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BACKGROUND PAPER

**GRANDPARENT-GRANDCHILD
ACCESS:
A LEGAL ANALYSIS**

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Grandparent-Grandchild Access: A Legal Analysis

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*The views expressed in this report are those of the author
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Aussi disponible en français

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EXECUTIVE SUMMARY

In June 2000, the United States Supreme Court decided the case of *Troxel v. Granville*. The Court said that as long as a parent adequately cares for his or her children, the state should not interfere with that parent's constitutionally protected right to make decisions about his or her children's contact with grandparents.

In March 2001, the Ontario Court of Appeal decided the grandparent access case of *Chapman v. Chapman*. The Court held that in the absence of evidence that demonstrates a parent's inability to act in the best interests of his or her children, a parent's right to make decisions on his or her children's behalf should be respected. These decisions include those about whom the children see, how often, and under what circumstances.

Troxel and *Chapman* reflect the evolution in jurisprudence in the United States and Canada. With the paucity of social science research about litigious grandparent access applications, as well as the vagueness of the best interests of the child test, courts have often relied on nostalgic, sentimental notions of the role of grandparents, and have frequently granted access to grandchildren contrary to the wishes of the children's parents.

Four provinces, Quebec, British Columbia, Alberta and New Brunswick, as well as Yukon, have legislation specifically providing for grandparent access. Other provincial legislation as well as the federal *Divorce Act* allow for access applications by people other than parents without explicitly mentioning grandparents.

It is becoming increasingly likely that the *Divorce Act* and provincial legislation such as Ontario's *Children's Law Reform Act*, may be subject to the scrutiny of the *Charter of Rights and Freedoms*. As such, it would be unacceptable for there to be unrestrained judicial interference with the rights of parents to decide what is in the best interests of their children.

It is argued that the best interests of the child test, which is included in all provincial and federal family law legislation, is more appropriately suited to claims between parents than between a parent and a non-parent. Accordingly, it is recommended that legislation regarding grandparent access provide for a two-stage, child-focussed hearing. The initial stage would determine whether the grandchild would suffer actual or potential harm if access to their grandparent were terminated. If no such harm could be shown, then the hearing would conclude and no access would be ordered. If actual or potential harm could be proven by the grandparents, then the second stage would proceed and access would be determined using the best interests of the child test.

It is recommended that provincial and territorial governments establish programs similar to Ontario's Office of the Children's Lawyer, which provides court-ordered counsel for children in custody and access disputes, including those involving grandparents. Children's counsel focus their efforts on gathering relevant evidence about the effect of grandparent access on their child clients. It is particularly helpful to the court to have, placed in context, the input of children who are able to express their views and preferences regarding their grandparents' access. Children's counsel are uniquely positioned to use dispute resolution techniques with the parties and their lawyers to, when appropriate, settle cases.

INTRODUCTION

On January 12, 2000, the issue of non-parents' rights and in particular the rights of grandparents to have access to their grandchildren, gained widespread publicity when the case of *Troxel v. Granville*¹ was argued before the United States Supreme Court. Throughout North America, there were hundreds of articles in newspapers and magazines, on Internet sites and in some academic journals, as well as numerous television news stories, about the issues raised in the case. The case focussed on a mother who restricted then denied access to her two children to their paternal grandparents. The issue before the Court was whether the courts can grant grandparents visitation rights to their grandchildren even when the parents of the children object.

There were numerous briefs filed on behalf of interested groups or organizations. Briefs representing the interests of older individuals, including one filed on the grandparents' behalf by the American Association of Retired Persons, noted that the number of children whose primary caretakers are their grandparents is growing rapidly in the face of nuclear family dissolution. These groups claim that for approximately 1.4 million American children, their grandparents are standing *in loco parentis*.²

Briefs representing the religious right, filed on the parents' behalf, held up the traditional family consisting of married parents and their children.³ On the other hand, gay rights organizations asserted that neither side's position was sufficiently protective of the needs of children being reared in non-traditional families. In these families the *de facto* parent may have neither biological nor legal ties to the child. These organizations argued that courts should take into account the quality and security of the relationship between individual children and adults rather than blood ties or labels.⁴

The American Civil Liberties Union submitted a brief supporting the mother's position that parents, rather than the state, are presumed to be entitled to act and make decisions in the best interest of their children. Courts should not be permitted to override those decisions merely because a judge disagrees.⁵

The National Association of Counsel for Children's brief supported the mother's position, but urged the Court to allow non-parents who have historically acted in a parenting capacity to be able to apply to the court for access. The Association is a multidisciplinary professional organization of child advocates comprised largely of lawyers. Its position before the Court was that the non-parent has the burden of both showing that a significant relationship with a child exists, and that, based on some substantive standard, access will be in the interests of the child,

¹ 120 S. Ct. 2054 (2000).

² Brief *Amici Curiae* of the American Association of Retired Persons and Generations United, filed November 12, 1999.

³ Brief *Amicus Curiae* of the American Center for Law and Justice Supporting Respondent, filed December 10, 1999; Brief *Amici Curiae* of the Christian Legal Society and The National Association of Evangelicals, filed December 13, 1999.

⁴ Brief of the Lambda Legal Defense and Education Fund and Gay and Lesbian Advocates and Defenders as *Amici Curiae*, filed December 13, 1999.

⁵ Brief *Amicus Curiae* of the American Civil Liberties Union (ACLU) and the ACLU of Washington, filed December 13, 1999.

having regard to the common-law and constitutional presumption that parents act in their child's best interests. The Association asserted that this approach would ensure that a child's constitutional rights and best interests would be protected.⁶

These disparate groups all claimed that their perspective would ultimately promote the best interests of children.

Slightly more than a year before the *Troxel* case was heard by the United States Supreme Court, the report of the Special Joint Committee on Child Custody and Access⁷ was tabled in Canada. The report included among its many recommendations that provincial and territorial governments should give special legislative recognition to non-parents, including grandparents, when resolving child custody and access disputes. Several lobby groups representing grandparents made submissions before the Committee.

On March 2, 2001, the Ontario Court of Appeal addressed the issue of grandparent access in *Chapman v. Chapman*.⁸ This important and significant appellate court decision provides some clarity and direction about the visitation rights of grandparents to their grandchildren.

This paper discusses the *Troxel* and *Chapman* cases in detail, examines the roles grandparents can play, the suitability of the best interests of the child test in these circumstances, reviews American and Canadian case law, discusses constitutional and policy considerations, and recommends several alternative approaches to grandparent access cases.

TROXEL V. GRANVILLE

The *Troxel* case involved section 26.10.160 (3) of the Revised Code of Washington, which states the following:

Any person may petition the Court for visitation rights at any time including, but not limited to, custody proceedings. The court may order visitation rights for any person when visitation may serve the best interests of the child whether or not there has been any change of circumstances.⁹

Paternal grandparents Jennifer and Gary Troxel petitioned the United States Supreme Court for the right to visit their grandchildren, Isabelle and Natalie Troxel who, at the date of the hearing, were ages 8 and 10, respectively. Tommie Granville, the children's mother, opposed the petition.

Tommie Granville and Brad Troxel were never married but had a relationship that ended in June 1991. Isabelle and Natalie are their two daughters. After Tommie and Brad separated, Brad lived with his parents and regularly brought his daughters to their home for weekend

⁶ Brief *Amicus Curiae* of the National Association of Counsel for Children, filed December 13, 1999.

⁷ Canada, Report of the Special Joint Committee on Child Custody and Access, *For the Sake of the Children*, available online at <http://www.parl.gc.ca/InfoComDoc/36/1/SJCA/Studies/Reports/sjcarp02-e.htm> (date accessed, July 30, 2001).

⁸ [2001] O.J. No. 705 (Ont. C.A.).

⁹ Wash. Rev. Code § 26.10.160 (3) (Supp.1996).

access. Brad committed suicide in May 1993. The Troxels continued to see the girls regularly; however, in October 1993, Tommie informed the Troxels that she wished to limit their access to one visit per month. In December 1993, the Troxels began an action in Washington Superior Court to obtain access rights. The Troxels requested two weekends of overnight access per month and two weeks each summer. Tommie did not oppose access but asked the Court to order one day of visitation each month with no overnight stay. In 1995, the Washington State Superior Court ordered that access occur one weekend per month, one week during the summer and four hours on both the grandparents' birthdays.

Tommie appealed, during which time she married Kelly Wynn. The Washington Court of Appeals remanded the case to the Superior Court. On remand, the Superior Court found that access was in the children's best interests. Approximately nine months after the remand order was made, Tommie's new husband adopted the children.

The Washington Court of Appeals then reversed the Superior Court's visitation order and dismissed the Troxels petition for access, holding that non-parents lack standing to seek visitation under section 26.10.160 (3) unless a custody action is pending.

The Washington Supreme Court affirmed the Court of Appeals result.¹⁰ It found that the language of section 26.10.160 (3) gave the Troxels standing to seek visitation, regardless of whether a custody action was pending but concluded that the Troxels could not actually obtain visitation under section 26.10.160 (3). It based this decision on the United States Constitution, holding that section 26.10.160 (3) unconstitutionally infringed on the fundamental right of parents to rear their children. The Washington Supreme Court found that the Constitution permits a state to interfere with that right only to prevent harm or potential harm to a child. Section 26.10.160 (3) does not meet that standard because it does not require a showing of harm. Also, by allowing "any person [to] petition the court for visitation rights [of a child] at any time," the Washington visitation statute is too broad. The Washington Supreme Court held that "parents have a right to limit visitation of their children with third persons,"¹¹ and that, between parents and judges, "the parents should be the ones to choose whether to expose their children to certain people or ideas."¹²

On June 5, 2000, the United States Supreme Court affirmed the Washington Supreme Court's decision in a 4-3 opinion written by Justice Sandra Day O'Connor. The Court found that section 26.10.160 (3), as applied here, violated the U.S. Constitution. Justice O'Connor indicated that the Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property without due process of law,"¹³ and that the court has long recognized that the Amendment's Due Process Clause, "guarantees more than fair process."¹⁴ It also includes a substantive component that "provides heightened protection against governmental interference with certain fundamental rights and liberty interests."¹⁵ Justice O'Connor noted that the liberty

¹⁰ *Troxel* was combined with two other similar cases and is cited as *Re Custody of Sara Skyanne Smith et al.*, 137 Wn. 2nd 1 (Wash. 1998).

¹¹ *Ibid* at 21.

¹² *Ibid*.

¹³ U.S. Const. amend. XIV, § 1, cl. 2.

¹⁴ *Supra*, Note 1 at 2059.

¹⁵ *Ibid* at 2060.

interest at issue, custody and control of children, “is perhaps the oldest of the fundamental liberty interests recognized by this court.”¹⁶ She also pointed out the “extensive precedent,”¹⁷ whereby “the court has recognized the fundamental right of parents to make decisions concerning the care, custody and control of their children.”¹⁸ In light of this, Justice O’Connor concluded the following:

It cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.¹⁹

The Court held that section 26.10.160 (3), as applied, unconstitutionally infringed on that fundamental parental right because it was too broad. Its language effectively permits any third party seeking access to subject to judicial review any decision by a parent concerning visitation of the parent’s children. Moreover, Justice O’Connor noted that, “A parent’s decision that visitation would not be in the child’s best interest is accorded no deference,”²⁰ as section 26.10.160 (3) contains no requirement that a court give the parent’s decision any weight. Instead, it places the best interest determination solely in the hands of the judge. In effect, a court in the state of Washington can disregard and overturn any decision by a fit custodial parent concerning visitation whenever a third party applies for access, based only on the judge’s determination of the child’s best interests.

The Superior Court’s order was not founded on any special factors that might justify state interference with Tommie Granville’s fundamental right to make decisions concerning the rearing of her two daughters. The Troxels did not allege that Tommie was a poor or unfit parent. The U.S. Supreme Court noted that this aspect of the case is important, for there is a presumption that fit parents act in the best interests of their children. The court cited its own previous decision in *Parham v. J. R. et al*:

Our constitutional system long ago rejected any notion that a child is “the mere creature of the State” and, on the contrary, asserted that parents generally “have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligation”.... The law’s concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience and capacity for judgment required for making life’s difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.²¹

Justice O’Connor went on to say:

¹⁶ Ibid.

¹⁷ Ibid. See also, U.S. Supreme Court decisions in *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*. 268 U.S. 510 (1925); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Ibid at 2061.

²¹ 442 U.S. 584 at 602 (1979).

So 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.²²

The Court found that the problem in this case was that the Superior Court attached no weight to the mother's determination of her daughters' best interests.

The Superior Court apparently applied exactly the opposite presumption, employing a decisional framework that:

...directly contravened the traditional presumption that a fit parent will act in the best interest of his or her child.... The court's presumption failed to provide any protection for Granville's fundamental constitutional right to make decisions concerning the rearing of her own daughters.²³

Justice O'Connor went on to say:

In an ideal world, parents might always seek to cultivate the bonds between grandparents and their grandchildren. Needless to say, however, our world is far from perfect, and in it the decision whether such an intergenerational relationship would be beneficial in any specific case is for the parent to make in the first instance. And, if a fit parent's decision of the kind at issue here becomes subject to judicial review, the court must accord at least some special weight to the parent's own determination.²⁴

The Court concluded that the visitation order was an unconstitutional infringement on Tommie Granville's fundamental rights. The Superior Court failed to accord the determination of a "fit" custodial parent any material weight. The Court held that "the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a "better" decision could be made."²⁵

The Supreme Court based its decision on the "sweeping breadth"²⁶ of section 26.10.160 (3) and its broad, unlimited application in this case. As a result, the Court did not address a significant constitutional question raised by the Washington Supreme Court—whether the Due Process Clause requires non-parental access statutes to include a showing of harm or potential harm to the child as a condition of granting visitation. This issue is discussed later in this paper. Each of the 50 American states now has some form of statute permitting non-parent access, including grandparent access.

