

Comment, Revisiting Grandparent Rights Across the United States

Introduction

The debate over grandparent rights has resurfaced across the country due to the ever-changing nature of the American “nuclear family.”¹ Fifty years ago, nuclear families constituted “42% of all American households.”² Today, they account for only “22% [of all American households],” a decline by nearly half of what they were before.³

As the nature of the American family continues to diversify, the frequency with which grandparents are called upon to take part in their grandchildren’s lives increases. In recent years, grandparents have become more involved in their grandchildren’s daily lives, from providing them general care, to living with them or raising them in place of their parents.⁴ Due to increases in longevity, good health, and disposable income,⁵ grandparents have become important figures in the lives of their

¹ The term refers to the Anglo-American ideal that a functional family consists of a breadwinner-husband, a homemaker-wife, and their children. *See, e.g.,* Laura T. Kessler, *Community Parenting*, 24 WASH. U. J.L. & POL’Y 47 (2007). George Murdock defined the “nuclear family” as “a social group characterized by common residence, economic cooperation, and reproduction. It includes adults of both sexes, at least two of whom maintain a socially approved sexual relationship, and one or more children, own or adopted, of the sexually cohabitating adults.” GEORGE P. MURDOCK, *SOCIAL STRUCTURE* 1 (1949).

² Carly Stern, *Will the American Nuclear Family Die Out?*, OZY (Feb. 11, 2020), <https://www.ozy.com/news-and-politics/the-nuclear-family-is-in-decline-but-did-it-ever-represent-america/258493/>.

³ *Id.*

⁴ Karl A. Menninger, *Grandparent Visitation and Custody Awards*, 69 AM. JUR. PROOF OF FACTS 3d 281 (originally published in 2002).

⁵ *See* Hope Yen, *Grandparents Playing Larger Role in Raising Grandchildren*, NEW HAVEN REG. (Aug. 25, 2011), <https://www.nhregister.com/news/article/Grandparents-playing-larger-role-in-raising-11570728.php>.

grandchildren, particularly given changes in family structures.⁶ Factors such as divorce, economic hardship, single parenthood, teenage pregnancy, drug and alcohol addiction, incarceration, child abuse and neglect, and military employment have all influenced this increase in involvement.⁷

Currently, grandparents are pushing for legislation that would allow them to be involved in their grandchildren's lives in cases of parental alienation.⁸ While an expansion of grandparent rights may seem more fitting in the modern era, problems arise when these rights conflict with parental autonomy. Whether grandparent rights should be expanded beyond their original limited scope⁹ remains in a state of flux.¹⁰ While some states have broadened the scope of their statutes in the wake of structural changes, others have placed even narrower limitations.¹¹ Deficiencies in these laws tend to create more problems for both grandparents and parents in understanding their rights.

⁶ Valerie King & Glen H. Elder, Jr., *The Legacy of Grandparenting: Childhood Experiences with Grandparents and Current Involvement with Grandchildren*, 59 J. MARRIAGE & FAM. 848 (1997).

⁷ E.g., *id.*; Tricia V. Argentine, *Grandparents Act as the "National Guard" of Their Families—All Eager and Ready to Respond When in Need: A Call for Expansion of Grandparent Visitation Rights in North Carolina*, 37 N.C. CENT. L. REV. 68, 69 (2014); Michael K. Goldberg, *A Survey of the Fifty States' Grandparent Visitation Statutes*, 10 MARQ. ELDER'S ADVISOR 245, 246 (2009); Terry Turner, *Taking Care of Yourself While Raising Your Grandchildren*, RETIREGUIDE (July 31, 2020), <https://www.retireguide.com/guides/self-care-raising-grandchildren/>.

⁸ See *infra* part IV.

⁹ See *infra* notes 32-51 and accompanying text.

¹⁰ Currently, several states are considering amending their laws governing grandparent visitation. See, e.g., Colo. H.B. 1026, 74th Cong., 1st Reg. Sess. (2023) (changing the term "visitation rights" to "family time"); Conn. H.B. 5831, Gen. Assemb. (2023) (granting grandparents visitation rights if they can prove to the court by "clear and convincing evidence" that such visitation should be granted); Haw. S.B. 406, 32nd Leg., Reg. Sess. (2023) (providing grandparents visitation rights when one of the child's parents is either dead or incarcerated); Minn. S.F. 593, 93rd Leg. Sess., 1st Reg. Sess. (2023) (modifying visitation rights to a minor child who is "unmarried"); Miss. H.B. 499, 38th Leg. Sess. (2023) (amending the Act to include "great-grandparents"); Nev. S.B. 74, 82nd Reg. Sess. (2023) (providing further provisions regarding grandparent and great-grandparent visitation); Tex. H.B. 956, 88th Leg. (2023) (amending the Act to include a court-appointed "guardian ad litem").

¹¹ See *infra* part II and part III.

This Comment proceeds in four parts. Part I sets the stage by providing a historical overview of grandparent rights in the United States. Part II reviews the current state statutes on visitation, detailing the two critical thresholds that a grandparent must meet to be awarded visitation rights of grandchildren. Part III reviews the current state statutes and theories on custody, detailing the proof requirements that a grandparent must meet to be awarded custody rights of grandchildren. Finally, Part IV delves into the latest phenomena of parental alienation in grandparent visitation and custody disputes, specifically addressing the arguments for and against the inclusion of parental alienation in grandparent laws. For purposes of this Comment, “third-party custody,”¹² commonly referred to as “non-parent custody,” refers only to the custody rights of grandparents. The custody rights of stepparents, siblings, and additional third parties are beyond the scope of this Comment.

I. A Historical Overview of Grandparent Rights

A. Grandparent Visitation and Custody Rights Pre-Troxel

Since the colonization of the United States, there have been laws governing child custody. At common law, the father had virtually exclusive custody over his children, leaving mothers with almost no authority.¹³ Custody other than that of the father was considered illegal because there were no procedures for adjudicating placement decisions, unless the father had voluntarily granted a third party his parental rights.¹⁴ By the nineteenth century, most U.S. courts shifted away from this paternal preference and adopted the “tender years doctrine,” a doctrine that gave

¹² When an adult who is not a child’s parent is given custody rights of that child. See generally LegalMatch, <https://www.legalmatch.com/law-library/article/third-party-custody-rights.html> (last visited Mar. 29, 2023).

¹³ MARY A. MASON, FROM FATHER’S PROPERTY TO CHILDREN’S RIGHTS 6 (1994). See generally Paul Sayre, *Awarding Custody of Children*, 9 U. CHI. L. REV. 672, 676 (1942) (explaining that a father could not lose custody of his child unless “he actually kept the child in such degraded conditions that the child itself might become delinquent”).

¹⁴ Ramsay L. Klaff, *The Tender Years Doctrine: A Defense*, 70 CALIF. L. REV. 335, 337 (1982).

preference to mothers for the custody of younger children.¹⁵ Under this doctrine, it was presumed that it was better for a young child to remain in their mother's custody, unless the father could prove that the mother was "unfit."¹⁶ Consequently, grandparents still had very limited rights to custody.¹⁷

Unlike custody statutes, grandparent visitation statutes date from the mid to late twentieth century.¹⁸ At common law, if the child's parents objected to the visitation, grandparents had no legal right to petition for visitation rights.¹⁹ Parents had a moral obligation to allow grandparent visitation, but not a legal one.²⁰ Indeed, grandparents had no recourse in the judicial system, only limited equitable exceptions that permitted visitation in special circumstances.²¹

Spurred by social²² and political²³ changes, societal views regarding grandparent rights started to evolve. Between the 1960s

¹⁵ Cassandre Theano, *Child Custody, Visitation and Termination of Parental Rights*, 9 GEO. J. GENDER & L. 963, 967 (2008).

¹⁶ Klaff, *supra* note 14, at 336.

¹⁷ See Jeff Atkinson, *Shifts in the Law Regarding the Rights of Third Parties to Seek Visitation and Custody of Children*, 47 FAM. L.Q. 1, 1 (2013) (explaining that third party custody rights did not increase until after *Troxel*, demonstrating that third parties had very limited rights to custody prior to 2000).

¹⁸ See e.g., Hugh M. Lee & Jennifer N. Marshall, *Troxel v. Granville: The Uncertain State of Grandparent Visitation Rights More Than a Decade Later*, 264 ELDER L. ADVISORY (2013).

¹⁹ See George L. Blum, Annotation, *Grandparents' Visitation Rights Where Child's Parents Are Living*, 71 A.L.R. 5TH 99 (1999); Catherine Bostock, *Does the Expansion of Grandparent Visitation Rights Promote the Best Interests of the Child?: A Survey of Grandparent Visitation Laws in the Fifty States*, 27 COLUM. J.L. & SOC. PROBS. 319, 319 (1994).

