncustodial parent. To be recognized as the father may require a man to produce evidence of parental conduct as well as the genetic tie. See Czapanskiy, Volunteers and Draftees, supra note 151.
necessary fine distinctions.

Like all presumptions, co-residency will be wrong in some cases. Some co-residential grandparents who do not make the sacrifices demanded by co-parenthood will gain an entitlement to seek visitation with formerly co-residential grandchildren. A fourth justification for this apparently wrong result is to encourage grandparents to be generous to their needy children and grandchildren.\textsuperscript{162} Co-residency even without co-parenthood is, after all, more than most grandparents provide. Furthermore, if evidence of co-parenthood is required, a grandparent might be tempted to demand a co-parenting relationship when the parent does not want, and the grandchild does not need, the extra parent. All they need is a place to live.

Under-inclusiveness is a problem because the category of qualifying grandparents will not include the grandparent who has a close relationship with his or her grandchild but who lives too far away for daily or near daily contact. The grandparent may dedicate vacation time to visiting the grandchild, may phone or write frequently, or may be a strong presence fostering the grandchild's connection with his or her past, religion, or ethnicity. In other words, the grandparent has done all that is possible to create and enhance the relationship with the grandchild, given the geographical constraints. If the grandchild's parent or parents decides to eliminate contact between the grandchild and grandparent, the co-residency criterion would deprive the grandparent of any entitlement to judicially-mandated contact with the grandchild.

Arguments similar to those concerning over-inclusiveness are persuasive in support of under-inclusiveness. The involved but geographically-distant grandparents who will be disadvantaged are extremely few in number, since involvement is, with rare exceptions, correlated positively to geographical proximity. To require courts to distinguish geographically remote involved grandparents from geographically remote typical grandparents involves judges in making fine distinctions that, in most cases, will not result in an award of grandparent visitation. In the meantime, however, the parent will have to expend financial resources on legal fees. Since poverty or near-poverty is common in single-parent

\textsuperscript{162} On the other hand, the co-residency presumption might discourage a parent from opening his or her home to a disabled grandparent on the theory that the grandparent, once recovered and independent again, will gain the right to seek visitation because of the parent's generosity. This seems a highly unlikely scenario, because most elderly grandparents who move in with children to receive care never regain their independence; instead, their health and fitness continue to deteriorate with age.
families, such expenditures are antithetical to the needs of both the grandchildren and the parents. The simple co-residency or equivalent criterion will discourage more grandparents from suing. As a result, parents will be able to conserve needed resources for their children.163 Finally, as the grandparent visitation cases show, courts are inclined to permit grandparent visitation when the objecting parent is female.164 This bias is not likely to evaporate with a change in criteria unless the criteria are explicit and simple.165

Defining the limits of grandparent visitation using an interrelationship model is a necessary step toward recognizing the legal needs of three-generation families, because the redefined limits increase the legal value accorded to social practices involving people in sharing responsibility for children in ways that are mutually respectful. At the same time, legal recognition of grandparent visitation of any kind, even as limited under the interrelationship model, sustains within family law the necessary challenges to parental autonomy and the exclusive exercise of parental rights. The door is then opened to the legal recognition of co-guardianship contracts, because many of the traditional barriers in family law have been reduced, while the value given to norms of sharing and mutual respect has increased.

The specific ways that the grandparent visitation law challenges should be used to shape the legal recognition of co-guardianship contracts are important to understand. First, the principles that parental autonomy isn’t everything and that relationships unlock doors are highly persuasive in the setting of simultaneous co-guardianship of a co-residential grandparent and parent where two preconditions are present: the parent is unable to protect the child from legal vulnerability and the parent and grandparent agree that co-guardianship is desirable. Where the parent’s circumstances are such that a grandparent is performing many of the daily tasks needed by children, the child may experience legal vulnerability. The example of the AIDS-affected mother with the HIV-positive child discussed earlier is such a case. On many days, the mother may be physically and mentally able to perform whatever tasks

164. See, e.g., supra notes 77, 107-111, 120.
165. See Jane C. Murphy, Eroding the Myth of Discretionary Justice In Family Law: The Child Support Experiment, 70 N.C. L. REV. 209 (1991); cf. Czapskiy, Gender Bias, supra note 159; Schneider, supra note 159.
the child's needs, including considering whether to consent to medical procedures on behalf of the child. On other days, the mother may be totally or partially incapacitated, and the child will be left legally vulnerable by the absence of a guardian. The second precondition suggested for co-guardianship contracts, that of agreement between the co-parenting parent and grandparent, arises out of the dubiousness of the proposition that peace treaties are possible in light of the evidence about the negative impact on children of post-divorce conflict. While many children live in conflicted households headed by two parents, there is some evidence that their development is not enhanced by the conflict. Since grandparent-parent co-guardianship is a legal state only in the imagination, there seems no reason to import into it the legal sanction of conflict that is a regrettable characteristic of other parental relationships.