²² *Supra*, Note 1 at 2061.

²³ *Ibid* at 2062.

²⁴ *Ibid*.

²⁵ *Ibid* at 2064.

²⁶ *Ibid*.

CHAPMAN V. CHAPMAN

The case of *Chapman v. Chapman* involved an intact family with two children, Leanna and Eric, who, at the time of the trial, were 8 and almost 10 years of age, respectively. The children's grandmother, Esther Chapman, age 77, sought access to them. The parents, Larry and Monica Chapman, and the grandmother had a very poor relationship as they (particularly Monica Chapman) believed Esther to be a negative influence on them and their two children. Nevertheless, the parents acknowledged that the children spending time with extended family might be beneficial for Leanna and Eric. Thus, the dispute before the trial judge, Justice Ingram, was not whether access was to take place, but rather the frequency and nature of the access. Esther Chapman wanted 10 four-and-a-half-hour visits each year. The parents were prepared to offer six four-and-a-half-hour visits. Although Justice Ingram acknowledged the parents' role in raising their children, he stated:

Their right to independently raise their children should not be lightly interfered with.... Ideally the parties would be left to make their own schedule; however, the parents made it so difficult to negotiate that procedures to resolve scheduling disputes must be utilized.²⁷

Justice Ingram determined that access would be for at least 44 hours per year, comprising between 6 and 10 visits, depending on the duration of each visit. Although the difference between the two parties was very small, Larry and Monica Chapman's position was that they were fit, competent and loving parents who believed that they, not Esther Chapman, nor the courts, should determine how often their children should have access to their grandmother. Accordingly, the parents appealed the trial judge's decision to the Ontario Court of Appeal.

Justice Abella, writing for a unanimous court, characterized the issue before it as whether "the disruption and stress generated by the grandmother's insistent attempts to get access on her own terms are in the children's best interests."²⁸ A review of the trial judgment shows the parents to be somewhat unreasonable, intransigent and insistent about access being determined on their own terms. However, the Ontario Court of Appeal allowed the parents' appeal. Justice Abella stated:

The trial judge acknowledged that the right of Larry and Monica Chapman "to independently raise their children should not be lightly interfered with", yet he defers that right to the speculative hope that continued imposed access to the grandmother will one day produce a positive relationship for these children. This speculation, it seems to me, is an insufficient basis for overriding the parents' right to protect the children's interests and determine how their needs are best met. These are loving, devoted parents committed to their children's welfare. In the absence of any evidence that the parents are behaving in a way which demonstrates an inability to act in accordance with the best interests of their children, their right to make decisions and judgments on their children's behalf should be respected, including decisions about whom they see, how often, and under what circumstances they see them.

²⁷ (28 March 2000), Ontario 1131/98 (Ont. S.C.J.) [unreported].

²⁸ *Supra*, Note 8 at para. 20.

Larry and Monica Chapman, not Esther Chapman, are responsible for the welfare of the children. They alone have this legal duty. Esther Chapman, as a grandparent, loves her grandchildren and, understandably, wants to maintain contact with them. Nonetheless, the right to decide the extent and nature of the contact is not hers and neither she nor a court should be permitted to impose their perception of the children's best interests in circumstances such as these where the parents are so demonstrably attentive to the needs of their children. The parents have, for the moment, decided that those needs do not include lengthy, frequent visits with their grandmother. Although the parents' conflict with Esther Chapman is unfortunate, there is no evidence that this parental decision is currently detrimental to the children. It should therefore be respected by the court and the children's best interests left in the exclusive care of their parents.

The trial judge's articulated purpose was to create a close relationship between two children and a grandmother who loves them. There can be no criticism of this goal. But any duty to create such a relationship lies with the children's parents. The failure to do so does not warrant judicial intervention, especially in circumstances such as these where the immediate family is functioning well and the children's best interests are being assiduously nurtured by dedicated parents.²⁹

As in *Troxel*, the Ontario Court of Appeal held that fit and competent parents are presumed to act in the best interests of their children. As such, the parents should decide with whom they wish their children to interact, not the courts or grandparents.

RELEVANT CANADIAN LEGISLATION

In Canada, the "grey lobby" has been somewhat less successful in moving the provinces and the federal government toward enacting specific legislation regarding grandparent access. Quebec, New Brunswick, British Columbia, Alberta and Yukon have such legislation. Article 611 of the *Civil Code of Quebec*³⁰ states:

In no case may the father or mother, without grave reason, interfere with personal relations between the child and his grandparents.

Failing agreement between the parties, the terms and conditions of these relations are decided by the court.

By using the words "interfere with personal relations," article 611 seems to imply that there is some form of ongoing grandparent-grandchild relationship that the legislation seeks to maintain.

Section 129 (3) of the New Brunswick *Family Services Act*³¹ states that determinations of access applications must be made on the basis of the best interests of the child. Section 1 of the Act defines the *best interests of the child* as, *inter alia*, taking into consideration the "love, affection and ties that exist between the child and... where appropriate... each grandparent of the child." As article 611 of the *Civil Code of Quebec* does, so too does the New Brunswick statute

²⁹ *Supra*, Note 8 at paras. 21-23.

³⁰ Art. 611 C.C.Q.

³¹ S.N.B. 1980, c. F-2.2.

contemplate an *existing* grandparent-grandchild relationship. Section 1 of the Act also includes a grandparent along with a parent in the definition of *immediate family*.

In 1997, Alberta amended its *Provincial Court Act*³² to make specific provision for grandparent access:

- Section 32.1(2) If a grandparent at any time is refused access to a child, the court may on application make an order as it sees fit regarding the grandparent's right of access to the child.
- (3) The application for an order under this section may be made
 - (a) by a grandparent of the child, or
 - (b) by the child who may apply with or without any person interested on his behalf.
 - (4) In making an order under this section, the court shall take into consideration only the best interests of the child as determined by reference to the needs and other circumstances of the child including
 - (a) the nature and extent of the child's past associations with the grandparent, and
 - (b) the child's views and wishes if they can be reasonably ascertained.

In 1998, British Columbia's *Family Relations Act*³³ was amended to include grandparents as part of the class of people that a court must consider in a custody and access dispute when determining the best interests of a child:

- Section 24 (1) When making, varying, or rescinding an order under this Part, a court must give paramount consideration to the best interests of the child and, in assessing those interests, must consider the following factors and give emphasis to each factor according to the child's needs and circumstances:
- (a) the health and emotional well being of the child, including any special needs for care and treatment;
 - (b) if appropriate, the views of the child;
 - (c) the love, affection and similar ties that exist between the child and other persons;
 - (d) education and training for the child;
 - (e) the capacity of each person to whom guardianship, custody or access rights and duties may be granted to exercise those rights and duties adequately.

³² R.S.A. 1980 c. p-20.

³³ R.S.B.C. 1996, c.128, as am. by S.B.C. 1998, c.28.

- (1.1) The references to “other persons” in subsection (1)(c) and to “each person” in subsection (1)(e) include parents, grandparents, other relatives of the child and persons who are not relatives of the child.

The Act was further amended in 1998 to allow courts to make a custody and access order to a grandparent:

Section 35 (1) Subject to Part 3, a court may, on application, order that one or more persons may exercise custody over a child or have access to the child.

- (1.1) The reference to “persons” in subsection (1) includes parents, grandparents, other relatives of the child and persons who are not relatives of the child.

Similarly, Yukon amended its *Children’s Act*³⁴ in 1998 to include the involvement of grandparents in a child’s life as a factor when applying the best interests of the child test in an application for custody or access.

Section 30 Best interests of the child

- (1) In determining the best interests of a child for the purposes of an application under this Part, in respect of custody of or access to a child, the court shall consider all the needs and circumstances of the child including
- (a) the bonding, love affection and emotional ties between the child, and
 - (iii) persons, including grandparents involved in the care and upbringing of the child.

The *Children’s Act* was also amended to explicitly allow grandparents to apply to a court for an order for custody of, or access to, a grandchild.

Section 33 Application to the court

- (1) A parent of the child, or any other person, including the grandparents may apply to the court for an order respecting custody of or access to the child or determining any aspect of the incidents of custody of the child.

That the other provinces’ legislation and the *Divorce Act*³⁵ contain no specific language dealing with grandparent visitation is, in large measure, due to the fact that the existing language of the relevant statutes permit such applications to be made. For example, Section 21 of the Ontario *Children’s Law Reform Act*³⁶ states:

A parent of a child or any other person may apply to a court for an order respecting custody of or access to the child or determining any aspect of the incidents of custody of the child.

³⁴ R.S.Y. 1986, c.22, as am. by S.Y. 1998, c.4.

³⁵ R.S.C. 1985, chap. 3.

³⁶ R.S.O. 1990, chap. C.12.

Section 21 of the Act must also be read in conjunction with section 24 (1):

- (1) The merits of an application under this Part in respect of custody of or access to a child shall be determined on the basis of the best interests of the child.

These two sections when read together appear to be largely consistent with the now constitutionally invalid Washington state statute. The Canadian constitutional questions regarding third-party and non-parent access and related legislation are addressed later in this paper.

Sections 21 and 24 (1) of the Ontario's *Children's Law Reform Act* must also be read in conjunction with section 24 (2) and, in particular, subsection (g), which states:

- (2) In determining the best interests of a child for the purposes of an application under this Part, in respect of custody of or access to a child, a court shall consider all the needs and circumstances of the child including,
 - (g) the relationship by blood or through an adoption order between the child and each person who is a party to the application.

When the court is determining whether access is in the best interests of a child, it must by law consider whether access to the child by grandparents, as blood relatives, is in that child's best interests.

The relief that a non-parent may apply for under section 21 is provided for under section 28, which gives the court broad powers to make an order it deems to be in the best interests of a child.

- The court to which an application is made under section 21,
- (a) by order may grant the custody of or access to the child to one or more persons;
 - (b) by order may determine any aspect of the incidents of the right to custody or access; and
 - (c) may make such additional order as the court considers necessary and proper in the circumstances.

Thus, the legislation in Ontario (and in most Canadian provinces) already allows for grandparents to apply for custody or access to grandchildren.

The *Divorce Act* allows standing for individuals, other than spouses, to apply for custody of, or access to, a child. Section 16 says the following:

- (1) A court of competent jurisdiction may, on application by either or both spouses or by any other person, make an order respecting the custody of, or access to, any or all children of the marriage.
- (2) Where an application is made under (1), the court may, on application by either or both spouses or by any other person, make an interim order respecting the custody of or the access to any or all children of the marriage pending determination of the application under (1).

- (3) A person other than a spouse, may not make an application under (1) or (2), without leave of the court.

Therefore, the *Divorce Act* currently allows for non-parents, including grandparents, to apply for custody of, or access to, a child. Non-spouses, however, must first obtain leave of the court to pursue an application for custody or access.

“ANY OTHER PERSON”: THE THRESHOLD NON-PARENTS MUST MEET

The provisions for non-parent access contained in the *Divorce Act* are broad in scope. While the case law is not entirely consistent, the prevailing judicial position is that for grandparents to be considered as “any other person” having a right to apply for access, “they must, as a preliminary step, establish that they already have a close relationship to the child at the time of the application and that they are not using the application to create or establish such a relationship.”³⁷

The Ontario Court of Appeal in *Finnegan v. Desjardins* stated that an applicant under section 21 of the *Children’s Law Reform Act* must meet a threshold that the application must not be “so patently tenuous and devoid of merit that it was proper to bring it to a halt.”³⁸ In arriving at its decision, the Court of Appeal relied upon its own decision four years earlier in an adoption case *C.G.W. v. M.J. and A.C.*,³⁹ in which there was no relationship in law and there had been no relationship in fact established.

In *D. (G.) v. M. (G.)*, Justice Vertes of the Northwest Territories Supreme Court stated:

In my opinion, the best interests of a child are not served by frivolous or ill-founded applications for custody or access. Not anyone who merely has an interest in the child should be allowed to force the custodial or biological parent into court. There must be a connection to the child that can be almost equated to a parental one in the sense of care, nurture and support.⁴⁰

Justice Vertes adopted the comments made by Sparks J. of the Nova Scotia Family Court in *Stewart v. MacDonnell*:

It seems to me that before standing should be granted by the court, the legal stranger to the child must establish, at the very least, a *prima facie* case connecting the welfare of the child with continued visits. This may be proved by demonstrating a lengthy and meaningful prior relationship, a positive bond with the child, and a substantive reason for disregarding the contrary wishes of the custodial parent.⁴¹

³⁷ *D. (G.) v. M. (G.)* (1999) 47 R.F.L. (4th) 16 at 27 (N.W.T.S.C.).

³⁸ [1985] O. J. No. 725 at para. 1 (Ont. C.A.) (QL).

³⁹ (1982) 24 R.F.L. (2d) 342 (Ont. C.A.).

⁴⁰ *Supra*, Note 37 at 27.

⁴¹ (1992) 39 R.F.L. (3d) 163 at 167 (N.S. Fam. Ct.).

In *M. v. W. and R.*, the British Columbia Supreme Court held that under the *Family Relations Act* “the designation of ‘any person’ surely has to include someone that has some real connection or real relationship to this child—some tie must exist.”⁴²

It is established law that in custody and access disputes between parents, it is the child’s right to have contact with the non-custodial parent rather than the reverse.⁴³ Despite this stated legal principle, the case law often focusses on the respective rights and roles of parents.

Similarly, the case law regarding grandparent access also establishes the principle that access is the right of the grandchild and not the grandparent.⁴⁴ In *Meloche v. Frank*, Vogelsang, J. stated:

In any question of access, the focus of the inquiry is the child, for the right to access is that of the child and not the right of the claimant, be he or she a parent, grandparent or other person.⁴⁵

THE SOCIAL SCIENCE LITERATURE AND CULTURAL AND JUDICIAL MYTHOLOGY

Given the current high rate of marital breakdown in Western societies as well as the various forms of modern nuclear families, there exist many opportunities for grandparents to play a role in the lives of their grandchildren. Many grandparents can and do play a very meaningful and positive part in their grandchildren’s lives. Others can be a negative and stressful influence on grandchildren, either directly or often indirectly by having a poor relationship with the parents.