²⁰ Succession of Reiss, 15 So. 151, 152 (La. 1894) (stating that the "obligation ordinarily to visit grandparents is moral and not legal").

²¹ See generally Bostock, *supra* note 19, at 326-27; Cynthia L. Greene, *Grandparents' Visitation Rights: Is the Tide Turning?*, 12 J. AM. ACAD. MATRIM. LAW. 51, 53 (1994). See also Reiss, 15 So. at 152 (recognizing that there may be cases involving grandparent visitation that are "downright wrong and inhuman[e] [that] demand[] judicial intervention . . .").

²² See generally Bostock, *supra* note 19, at 322-25; Greene, *supra* note 21, at 54.

²³ See generally Karen J. McMullen, *The Scarlet "N": Grandparent Visitation Statutes That Base Standing on Non-Intact Family Status Violate the Equal Protection Clause of the Fourteenth Amendment*, 83 ST. JOHN'S L. REV. 693, 694-95 (2009).

and 1980s, state legislatures launched a concerted effort to expand grandparent rights by enacting third party visitation statutes that permitted grandparents to request court-ordered visitation.²⁴ By the end of the 1980s, all fifty states had enacted grandparent visitation statutes.²⁵

During this same period, many states adopted a strong parental presumption to solve third-party custody disputes.²⁶ This came to be known as the “parental-right doctrine,” a doctrine which presumes that “a parent’s right to custody of a biological child will not be disturbed in favor of a non-parent unless the parent is first proved ‘unfit’ or to have ‘forfeited’ the right to custody.”²⁷ Given that the U.S. Supreme Court had consistently upheld parental rights until the *Troxel v. Granville*²⁸ case in 2000, this presumption made it nearly impossible for third parties to be awarded custody rights of children.²⁹

The constitutionality of these visitation and custody statutes was called into question following the Supreme Court’s landmark *Troxel* decision.³⁰ In this case, the U.S. Supreme Court interpreted a Washington statute that gave “any person” the ability to petition a court for visitation rights “at any time,” and permitted that a court grant such visitation rights whenever “visitation may serve the best interest of the child.”³¹

²⁴ See *id.*

²⁵ Lee & Marshall, *supra* note 18.

²⁶ See, e.g., J. Thomas Oldham, *Changing Norms in the United States for Resolving Custody Disputes Between a Parent and a Non-Parent*, 35 J. AM. ACAD. MATRIM. LAW. 299, 299 (2022).

²⁷ Michael B. Thompson, *Child-Custody Disputes Between Parents and Non-Parents: A Plea for the Abrogation of the Parental-Right Doctrine in South Dakota*, 34 S.D. L. REV. 534, 536 (1989).

²⁸ 530 U.S. 57.

²⁹ *Id.* See e.g., *Meyer v. Nebraska*, 262 U.S. 390 (1923) (holding that the Due Process Clause includes the right of parents to “establish a home and bring up children”); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (holding that the Due Process Clause includes the right of “parents and guardians to direct the upbringing and education of children under their control”).

³⁰ 530 U.S. 57.

³¹ *Id.*

B. *Troxel v. Granville*

Tommie Granville and Brad Troxel never married but were in a romantic relationship.³² During the relationship, they had two daughters.³³ In June 1991, the couple split.³⁴ Brad moved in with his parents, Jennifer and Gary Troxel, while Tommie kept sole custody of their children.³⁵ Brad brought his daughters to the Troxel's house on weekends until he committed suicide in May 1993.³⁶ Although the Troxels continued to see their granddaughters on a regular basis following their son's death, their visits became limited when Tommie re-married and decided to restrict their visitation to one visit per month.³⁷

In December 1993, the Troxels filed a lawsuit under the Washington statute, requesting visitation rights for their granddaughters.³⁸ At trial, the Troxels requested two weekends of overnight visitation each month, while Tommie requested only one weekend of overnight visitation per month.³⁹

The Washington Superior Court ruled in favor of the Troxels, finding that visitation was in the daughters' best interests because "[t]he Petitioners [the Troxels] are part of a large, central, loving family . . . and can provide opportunities for the children."⁴⁰ The Washington Court of Appeals reversed the trial court's decision, finding that the Troxels lacked standing to seek visitation under the statute and that the Washington statute was unconstitutional.⁴¹ The Washington Supreme Court declined to follow the appellate court's holding, finding that the Troxels did have standing to seek visitation rights; however, it agreed with the appellate court's conclusion that the Washington statute was unconstitutional.⁴² The Troxels then petitioned the U.S. Supreme Court for review, which granted certiorari.⁴³

³² *Id.* at 60.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 60-61.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 61-62.

⁴¹ *Id.*

⁴² *Id.* at 62-63.

⁴³ *Id.*

On June 5, 2000, the Supreme Court issued its plurality opinion.⁴⁴ The Court began its analysis by acknowledging that the nuclear family had undergone demographic changes and that grandparents can have a significant role in child rearing.⁴⁵ However, Justice O'Connor, joined by Chief Justice Roberts, Justice Ginsburg, and Justice Breyer, ultimately concluded that Washington's third-party visitation statute violated the Due Process Clause of the Fourteenth Amendment because it infringed upon Tommie's fundamental right, as a fit parent, to decide the care, custody, and control of her children.⁴⁶ The Court criticized the state statute for being "breathhtakingly broad" in that it permitted any third-party to petition for visitation rights without even requiring courts to give any "special weight" to a fit parent's decision; that it placed the burden on Tommie, a fit parent, to have to disprove that visitation would be in her daughters' best interests; and that it disregarded the fact that Tommie had previously consented to visitation before the Troxel's filed their petition.⁴⁷

Interestingly, the Court declined to rule that all third-party visitation statutes were unconstitutional. Instead, the Court stated in its plurality opinion:

We do not consider the primary constitutional question passed on by the Washington Supreme Court—whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation. We do not, and need not, define today the precise scope of the parental due process right in the visitation context Because much state-court adjudication in this context occurs on a case-by-case basis, we would be hesitant to hold that specific nonparental visitation violate the Due Process Clause as a *per se* matter.⁴⁸

The Court indicated that state courts would have to review and interpret their own states' statutes, giving judges the authority to weigh parental rights on a case-by-case basis.⁴⁹ Although the *Troxel* decision emphasized parental autonomy, it did not

⁴⁴ *Id.*

⁴⁵ *Id.* at 63-64.

⁴⁶ *Id.* at 66-67.

⁴⁷ *Id.* at 58, 67, 70.

⁴⁸ *Id.* at 73.

⁴⁹ See Sara E. Culley, *Troxel v. Granville and Its Effect on the Future of Grandparent Visitation Statutes; Legislative Reform*, 27 J. LEGIS. 237, 244 (2015).

“define the exact scope of parental rights under the Due Process Clause.”⁵⁰ Consequently, its decision has left many questions unanswered.⁵¹

C. *Grandparent Visitation and Custody Rights Post-Troxel*

The *Troxel* Court left numerous unanswered questions. The fact that it “refused to define an exact scope of parental rights”⁵² has left state courts with no strong guidance on what legal standards and thresholds they should follow when drafting their visitation and custody statutes.⁵³

Although each of the fifty states have a grandparent visitation statute, their laws vary greatly.⁵⁴ The fact that *Troxel* did not address constitutional issues, like how to delineate between intact and non-intact families or how a grandparent can overcome the parental presumption,⁵⁵ has created a lack of uniformity.⁵⁶ Indeed, state statutes tend to vary on issues such as who has the right to petition for visitation rights, what circumstances give rise to that right, and what factors are considered when applying the “best interests of the child” standard.⁵⁷

Following the *Troxel* ruling, legislatures and courts amended their grandparent visitation statutes to emphasize parental rights while making it more difficult for grandparents to obtain visitation rights.⁵⁸ Some states amended their visitation statutes to reflect the *Troxel* decision, while others have used the decision to analyze their current statutes.⁵⁹ Additionally, several states’ statutes have been constitutionally challenged over the years.⁶⁰ For instance, Hawaii and Idaho’s statutes have been struck down as

⁵⁰ *Id.* at 237.

⁵¹ *Id.* at 238.

⁵² *Id.* at 237.

⁵³ See Sarah J.M. Cox, *Grandparent and Third-Party Visitation Rights: A 50 State Survey*, 40 CHILD. LEGAL RTS. J. 76, 78 (2020).

⁵⁴ See *infra* part II.

⁵⁵ Cox, *supra* note 53, at 78-79.

⁵⁶ See Debra Wiseman, Comment, *Grandparent Visitation Statutes: A Proposal for Uniformity*, 19 J. MARSHALL L. REV. 703, 716 (1986).

⁵⁷ *Id.* at 713.

⁵⁸ Atkinson, *supra* note 17, at 5.