If co-guardianship contracts can be imagined, need they be authorized to cover every right and responsibility of parenthood, or should some characteristics of parenthood be excluded? Since a primary goal of creating co-guardianship contracts is to protect the child from legal vulnerability in daily life, the most likely aspects of parenthood to be subject to co-guardianship are those that affect daily life: decisions about school, friends, medical care, etc. Decisions such as whether a child should be adopted, on the other hand, are in a wholly different category because they go beyond the daily into the permanent. There seems to be no justification to include such rights within the framework of a contractual co-guardianship. Financial responsibility, similarly, could be divided into two parts: a duty to support a co-residential grandchild is easily justified as part of the daily interactions of a responsible parent figure with the dependent child. On the other


hand, a duty to support a grandchild who is not a member of one's household probably is outside the scope of justified interference in the autonomy of the grandparent.

Interrelationship theory supports a distinction between decisions affecting the existence of a legal parental relationship and other decisions affecting the daily life of the child. It would be less likely that a parent would agree to accept help from a grandparent for a temporary problem if the legal result of that decision would be to give up the exclusive right to determine whether the child should remain one's child or be placed for adoption by others. Similarly, interrelationship theory supports a distinction between financial responsibility for the time when a grandchild is residing with the grandparent and ongoing financial responsibility. Grandparents would have a strong disincentive to provide temporary assistance and shelter if that offer carried with it a price tag lasting another eighteen years.

A highly complex question about the co-guardianship contract arises when the child has two living biological or legal parents as well as a co-residential grandparent or two. Even in its most extreme form, the law of grandparent visitation ordinarily does not permit grandparents to share parental authority when the child resides with two parents, particularly where those parents are married. Similarly, the Children Act of Great Britain does not authorize a residence order to be granted to a third person when the child is living with two parents. However, one is authorized when the child is living with one parent and a stepparent. Interrelationship theory, however, would not draw the lines in the same way. If the parents were both residing with the grandparent and grandchild, a co-guardianship contract could be justified if both parents suffer from conditions that leave the child legally vulnerable. What is important to interrelationship theory is to determine the legal rule that would permit and encourage people to rely on each other as needed and to be independent as needed. A grandparent who is willing to assist two parents and a grandchild is precisely the kind of person who should be permitted to gain the legal authority needed to provide the assistance. The opposite rule could discourage a grandparent from offering assistance in the harder case, where there are two adults to assist rather than only one. It makes no difference to the child whether one or both parents experiences a disability. The child becomes legally vulnerable in both cases unless the grandparent can be empowered to assist the

to her, defined as period of co-residency).
grandchild.

If a grandchild has two living legal parents and only one parent lives in the three-generation household, the grandparent visitation law challenges probably would not suffice to authorize the co-residential parent and grandparent to enter into a co-guardianship contract. This conclusion is not certain because grandparent visitation law authorizes numerous invasions of parental autonomy. Those challenges, however, rarely extend to diminishing the rights of the nonresidential parent. Usually, the parent whose rights are diminished is the residential parent. The Children Act of Great Britain, on the other hand, applies a different norm, a norm that values the need of the child over the rights of the parent. Under this alternative vision, shared responsibility through a child’s household members may be authorized by a residence order even when the child has a legal parent residing outside of the household. Interrelationship theory would fall in the middle. If the nonresidential parent is able and available to take care of a child’s daily legal needs, a co-guardianship contract should not be permitted. Such a contract might interfere with the continuing relationship of the grandchild with his or her nonresidential parent. If the nonresidential parent is unable or unavailable to take care of a child’s daily legal needs, however, co-guardianship is justified, because of the necessity for cultivating the interrelationship of the grandparent, residential parent, and grandchild.

V. CONCLUSION

The relationship of co-residential grandparents, parents, and children is different not only in degree but also in kind from the relationship of typical grandparents, parents, and children. To treat them identically in the law fails to recognize the differences in the contribution of the grandparents, the situation of the parents, and the needs of the child. Using the challenges developed in the arena of grandparent visitation, it is possible to envision a new kind of contractual co-guardianship that recognizes and legally empowers a relationship of parenthood shared simultaneously between a grandparent and parent for the benefit of the child. At the same time, the law of grandparent visitation itself needs to be reformed to provide support for interdependent, altruistic, and responsible adults who care for children. With these reforms, the inverse relationship that now exists between the degree of care provided by grandparents and the degree of legal authority they may exercise will be reversed. Grandparents who provide the most care will also have the greatest entitlements. Grandparents who provide the least care will enjoy
the least entitlement. Once redesigned, the law of three-generation families will be capable of fostering interdependency. Family members who can rely on each other, who can share their joys and their sorrows, will have the law to assist them in their times of need.