There are many conceptions about grandparents, some based in reality and others based in social mythology. Canadian researchers commented on some of these notions of grandparents:

On the positive side, they are seen as being the reserves in times of crises, giving sanctuary, unconditional love, freedom and permissiveness; providing special treats and entertainment; being the transmitters of societal, personal and moral values; and remaining balanced and impartial and above the fray of their children’s divorce.... Older family members may be called upon to provide the missing authority or leadership in a dysfunctional family....

On the negative side, grandparents have been perceived by clinicians as focussed on their own needs, perhaps to fill their empty nests; as making reparation for their own past perceived failures; as impeding the gaining of autonomy and independence in their own children; and as remaining enmeshed and overinvolved with these children through their grandchildren. Grandparents have been viewed as interfering, indulgent, overprotective,

⁴² (1985) 45 R.F.L. (2d) 337 at 347 (B.C.S.C.).

⁴³ *MacGyver v. Richards* (1995) 22 O.R. (3d) 481 at 492 (Ont. C.A.).

⁴⁴ *Wylde v. Wylde* [1984] O.J. No. 764 (Ont. Prov. Ct. Fam. Div.) (QL); *Moreau v. Cody* (1995) 15 R.F.L. (4th) 174 (O.C.J. Prov. Div.); and *Paulini v. Schmidt* [1993] O.J. No. 2907 (O.C.J. Gen. Div.) (QL).

⁴⁵ [1991] O.J. No. 1114 (O.C.J. Prov. Div.) (QL).

demeaning of the parents and sabotaging their efforts at discipline, competing with their children and wanting to assume former, rewarding roles, tinged with power and control.⁴⁶

In fact, there is a paucity of empirical research, in both Canada and the United States, on disputed access by grandparents to grandchildren. Cogswell and Henry acknowledge this by stating that “research is needed that more specifically distinguishes among particular types of grandparent figures.”⁴⁷

Notwithstanding the limited social science research in this area, judges in both Canada and the United States frequently make comments about grandparents that principally accept the “positive side,” as articulated by Wilks and Melville, as a given.

In *Troxel*, the United States Supreme Court was critical of the Washington Superior Court’s presumption and comments in favour of grandparent access:

The Superior Court’s announced reason for ordering one week of visitation in the summer demonstrates our conclusion well: “I look back on some personal experiences.... We always spent as kids a week with one set of grandparents and another set of grandparents, [and] it happened to work out in our family that [it] turned out to be an enjoyable experience. Maybe that can, in this family, if that is how it works out.”⁴⁸

In *King v. King*, the majority of the Supreme Court of Kentucky came to very nostalgic conclusions about grandparent access based on no empirical research:

Under ordinary circumstance, few would dispute that there are benefits to be derived from the establishment of a bond between grandparent and grandchild....

There is no reason that a petty dispute between a father and son should be allowed to deprive a grandparent and grandchild of the unique relationship that ordinarily exists between those individuals....

If a grandparent is physically, mentally and morally fit, then a grandchild will ordinarily benefit from contact with the grandparent. That grandparents and grandchildren normally have a special bond cannot be denied. Each benefits from contact with the other. The child can learn respect, a sense of responsibility and love. The grandparent can be invigorated by exposure to youth, can gain an insight into our changing society, and can avoid the loneliness which is so often a part of an aging parent’s life. These considerations by the state do not go too far in intruding into the fundamental rights of the parents.⁴⁹

⁴⁶ Corinne Wilks and Catherine Melville, *Grandparents in Custody and Access Disputes* (1990) 13 (3): *Journal of Divorce*, 1 at 3-4.

⁴⁷ Carolyn Cogswell and Carolyn S. Henry, *Grandchildren’s Perceptions of Grandparental Support in Divorced and Intact Families*, (1995) 23 (3/4): *Journal of Remarriage and Divorce*, 127 at 147.

⁴⁸ *Supra*, Note 1 at 2063.

⁴⁹ 828 S.W. (2d) 630 at 631-632 (Ky. 1992).

The minority opinion in *King* spoke critically of this perspective:

The opinion of the majority makes little pretense of constitutional analysis but depends entirely on the sentimental notion of the inherent value in visitation between grandparent and grandchild, regardless of the wishes of the parents.⁵⁰

In *Shadders v. Brock*,⁵¹ the court concluded that a strong and meaningful relationship existed between the paternal grandparents and the child on no other evidence than the fact that previous visits had occurred. The court here, as did the majority in *King*, held a sentimental presumption by quoting approvingly the following comments from the court in *Mimkon v. Ford*:

Visits with a grandparent are often a precious part of a child's experience and there are benefits which devolve upon the grandchild from the relationship with his grandparents which he cannot derive from any other relationship. Neither the Legislature nor this court is blind to human truths which grandparents and grandchildren have always known.⁵²

In *Punsly et al. v. Manwah Ho*,⁵³ the Court of Appeal of California was critical of the trial judge's presumption that access by a deceased father's parents to their 12-year-old granddaughter, who did not have a strong bond with the girl, was in the child's best interests. The court quoted the trial judge as stating:

The problem that I see is not [that] there is not a wonderful relationship between [Kathryn] and the [Punslys].... It's good to have a nice solid bond between the mother and the child. I don't think it is appropriate, though, for it to go to the extent that it excludes other bonds with other people that are significant in her life.... I don't see any problem with the [Punslys] being similar to a Disneyland dad.... I am a grandparent. That seems to be what we do for grandchildren.⁵⁴

The court went on to find that:

In light of Manwah's fitness as a parent and her willingness to voluntarily schedule visitation, in combination with the trial court's erroneous application of a presumption that visitation with the Punslys was in Kathryn's best interests, we conclude the application of section 3102 over Manwah's objections unduly infringed upon her fundamental parenting rights.⁵⁵

Similarly, the Ontario Court of Justice (Provincial Division) in *Peck v. Peck* attached significance to the very generalized concept of grandparent access:

⁵⁰ Ibid at 633.

⁵¹ 420 N.Y.S. 2d 697 (N.Y. Fam. Ct. 1979).

⁵² 332 A. 2d 199 at 204-205 (N.J. 1975).

⁵³ 87 Cal. App 4th 1099 (2001).

⁵⁴ Ibid at 1110.

⁵⁵ Ibid.

It is clearly the presumption in law that it is usually in the best interests of a child to know his or her extended family and to gain from contact with both sides of his or her heritage.⁵⁶

In *W. (M.) v. W. (D.)*,⁵⁷ the Alberta Provincial Court found that it is in every child's interest to have as many adults in his or her life as possible who love and connect with him or her in a positive manner, and that a grandparent's access to a child must not be denied unreasonably or arbitrarily. As one author observed, these cases tend to "cling to the nostalgic concept of an extended family in which there are differences of opinion, but whose members are joined together by the common bond of family unity."⁵⁸

In *Chapman v. Chapman*, the Ontario Court of Appeal seemed to recognize the potential benefit that may result in a positive grandparent-grandchild relationship:

A relationship with a grandparent can—and ideally should—enhance the emotional well being of a child. Loving and nurturing relationships with members of the extended family can be important for children. When those positive relationships are imperiled arbitrarily, as can happen, for example, in the reorganization of a family following the separation of the parents, the court may intervene to protect the continuation of the benefit of the relationship.⁵⁹

However, the court also did not want to extrapolate from a generalized notion of a positive grandparent-grandchild relationship and apply it to the Chapman family. The court stated:

The essence of the grandmother's submission is that, in general, it is in the best interests of children to maintain contact with members of their extended family. The test, however, is not what, in theory, is best for children in general, but what is in the best interests of the particular children before the court.⁶⁰

Article 611 of the *Civil Code of Quebec* enshrines into law the legal presumption that grandparent access is, unless there is a "grave reason" to the contrary, a positive influence in a child's life. In fact, the article states that if there is disagreement between the parties and there isn't a "grave reason" for access to not take place, then it is only the terms and conditions of the access that are to be determined by a court.

Derdeyn expresses concern about whether high conflict intrafamilial litigation will allow for positive grandparent-grandchild interaction given that the grandparents have successfully gained

⁵⁶ [1996] O.J. No. 755 at Par. 7 (O.C.J. Prov. Div.) (QL).

⁵⁷ [2000] A.J. No. 1082 (Alta. Prov. Ct.) (QL).

⁵⁸ Anne Marie Jackson, *The Coming of Age of Grandparent Visitation Rights*, (Winter 1994) 43 *Am. U.L. Rev.* 563 at 580.

⁵⁹ *Supra*, Note 8 at para. 19.

⁶⁰ *Ibid* at para. 17.

court-ordered access against the will of the custodial parent(s).⁶¹ The conflict in these cases is markedly different from the image of intergenerational relationships portrayed in popular culture.

Other researchers have agreed with Derdeyn's observations and state the following:

If children enjoy the benefits of the grandparenting relationship largely in the context of harmonious intergenerational relations, it is unclear whether grandparents' efforts to assist their grandchildren will be advanced through litigation making the child's parents and grandparents adversaries in a courtroom. Moreover, given the triggering conditions permitting grandparents to petition for visitation rights, it seems likely that children who are already experiencing the distress of a parental divorce or death would be additionally upset by a courtroom dispute between parents and grandparents concerning visitation rights. This dispute not only poses the threat of immediate emotional distress for the child but, if a visitation petition is granted, can make the child the focus of ongoing conflict between parents and grandparents. This is an unhappy conclusion because children may significantly miss their grandparents when access is restricted because of intergenerational conflict. But when such conflict occurs, it is unclear that the benefits of this relationship are ensured through court-ordered visitation.

...This review of the research on the grandparent-grandchild relationship suggests both that this relationship is a highly individualized, variable one and that its benefits to children are contingent, in part, on the mediating role of parents.

...To assume that the relationship with grandparents necessarily benefits children especially when legal intervention is required to maintain it, misrepresents the heterogeneity of grandparenting roles and the diverse influences mediating the impact of this relationship on grandchildren.⁶²

Given these comments, it is a challenge for judges, many of whom are grandparents themselves, to not hold generalized presumptions about the benefits of access, which from the existing research have little or no basis in fact. It is still a greater challenge for politicians, many of whom are also grandparents, to not translate popular stereotypical images of grandparent roles into legislation that further empowers their elderly constituents. The pressure of the "grey lobby" is something that these politicians must contend with, especially given that a greater proportion of older individuals typically vote than of the general population.

⁶¹ Andre P. Derdeyn, *Grandparent Visitation Rights: Rendering Family Dissension More Pronounced?* Amer. J. Orthopsychiat. (April 1985) 277 at 282.

⁶² Ross A. Thompson, Mario J. Scalora, Susan P. Limber and Lynn Castrianno, *Grandparent Visitation Rights: A Psycholegal Analysis, Family and Conciliation Courts Review*, January 1991, 29 (1) 9 at 16-17.

CASE LAW

Intact Families in Which Access Was Denied

The courts have often treated claims for access by grandparents differently when the family is intact from when it is not. The *Chapman* case involved an intact family, and the Ontario Court of Appeal left the decision about the frequency and nature of access to the parents who, the court presumed, will make that determination based on the best interests of the children:

The appeal is allowed, the order of Ingram J. is set aside, and the application for access is dismissed. This does not mean that the grandmother will be unable to have access; it means that the nature and frequency of the access will be at the discretion of the parents who, it is assumed, will make that determination based on the best interest of the children.⁶³

Bala and Jaremko, in a forthcoming article, comment on *Chapman*:

This decision and other judgments demonstrate a reluctance of judges to legally intrude on the intact families. The courts are reluctant to give grandparents the legal right to make claims against their own adult children in situations where the child's biological natural parents continue to reside together with the child.⁶⁴

In *Nielson v. Kroetsch*, the maternal grandparents disapproved of their son-in-law and the mother perceived this attitude as a threat to her efforts to stabilize her marriage. In discussing the grandparents' access application, the court held:

Attendances on the children over the objections of the parents also send a message to the children that their parents' direction is not worthy of respect and obedience; indeed, that it is subservient to the desires of their grandparents. That is a message that these children cannot afford. It undermines the authority of their parents at a time when the family unit is already fragile.⁶⁵

In *Rice v. Rice*,⁶⁶ the paternal grandparents of a 10-month-old boy had not seen their grandchild for about five months because of strained relations with their son and daughter-in-law. The grandparents' application for access was opposed by the parents. The court stated that the grandfather, in particular, had to accept that the parents were adults and that he had to respect the rights of those adults to make their own decisions, to live their own lives and to raise their own children. The court further stated that the child should grow up without feeling any tension or hostility between his parents and his grandfather. He should not be exposed to any criticism of either of his parents by the grandfather, since such criticism could unfairly and unnecessarily undermine the boy's sense of security in his parents' care and would not be in his best interests.

⁶³ *Supra*, Note 8 at par. 24.

⁶⁴ Nicholas Bala and Rebecca Jaremko, "Canada: Non-Marital Unions, Finality of Separation Agreements and Children's Issues, submitted for publication in Andrew Bainham, ed., *The International Survey of Family Law*, 2002 (Jordans).

⁶⁵ [1996] O.J. No. 2912 at Par. 49 (O.C.J. Prov. Div.) (QL).

⁶⁶ (1992) 42 R.F.L. (3d) 281 (N.B.Q.B. Fam. Div.).