⁵⁹ *Id.*

⁶⁰ See generally Goldberg, *supra* note 7, at 248-49 (discussing a few unconstitutional grandparent visitation statutes). See also Atkinson, *supra* note 17,

unconstitutional, and the states have failed to enact new ones.⁶¹ As a result, these states currently lack a valid grandparent visitation statute, which means grandparents in these states have no legal recourse if denied visitation.

While the *Troxel* ruling appeared to decrease the rights of grandparents in obtaining visitation rights of their grandchildren, it seemed to have the opposite effect on grandparents petitioning for custody rights of their grandchildren.⁶² Before *Troxel*, a parent would generally prevail in any custody dispute with a grandparent even if the grandparent seemed to be the more suitable parent to the child.⁶³ However, after *Troxel*, a number of states modified their statutes to allow third persons—who had served as either “*de facto*” parents or “psychological parents”—to have a chance at petitioning for custody rights.⁶⁴ A “*de facto*” parent refers to someone who is “raising the child, but is not the legal parent of that child.”⁶⁵ Likewise, a “psychological parent” refers to someone who forms a parent-like bond with the child or provides for the “emotional and physical needs” of the child.⁶⁶ These theories are part of what is commonly known as the “functional parent doctrine.”⁶⁷ Today, at least half of U.S. states have a third-

at 5 (stating that at least six state supreme courts struck down grandparent visitation statutes as overly broad after *Troxel*).

⁶¹ See *Doe v. Doe*, 172 P.3d 1067, 1068 (Haw. 2007) (finding the statute unconstitutional because it allowed the court to award reasonable visitation to grandparents if it was in the best interests of the child); *Nelson v. Evans*, 517 P.3d 816, 828 (Idaho 2022) (finding the statute unconstitutional because it allowed the court to grant visitation rights to both grandparent and great-grandparents if they could show that it would be in the children’s best interest).

⁶² See Atkinson, *supra* note 17, at 1.

⁶³ Oldham, *supra* note 26, at 301.

⁶⁴ *Id.* at 299.

⁶⁵ *Relationship & Parental Recognition Laws: De Facto Parent Recognition*, MOVEMENT ADVANCEMENT PROJECT (2022), <https://www.lgbtmap.org/img/maps/citations-parents-de-facto.pdf>.

⁶⁶ *Psychological Parent*, US LEGAL, <https://definitions.uslegal.com/p/psychological-parent/> (last visited Feb. 27, 2023).

⁶⁷ See *e.g.*, Courtney G. Joslin & Douglas NeJaime, *How Functional Parent Doctrines Function: Findings from an Empirical Study*, COLUM. L. REV. (forthcoming in 2023).

party custody statute,⁶⁸ and at least two-thirds of U.S. states have a functional parent doctrine.⁶⁹

II. Establishing Grandparent Visitation Rights

Grandparents seeking to establish visitation rights with their grandchildren bear the burden of proving to the court that they should be granted visitation rights despite a fit parent's objection.⁷⁰ While the Court did not define a clear standard for determining grandparent visitation, state laws share the same basic structure in terms of legal standards and thresholds.⁷¹

Before any court can decide whether to award grandparent visitation, the grandparents must first pass a two-part test.⁷² This part of the Comment will review the state statutes that have defined under what circumstances grandparents may obtain visitation rights with grandchildren. It details the two critical thresholds that the petitioning grandparent must meet to obtain these rights. The purpose of these thresholds is to "give deference to a fit parent's decision" while also ensuring that "the burden on the grandparent does not violate the fit parent's due process rights" under the *Troxel* holding.⁷³

A. *The Standing Threshold*

Standing in grandparent visitation cases has presented a significant challenge to grandparents when petitioning for visitation rights because it is an extremely high threshold to meet.⁷⁴ Standing refers to whether the grandparent has the legal right to petition the court for visitation.⁷⁵ Because the *Troxel* Court did not

⁶⁸ Richard S. Victor, et. al., *Statutory Review of Third-Party Rights Regarding Custody, Visitation, and Support*, 25 FAM. L.Q. 19, 20 (1991).

⁶⁹ Joslin & NeJaime, *supra* note 67, at 10.

⁷⁰ Mary M. Janicki, *Grandparents' Visitation Rights*, 2011-R-0079, Feb. 7, 2011, <https://www.cga.ct.gov/2011/rpt/2011-R-0079.htm>. See also *Troxel*, 530 U.S. 57.

⁷¹ See *infra* part II.A and part II.B.

⁷² See Goldberg, *supra* note 7, at 249-66.

⁷³ See Janicki, *supra* note 70.

⁷⁴ See e.g., Andrea Ciobanu, *Grandparent Rights: An Overview in Indiana* – *Family Law News*, INDYBAR (Feb. 3, 2014), <https://www.indybar.org/?pg=FamilyLawNews&blAction=showEntry&blogEntry=435>.

⁷⁵ See Bostock, *supra* note 19, at 320.

establish a clear standard for determining grandparent visitation, how a court determines whether a grandparent meets the standing requirement will depend on where the suit is filed.

The majority of states allow grandparents to petition for visitation rights if there has been a breakdown in the nuclear family.⁷⁶ Many states allow grandparents to petition for visitation rights when one or both parents are deceased,⁷⁷ or if the parents are divorced or legally separated.⁷⁸ Some states also allow grandparents to petition for visitation rights if a parent is incarcerated;⁷⁹ a parent has gone missing;⁸⁰ a parent has abandoned the

⁷⁶ *Id.* at 332.

⁷⁷ *See, e.g.*, ALA. CODE § 30-3-4.2(b) (2016); ARIZ. REV. STAT. ANN. § 25-409(C) (2022); ARK. CODE ANN. § 9-13-103(b) (2019); COLO. REV. STAT. ANN. § 19-1-117(1)(c) (2014); FLA. STAT. § 752.011 (2022); GA. CODE ANN. § 19-7-3(d)(1) (2022); 750 ILL. COMP. STAT. ANN. 5/602.9(c)(1) (2019); IND. CODE ANN. § 31-17-5-1(a) (2017); IOWA CODE ANN. § 600C.1(1) (2011); KAN. STAT. ANN. § 23-3301(c) (2015); KY. REV. STAT. ANN. § 405.021(1)(b) (2018); LA. STAT. ANN. § 9:344 (2012); MASS. GEN. LAWS ANN. ch. 119, § 39D (1998); MICH. COMP. LAWS ANN. § 722.27b (2010); MINN. STAT. ANN. § 257C.08.1 (2007); MISS. CODE ANN. § 93-16-3(1) (2019); MO. REV. STAT. ANN. § 452.402.1 (2019); NEB. REV. STAT. ANN. § 43-1802(1) (1986); NEV. REV. STAT. ANN. § 125C.050.1 (2001); N.M. STAT. ANN. § 40-9-2.B (1978); N.Y. DOM. REL. LAW § 72.1 (2004); OKLA. STAT. ANN. tit. 43 § 109.4(A)(1) (2016); 23 PA. CON. STAT. § 5325(1) (2018); S.C. CODE ANN. § 63-3-530(33) (2014); TENN. CODE ANN. § 36-6-306(a) (2018); TEX. FAM. CODE ANN. § 153.433(3) (2009); VT. STAT. ANN. tit. 15, § 1012 (1983); VA. CODE ANN. § 20-124.2(B2) (2021).

⁷⁸ *See, e.g.*, ALA. CODE § 30-3-4.2(b); ARIZ. REV. STAT. ANN. § 25-409(C); ARK. CODE ANN. § 9-13-103(b); CAL. FAM. CODE § 3104(b) (2015); COLO. REV. STAT. ANN. § 19-1-117(1)(a) (2014); DEL. CODE ANN. tit. 13 § 2412(a)(2) (2010); GA. CODE ANN. § 19-7-3(b)(1) (2022); 750 ILL. COMP. STAT. ANN. 5/602.9(c)(1); IND. CODE ANN. § 31-17-5-1(a); LA. STAT. ANN. § 9:344; MASS. GEN. LAWS ANN. ch. 119, § 39D; MICH. COMP. LAWS ANN. § 722.27b; MINN. STAT. ANN. § 257C.08.1; MO. REV. STAT. ANN. § 452.402.1; NEB. REV. STAT. ANN. § 43-1802(1); NEV. REV. STAT. ANN. § 125C.050.1; N.M. STAT. ANN. § 40-9-2.A (1978); OHIO REV. CODE ANN. § 3109.051(A) (2014); OKLA. STAT. ANN. tit. 43 § 109.4(A)(1); S.C. CODE ANN. § 63-3-530(33); TENN. CODE ANN. § 36-6-306(a).

⁷⁹ *See, e.g.*, CAL. FAM. CODE § 3104(b); GA. CODE ANN. § 19-7-3(d)(1); 750 ILL. COMP. STAT. ANN. 5/602.9(c)(1); LA. STAT. ANN. § 9:344; OKLA. STAT. ANN. tit. 43 § 109.4(A)(1); TEX. FAM. CODE ANN. § 153.433(3).

⁸⁰ *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-409(C); CAL. FAM. CODE § 3104(b); FLA. STAT. § 752.011; 750 ILL. COMP. STAT. ANN. 5/602.9(c)(1); TENN. CODE ANN. § 36-6-306(a).

child;⁸¹ parental rights have been terminated;⁸² a parent has been found to be legally incompetent;⁸³ the parent consents to grandparent visitation;⁸⁴ the child was born outside of marriage;⁸⁵ the child is not being raised by either parent;⁸⁶ and/or the child was neglected or abused in either parent's care.⁸⁷

In New York, grandparents can petition for visitation rights if one or both parents are deceased.⁸⁸ The statute also includes a distinct standing requirement, which allows grandparents to petition for visitation rights when "circumstances show that conditions exist in which equity would see fit to intervene."⁸⁹ In cases where the grandparents have taken no steps to contact their grandchildren before initiating visitation proceedings, New York courts have ruled that this is not an equitable consideration that gives grandparents standing.⁹⁰

However, there are a few states that allow grandparents to petition for visitation rights even when there has not been a breakdown in the nuclear family. For instance, in Kentucky, a grandparent can petition for visitation rights even if the

⁸¹ See, e.g., OKLA. STAT. ANN. tit. 43 § 109.4(A)(1); VT. STAT. ANN. tit. 15, § 1012.

⁸² See, e.g., MISS. CODE ANN. § 93-16-3(1); NEV. REV. STAT. ANN. § 125C.050.1; OKLA. STAT. ANN. tit. 43 § 109.4(A)(1).

⁸³ See, e.g., GA. CODE ANN. § 19-7-3(d)(1); 750 ILL. COMP. STAT. ANN. 5/602.9(c)(1); LA. STAT. ANN. § 9:344; TEX. FAM. CODE ANN. § 153.433(3); UTAH CODE ANN. § 30-5-2(3) (2022); VT. STAT. ANN. tit. 15, § 1012; VA. CODE ANN. § 20-124.2(B2).

⁸⁴ See, e.g., DEL. CODE ANN. tit. 13 § 2412(a)(2); 23 PA. CON. STAT. § 5325(1).

⁸⁵ See, e.g., ALA. CODE § 30-3-4.2(b); ARIZ. REV. STAT. ANN. § 25-409(C); ARK. CODE ANN. § 9-13-103(b); IND. CODE ANN. § 31-17-5-1(a); MASS. GEN. LAWS ANN. ch. 119, § 39D.

⁸⁶ See, e.g., CAL. FAM. CODE § 3104(b); COLO. REV. STAT. ANN. § 19-1-117(1)(b); MICH. COMP. LAWS ANN. § 722.27b; MINN. STAT. ANN. § 257C.08.1; MO. REV. STAT. ANN. § 452.402.1; N.M. STAT. ANN. § 40-9-2.C (1978); OKLA. STAT. ANN. tit. 43 § 109.4(A)(1); 23 PA. CON. STAT. § 5325(1); TENN. CODE ANN. § 36-6-306(a).

⁸⁷ See, e.g., DEL. CODE ANN. tit. 13 § 2412(a)(2).

⁸⁸ N.Y. DOM. REL. LAW § 72.1 (2004).

⁸⁹ *Id.*

⁹⁰ See *Kushner v. Askinazi*, 175 N.Y.S.3d 567 (N.Y. App. Div. 2d Dept. 2022) (finding that the grandmother lacked standing to seek visitation rights of grandson because she took no steps to contact him for four years).

grandchild is still part of an intact family.⁹¹ Under the statute, if the court determines that it is in the best interests of the child, the court may grant grandparents visitation rights.⁹² There are no standing requirements in the statute that must be met before a grandparent can petition for visitation.⁹³ However, in 2020, the Supreme Court of Kentucky found that this statute was unconstitutional because it created “a rebuttable presumption that visitation is in the best interest of the child.”⁹⁴ The Kentucky legislature has yet to take up this issue.

B. *The Proof Threshold*

If the grandparent can establish that he or she has standing to file a visitation petition, the grandparent must still prove to the court why visitation should be granted.⁹⁵ Most states require that courts use the “best interest” standard to make this determination.⁹⁶ The best interest standard requires grandparents to demonstrate that grandparent visitation is in their grandchild’s best interest in order to rebut the presumption that “fit parents act in their children’s best interest.”⁹⁷ There are several factors that courts can consider in determining the child’s best interest. Most states have similar definitions of best interest.⁹⁸

For example, Missouri courts consider the following “best interest” factors:

- (1) The wishes of the child’s parents as to custody and the proposed parenting plan submitted by both parties;
- (2) The needs of the child for a frequent, continuing and meaningful relationship with both parents and the ability and willingness of parents to actively perform their functions as mother and father for the needs of the child;
- (3) The interaction and interrelationship of the child with parents, siblings, and any other person who may significantly affect the child’s best interests;
- (4) Which parent is more likely to allow the child frequent, continuing and meaningful contact with the other parent;
- (5) The child’s adjust-

⁹¹ See KY. REV. STAT. ANN. § 405.021(1)(a) (2018).

⁹² *Id.*

⁹³ See *id.*

⁹⁴ Pinto v. Robinson, 607 S.W.3d 669 (Ky. 2020).

⁹⁵ Goldberg, *supra* note 7, at 252.

⁹⁶ Nearly all states use the best interest standard in determining whether to grant or deny grandparent visitation rights, except for Connecticut, Georgia, Illinois, Michigan, Tennessee, Texas, and Utah. See *infra* note 106.

⁹⁷ *Troxel*, 530 U.S. at 58.

⁹⁸ Goldberg, *supra* note 7, at 253.

ment to the child's home, school, and community; (6) The mental and physical health of all individuals involved, including any history of abuse of any individuals involved; (7) The intention of either parent to relocate the principal residence of the child; and (8) The wishes of a child as to the child's custodian.⁹⁹

In addition, some states require the court to find not only that grandparent visitation is in the child's best interest, but also some other supporting factor.¹⁰⁰ This has been referred to as the "best interest-plus" standard.¹⁰¹ What the "plus" factor requires varies by state.¹⁰² A statute may require both a determination that grandparent visitation is in the grandchild's best interest, and that the grandparent demonstrate that they have established, or attempted to establish, a significant or parent-like relationship with their grandchild;¹⁰³ that grandparent visitation would not interfere with any parent-child relationship;¹⁰⁴ and/or that the parent who is objecting to the visitation is unfit.¹⁰⁵

While most states follow some variation of the best interest standard, other states have shifted away from this standard. Instead, few states require that courts only use a "harm" standard to make this determination.¹⁰⁶ The harm standard requires grandparents to prove that denying grandparent visitation would cause significant harm to their grandchild.¹⁰⁷

⁹⁹ MO. REV. STAT. ANN. § 452.375.2 (2021).

¹⁰⁰ See Goldberg, *supra* note 7, at 257.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ See, e.g., ALA. CODE § 30-3-4.2(d) (2016); ALASKA STAT. § 25.20.065 (1995); ARK. CODE ANN. § 9-13-103(d) (2019); CAL. FAM. CODE § 3104(a) (2015); CONN. GEN. STAT. ANN. § 46b-59(b); IOWA CODE ANN. § 600C.1(3) (2011); KAN. STAT. ANN. § 23-3301(c); KY. REV. STAT. ANN. § 405.021(1)(b); ME. REV. STAT. tit. 19-A, § 1803 (2018); MISS. CODE ANN. § 93-16-3(3) (2019); NEB. REV. STAT. ANN. § 43-1802(2) (1986); N.C. GEN. STAT. ANN. § 50-13.2A (1985).

¹⁰⁴ See, e.g., OR. REV. STAT. § 109.119(4)(a) (2003); S.C. CODE ANN. § 63-3-530(33); S.D. CODIFIED LAWS § 25-4-52(1) (2004).

¹⁰⁵ See, e.g., S.C. CODE ANN. § 63-3-530(33); UTAH CODE ANN. § 30-5-2(3).

¹⁰⁶ See, e.g., CONN. GEN. STAT. ANN. § 46b-59(b) (2013); 750 ILL. COMP. STAT. ANN. 5/602.9(b)(3) (2019); MICH. COMP. LAWS ANN. § 722.27b (2010); TENN. CODE ANN. § 36-6-306(b) (2018); TEX. FAM. CODE ANN. § 153.433(3) (2009); UTAH CODE ANN. § 30-5-2(3).