In *Lusher v. Lusher*, the paternal grandmother had a very controlling relationship with her son and she intruded in his marriage and child rearing. In determining that there should be no access by the grandmother, Justice Main commented:

It is unfortunate that he will not have a chance to develop a relationship at this time with his paternal grandmother, particularly since his maternal grandmother is deceased. However, on balance, his emotional health and the stability of his nuclear family are much more important considerations.⁶⁷

In *Morecraft v. Morecraft*, the parents married when the mother was pregnant with their first child. The paternal grandparents were against the marriage as they were of the view that the child was not their son's. They believed that their daughter-in-law was not good enough for their son and tried to undermine the marriage. In rejecting the access application, the court observed that "under the circumstances, granting access to the Applicant would be tantamount to dropping a puck between two warring teams."⁶⁸ The court further held that:

Great weight must be given to the wishes of the custodial parents and care must be taken not to unduly interfere with the parents' inherent right to determine the course of their child's upbringing.⁶⁹

A significant decision that followed *Chapman* is *Blium v. Blium*,⁷⁰ in which the Superior Court of Justice (Family Court) of Ontario rendered summary judgment on a claim for access by the grandparents against their son and daughter-in-law. The case involved triplet boys who were six years of age at the time of the hearing. The parents did not oppose access but wished to maintain decision-making authority about the frequency and circumstances of the access. Justice Rogers was critical of the grandparents' behaviour, their use of five different lawyers and multiple court appearances without any resolution.

At the parents' urging, the court found that there was no dispute about the respondents' parenting abilities. The court held that:

The parents do not and have not disputed the right of the grandparents to have access. They only wish to decide when and under what circumstances. The Court of Appeal has recently dealt with this very issue in the case of *Chapman v. Chapman*, which was rendered March 2, 2001. The court says in paragraph 21:

"In the absence of any evidence that the parents are behaving in a way which demonstrates an inability to act in accordance with the best interests of their children, their right to make decisions and judgments on their children's behalf should be respected, including decisions about whom they see, how often, and under what circumstances they see them."

⁶⁷ (1998) 13 R.F.L. (3d) 201 at 208-209 (Ont. Prov. Ct. Fam. Div.).

⁶⁸ (1991) 122 N.B.R. (2d) 271 at 281 (N.B.Q.B. Fam. Div.).

⁶⁹ Ibid at 278.

⁷⁰ (May 16, 2001), Ontario 8269/00 (Ontario S.C.J.) [unreported].

In the case at bar there is no factual disagreement about the devotion and skills of the parents. They are committed to the welfare of the children and such caring shows in the well adjusted happy product. They are acting in their children's best interest and show every promise of continuing to do so. The respondent parents therefore fit within the factual criteria as set out in the *Chapman* case. There is nothing to try on the facts as laid out in *Chapman*.⁷¹

The court went on to conclude that the parents:

...seek the right to make decisions about how often and under what circumstances the grandparents see the children. This is the ratio in the *Chapman* case. The parents wish the same outcome as the Court of Appeal ordered.

There is therefore no genuine issue for trial. The court orders that the grandparents shall have access. The nature and frequency shall be at the discretion of the parents. If the parents decide at times during this access order that such access should be supervised, then the access centre shall take direction from the parents as to the frequency and duration.⁷²

Blium v. Blium was appealed to the Ontario Divisional Court and unanimously dismissed without written reasons.⁷³

Intact Families in Which Access Was Granted

There are also cases in which the courts grant access in intact family situations. In *Chabot v. Halliday*,⁷⁴ the paternal grandmother applied for access to two very young children. The access application was opposed by the children's parents, although the assessment report recommended that the grandmother have access. The court held that the poor relationship between the grandmother and her son and daughter-in-law was not, in itself, sufficient to deny access.

In *Cole v. Nevill*,⁷⁵ the mother, and the father (who was in the armed services and absent from home for extended periods) felt it was their exclusive right to care for their two children. The maternal grandmother was granted overnight access once per month, as the court concluded that the parents' denial was not based on the best interests of their children but rather on their desire to exert control over the grandmother.

Single-Parent Families in Which Access Was Granted

The more typical grandparent access claim occurs where the parents no longer cohabit, one of them is deceased or mentally ill, or one of the parents remarries and the stepparent adopts the children. In these instances, the courts appear to be more willing to grant access to grandparents, particularly when there is no contact between the non-custodial parent and the children and the court hopes to provide the children with the purported benefits of the extended family.

⁷¹ Ibid at paras. 8 and 9.

⁷² Ibid at paras. 10 and 11.

⁷³ (Sept. 21, 2001) Ontario 59638/01 (Ont. Div. Ct.) [unreported].

⁷⁴ (1993) W.D.F.L. 083 (Ont. Ct. Gen. Div.).

⁷⁵ [1991] O.J. No. 2446 (Ont. Ct. Prov. Div.) (QL).

In *Barr v. Gattinger*,⁷⁶ the grandparents sought access to their grandson. The mother opposed the access, claiming that the grandparents should exercise access during the father's visitation periods. Except for the father, who resided in Alberta, all the other parties resided in Saskatchewan. The court allowed the grandparents' application, holding that the grandparents were responsible individuals who had a genuine affection for their grandson and that it was in the child's best interests to have a relationship with all his grandparents. As the father did not live in Saskatchewan, it was inappropriate to link his access to that of the paternal grandparents.

In *White v. Mathews*,⁷⁷ the paternal grandparents were granted limited access to their two-year-old grandchild. The grandparents had had frequent visits until the child was 16-months-old, at which time the mother terminated contact through a custody order with no access to the father. The court noted that the grandparents neither condoned nor assisted in the father's disruptive conduct. The court found that the grandparents were not attempting to raise the child nor interfere with the mother's role as a parent. The child had a very positive relationship with the grandparents. Moreover, in this case the child was black while the mother and her fiancé were white. The court held that it was important for the child to have contact with the grandparents to provide a connection to the child's black heritage.

In *McLellan v. Glidden*,⁷⁸ the maternal grandparents had a good relationship with their five-year-old grandchild and his parents. Following the mother's sudden death, the child continued to visit the grandparents regularly until the father and his new wife ended the visits, claiming that they upset the child. The court ordered access for the grandparents, holding that it would be in the child's best interests to restore the strong bond that had developed.

In *DeBruyn v. Turner*,⁷⁹ a grandmother and mother had jointly been the child's caregiver. The court granted access to the grandmother, finding that she did not have an improper motive in bringing her application.

In *Gallant v. Jackson*,⁸⁰ the parties had lived separate and apart under the same roof for two years. During that time, the paternal grandparents cared for the two children of the marriage while the parents were at work. Both parties applied for custody and the grandparents applied for access. The court acknowledged the attachment the children had to the grandparents and ordered that when the mother was not available on weekdays, the grandparents were to have access.

In *Deshane v. Perry*,⁸¹ the maternal grandmother had cared for the youngest child when the mother disappeared, and had thwarted the father's efforts to find the child while in her care. The father, who was now in a common-law-relationship, was granted custody, and the grandmother received liberal access to the youngest child in light of the fact that she was the child's psychological mother and there was a strong bond between them.

⁷⁶ [1999] S.J. No. 568 (Sask. U.F.C.) (QL).

⁷⁷ [1997] S.C.J. No. 604 (N.S. Fam. Ct.) (QL).

⁷⁸ (1996) 23 R.F.L. (4th) 106 (N.B.Q.B. Fam. Div.).

⁷⁹ [1998] O.J. No. 1544 (O.C.J. Gen. Div.) (QL).

⁸⁰ (1994) 7 R.F.L. (4th) 391 (O.C.J. Gen. Div.).

⁸¹ [1988] O.J. No. 2438 (Ont. Ct. Prov. Div.) (QL).

In *Fleming v. Fleming*,⁸² the father had custody of the child and both the mother and maternal grandmother had access. The mother was often late for her visits and combative towards the father and his new partner. As a result, the father applied to the court to terminate the mother's access, even though the child still wished to see her, and terminated the grandmother's access. The court held that it was inappropriate for the father to cut off the grandmother's access. Access was, therefore, allowed to continue under the supervision of the grandmother. If the mother failed to make herself available, the visit would go ahead between the grandmother and the child.

In *Ruth v. Young*,⁸³ the parents entered into a consent order regarding custody and access of their children, that granted the father two days of access per week. The paternal grandparents applied for an order granting them access. The mother objected to the order on the basis that the grandparents could see the children during the father's access time and because she did not have a good relationship with the grandmother. The court held that the inclusion of the grandparents access during the father's access time would not detract from the father's ability to establish a bond with the children. In addition, an order for some access by the grandparents, independent of the father's access, was deemed appropriate and in the best interests of the children. Accordingly, the grandparents were granted one visitation day per month.

Single-Parent Families in Which Access Was Denied

The case law is also replete with decisions that respect single parents' decisions regarding access. Unless a parent's decision is based on unreasonable concerns, the court's tendency is increasingly to respect the autonomy of that parent to make the decision. There is often stated legal recognition that parents are presumed to act in the best interests of their children.⁸⁴ Accordingly, parents are usually accorded the right to determine with whom their children will associate. This is especially so when there is acrimony between the grandparents and one or both parents.

In *Wylde v. Wylde*,⁸⁵ the court held that the mother was fully competent to determine what was in her children's best interests. There was nothing to suggest that the court should interfere with her decision to deny access to the grandmother, who had virtually no relationship with the children and had not seen them at all for four years prior to the application.

In *B. (M.) v. W. (C.)*,⁸⁶ the mother died and the maternal grandparents blamed the father for her death. When the father remarried, the maternal grandmother made a number of inappropriate comments about the stepmother to her grandsons. The children were very uncomfortable with these comments. In denying access to the maternal grandparents, the court considered the wishes of the boys, the reasonableness of the father's refusal to allow grandparents access, the agenda of the grandparents and the level of hostility between the father and the grandparents.

⁸² [1999] C.C.L. 5070 (S.C.J.).

⁸³ [1998] B.C.J. No. 961 (B.C.S.C.) (QL).

⁸⁴ *Morecraft v. Morecraft* (1991) 122 N.B.R. (2d) 271 (N.B.Q.B. Fam. Div.); and *Parham v. J.R. et al.*, 442 U.S. 584 (1979).

⁸⁵ [1984] O.J. No. 764 (Ont. Prov. Ct. Fam. Div.) (QL).

⁸⁶ (1998) 31 R.F.L. (4th) 351 (N.S. Fam. Ct.).

In *Hooper v. Hooper*,⁸⁷ the paternal grandparents applied for access when the father died. However, even before the father's death, these grandparents had continuously undermined the mother's authority and respect the children had for her. As a result, the mother deliberately interfered with the grandparents' access after the father's death. The relationship between the mother and the grandparents consisted of bitterness and fighting. The grandparents' application for access was dismissed as it was held not to be in the best interests of the children to place them in the middle of this conflict.

In *Cormier v. Cormier*,⁸⁸ the court found that it would not be in the best interests of the children to allow access to the paternal grandparents. The parents had an acrimonious relationship, as did the mother and the grandparents. As a result of actions taken by the grandparents against the mother, the older child (age 11) did not wish to visit with his grandparents and the younger child (age 9) did not want to see the grandparents without his sibling.

In *Hafer v. Stewart*,⁸⁹ the child had resided with her father until his death at which time the mother assumed custody. The Manitoba Court of Appeal dismissed the paternal grandparents' access application, stating that visitation would not be in the child's best interests and could even cause her harm given the child's emotional problems, her lack of a close relationship with the grandparents, as well as the acrimony between the grandparents and the mother.

In *Greber v. Moskowitz*,⁹⁰ a grandmother who saw her grandchildren almost daily applied for access to them following her daughter's death and her son-in-law's subsequent refusal to allow visitation. The court denied access, stating that, although the grandmother was genuinely concerned about the welfare of the children and wished to establish a meaningful relationship with them, the animosity between the parties was such that it would undermine and endanger the stability that the children enjoyed with their father and might disturb the children emotionally.

In the British Columbia case of *G. (M.L.) v. G. (K.L.)*,⁹¹ the paternal siblings and grandparents brought separate actions for access against the mother. The cases were all dismissed, as there was evidence the grandfather had sexually assaulted the child. The conduct of the applicants was deemed outrageous as they had only brought the actions to clear the grandfather's name. On appeal, access was again denied, since the hostility between the parties had not abated and, in fact, had increased during the appeal period. The B.C. Court of Appeal held that the access was to remain at the discretion of the mother after a one-year cooling off period. Justice Finch, writing for the majority, wrote:

I would observe that in this case no party seeking access is a parent of J.'s. Acrimony between a custodial parent and someone seeking access to the child is a factor to consider when looking at the child's best interests. When the person seeking access is another parent, bad feelings, hostility, or personal enmity between the parents would be expected to derive from a continued relationship with both parents.

⁸⁷ (1997) 23 R.F.L. (4th) 441 (N.B.Q.B. Fam. Div.).

⁸⁸ (1995) 163 N.B.R. (2d) 323 (N.B.Q.B. Fam. Div.).

⁸⁹ (1984) 34 Man. R. (2d) 158 (Man. C.A.).

⁹⁰ [1982] O.J. No. 595 (Ont. Prov. Ct. Fam. Div.) (QL).

⁹¹ [1992] B.C.J. No. 1118 (B.C.S.C.) (QL).

However, in a case such as this, where those seeking access are not parents, acrimony between the parties may be a more important factor in deciding how the child's best interests are to be served and protected. The more distant the connection between the child and the person seeking access, the more importance I would accord to hostility between the parties as a factor in deciding whether access is in the child's best interests.⁹²

The case law above seems to suggest that the courts may use their jurisdiction to maintain existing relationships between grandparents and grandchildren when the acrimony between the parents and grandparents is not so strong as to place the children in an untenable position. However, the courts are unlikely to create or establish relationships when none previously existed, against the wishes of a parent.⁹³

GRANDPARENTS STANDING *IN LOCO PARENTIS*

When grandparents have served as a custodial parent for the child for a significant period of time (called standing *in loco parentis* to the child), they may successfully argue, as in *Deshane v. Perry*,⁹⁴ for example, that they served as a "psychological parent" to the child and disruption of this relationship would be psychologically unsettling for the child.