¹⁰⁷ See, e.g., MONT. CODE ANN. § 40-9-102(4) (2015); OKLA. STAT. ANN. tit. 43 § 109.4(A)(1); WASH. REV. CODE ANN. § 26.11.040(1)(a) (2018).

In Utah, courts can grant visitation rights over a fit parent's objection if the grandparents can prove that "the loss of the relationship between the grandparent and the grandchild would cause substantial harm to the grandchild."¹⁰⁸ Utah courts have ruled that a mere "warm, healthy, and loving relationship" between grandparents and their grandchildren is insufficient to prove that the parent's denial of visitation would cause harm to the child.¹⁰⁹ For example, in *Jones v. Jones*, the Supreme Court of Utah held that paternal grandparents failed to show that granting them visitation rights was necessary to prevent harm to their grandchild because, despite having a substantial relationship with the grandchild, the grandparents were not a "custodian or caregiver or the like" to be able to sustain the harm standard under the statute.¹¹⁰

III. Establishing Grandparent Custody Rights

Grandparents seeking custody of their grandchildren are faced with the burden of proving to the court that they should be granted custody rights of their grandchildren over their natural parent.¹¹¹ While the Court did not define a clear standard for determining third-party custody, all state laws give automatic preference to the parents over third parties in initial custody determinations.¹¹² Before a grandparent can assert a claim for custody, the court must first determine whether the petitioning grandparent meets the standing requirement, if applicable.¹¹³ Regardless of whether its custody law includes a standing requirement, the court must then decide whether third-party custody can be granted under the applicable standard.¹¹⁴ This part of the Comment will review the state statutes that have defined under what circumstances grandparents may obtain custody rights to grandchildren. It details the two critical thresholds that the petitioning grandparent must meet in order to obtain custody rights.

¹⁰⁸ UTAH CODE ANN. § 30-5-2(3).

¹⁰⁹ *Jones v. Jones*, 359 P.3d 603, 612 (Utah 2015).

¹¹⁰ *Id.*

¹¹¹ See ANN M. HARALAMBIE, HANDLING CHILD CUSTODY, ABUSE AND ADOPTION CASES § 10:1 (2022).

¹¹² Atkinson, *supra* note 17, at 8.

¹¹³ See *id.* at 9.

¹¹⁴ See HARALAMBIE, *supra* note 111, at § 10:5.

The purpose of these thresholds is to give deference to a fit natural parent who is presumed to be the best person to raise their own child.¹¹⁵

A. *The Standing Threshold*

Some states require standing before a third-party can assert a custody claim.¹¹⁶ The way a court determines whether a grandparent has met the standing requirement for custody is similar to how courts determine grandparent visitation.

States differ greatly in their standing requirements, and the requirements are relatively different depending on which of the many statutory procedures is used by the petitioning grandparent.¹¹⁷ Many states allow grandparents to petition for custody rights based on their status as a *de facto parent* or standing in *loco parentis* of the child.¹¹⁸ Other states may allow the grandparent to petition for custody rights when one of the parents is deceased;¹¹⁹ the child is living with the grandparent;¹²⁰ and/or the child is not in the custody of one of his or her parents.¹²¹

Indiana was the first state to allow grandparents to seek custody of their grandchildren as *de facto* custodians in 1996.¹²² Under the statute, if the court finds by clear and convincing evidence that a grandparent is the child's *de facto* custodian, the court must include the grandparent as a party to the custody pro-

¹¹⁵ Thompson, *supra* note 27, at 536.

¹¹⁶ Atkinson, *supra* note 17, at 9.

¹¹⁷ *Id.*

¹¹⁸ See, e.g., ARIZ. REV. STAT. ANN. § 25-409(A) (2022); COLO. REV. STAT. ANN. § 14-10-123(1) (2021); CONN. GEN. STAT. ANN. § 46b-56(a) (2021); DEL. CODE ANN. tit. 13 § 8-201(c) (2013); IND. CODE ANN. § 31-9-2-35.5 (2007); KY. REV. STAT. ANN. § 403.270(1) (2021); ME. REV. STAT. tit. 19-A, 1891(2) (2016); MINN. STAT. ANN. § 257C.01 (2003); MONT. CODE ANN. § 40-4-211(4)(b) (2001); OR. REV. STAT. § 109.119(1) (2003); 23 PA. CON. STAT. § 5324(2) (2018); S.C. CODE ANN. § 63-15-60(A) (2008); TEX. FAM. CODE ANN. § 102.003(9) (2019).

¹¹⁹ See, e.g., ARIZ. REV. STAT. ANN. § 25-409(A).

¹²⁰ See, e.g., ARK. CODE ANN. § 9-13-101(a)(2)(B) (2021); CAL. FAM. CODE § 3040(a)(2) (2023); IDAHO CODE ANN. § 32-717(3) (2007).

¹²¹ See, e.g., COLO. REV. STAT. ANN. § 14-10-123(1); 750 ILL. COMP. STAT. ANN. § 5/601.2(b)(3).

¹²² Saul Spigel, *Grandparents' Custody of Grandchildren*, 2003-R-0596 (Sept. 22, 2003), <https://www.cga.ct.gov/2003/olrdata/kid/rpt/2003-R-0596.htm>.

ceeding.¹²³ In determining custody, the court must consider the grandparent's wishes; the extent to which the grandparent has cared for, nurtured, and supported the child; and the parent's intent and circumstances for placing the child with the grandparent.¹²⁴ If the court finds that awarding custody to the grandparent as a *de facto* custodian is in the best interest of the child, the court will grant grandparents custody rights of their grandchild.¹²⁵

In Minnesota, to qualify as a *de facto* custodian, a grandparent must show, by clear and convincing evidence, that they have been the primary caretaker for their grandchild who has resided with them for at least six months or more.¹²⁶ Once the grandparent has established that he or she is a *de facto* custodian, the grandparent must prove that placing their grandchild in their custody is in the best interest of their grandchild.¹²⁷ Notably, Minnesota courts are not required to give equal standing to parents and *de facto* custodians when making determinations of custody.¹²⁸ Under the statute, "the court must not give preference to a party over the *de facto* custodian . . . solely because the party is a parent of the child."¹²⁹

B. *The Proof Threshold*

Regardless of whether a state requires a grandparent to establish standing in an initial custody determination, the court must determine whether third-party custody can be granted under the state's applicable standard.¹³⁰ Most states require that courts use the "traditional" standard to make this determination.¹³¹ The traditional standard embodies the parent's rights doctrine, which holds that a natural parent has a right to custody, superior to all third-party claims.¹³² To be granted custody rights, the traditional standard requires a grandparent to prove either

¹²³ IND. CODE ANN. § 31-14-13-2.5 (1999).

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ MINN. STAT. ANN. § 257C.01(2)(a) (2003).

¹²⁷ MINN. STAT. ANN. § 257C.03(6)(a) (2016).

¹²⁸ See MINN. STAT. ANN. § 257C.04(1)(c) (2002).

¹²⁹ *Id.*

¹³⁰ See HARALAMBIE, *supra* note 111, at § 10:5.

¹³¹ *Id.*

¹³² *Id.*

the parents are unfit;¹³³ the parents abandoned the child;¹³⁴ and/or “extraordinary”¹³⁵ or “exceptional”¹³⁶ circumstances. Unfitness may include abuse, neglect, or an inability to provide proper care to the child.¹³⁷ However, unfitness does not generally include differences in lifestyles or financial resources.¹³⁸

For instance, in *People ex rel. Portnoy v. Strasser*, the maternal grandmother sought custody of her granddaughter on the grounds that the mother was unfit and that it would not be in the child’s best interests to remain with her mother.¹³⁹ The maternal grandmother claimed that the mother was unfit because the mother used daycare, married a black man, failed to raise her child in the Jewish faith, and was a communist.¹⁴⁰ The New York appellate court ruled in favor of the mother, rejecting the grandmother’s claim that the mother was unfit.¹⁴¹ The court found that the mother’s lifestyle was insufficient evidence to demonstrate that her child should be removed from her care.¹⁴²

¹³³ See, e.g., *Ex parte G.C., Jr.*, 924 So.2d 651, 660 (Ala. 2005) (the father’s voluntary relinquishment of custody to the grandparents and failure to pay child support indicated his unfitness); *Fitzgerald v. Jeter*, 428 So.2d 84, 85 (Ala. Civ. App. 1983) (the mother’s history of drug abuse and mental illness supported finding that she was unfit); *Lucas v. Hendrix*, 92 So.3d 699, 707 (Miss. Ct. App. 2012) (the father’s alcohol abuse and legal issues supported a finding that he was unfit); *Langerman v. Langerman*, 336 N.W.2d 669, 671 (S.D. 1983) (the father’s history of alcohol, endangerment of the children, and moral conduct sustained a finding that he was unfit).

¹³⁴ See, e.g., *Hamilton v. Houston*, 100 So.3d 1005, 1010 (Miss. Ct. App. 2012) (both parents abandoned their child for extended periods of time, leaving grandparents as primary caretakers); *Hughes v. Scaffide*, 58 Ohio St.2d 88, 89 (Ohio 1979) (the father abandoned his child for nine years after she was born and did nothing for her).

¹³⁵ See, e.g., *Martinez-Saroff v. Martinez-Saroff*, 174 A.D.3d 194, 194 (N.Y. App. Div. 4th Dept. 2019) (“extraordinary circumstances” existed for the grandparents to petition for custody of a child).

¹³⁶ See, e.g., *Basciano v. Foster*, 256 Md. App. 107, 150 (Md. Ct. Spec. App. 2022) (“exceptional circumstances” existed when the father relinquished all parenting responsibility to the grandparents following a drug overdose, and the child bonded with the grandparents as parents as a result).

¹³⁷ HARALMABIE, *supra* note 111, at § 10:5.

¹³⁸ See *id.* at § 10:7.

¹³⁹ *People ex rel. Portnoy v. Strasser*, 309 N.Y. 539, 541-42 (N.Y. 1952).

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 544.

¹⁴² *Id.*

While most states give preference to the parents under the traditional standard, some states give greater weight to the child's best interests under the best interest standard.¹⁴³ The best interest standard requires a grandparent to prove that grandparent custody would be in the best interests of the child, even without a showing of parental unfitness.¹⁴⁴ Grandparents can prove this under any of the typical best interest factors,¹⁴⁵ as well as under the theory of the "psychological parent."¹⁴⁶ Many times, the third party has had physical custody of the child for an extended period and has assumed the role of the child's "psychological parent."¹⁴⁷ Removing a child from a secure custodial environment conceivably could be detrimental to the child; thus, courts in these cases focus on the needs and attachments of the child rather than the needs of the natural parent.¹⁴⁸

In Colorado, courts have begun to place a greater emphasis on the role of psychological parents in the lives of their chil-

¹⁴³ See, e.g., CAL. FAM. CODE § 3011 (2023); CONN. GEN. STAT. ANN. § 46b-56(b)-(c); 750 ILL. COMP. STAT. ANN. 5/602.7(a)-(c) (2016); N.Y. DOM. REL. LAW § 240(1)(a) (2020); 23 PA. CON. STAT. § 5328(a) (2014). See also CAL. FAM. CODE § 3042(a) (2022) (requiring courts to give "due weight" to a child's preference for custody if the child is of "sufficient age and capacity" to make an informed decision).

¹⁴⁴ HARALMABIE, *supra* note 111, at § 10:5.

¹⁴⁵ See *supra* note 99.

¹⁴⁶ See HARALMABIE, *supra* note 111, at § 10:13.

¹⁴⁷ *Id.* at § 10:5.

¹⁴⁸ See, e.g., *In re Custody of Piccirilli*, 410 N.E.2d 1086, 1091 (Ill. App. Ct. 1980) (affirming it would be in the best interests of the child to remain in the custody of the maternal grandparents because the grandparents had provided a home for the child, had given her love and care, and the child wished to remain with the grandparents); *Mansukhani v. Pailing*, 318 N.W.2d 748, 751 (N.D. 1982) (holding that it would be detrimental to take the children from the custody of their paternal grandparents, with whom they had developed a psychological parent relationship); *In Interest [Custody] of D.G.*, 246 N.W.2d 892, 895 (N.D. 1976) (holding that grandparents who raised a six-year-old child in their home from birth were entitled to custody over the child's father, who had abandoned the child and provided little support); *Wrecsics v. Broughton*, 285 Pa. Super. 90, 96 (Pa. Super. Ct. 1981) (affirming it was proper to award custody of a 13-year-old to her maternal grandparents where the child had lived with her grandparents and expressed a strong preference to continue living with them).

dren.¹⁴⁹ To qualify as a “psychological parent,” a grandparent must meet the standing requirements and other criteria outlined in the statute.¹⁵⁰ The grandparent must also prove that he or she “has had the physical care of [the] child for a period of six months or more, [and commenced the action] within six months of the termination of the physical care.”¹⁵¹ Once the grandparent has established that he or she is a psychological parent, Colorado courts will consider it as part of the best interest standard.¹⁵² Notably, in many cases where a psychological parent was granted custody rights of the child, the child had been living with them for years.¹⁵³ For example, in *Delvin v. Huffman*, the Supreme Court of Colorado granted the maternal grandparents custody of their grandchildren on the basis that the grandchildren had lived with them for six years.¹⁵⁴ Despite the mother’s wishes for the children to return to her, the court determined that it was in the children’s best interests to remain with the grandparents based on the psychological parent theory.¹⁵⁵

IV. Conflict Between Grandparents Rights and Parents Rights

The traditional nuclear family no longer represents today’s society. As recognized by the *Troxel* Court, “persons outside of the nuclear family are called upon with increasing frequency to assist in the everyday tasks of child rearing” and, “in many cases, grandparents play an important role.”¹⁵⁶ While the family structure is changing, safeguarding parental autonomy continues to be strongly rooted in American legal tradition.¹⁵⁷ The issue persists

¹⁴⁹ Courtney N. Baldwin & Natalie C. Simpson, *Psychological Parents and Child Support*, COLO. LAW. 24, 25 (Nov. 2022), https://cl.cobar.org/wp-content/uploads/2022/10/Nov2022_Features-Family.pdf.

¹⁵⁰ See COLO. REV. STAT. ANN. § 14-10-123 (2021).

¹⁵¹ *In re C.T.G.*, 179 P.3d 213, 218 (Colo. App. 2007).

¹⁵² See *id.* at 219.

¹⁵³ *Id.* at 220.

¹⁵⁴ *Delvin v. Huffman*, 139 Colo. 417 (Colo. 1959).

¹⁵⁵ See *id.* at 419 (finding that the maternal grandparents showed “deep love and affection for the children, having cared for them, provided [for] them in a manner indicating a deep love and affection for said children”).

¹⁵⁶ *Troxel*, 530 U.S. at 64.

¹⁵⁷ Sandra Martinez, *The Misinterpretation of Troxel v. Granville: Construing the New Standard for Third-Party Visitation*, 36 FAM. L.Q. 487, 487 (2002).

between advocates focused on preserving parental autonomy and advocates focused on protecting the grandparent-grandchild relationship, particularly in cases involving parental alienation. This part of the Comment highlights the phenomenon of parental alienation and how it has recently become an issue in cases of grandparent visitation and custody. Specifically, it addresses the arguments for and against including parental alienation in grandparent statutes.

A. *Parental Alienation*

Parental alienation occurs when a child refuses to have contact with one parent for no justifiable reason.¹⁵⁸ This results when one parent utilizes alienating behaviors to sever their child's bond with the other parent.¹⁵⁹ The alienating parent can induce the child to refuse contact with the other parent by brainwashing or manipulating the child with false information, and by sabotaging the child's time with the other parent.¹⁶⁰ This behavior is commonly observed during family separation or divorce.¹⁶¹ Recent research has classified parental alienation as "a form of family violence and child maltreatment" because children of alienating parents are frequently subjected to verbal, physical, and financial abuse or neglect.¹⁶²

Typically, the alienating parent, the "targeted" parent, and the child are the main actors in cases of parental alienation.¹⁶³ However, in recent years, grandparents have also become targets of alienation strategies.¹⁶⁴ Alienating parents use manipulative tactics to try to damage not only the parent-child relationship, but also the grandparent-grandchild relationship.¹⁶⁵ Indeed, an alienating parent is likely to cut off contact between their child

¹⁵⁸ Olivia Bounds & Mandy Matthewson, *Parental Alienating Behaviours Experienced by Alienated Grandparents*, J. FAM. ISSUES 2, 2 (Sept. 9, 2022).

¹⁵⁹ *See id.*

¹⁶⁰ *Id.*

¹⁶¹ *See* Marissa Mallon, Comment, *Post-Separation Parent-Child Contact Problems: Understanding a Child's Rejection of a Parent and Interventions Beyond Custody Reversal*, 33 J. AM. ACAD. MATRIM. LAW. 609, 613 (2021).

¹⁶² Bounds & Matthewson, *supra* note 158, at 2.

¹⁶³ *Id.* at 3.