Derdeyn generally believes that grandparents commencing litigation to obtain access to their grandchildren, typically at very vulnerable times in their lives, "can only be experienced as yet another stress or threat by the child's primary caretaker and, therefore, by the child."⁹⁵ However, Derdeyn qualifies this for situations in which a grandparent has had custody of a grandchild for a significant period of time. In most of these cases, Derdeyn states, the grandparent would clearly be the child's "psychological parent."⁹⁶

In *Gallant v. Jackson*,⁹⁷ the court adopted this perspective for paternal grandparents who provided not custodial care, but rather regular daytime care, to their grandchildren while the parents were at work. As such, the court order provided for regular access.

Most of the Canadian and American cases and literature mentioned in this paper, even when proposing to severely limit grandparent access, distinguish grandparents standing *in loco parentis* from grandparents exercising some or no access.

⁹² (1993) 49 R.F.L. (3d) 437 at 440-441 (B.C.C.A.).

⁹³ *W. (C.G.) v. J. (M.)* (1982) 24 R.F.L. (2d) 342 (Ont. C.A.); *Vormittag v. Vormittag*, [1984] O.J. No. 760 (Ont. Prov. Ct. Fam. Div.) (QL); *D. (G.) v. M. (G.)* (1999) 47 R.F.L. (4th) 16 (N.W.T.S.C.).

⁹⁴ *Supra*, Note 81.

⁹⁵ *Supra*, Note 61 at 285.

⁹⁶ *Ibid* at 278.

⁹⁷ *Supra*, Note 80.

That courts do not view parents and non-parents on the same legal plane, absent the non-parent standing *in loco parentis* to a child, was commented on in *Morecraft v. Morecraft*:

While the “best interests” must remain paramount, the considerations revolving around the issue of access to third parties, including blood relatives, are far different from those involving natural parents. There is no automatic right of access to third parties.⁹⁸

In the Annotation to *Cyrenne v. Moar*, Professor James McLeod supports the *Morecraft* perspective, commenting as follows:

Given the *prima facie* entitlement of the non-custodial parent to access in substance, if not in form, the wishes of the custodial parent will be largely irrelevant unless the custodial parent can build a case based upon the welfare of the child. The custodial parent is expected to sublimate her feelings and controversies with the other parent *but not with strangers or relatives, who in the face of her objection will have to build their case.*⁹⁹ (Emphasis added)

In *Hooper v. Hooper*,¹⁰⁰ the court recognized the difference between parents contesting custody and access against each other—where they have equal claims—and grandparents litigating against parents by stating that it is not a “level playing field” for grandparents. Section 20 (1) of the Ontario *Children’s Law Reform Act* gives some effect to this proposition by stating that only the father and mother of a child have an equal entitlement to custody of their child.

In *Beaumont v. Fransden*, Justice Katarynych considered a grandparent’s claim for access quite differently from that of a non-custodial parent:

Although access must clearly be determined on the basis of the child’s best interests, and not the parent’s, a court must keep in mind that the *Children’s Law Reform Act* distinguishes between a custodial parent’s responsibility to a non-custodial parent and her responsibility to others who desire access to a child in her custody. There is a specific statutory duty cast on a custodial parent to encourage and support a child’s access to the non-custodial parent. There is no specific legal obligation on a custodial parent to encourage access between a child and a grandparent. From that, one can reasonably infer that the right of access between a non-custodial parent and child are qualitatively different than those between a child and extended family members. Any guidance provided by the jurisprudence must be assessed with that in mind.¹⁰¹

It should be noted, however, that only a very broad interpretation of the Act could yield the view that it imposes a specific statutory obligation on a parent to encourage and support access to the non-custodial parent in the same way as do sections 16(10) and 17(9) of the *Divorce Act*.

⁹⁸ *Supra*, Note 68 at 278.

⁹⁹ (1986) 2 R.F.L. (3d) 414 at 415- 416 (Man. C.A.).

¹⁰⁰ *Supra*, Note 87 at 446.

¹⁰¹ [1995] O.J. No. 425 at para. 19 (O.C.J. Prov. Div.).

In an American context, Professor Kathleen Bean views grandparents who have acted in a parenting capacity (that is, as psychological parents) in a dramatically different way from other grandparents whose access claims she believes to be an invasion of family autonomy:

The appropriateness of focusing on the child as opposed to the alleged void in the child's life is reflected in the one traditional exception to the old fortress of parental rights. When the grandparent was temporary custodian or stood *in loco parentis* to the child, the courts would sometimes allow parental rights to be penetrated for the purpose of ordering grandparent visitation. Because the *in loco parentis* relationship often occurs as a result of a parent's death or departure, the child may have additional needs for the continuity of the relationship. Such a situation differs from a mere grandparent-grandchild relationship, and, depending on the facts, this distinction may represent a basis for noting the difference between a relationship which is *beneficial* to the child's welfare and one which is *necessary* to the child's welfare.¹⁰²

THE BEST INTERESTS OF THE CHILD TEST

As indicated, the best interests of the child test governs child custody and access disputes in Canada. However, if it is accepted that third party access claims cannot be viewed by the courts in the same way as parental claims, then the question must be asked about the appropriateness of using the best interests test in the same fashion in which it is presently being applied.

In *Troxel*, the United States Supreme Court chose not to comment on the Washington Supreme Court's ruling concerning the best interests test. The Washington Supreme Court held that the Due Process Clause in the U.S. Constitution required the non-parent visitation statute to include a showing of harm or potential harm as a condition of granting access. The court noted the Tennessee Supreme Court decision in *Hawk v. Hawk* when it held:

The federal cases that support the constitutional right to rear one's child and right to family privacy also indicate that the state's power to interfere in the parent-child relationship is subject to a finding of harm to the child.... The requirement of harm is the sole protection that parents have against pervasive state interference in the parenting process.¹⁰³

Professor Bean criticizes the use of the best interests test for non-parental access claims:

Intervention based solely on a best interest of the child standard, with no showing of harm, is an unconstitutional infringement upon and deprivation of the right of parents to raise their child in accord with their own values. Apart from the constitutional concerns, public policy concerns should override consideration of grandparent visitation requests based solely on an allegation that it is in the best interest of the child.¹⁰⁴

The Washington Supreme Court in *Troxel* acknowledged situations in which a grandparent may have acted *in loco parentis* to his or her grandchild and in which he or she wishes to continue

¹⁰² Kathleen S. Bean, *Grandparent Visitation: Can the Parent Refuse?* *U. Louisville J. Fam. L.* 24 393 at 435-436.

¹⁰³ 855 S.W. (2d) 573 at 580 (Tenn. 1993).

¹⁰⁴ *Supra*, Note 102 at 441.

contact over the objection of the parent, but was also critical of the strict application of the best interests test:

We recognize that in certain circumstances where a child has enjoyed a substantial relationship with a third person, arbitrarily depriving the child of the relationship could cause severe psychological harm to the child. The difficulty, however, is that such a standard is not required in R.C.W. 26.10.160 (3)... The [statute] allows “any person” to petition for forced visitation of a child at “any time” with the only requirement being that the visitation serve the best interest of the child. There is no threshold requirement of a finding of harm to the child as a result of the discontinuation of the visitation.

Short of preventing harm to the child, the standard of “best interest of the child” is insufficient to serve as a compelling state interest overruling a parent’s fundamental rights.¹⁰⁵

In this regard, Professor Joan Bohl notes her concern for the potential undermining of parental authority: To impose grandparent visitation against the express wishes of parents without showing harm to the child if visitation does not occur, is to invade the “private realm” of family life.¹⁰⁶

In Canada, courts have also held that absent abuse or neglect, parents have significant and controlling rights over their children’s lives. Indeed, as indicated earlier in *Morecraft*, the court held that:

Great weight must be given to the wishes of the custodial parents and care must be taken not to unduly interfere with the parents’ *inherent right* to determine the course of their child’s upbringing.¹⁰⁷ (Emphasis added)

In *Salter v. Borden*, the court commented on the rights of parents to rear their children without outside intervention:

Traditionally any access to grandparents has flowed from the parent. It is best that parents make these decisions as the law clearly recognizes the parental right to control the upbringing of their children. Rarely will the state interfere with the moral and legal parental obligation to determine the best course in life for their children.¹⁰⁸

As mentioned, many of the cases dealing with grandparent access inherently involve acrimony and hostility between the grandparents and parents to the point that they are litigating the matter. In such circumstances, the courts decide both to grant and deny access often depending on the degree of discord. However, in situations in which granting or denying access will have either actual or potential adverse consequences on the child, this will be a significant factor in the court’s determination.

¹⁰⁵ *Supra*, Note 10 at 20.

¹⁰⁶ Joan Catherine Bohl, *Grandparent Visitation Law Grows Up: The Trend Toward Awarding Visitation Only When the Child Would Otherwise Suffer Harm*, 48 (2000) *Drake L. Rev.* 279 at 315.

¹⁰⁷ *Supra*, Note 68 at 278.

¹⁰⁸ (1991) 31 R.F.L. (3d) 48 at 52 (N. S. Fam. Ct.).

The Canadian courts have in many instances used, in the context of the best interests test, a harm-based analysis when determining the appropriateness of grandparent-grandchild access. In *Chapman*, the Ontario Court of Appeal found no evidence that the parents' decision to limit their children's access to their grandmother was harmful. Justice Abella stated:

Although the parents' conflict with Esther Chapman is unfortunate, there is no evidence that this parental decision is currently detrimental to the children. It should therefore be respected by the court and the children's best interests left in the exclusive care of their parents.¹⁰⁹

In *V. (G.) v. S. (L.)*, the court denied the grandparents' application for access to the child "K." and held:

If the court were of the view that [their decision to deny access] would negatively affect K., then the wishes of the respondents might well be overridden. However, no evidence has been presented to establish that K. is now or will be adversely affected in a significant manner by not resuming the relationship that she had with the applicants. Therefore, there is no basis upon which the court should disregard the parents' wishes.

Although there would be benefits to K., I conclude on the balance of probabilities, that there could be a detrimental effect on her on a long-term basis. The security of her family, the authority of her parents and her relationship within her family might well be undermined by access to the applicants....

I have accorded a great deal of weight to the wishes of... the natural parents of K. and they are the ones who have the responsibility of nurturing and rearing her. Their opinion of who should have contact with their child deserves great consideration. It is not the only circumstance to be considered but it is an important one. I am cognizant of the fact that to override their parental wishes could damage the parent-and-child relationship that they have with K. and also negatively affect their family functioning.¹¹⁰

In this case, the court looked at the possible harm to the child in the context of the direct effect of loss of contact with her grandparents as well as the adverse impact on the nuclear family in the event access was ordered.

In *D. W. v. M. P.*, the court granted limited access to a grandmother whose behaviour it regarded as offensive because of the importance of her relationship to the child and the concern:

...that totally to sever any connection between child and grandmother could well damage the child. On the other side of the coin, any repetition by the applicant of her malicious conduct could be even more damaging—a true Hobson's choice.¹¹¹

¹⁰⁹ *Supra*, Note 8 at para. 22.

¹¹⁰ (1997) 35 R.F.L. (4th) 122 at 130 (O.C.J. Prov. Div.).

¹¹¹ [1998] O.J. No. 2998 at para. 15 (O.C.J. Prov. Div.) (QL).

In *B. (M.) v. W. (C.)*, the court denied the grandparents' access application because of their very negative behaviour toward the father. The court held that:

It is prudent to examine the reasonableness of the parents who would deny access by grandparents, particularly when it is alleged that the grandparents are a destructive influence. I have instructed myself that such allegations and resulting animosity between the parties are not determinative but, if serious enough to impact on the children, ought to be considered as a factor.

...I find that any of the so-called traditional benefits which might flow from grandparent access after several years of no contact have been overwhelmed by the negative impact of their conduct upon the W. family generally and upon the children, in particular. To now grant them access in the context of this case, charged as it is with hostility, anger and distrust, has not been demonstrated to me to be of any benefit to the children.¹¹²

In *T. (A.H.) v. P. (E.)*,¹¹³ the paternal aunt and uncle of two young children had been granted custody in a bitter dispute with the maternal grandparents following the death of the children's parents. The grandparents aggressively and ruthlessly pursued custody and their behaviour was criticized by the court. The Alberta Court of Appeal somewhat hesitatingly and seemingly sentimentally granted limited access to the grandparents by focussing on the potential harm that might accrue to the children if access were entirely terminated:

[The grandparents] conduct has shown that they are not capable of maintaining a supportive grandparent role....

Nonetheless, we are concerned that a complete cessation of visiting rights would impact on these young children negatively, having regard to their situation. They know their grandparents. Grandparents can have a great role in children's lives, even if they have minimum contact.¹¹⁴

The harm-based analysis in this case must be juxtaposed, in these factual circumstances, with the court's sentimental view of the role of grandparents in general. By its own comments, the court's view of these particular grandparents was far from charitable and yet it chose to cling to the hopeful prospect that the grandparents could learn to behave appropriately. The court was, in part, seemingly motivated to maintain some form of access due to the very tragic circumstances in which the children found themselves.

GRANDPARENT ACCESS AS A POSSIBLE BENEFIT TO GRANDCHILDREN

Courts in both Canada and the United States are frequently tempted to allow non-parents' access claims to succeed because, in their subjective view, the children would benefit in some way that would better their lives. With good intentions, judges want to ensure the best possible outcome

¹¹² *Supra*, Note 86 at 376-377.

¹¹³ (1995) 173 A.R. 369 (Alta. Q.B.).

¹¹⁴ (1995) 20 R.F.L. (4th) 115 at 121 (Alta. C.A.).

for children who are the subjects of the litigation before them. However, there are significant risks associated with an approach that allows judges to displace the role of otherwise fully competent and reasonable parents to make decisions about contact between their children and non-parents. Professor Bean observes that:

To allow grandparents to receive visitation with their grandchildren because the court determines that the child's development will be "better because of it" is to set precedent which places in the courts the authority to direct the development of children; it gives to the state what is best reserved for the parents.¹¹⁵

In the case of *In re Marriage of Wellman*, the court held that "the state has no general authority to dictate to parents the manner in which they should rear their children."¹¹⁶

Nor, Professor Bean asserts, should:

the state have such authority even when the parents have made the "wrong" decision. Even assuming that the parent makes a mistake in denying the child the right to see the grandparent, the fundamental right of parents to make decisions concerning their children must include the right to make wrong decisions. For the state to delegate to the parents the authority to raise the child as the parents see fit, except when the state thinks another choice would be better, is to give the parents no authority at all. "You may do whatever you choose, so long as it is what I would choose also" does not constitute a delegation of authority. If there is no delegation of authority, there is no barrier between the state and how parents raise their children.

When there is no barrier, parents will find the state directing the development of their child whenever the judge determines another course of action might be better.¹¹⁷

In *Bennett v. Jeffreys*, the New York Court of Appeals ruled that courts do not have the constitutional authority to make a child custody decision due to a better alternative being available. The court held that:

Absent extraordinary circumstances, narrowly categorized, it is not within the power of a court, or, by delegation of the Legislature or court, a social agency, to make significant decisions concerning the custody of children, merely because it could make a better decision or disposition. The State is *parens patriae* and always has been, but it has not displaced the parent in right or responsibility.¹¹⁸

¹¹⁵ *Supra*, Note 102 at 441.

¹¹⁶ 104 Cal. App. 3d 992 at 996 (1980).

¹¹⁷ *Supra*, Note 102 at 441-442.

¹¹⁸ 356 N.E. 2d 277 at 281 (N.Y. App. 1976).

*Hawk v. Hawk*¹¹⁹ affirmed the principle enunciated in *Bennett v. Jeffreys*. So, too, did the Washington Supreme Court in *Troxel* when the majority held:

Short of preventing harm to the child, the standard of “best interest of the child” is sufficient to serve as compelling state interest overruling a parent’s fundamental rights. State intervention to better a child’s quality of life through third party visitation is not justified where the child’s circumstances are otherwise satisfactory. To suggest otherwise would be the logical equivalent to asserting that the state has the authority to break up stable families and redistribute its infant population to provide each child with the “best family”. It is not within the province of the state to make significant decisions concerning the custody of children merely because it could make a ‘better’ decision.¹²⁰

The United States Supreme Court affirmed the Washington Supreme Court’s finding and stated:

The Due Process Clause does not permit a state to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a “better” decision could be made.¹²¹

In *Daley v. Daley*, the Nova Scotia Family Court denied access to grandparents even though it considered that access to be of possible benefit to the child. In respecting the custodial mother’s right to make decisions about her child, the court stated:

I am of the view that unless there are grave extenuating circumstances, children can benefit from the involvement of the extended family, as long as that involvement is not destructive or divisive in nature. However, I am not convinced that court ordered access is necessarily in the best interests of the child, even where access is a good thing unless there are extenuating circumstances. If this were the case, the potential is there to have a child’s entire life scheduled by court order to be with those with whom the child’s interaction is considered appropriate and important.¹²²

In *Bourgeois v. Bastarache*, the maternal grandmother brought a motion for custody of her granddaughter against the father. The child had been in the sole custody of her mother for six years prior to the mother’s death, with the grandmother having significant access. The grandmother could likely offer the child a better lifestyle but the court rejected this argument and held that:

In 1993, I take the law to be that a natural parent who is of good character and is able and willing to support his or her child in a satisfactory manner is not to be deprived of that right merely because on a nice balancing of material and social advantages the court is of the opinion that others, who wish to do so, could provide better.¹²³

¹¹⁹ *Supra*, Note 103.

¹²⁰ *Supra*, Note 10 at 29.

¹²¹ *Supra*, Note 1 at 2064.

¹²² (1992) 124 N.S.R. (2d) 273 at 274; 345 A.P.R. 273 at 274 (N.S. Fam. Ct.).

¹²³ (1993) 138 N.B.R. (2d) at 330 (N.B.Q.B.).

BURDEN OF PROOF

In a mobility rights dispute *between parents*, the Supreme Court of Canada in *Gordon v. Goertz*¹²⁴ held that both parties bear an evidentiary burden to demonstrate where the best interests of the child lie. The Supreme Court affirmed the principle articulated by Justice Morden in *Carter v. Brooks* when he stated:

I do not think that the process should begin with a general rule that one of the parties will be unsuccessful unless he or she satisfies a specified burden of proof. This over-emphasizes the adversary nature of the proceedings and depreciates the Court's *parens patriae* responsibility. Both parents should bear an evidential burden. At the end of process, the Court should arrive at a determinate conclusion on the result which better accords with the best interests of the child.¹²⁵

There are two perspectives that cloud the issue of who has the burden of proof to show that grandparent-grandchild access would be in child's best interest. First, as mentioned, many judges cling to the sentimental notion and assumption that grandparent access, even when it is court-ordered, is usually a very positive influence. Holding this perspective may tilt the judicial decision regarding who has the burden of proof. Second, the use of a strict best interests test itself rather than a harm-based component makes it unclear, in practice, who has the onus upon them.

In *F. (N.) v. S. (H.L.)*,¹²⁶ the B.C. Court of Appeal affirmed the B.C. Supreme Court's reversal of a Provincial Court decision to place the burden of proof on the mother to show that access to a grandmother who was a prostitute would be harmful to the child. The Court of Appeal held that the onus was on the grandmother, not the mother, to show that the proposed access was in the child's best interests.

In *Wylde v. Wylde*, the court held that "the onus is clearly on the grandparents to show a benefit to the child before the court would interfere with the parental rights."¹²⁷

In *Hooper v. Hooper*, the court held that "it is up to them [grandparents] to demonstrate that their access to the children will be beneficial to them."¹²⁸

Although the statements in both *Wylde* and *Hooper* regarding who holds the burden of proof are likely correct, it is likely incorrect that all that needs to be shown is merely a benefit to the child. As mentioned, the standard of proving a benefit opens the door for judges to take the place of competent and reasonable parents to make decisions about their children's interaction with non-parents.

¹²⁴ (1996) 19 R.F.L. (4th) 177 (S.C.C.).

¹²⁵ (1990) 30 R.F.L. (3d) 53 at 63 (Ont. C.A.).

¹²⁶ (1999) 49 R.F.L. (4th) 250 (B.C.C.A.).

¹²⁷ *Supra*, Note 85 at para. 39.

¹²⁸ *Supra*, Note 87 at 446.

In their 1999 *Annual Review of Family Law*, Professor James McLeod and Alfred Mamo agree that the onus is on the non-parent who wishes to have a relationship with a child to demonstrate why it is in that child's best interests for access to take place.¹²⁹

In *B. (M.) v. W. (C.)*, the court denied the maternal grandparents access to their two grandchildren and held that:

It is the responsibility of the applicants to prove on a balance of probabilities that the best interests of the children will be best served by permitting access.¹³⁰

The Nova Scotia Family Court in *Jayaratham v. Devarajan*¹³¹ also held the onus to be on the applicant grandparents.

In *Troxel*, the United States Supreme Court found that the Superior Court judge's presumption that the grandparents' access application should succeed unless the children would be adversely affected was incorrect. Justice O'Connor wrote that "in effect, the judge placed on Granville, the fit custodial parent, the burden of disproving that visitation would be in the best interest of her daughters."¹³²

Professor Bean is concerned that using a strict best interests of the child test rather than applying a threshold harm-based analysis places the onus on the parent rather than the grandparent:

Without a threshold that is several steps away from "best interest of the child" and towards demonstrative harm, a best interest analysis theoretically allocates a burden to the grandparent, but in practice allocates a real burden to the parents; this burden requires evidence that there is an inherently obnoxious intrusion into the privacy of the family. Instead of requiring grandparents to show they are necessary to the child's welfare, the courts will invariably look to the parents to say "Why not? Aren't these grandparents good?" In such a case, the parent must argue that no, the grandparents are not good.¹³³

Article 611 of the *Civil Code of Quebec* is a clear expression of a legislature reversing the burden of proof and placing it squarely on the parent. The onus placed on a litigant in Quebec is even higher than in other jurisdictions, since a parent has to demonstrate that there exists a "grave reason" why access to his or her child by a grandparent should not take place.

Apart from Quebec courts, it seems clear that the courts treat the burden of proof in disputes between a grandparent and a parent differently from that in disputes between parents. This is another manifestation of judicial recognition that the legal claims of non-parents and parents are not viewed as being on the same plane.

¹²⁹ James G. McLeod & Alfred A. Mamo (1999, Carswell) *Annual Review of Family Law* at 46.

¹³⁰ *Supra*, Note 86 at 374-375.

¹³¹ (1991) 105 N.S.R. (2d) 9, 284 A.P.R. 9 (N.S. Fam. Ct.).

¹³² *Supra*, Note 1 at 2062.

¹³³ *Supra*, Note 102 at 446.

CHILDREN'S WISHES

Given that the right of access is that of the child, then it is appropriate, when possible, that the views and preferences of a child be sought. For example, section 24 (2)(b) of the Ontario *Children's Law Reform Act* and section 32.1 (4)(b) of the Alberta *Provincial Court Act* provide for such input when the court is determining whether access is in the best interests of a child.

In *B. (M.) v. W. (C.)*, the evidence presented to the court indicated that the children, ages 11 and 14, did not want to have contact with their maternal grandparents. The court commented on the relevance and weight of the children's wishes as follows:

They are at the age and stage where their wishes should receive considerable weight. I am satisfied that the children's wishes do not flow from undue influence or control by their parents in an effort to thwart the applicant's desire for contact. In the extreme circumstances of this case, I can see no advantage in forcing the children into an access arrangement in which they will feel insecure, uncomfortable and unhappy.¹³⁴

Thompson et al. suggest that a *guardian ad litem* might help focus on the child's interests and needs.¹³⁵ In Ontario, court-ordered counsel for a child may be provided by the Office of the Children's Lawyer. It is recommended that all provinces and territories follow Ontario's progressive lead and establish a system court-ordered independent counsel representing children in custody and access disputes, including those involving grandparents. Child's counsel focus their efforts on gathering relevant evidence about the effect of grandparent access on their child clients. It can be particularly helpful to the court to have, placed in context, the input of children who are able to express their views and preferences regarding their grandparents' access. Given child's counsel's role using dispute resolution techniques with the parties and their lawyers they are uniquely positioned to, when appropriate, settle cases.

COSTS

The general rule in custody and access cases is that costs should not be awarded against a person who, in good faith, pursues a reasonable claim.¹³⁶ A court may award costs against a party who unreasonably initiates or continues proceedings.¹³⁷

A judge's jurisdiction to order costs against an unsuccessful party may provide parents, in particular, with some bargaining power or relief when dealing with grandparents who are denied access by the court. Given the observations of Thompson et al., the threat of a costs award may have a needed ameliorating effect upon grandparents and "level the financial and emotional playing fields."

We can regard grandparent visitation statutes as empowering grandparents in their intergenerational "bargaining in the shadow of the law" with other family members concerning access to grandchildren and other matters. Indeed one of the intended

¹³⁴ *Supra*, Note 86 at 377.

¹³⁵ *Supra*, Note 62 at 22.

¹³⁶ *Ligate v. Richardson* (1997), 34 O.R. (3d) 423 (Ont. C.A.).

¹³⁷ *Dhaliwal v. Beloud*, (1998) 38 R.F.L. (4th) 345 (B.C.C.A.).

purposes of these statutes may have been to permit grandparents greater leverage in their negotiations with other family members because their new standing to petition courts for visitation privileges permits the threat of a lawsuit if domestic disputes cannot be resolved satisfactorily.

Grandparents leverage in those situations is likely to be especially influential because the “triggering conditions” underlying their standing to petition the court often render the parent less equipped financially or emotionally for a court battle.¹³⁸

In grandparent access cases, there often is a power imbalance between grandparents and parents due to the relative stages in life of the respective parties. This was recognized to some degree by the United States Supreme Court in *Troxel*, which noted that “the litigation costs incurred by Granville in her trip through the Washington court system and to this court are without a doubt already substantial.”¹³⁹

In his dissenting opinion, Justice Anthony Kennedy noted with concern the very costly impact of this form of litigation: “If a single parent who is struggling to raise a child is faced with visitation demands from a third party, the attorney’s fees alone might destroy her hopes and plans for the child’s future.”¹⁴⁰

In fact, Tommie Granville Wynn created a Web page designed to seek funds to help her and her husband deal with her significant litigation costs.¹⁴¹

In *Wylde v. Wylde*, the court ordered costs against the grandmother and stated:

I am satisfied that the grandmother is in a better position to pay for litigation than the mother. The mother is not working while the grandmother has retired and undoubtedly has a pension, she owns her property and has no real dependents. Although there was no evidence that the grandmother is wealthy, I feel she is in a better position to pay for the litigation she commenced.

The court must be careful not to encourage relatively well-off grandparents in retirement using their time and money to pursue grandchildren, except in situations that will benefit children.

Under the circumstances, the mother was successful and can least afford costs.¹⁴²

On the other hand, in *Panny v. Gifford*, costs were ordered and fixed against a mother who brought unnecessary motions and filed voluminous affidavits. Although the matter was settled, the court found that:

¹³⁸ *Supra*, Note 62 at 20.

¹³⁹ *Supra*, Note 1 at 2065.

¹⁴⁰ *Ibid* at 2079.

¹⁴¹ Wynn Legal Defense Fund at <http://www.parentsrightrights.org/troxel/wynnlet.html> (accessed November 1, 2000, and October 14, 2001).

¹⁴² *Supra*, Note 85 at paras. 56-58.