¹⁶⁴ *Id.*

¹⁶⁵ *See id.*

and their grandparents in order to sever that relationship.¹⁶⁶ Additionally, grandparents may become collateral damage if their adult child is disparaged and rejected by their own child.¹⁶⁷

The issue of grandparents seeking visitation or custody rights of their grandchildren in cases involving parental alienation is a complicated legal matter because there is limited research in this area for courts to consider when dealing with these types of situations.¹⁶⁸ In such cases, grandparents may attempt to argue for visitation or custody rights in order to preserve the grandparent-grandchild relationship, claiming that the alienating parent is preventing them from doing so. However, courts have been reluctant to interfere with the rights of parents in visitation and custody cases, typically holding that the alienating parent has the right to decide whether their children should have contact with their grandparents.¹⁶⁹

For instance, in *In re Russell*, the Texas Court of Appeals denied the paternal grandparents' request to enforce visitation with their granddaughter.¹⁷⁰ In this case, the mother and the step-father of the child divorced.¹⁷¹ As part of the custody arrangement, the parents of the step-father were allowed visitation with their granddaughter only when their son was away on military deployment.¹⁷² During this time, the mother's counselor had accused the mother of committing "grandparent alienation" and recommended that the grandparents be given custody of the granddaughter because of the mother's alienating behavior to-

¹⁶⁶ See Carol A. Golly, *Grandparents Cut Off from Grandchildren: An Exploratory Study* (2019) (Ph.D. dissertation, Barry University), https://www.familyaccessfightingforchildrensrights.com/uploads/2/6/5/0/26505602/golly_dissertation-final.5.20.2019.pdf.

¹⁶⁷ *Id.* at 15.

¹⁶⁸ See *id.* at 16; Stephen F. Beiner, et. al., *The State of Grandparents' Rights: Psychological and Legal Arguments*, 42 AM. J. FAM. THERAPY 1, 3 (2014).

¹⁶⁹ See e.g., THOMAS R. YOUNG, LEGAL RIGHTS OF CHILDREN § 3:5 (2022). See also *Troxel*, 530 U.S. 57, 68-69 ("[S]o long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children").

¹⁷⁰ *In re Russell*, 321 S.W.3d 846 (Tex. App. 2010).

¹⁷¹ *Id.* at 850.

¹⁷² *Id.* at 851.

ward them.¹⁷³ Subsequently, the mother had refused to transfer possession of the granddaughter to the grandparents after school, which the grandparents claimed violated the prior court order.¹⁷⁴ The trial court initially granted the grandparents' motion to enforce visitation with their granddaughter despite the mother's objection.¹⁷⁵ However, the court of appeals reversed the lower court's decision, finding that the grandparents failed to show that the alleged grandparent alienation had any effect on their granddaughter other than the fact that she missed her mother when she was with her grandparents.¹⁷⁶ Furthermore, the court found that the trial court abused its discretion in granting the grandparents' visitation rights because it was determined that they lacked standing under the applicable statute.¹⁷⁷

Recently, Florida enacted the "Markel Act," a law that provides grandparents with the right to petition for court-ordered visitation in narrow cases of parental alienation.¹⁷⁸ The act was inspired by the death of Dan Markel, a law professor who was killed by hitmen hired by the family of his ex-wife, Wendi Adelson.¹⁷⁹ The hitmen were hired to secure Adelson's ability to relocate with their children.¹⁸⁰ After members of Adelson's family were named as co-conspirators to the case, Adelson cut off contact between Markel's parents and the children.¹⁸¹ Markel's par-

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 852.

¹⁷⁶ *Id.* at 863.

¹⁷⁷ *Id.* See also TEX. FAM. CODE ANN. § 153.432(a) ("A biological or adoptive grandparent may request possession of or access to a grandchild").

¹⁷⁸ Peter Schorsch, 'Markel Act' Signed into Law, Gives Grandparents Visitation Rights, FLORIDA POLITICS (June 25, 2022), <https://floridapolitics.com/archives/535322-gov-desantis-signs-markel-act-giving-grandparents-visitation-rights/>.

¹⁷⁹ Jeff Truesdell, *Former Brother-in-Law Charged with Murdering Florida Law Professor Dan Markel Amid Custody Battle*, PEOPLE (Apr. 21, 2022, 2:20 PM), <https://people.com/crime/dan-markel-case-former-brother-in-law-charged-custody-battle/>.

¹⁸⁰ Peter Schorsch, *Advocates Urge Governor to Take Stand for Florida Dads with 'Markel Act'*, FLORIDA POLITICS (June 17, 2022), <https://floridapolitics.com/archives/533299-advocates-urge-governor-to-take-stand-for-florida-dads-with-markel-act/>.

¹⁸¹ Paul Caron, *Florida Gov. DeSantis Signs Markel Act, Giving Grandparents Right to Visit Their Grandchildren Where Living Parent Killed Other*

ents sought visitation rights with their grandchildren, but the court denied them visitation even after Adelson was later named as a co-conspirator to the crime.¹⁸² This case garnered national attention, inspiring advocates of grandparent rights to push for legislation that would prevent alienation between children and their grandparents in narrowly tailored situations.¹⁸³ Before the act was adopted, grandparents could only be granted visitation rights if a child's parents were "deceased, missing, or in a permanent vegetative state."¹⁸⁴ Today, grandparents can seek visitation rights for their grandchildren if one of the child's parents "has been held criminally or civilly liable for the death of the other parent."¹⁸⁵

Whether the new Florida law has had or will have any impact on the way courts deal with situations involving grandparents and parental alienation has yet to be reported.¹⁸⁶ However, since its passage, the Markel Act has reignited the ongoing debate between supporters of grandparent rights and supporters of parental rights over whether grandparent rights should be expanded to include parental alienation.

B. Arguments for the Inclusion of Parental Alienation in Grandparent Statutes

Grandparent rights organizations across the country, such as Grandparents Rights Organization, Alienated Grandparents Anonymous, Advocates for Grandparent-Grandchild Connection, and Grandparents Rights Advocates National Delegation of the U.S.A., to name a few, are advocating for legislation that would expand grandparent rights in cases of parental aliena-

Parent, TAXPROF BLOG (June 27, 2022), https://taxprof.typepad.com/tax-prof_blog/2022/06/florida-gov-desantis-signs-markel-act-giving-grandparents-right-to-visit-their-grandchildren-where-l.html.

¹⁸² *Id.*

¹⁸³ Schorsch, *supra* note 178.

¹⁸⁴ FLA. STAT. ANN. § 752.011 (2015).

¹⁸⁵ FLA. STAT. ANN. § 752.011(2) (2022).

¹⁸⁶ At the time of this writing, Wendi Adelson has not been convicted of Dan Markel's murder. She has only been named as a co-conspirator to the crime. See Karl Eppers, *Dan Markel Murder*, TALLAHASSEE DEMOCRAT (Sept. 9, 2022).

tion.¹⁸⁷ The consensus among these advocacy groups is that state legislators should include parental alienation in their grandparent statutes in order to maintain the grandparent-grandchild relationship and protect grandchildren from child abuse or child maltreatment.¹⁸⁸

1. *Maintain Grandparent-Grandchild Relationship*

Proponents of grandparent rights legislation contend that the inclusion of parental alienation in grandparent statutes is important to safeguard and promote positive relationships between grandparents and grandchildren.¹⁸⁹ They have argued in public forums that extended family relationships are critical to a child's development, and that parental alienation is detrimental to the grandparent-grandchild relationship because it deprives children of the opportunity to love and be loved by their extended family.¹⁹⁰ They have shared studies reporting that the child's development and well-being can be adversely affected if the alienating parent is preventing them from maintaining a continuing nurturing relationship with their grandparent.¹⁹¹ Furthermore, proponents of grandparent rights have suggested that the purpose of grandparent laws are to maintain and safeguard the grandparent-grandchild relationship because it allows grandparents standing

¹⁸⁷ See Grandparents Rights Organization, https://aaa1b.org/caregiver_services/grandparents-rights-organization/ (last visited Apr. 2, 2023); Alienated Grandparents Anonymous, <https://alienatedgrandparentsanonymous.com/complex-dynamics/> (last visited Apr. 2, 2023); Advocates for Grandparent-Grandchild Connection, <https://www.grandparentchildconnect.org> (last visited Apr. 2, 2023); Grandparent Rights Advocates National Delegation of the USA, FACEBOOK, https://www.facebook.com/grand.usa/?ref=page_internal (last visited Apr. 2, 2023).

¹⁸⁸ See Advocates for Grandparent-Grandchild Connection, *supra* note 187; Alienated Grandparents Anonymous, *supra* note 187; Grandparent Rights Advocates National Delegation of the USA, Grandparents Rights Organization, *supra* note 187; *supra* note 187.

¹⁸⁹ See Grandparents Rights Organization, *supra* note 187; Advocates for Grandparent-Grandchild Connection, *supra* note 187; Alienated Grandparents Anonymous, *supra* note 187; Grandparent Rights Advocates National Delegation of the USA, *supra* note 187.