[The grandparents] were put to considerable expense as a result of how [the mother] approached this litigation.... It is the limited means of [the mother] that saves her from an order that she indemnify the [grandparents] on a solicitor-and-client basis for the costs that they needlessly incurred in this proceeding.¹⁴³

ENFORCEMENT OF GRANDPARENT ACCESS

Encouraging a positive and healthy relationship between grandparents and grandchildren is the goal of any court order made about access. The purported benefits of knowing your extended family, cultural heritage and roots are the bases upon which such orders are made. Enforcing these orders and expecting the goodwill needed to properly implement them is, in most cases, quite unrealistic. The Alberta *Provincial Court Act*, which deals with grandparent access, includes a penalty provision to respond to orders being breached.¹⁴⁴

S. 32.1 (7) Any person who contravenes a provision as to right of access in an order made under this section is guilty of an offence and liable to a fine of not more than \$1000 or to imprisonment for a term not exceeding 4 months.

Should this section ever need to be relied upon, then it is highly likely that the atmosphere for any semblance of “normal” access would not exist.

THE CANADIAN *CHARTER OF RIGHTS AND FREEDOMS*

The decision in *Troxel*, and other United States cases, regarding non-parent access is largely steeped in American constitutional law. It is not entirely clear whether in Canada the *Charter of Rights and Freedoms*¹⁴⁵ applies to private family disputes. Section 7 of the *Charter* states:

Section 7 Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

In *Young v. Young*¹⁴⁶ and *P. (D.) v. S. (C.)*,¹⁴⁷ the Supreme Court of Canada was divided on the applicability of the *Charter* in custody and access matters. These two cases involved the freedom of religion of non-custodial fathers who, when exercising access to their children, participated in religious practices that were objectionable to the custodial parent. Three Justices declined to specifically rule on the application of the *Charter* because “valid orders under the ‘best interests of the child’ standard cannot violate the *Charter*.”¹⁴⁸ Three other Justices found that the *Charter* has no application to private disputes between parents, nor to court orders regarding custody and access matters. Only Justice Sopinka held that the *Charter* did apply in both cases and that while “the ultimate determination in deciding issues of custody and access is

¹⁴³ (1997) 31 R.F.L. (4th) 440 at 445 (O.C.J. Prov. Div.).

¹⁴⁴ *Supra*, Note 32.

¹⁴⁵ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.) 1982, c.11.

¹⁴⁶ (1993) 108 D.L.R. (4th) 193 (S.C.C.).

¹⁴⁷ (1993) 49 R.F.L. (3d) 317 (S.C.C.).

¹⁴⁸ *Supra*, Note 145 at 273.

‘the best interests of the child test’, it must be reconciled with the Canadian *Charter of Rights and Freedoms*.¹⁴⁹

Justice Sopinka found that the competing interests could be reconciled by interpreting the best interests test to allow *Charter* rights, namely freedom of religious expression, to be overridden only when applying the test would result in “more than inconvenience, upset or disruption to the child and incidentally to the custodial parent.”¹⁵⁰

The following year, in 1995, the Supreme Court of Canada in *B. (R.) v. Children’s Aid Society of Metropolitan Toronto*¹⁵¹ addressed the applicability of section 7 of the *Charter* to child protection. The court was divided on whether parents could avail themselves of constitutional rights under the *Charter*. The case involved a premature child who required a blood transfusion but whose parents, being Jehovah’s Witnesses, refused such treatment based on religious grounds. Justice La Forest, writing on behalf of three other Justices, said that although American constitutional law provided useful guidance on the scope of the liberty interest under the *Charter*, section 7 does not protect the:

...integrity of the family unit as such. The Canadian *Charter*, and s. 7 in particular, protects individuals. It is the individual’s right to liberty under the *Charter* with which we are here concerned. The concept of the integrity of the family unit is itself premised, at least in part, on that of parental liberty.¹⁵²

As Justice La Forest observed, the liberty provision in section 7 must be read in the context of section 1 of the *Charter*.

Section 1 The Canadian *Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Therefore, whatever the court determines the liberty interest to be in an intrafamilial context, it operates within certain parameters. Justice La Forest commented:

Freedom of the individual to do what he or she wishes must, in any organized society, be subject to numerous constraints for the common good. The state undoubtedly has the right to impose many types of restraints on individual behaviour and not all limitations will attract *Charter* scrutiny.

On the other hand, liberty does not mean mere freedom from physical restraint. In a free and democratic society, the individual must be left room for personal autonomy to live his or her own life and to make decisions that are of fundamental personal importance.

.... The right to nurture a child, to care for its development, and to make decisions for it in fundamental matters, such as medical care, are part of the liberty interest of a parent....

¹⁴⁹ Ibid at 263.

¹⁵⁰ Ibid.

¹⁵¹ (1994) 9 R.F.L. (4th) 157 (S.C.C.).

¹⁵² Ibid at 201.

The common law has long recognized that parents are in the best position to take care of their children and make all the decisions necessary to ensure their well-being.... In recent years, courts have expressed some reluctance to interfere with parental rights and state intervention has been tolerated only where necessity was demonstrated. This only serves to confirm that the parental interest in bringing up, nurturing, and caring for a child, including medical care and moral upbringing, is an individual interest of fundamental importance to our society.

.... While acknowledging that parents bear responsibilities towards their children, it seems to me that they enjoy correlative rights to exercise them. The contrary view would not recognize the fundamental importance of choice and personal autonomy in our society.... The state is not actively involved in a number of areas traditionally conceived of as properly belonging to the private sphere. Nonetheless, our society is far from having repudiated the privileged role parents exercise in the upbringing of their children. This role translates into a protected sphere of parental decision making which is rooted in the presumption that parents should make important decisions affecting their children both because parents are more likely to appreciate the best interests of their children and because the state is ill-equipped to make such decisions itself. Moreover, individuals have a deep personal interest as parents in fostering the growth of their own children. This is not to say that the state cannot intervene when it considers it necessary to safeguard the child's autonomy or health. But such intervention must be justified. In other words, parental decision making must receive the protection of the *Charter* in order for state interference to be properly monitored by the courts, and be permitted only when it conforms to the values underlying the *Charter*.¹⁵³

In *New Brunswick (Minister of Health) v. G. (J.)*,¹⁵⁴ then Chief Justice Lamer, who in *B. (R.)* held the liberty provision to not include the right of a parent to raise his or her children free from state interference, now writing for the majority of the court, held that a child protection proceeding is a threat to the "security of the person" of both parent and child. Justice Lamer held that the protection of the *Charter* was warranted in circumstances in which a low-income mother was originally denied counsel paid for by the New Brunswick Legal Aid plan when her children were apprehended by child welfare authorities. The mother's entitlement to counsel was "in accordance with the principles of fundamental justice." Justice Lamer stated:

The interests at stake in the custody hearing are unquestionably of the highest order. Few state actions can have a more profound effect on the lives of both parent and child. Not only is the parent's right to security of the person at stake, the child's is as well. Since the best interests of the child are presumed to be with the parent, the child's psychological integrity and well-being may be seriously affected by the interference with the parent-child relationship.¹⁵⁵

¹⁵³ Ibid at 204 -207.

¹⁵⁴ (1990) 50 R.F.L. (4th) 63.

¹⁵⁵ Ibid at 104-105.

In *B. (R.)* and *G. (J.)* the court recognized the integrity and importance of the parent-child relationship. In *G. (J.)*, the majority of the court found that the *Charter* applied to protect what it considered to be vital issues affecting the relationship between a mother and her three children.

Winnipeg Child and Family Services v. K.L.W. was a case that dealt with the constitutional validity of Manitoba legislation permitting warrantless apprehensions in non-emergency circumstances. In upholding the legislation's validity, the entire Supreme Court of Canada found that state intervention must "accord with the principles of fundamental justice" and that any limitations placed on the rights of parents and children to have a relationship with each other will be examined on the basis of whether it promotes the interests of children. Although dissenting in the result, Madam Justice Arbour held:

The central concerns in the case before us are the parent's [*Charter*-protected] interest in raising his or her child free from unwarranted state intrusion and the child's right to have his or her best interests protected. However, when they appear to conflict, these interests must be balanced against each other and against the interests of society in the child protection context.

In my view, not only should the Court recognize the child's interest in being protected from harm, but we must also recognize the interests of a child in being nurtured and brought up by his or her parent.¹⁵⁶

A child protection proceeding is, of course, inherently different from a custody and access dispute by virtue of the fact that the state, through a child protection agency, has intervened to ensure a child's well-being. The evolution of the Supreme Court's thinking on child protection cases in the last several years has resulted in *Charter* recognition and protection to preserve, except in cases of parental abuse or neglect, the parent-child relationship, as it is consistent with the best interests of the child.

Until recently, it appeared that the *Charter's* purpose was limited to protecting individuals from unwarranted state intervention. In *Dolphin Delivery v. R.W.D.S.U.*,¹⁵⁷ the Supreme Court of Canada held that the *Charter* does not apply to strictly private litigation, which a custody case is, but rather to protection against government action.

The intervention of the state through its child protection authorities is necessary to ensure that a parent's conduct does not fall below a certain threshold so as to jeopardize the safety and well-being of a child. As indicated, the application of the *Charter* to this circumstance appears now to be accepted in Canada. In these situations, the ability to adequately parent a child is usually at issue. In a private grandparent access case, the need to protect the sanctity of the parent-child relationship is no less compelling than in a child protection case. Here, grandparents are attempting to interfere with decisions made by parents, whose competence is not in issue, regarding the people with whom they wish their children to interact. One might ask whether such a family, however it is constituted, should not in these circumstances be afforded the same protection under the *Charter* as a family who is subject to child protection proceedings? The

¹⁵⁶ [2000] S.C.J. No. 48 at paras. 11 & 12 (S.C.C.) (QL).

¹⁵⁷ [1986] 2 S.C.R. 573.

autonomy of a parent to make decisions regarding their children is a value that now appears to attract the scrutiny and protection of the *Charter*. In *B. (R.)*, Justice La Forest remarked:

Children undeniably benefit from the *Charter* most notably in its protection of their rights to life and to the security of their person. As children are unable to assert these, our society presumes that parents will exercise their freedom of choice in a manner that does not offend the rights of their children.¹⁵⁸

In *F. (N.) v. S. (H.L.)*, in which a grandmother sought access to her grandchild, the B.C. Court of Appeal made reference to Justice La Forest's opinion in *B. (R.)*. Justice Esson strongly agreed that parents' decisions, outside the context of a child protection case, not be judicially set aside unless there is a compelling reason to do so. Justice Esson held:

That case, of course, was dealing with state interference with parents in respect of parenting. But nevertheless, in my view it has substantial application. It would be equally unacceptable for there to be unrestrained judicial interference with the rights of parents to decide what is in the best interests of their children.¹⁵⁹

The court seems to be indicating that grandparent access cases may attract *Charter* protection when a judge inappropriately disregards a competent parent's decision about what is in his or her child's best interests and substitutes his or her own determination.

Professor Nicholas Bala, in a recent article, states that:

The Court has acknowledged that "Charter values" may affect how the courts interpret and apply the common law and legislation to private disputes, and further has accepted that *legislation* that applies to private disputes is a form of "government action" that is subject to *Charter* scrutiny.¹⁶⁰

Given Professor Bala's view, it is likely that legislation such as the *Divorce Act* and the *Children's Law Reform Act* would be subject to *Charter* scrutiny. Therefore, the comments of Justice Sopinka in *Young* that the best interests of the child test, the standard used in both these statutes, must be reconciled with the *Charter* seems to resonate more in 2001 than in 1994 when *Young* was decided.

Professor Bala notes, however, that "it is clear that the courts will not allow the *Charter* to be used in a dispute between parents in a fashion that seems contrary to the best interests of children."¹⁶¹

Grandparent access is not a dispute "between parents." However, given the Supreme Court's acceptance of the best interests test, as evidenced in *Young* and *Gordon v. Goertz*,¹⁶² it will be

¹⁵⁸ *Supra*, Note 150 at 208.

¹⁵⁹ *Supra*, Note 126 at 253.

¹⁶⁰ Nicholas Bala, *The Charter of Rights and Family Law in Canada: A New Era*, *C.F.L.Q.* 18 (2000-2001) 373 at 423.

¹⁶¹ *Ibid.*

¹⁶² *Supra*, Note 124.

reluctant to apply the *Charter* in a way that might have adverse consequences for a child. This may mean that, as Justice McLachlin said in *Young*, a harm-based analysis should be applied to the best interest test to determine whether potential or actual harm to a child may result if grandparent-grandchild access were denied.

Professor Bala summarizes the constitutional approaches in both the United States and Canada regarding grandparent access and concludes that the *Charter* may well be applicable now:

The Supreme Court of Canada in *Young v. Young and G. (J.)*, and even more clearly in *W. (K.L.)*, has adopted an approach that tends to use the *Charter* as a tool for promoting the interest of children, so it seems unlikely that Canadian courts will adopt the type of rhetoric in *Troxel* in terms of recognizing parental *rights*, and restricting the scope of “best interests” decision making. However, there is a strong argument that a grandparent’s request for access is an application for state interference in the family sphere, that there should ordinarily be a strong presumption that a parent, rather than a judge will make decisions about their children. In the absence of the grandparent having assumed the role of a psychological parent, it is in the long term best interests of both parents and children to avoid having judges making decisions about the extent to which children will see their grandparents. Judicial interference in this type of decision making can be viewed as a state threat to the constitutionally protected “security of the person” of both children and parents, which can only be justified if it is demonstrably in the best interest of the children.¹⁶³

THE BEST INTERESTS AND HARM TESTS

It is argued by many that the application of a strict best interests of the child test in grandparent access cases is the correct approach, as it ostensibly focusses on the needs of the child and the ability and willingness of the parties to meet those needs. This standard is so ingrained in family law in Canada that calls to examine its suitability in certain circumstances, despite its vagueness, have received little attention. Its appropriateness for resolving disputes between parents is not questioned here nor, as was clearly articulated in *Gordon v. Goertz*,¹⁶⁴ is the role of the courts to adjudicate such intraparental matters using this test.

In the case of *Young*, which was between two parents, Justice McLachlin included a harm-based analysis as part of the best interests test. Yet non-parental access claims raise concerns about the best interests test that need study to determine the suitability of its application to non-parental claims. As indicated, in many instances in Canada a harm-based analysis is used in grandparent access cases under the name of the best interests test. As many American jurists and scholars have noted, a harm-based analysis is essential to meet U.S. constitutional requirements but also is important on public policy grounds. Professor Bean commented on the best interests test’s application to grandparent access cases, which purports to be child-centered:

The courts, with encouragement from the legislatures, have defined termination of grandparent contact, or prohibition of it, as harmful to grandchildren. They have done

¹⁶³ *Supra*, Note 159 at 426-427.

¹⁶⁴ *Supra*, Note 124.

this by beginning and ending the analysis of court-ordered grandparent visitation with the best interest of the child standard. This use of the best interest standard fails to recognize that court-ordered third-party visitation is an intrusion upon the constitutional fundamental right of family autonomy. The vagueness of the standard, in combination with the lack of structured analysis, also invites the courts to focus on the interests of the grandparents as opposed to the interests of the child, when the child's needs should constitute the sole basis for the intervention and intrusion. The courts' erroneous focus results in placing a burden on the parents to justify their use of parental authority. The result of so using the best interest standard has policy implications which are contrary to our constitutional preference of non-governmental interference in raising children, so long as no harm occurs to the children.¹⁶⁵

The most appropriate approach may be a type of bifurcated hearing, in which there must be an initial showing that actual or possible harm to a child would arise from termination of access by a grandparent. If this harm could be established on the evidence, then the court should move to the second stage of the hearing to determine what, if any, access would be in the best interests of the child. If no harm were established at the initial stage, then the court should not intrude further into the decision-making authority of the parents and the private realm of their family life. This analysis was employed in *Hawk v. Hawk*¹⁶⁶ and in many other cases since, including the Washington Supreme Court's decision in *Troxel*,¹⁶⁷ as well as Canadian decisions in *D. W. v. M. P.*¹⁶⁸ and *T. (A.H.) v. P. (E.)*.¹⁶⁹

Another good but less desirable two-stage approach, which is not as child-focussed, would be to make an initial inquiry into the fitness and competence of the parents to make decisions regarding their children's contact with their grandparents, and then enter the second, best-interests-test phase only when the parents are determined not to be fit or competent to make such decisions. In essence, this is the *Chapman* approach, which was followed in *Blium* when the court found the parents to be fit and committed to acting in their children's best interests. As such, in the context of *Chapman*, there was no triable issue. This approach would not take into account the circumstance in which a grandparent has acted *in loco parentis* to his or her grandchild and possible harm would result if access were terminated.

A third approach would be to place the onus on grandparents to demonstrate why it is contrary to the best interests of the children for the parents to make the determination regarding access. This approach is clearly predicated on the presumption that parents act in the best interests of their children. It would be left to the grandparents to prove otherwise.

A fourth approach would be to assume that the parents' decision about grandparents having access to the children would prevail unless the grandparents could demonstrate "special and extraordinary" circumstances. Presumably, special and extraordinary circumstances would include situations in which grandparents have stood *in loco parentis*. The general concern about using this approach is the very definition of the terms *special* and *extraordinary*. As can be seen

¹⁶⁵ *Supra*, Note 102 at 430.

¹⁶⁶ *Supra*, Note 103.

¹⁶⁷ *Supra*, Note 10.

¹⁶⁸ *Supra*, Note 111.

¹⁶⁹ *Supra*, Note 113.

in case law interpretation of both the federal and provincial child support guidelines, the terms invite court intervention for definition as well as a determination of whether, on the facts of each case, the definitional threshold has been met.

A fifth approach would use the current statutory two-stage framework of the *Divorce Act*. In order for a person other than a spouse to apply for access to a child, he or she would first require leave of the court to do so. Ostensibly, the leave application could examine more than simply the actual standing or “connection” of the applicant to the child. The court at this stage could receive evidence from the applicant grandparent who would have the burden of proving that a cessation of access to his or her grandchild would be harmful or detrimental to the children. In the event the threshold could be met, then the matter could proceed to determine the issue of access based on the best interests of the child standard. However, if the evidentiary threshold could not be established then the case would conclude at that point, with the court not granting leave for the grandparent to apply for access to his or her grandchild.

With legislation that does not specifically entitle grandparents to apply for access, such as the *Divorce Act*, the application for leave provides the opportunity to determine the effect that the cessation of access might have on the child. As such, it is recommended that the leave application be maintained.

However, greater clarity for judges should be provided by section 16(3) of the *Divorce Act*, including a provision stating that in the leave application the applicant would have to prove that “harm” or “substantial harm” to the child would likely result from the applicant not being granted an order for custody or access.

The recommended approach regarding the *Divorce Act* is similar in nature to the preferred first approach mentioned above. A bifurcated hearing would occur in which there is an initial requirement to show that actual or possible harm to a child would arise from the cessation of access to a grandparent in order for the case to continue and be determined upon the best interests of the child test. This approach is recommended when legislation does not require leave of the court for grandparents or “other persons” to apply for access. It is recommended that provincial and territorial legislatures amend their relevant statutes and require this form of bifurcated, child-centred hearing.

The common thread through all these approaches is the assumption that the state should be careful not to tread upon the integrity and autonomy of the nuclear family unit.

THE EVOLVING DEFINITION OF THE FAMILY

As indicated, some of the cases make distinctions between access to grandchildren based on whether the parents are together—an intact family—or separated or in a single parent family.

Whether this distinction has any meaningful application in modern society was considered by the United States Supreme Court in *Troxel* when Justice O’Connor stated:

The demographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to

household. While many children may have two married parents and grandparents who visit regularly, many other children are raised in single-parent households.¹⁷⁰

In *Roberts v. Ward*, the Supreme Court of New Hampshire reflected on the changing nature of family life:

Parental autonomy is grounded in the assumption that natural parents raise their own children in nuclear families consisting of a married couple and their children. More varied and complicated family situations arise as divorces and decisions not to marry result in single-parent families; as remarriages create step-families; as some parents abandon their children; as others give them to temporary caretakers; as still others are judged unfit to raise their own children.¹⁷¹

The adoption of a harm-based component for determining contact between grandparents and grandchildren necessarily shifts the focus away from the parents' marital status. In this context, when a child resides in a loving, stable household it is not relevant to examine whether the parents are married, separated or, for whatever reason, there is only one parent.

The United States Constitution supports the right of parents to raise their children free from state intervention. In Canada and the United States, the case law also provides parents with this authority. The focus is on the rights of parents, not just married parents. In this regard, Professor Joan Bohl commented:

Logically, fit parents are entitled to a right of family autonomy in the context of grandparent visitation law, as in other areas of domestic relations law, regardless of whether they are married, single, widowed or divorced.

.... By redefining the intact family to include any stable family unit or to reflect united parental decision-making, courts have essentially shifted the focus of the inquiry to whether the child is at risk of harm. Clearly when children are part of a stable family unit they are presumptively free of the harm that threatens a child whose custody is at issue. Similarly, when a child's parents participate in cooperative decision-making on the child's behalf, the child enjoys the same protection from harm whether those parents are married or divorced.¹⁷²

In *In re Aubin*, the dissenting Justice observed in *obiter dicta* some of the very real and practical situations in which children are raised:

.... A review of the record indicates that, chances are, Crystal Aubin will not receive "mother of the year" award. Neither shall millions of other single mothers who are attempting to care for their children under trying circumstances. In virtually every parent-child relationship, crystal ball observers can no doubt conjure up more pleasing

¹⁷⁰ *Supra*, Note 1 at 2059.

¹⁷¹ 126 N.H. 388 at 391-392 (1985).

¹⁷² *Supra*, Note 106 at 296 and 331.

scenarios, better ways and means of child rearing. However, real life defies such fairytale perfection.¹⁷³

In *Kyle O. v. Donald R. et al.*,¹⁷⁴ the Court of Appeal of California, on facts similar to those in the *Troxel* case, followed the United States Supreme Court decision. In this case, the mother died and her parents initially sought custody and later access to their eight year-old granddaughter. The father agreed to visitation but believed he should determine the amount and timing of access. The court held that:

...as a matter of law, Kimberly's death did not imbue the grandparents with their daughter's parental rights or diminish Kyle's parental rights. Nothing in the unfortunate circumstances of one biological parent's death affects the surviving parent's fundamental right to make parenting decisions concerning their child's contact with grandparents.¹⁷⁵

As mentioned, even though a child's circumstances may, in the view of his or her grandparents, be better made by having contact with them, the courts have usually granted the parents the authority to make this decision. It seems now that courts may be more willing to consider the various types of family life.

In *Wylde v. Wylde*, the court acknowledged the "non-traditional family" that existed and the support that it required. Justice Fisher remarked:

...What interest does the state have in these proceedings? The state's interest is the preservation of the welfare of the family and the protection of its members.

Here the mother and her children are the only family unit presently constituted. Any decision should support that unit as opposed to the grandmother who has lost any consistent or healthy family connections.

Coercive intervention by the state into the lives of parents and their children should not be encouraged unless there is a significant probability that the intervention will be in the child's best interest.¹⁷⁶

CONCLUSION

The role that non-parents, particularly grandparents, can play in the lives of children can be positive and enriching. However, many family circumstances do not fit the Norman Rockwell image that is popularly held of grandparents. That some situations of access by a grandparent to a grandchild have entered the courtroom suggests that the traditional notion of "one big happy family" must be examined critically, and that sentimental, nostalgic assumptions should be challenged in each case. More extensive empirical research is needed into contemporary grandparenting roles in general and into high conflict access situations, in particular. As Thompson et al. stated:

¹⁷³ 29 S.W. (3d) 199 at 204 (Tex. App.-Beaumont 2000).

¹⁷⁴ 85 Cal. App. (4th) 848 (2000).

¹⁷⁵ Ibid at 863.

¹⁷⁶ *Supra*, Note 85 at paras. 45-47.

The vagueness of statutory language concerning the “best interests” guideline and the limited amount of research concerning grandparent and grandchild relationships make it difficult to know what factors to evaluate—and how to evaluate them—when grandparents petition for visitation rights.... Given the variability and complexity of individual grandparent-grandchild relationships and the families in which they occur, effective judicial assessment of the child’s “best interests” is undermined by the absence of reliable clinical or research procedures for answering these questions—or even knowing the proper questions to ask.¹⁷⁷

It may be that in appropriate cases mediation can help grandparents and parents come together to work out an access arrangement that allows grandchildren to maintain an existing relationship with their grandparents, while at the same time allowing the parents to preserve their primary role in their children’s lives.

However, if the matter is litigated, the manner in which the courts deal with access claims between parents would usually not be the same as it would between a grandparent and a parent. As such, the tests to determine the appropriateness of access should be reviewed to determine which best serves the interests of children in the context of their nuclear family unit, however constituted. As indicated, legislatures should consider amending their relevant statutes, which would require holding a two-stage hearing to determine the appropriateness of grandparent-grandchild access in each case. Certainly, if it can be first demonstrated that a child may be harmed by the cessation of pre-existing access, then the courts should consider the application based on the best interests test. When harm cannot be shown then it is recommended that there be no further inquiry. To do otherwise is for the state to intrude into the realm of the parent-child relationship in a manner that may now countervene the *Charter*.

Broadening statutory entitlement for grandparents and others to have access to children along the lines of article 611 of the *Civil Code of Quebec*, as recommended by the Special Joint Committee on Child Custody and Access,¹⁷⁸ is clearly contrary to the judicial trend in both Canada and the United States. This trend is respectful of constitutional considerations and of the parent-child relationship.

As Professor Sherry Colb commented:

The Court in *Troxel v. Granville*... demonstrated as much respect for contemporary reality as it did for the nuclear family. To be a parent is to take on enormous responsibility for deciding what is best for one’s child. It involves facing the certain knowledge that sometimes one’s decisions will have been wrong. When they embark on that most serious endeavor, it is critical for parents that no one be given an automatic right to ask a court to second-guess their decisions, not even a grandparent. The reality of responsible parenthood carries with it the privilege of having one’s decision be final in most circumstances. Nothing about the Court’s decision in *Troxel*, however, prevents

¹⁷⁷ *Supra*, Note 62 at 17-18.

¹⁷⁸ *Supra*, Note 7.

people who have shared the role of custodial parent from asking a judge to give that reality the weight it deserves as well.¹⁷⁹

To give most parents decision-making authority about the individuals with whom they wish their children to associate is not simply a parents' rights perspective. By bringing some peace and stability to a nuclear family, it is also, more importantly, a perspective that provides for the best interests of children. As Thompson et al. observed:

These [various] legal proposals assume, however, that adjudicated solutions to domestic disputes of this kind are desirable. Alternatively, however, it might be wise to question the assumption that family law should strive to protect all the significant relationships which a child shares with adults. Given the complexity of both children's needs and family functioning, the fact that the law is a blunt instrument for ensuring relational ties should introduce caution into efforts to extend legal protection to the relationships with non-parental figures possibly significant to children. While children doubtlessly benefit from the various adults contributing to their development, these relationships are meaningful as they occur naturally, not as they are judicially enforced. Legalizing the ties that bind may, in the end, undermine the relationships nurturing the children we seek to assist.¹⁸⁰

¹⁷⁹ Sherry Colb, *King Solomon in the 21st Century*, online: Findlaw <http://writ.news.findlaw.com/commentary/20000628-colb.html> (accessed November 1, 2000).

¹⁸⁰ *Supra*, Note 62 at 23.

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