¹⁹⁰ See Grandparent Rights Advocates National Delegation of the USA, FACEBOOK (June 14, 2022), <https://www.facebook.com/grand.usa/photos/a.4082494598536655/5202410346545069/>.

¹⁹¹ See Beiner, et. al., *supra* note 168, at 14-15.

in court to advocate for their grandchild,¹⁹² particularly during times of separation or divorce.¹⁹³ While several states' laws already consider whether grandparents have a significant relationship with their grandchild when determining visitation or custody,¹⁹⁴ proponents of grandparent rights are pushing to broaden this even further.

2. *Protect Grandchildren from Alienating Child Abuse or Maltreatment*

Proponents of grandparent rights legislation contend that the inclusion of parental alienation in grandparent statutes are crucial in order to protect grandchildren from abuse or maltreatment by the alienating parent.¹⁹⁵ These proponents have made the public argument that parental alienation is a form of psychological child abuse,¹⁹⁶ circulating studies that have found that parental alienation can result in emotional manipulation, as well as verbal, physical, and financial abuse of the child.¹⁹⁷ Often in court, grandparents will have to prove in cases of visitation and custody that within the context of that individual case, the alienation amounts to child abuse that is not in the best interests of the child and/or that the parent is unfit because they are abusive towards the child.¹⁹⁸ However, the reality is that parental aliena-

¹⁹² Susan Hoffman, *Grandparent Rights – A Precious Bond Should Not Be Broken*, EZINE ARTICLES (July 29, 2010), <https://ezinearticles.com/?Grandparent-Rights---A-Precious-Bond-Should-Not-Be-Broken&id=4763977>.

¹⁹³ See Beiner, et. al., *supra* note 168, at 14-15.

¹⁹⁴ See *supra* part II.B and part III.B.

¹⁹⁵ See Grandparent Rights Advocates National Delegation of the USA, *supra* note 190; Alienated Grandparents Anonymous, <https://alienatedgrandparentsanonymous.com/complex-dynamics/> (last visited Apr. 2, 2023).

¹⁹⁶ *Id.*

¹⁹⁷ See Bounds & Matthewson, *supra* note 158, at 2. See also Glenn F. Cartwright, *Expanding the Parameters of Parental Alienation Syndrome*, 21 AM. J. FAM. THERAPY 1, 6 (1993) (arguing that parental alienation syndrome is a form of child abuse).

¹⁹⁸ See generally American Law Journal, *Parental Alienation, Grandparents Rights' & New Divorce Rules: Hot Topics in Family Law*, YOUTUBE (Mar. 6, 2017), <https://www.youtube.com/watch?v=YZpFsBqXD7E>. It is important to note that this video discusses how courts are cynical about allegations of parental alienation when raised by only parents. However, given there has been little research involving grandparents, it is reasonable to assume that courts are likely more cynical towards such allegations when raised by grandparents.

tion is very difficult to prove and many courts are cynical about whether such familiar alienation can be proven.¹⁹⁹ Even in cases involving parental alienation between parents, there is currently no statute that establishes that parental alienation is a form of child abuse.²⁰⁰ While parental alienation is not specifically recognized as child abuse in any jurisdiction, proponents of grandparent rights are pushing for laws that would explicitly recognize parental alienation as child abuse or maltreatment so that they may be granted standing in these types of situations.

C. *Arguments Against the Inclusion of Parental Alienation in Grandparent Statutes*

Proponents of parental rights continue to work towards the protection of parental rights. Several national parental rights organizations, including the Family Preservation Foundation, ParentalRights.org, and Advocates Against Grandparents' Visitation Rights, are actively fighting to limit the expansion of grandparent rights.²⁰¹ Proponents of parental rights agree that state legislators should continue to prioritize parental autonomy and allow parents to decide who their children should have contact with, particularly when there is conflict between parents and grandparents.²⁰²

1. *Parental Autonomy*

Proponents of parental rights are opposed to expanding grandparent rights in cases involving parental alienation because they believe it infringes on the fundamental rights of parents to

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ See Advocates Against Grandparents' Visitation Rights, FACEBOOK, <https://www.facebook.com/advocatesagainstgrandparentsvisitationrights/> (last visited Apr. 2, 2023); Family Preservation Foundation, https://familypreservationfoundation.org/about/parents-rights?gclid=CJ0KCQjw8qmhBhCIARIsANAtbofMxTsXI965ogUSJ05NSRjXzUO8c4eZ5RthRGTZ7rfrKas5k5b513waAo0MEALw_wcB (last visited Apr. 2, 2023); ParentalRights.org, <https://parentalrights.org/about/> (last visited Apr. 2, 2023).

²⁰² See Advocates Against Grandparents' Visitation Rights, *supra* note 201; Family Preservation Foundation, *supra* note 201; ParentalRights.org, *supra* note 201.

make decisions about their children's upbringing,²⁰³ which is protected by the U.S. Constitution.²⁰⁴ Proponents of parental rights, like the mother in *Troxel*, argue that parents have the right to decide with whom their children associate, and that granting grandparents visitation or custody rights against the parents' wishes in cases of parental alienation violates that right.²⁰⁵ They have contended that the purpose of the judiciary is to uphold existing constitutional rights in order to remain faithful to the *Troxel* Court's original intent.²⁰⁶ By imposing their own views in cases of parental alienation, judges would be setting a legal precedent that would undermine that law.²⁰⁷ Thus, proponents of parental rights continue to hold the position that any issue relating to visitation or custody of their children should continue to be considered within the realm of parental autonomy and in accordance with the *Troxel* decision.²⁰⁸

2. *Strained Relationship Between Alienating Parent and Grandparents*

Proponents of parental rights are opposed to expanding grandparent rights in cases involving parental alienation, particularly in cases where the relationship between the alienating parent and the grandparents is strained.²⁰⁹ Proponents of parental

²⁰³ See Advocates Against Grandparents' Visitation Rights, *supra* note 201; Family Preservation Foundation, *supra* note 201; ParentalRights.org, *supra* note 201.

²⁰⁴ See *supra* part I.A-B.

²⁰⁵ Family Preservation Foundation, https://familypreservationfoundation.org/about/parents-rights?gclid=CJ0KCCQjw8qmhBhClARIsANAtbofMxTsXl965ogUSJ05NSRjXzUO8c4eZ5RthRGTZ7rfrKas5k5b513waAo0MEALw_wcB (last visited Apr. 2, 2023).

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ At the time of this writing, an amendment to the U.S. Constitution, called the "Parental Rights Amendment," was being introduced to Congress. See H.J. Res. 38, 118th Cong., 1st Sess. (2023-2024). The purpose of the amendment is to "enshrine the traditional liberty of parents to direct a child's upbringing, education, and care as a fundamental right." ParentalRights.org, <https://parentalrights.org/> (last visited Apr. 2, 2023).

²⁰⁹ E.g., Karen Woodall, *The Generation Game: Grandparenting and Parental Alienation*, KAREN WOODALL BLOG (Nov. 27, 2014), <https://karenwoodall.blog/2014/11/27/the-generation-game-grandparenting-and-parental-alienation/>.

rights argue that when the involvement of grandparents is detrimental to the child, parents should have the right to shield their child from those strained relationships.²¹⁰ Studies have suggested that children may suffer if they are exposed to the ongoing tension between their parent and grandparents.²¹¹ Proponents of parental rights have contended that parents are the best protectors of their children,²¹² and thus a parent's decision to alienate their children from their grandparents should continue to fall within the realm of parental autonomy and not at the discretion of the court.

V. Conclusion

The issue of grandparent rights continues to divide supporters of grandparent rights and supporters of parental rights. Because of the changes in family structures, grandparents have played more significant roles in their grandchildren's lives. With grandparents increasingly involved in their grandchildren's lives, supporters of these rights believe that laws on visitation and custody should be expanded to include parental alienation.

Current law gives preference to the decisions of parents in cases involving alienation in accordance with the *Troxel* ruling. While *Troxel* provided some guidance on how courts should weigh parental rights, it failed to specify the exact standard courts should use when making visitation or custody decisions. The Court's failure to provide states with guidance and uniformity has arguably made it more difficult for grandparents and parents to understand their rights.

When it comes to cases of parental alienation involving grandparents, courts are particularly left with a lack of guidance. With no guidance, determinations of visitation and custody are left to the courts' discretion, which arguably can have negative implications for both parents and grandparents. This Comment does not take a position in favor of or opposition to expanding grandparent rights. However, legislators should prioritize working towards laws that would provide more uniformity among the states. That way, there could be fewer conflicts and less litigation

²¹⁰ *E.g.*, Beiner, et. al., *supra* note 168, at 10-11.

²¹¹ *Id.* at 2.

²¹² *See* Family Preservation Foundation, *supra* note 205.

between grandparents and parents, and courts could have a clearer understanding on how to rule in cases involving claims of parental alienation.

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