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The Best Interests of All Children: An Examination of Grandparent Visitation Rights Regarding Children Born Out of Wedlock

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THE BEST INTERESTS OF *ALL* CHILDREN: AN EXAMINATION OF GRANDPARENT VISITATION RIGHTS REGARDING CHILDREN BORN OUT OF WEDLOCK

I. INTRODUCTION

Today, due to the changes the American family has undergone in recent years, family law is also changing.[1] As a result of the increasing number of unmarried parents, divorced parents, step-families, death within families, drug and alcohol abusers, financial setbacks, and children born out of wedlock, the family of the 1990s is significantly different than of generations past, in that the stereotypical, traditional "family" is no longer so prevalent.[2] Whereas grandparent visitation was traditionally a moral right,[3] today all fifty states have established laws identifying visitation rights for grandparents.[4] Nevertheless, none of these statutes provide grandparents with inherent rights to request visitation with their grandchildren from their grandchildren's parents.[5] These statutes merely define when grandparents have standing to seek visitation, and thus provide visitation rights to those grandparents who have standing, if a trial court finds it to be in the child's best interests.[6] Accordingly, unless specified states' statutes create a right for visitation, none exists.[7] While parents have the right to raise their children without state interference, this right is not absolute and must be balanced against the states' interest in protecting the best interests of the child.[8]

Traditionally, most grandparent visitation statutes only encompassed family situations complicated by death, separation, or divorce of the parents.[9] Today, however, some states permit a grandparent to seek

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1. *See* Ann Marie Jackson, Comment, *The Coming of Age of Grandparent Visitation Rights*, 43 AM. U. L. REV. 563 (1994).

2. *See* Katherine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family has Failed*, 70 VA. L. REV. 879 (1984).

3. *See* Jackson, *supra* note 1, at 563.

4. *See id.* at 563-64.

5. *See* Sarah Norton Harpring, Comment, *Wide-Open Grandparent Visitation Statutes: Is the Door Closing?*, 62 U. CIN. L. REV. 1659 (1994).

6. *See id.* at 1662.

7. *See id.* at 1659.

8. *See* Judith L. Shandling, Note, *The Constitutional Constraints on Grandparents' Visitation Statutes*, 86 COLUM. L. REV. 118, 129-30 (1986).

9. *See* Rebecca Brown, Comment, *Grandparent Visitation and the Intact Family*, 16 S. ILL. U. L.J. 133, 133 (1991).

visitation without first considering whether the petitioning grandparent has standing under express statutory terms.[10] These "open-ended" or "wide-open" statutes allow grandparents to file a petition for visitation privileges regardless of the marital status of the child's parents.[11] Nevertheless, while grandparent visitation statutes are expanding beyond their original, limited scope, an overwhelming majority of the states have statutes so narrowly drawn that they limit standing to *special circumstances* where the nuclear family has been disrupted by divorce, legal separation, or the death of a parent.[12]

Although some states have amended their statutes to extend standing to grandparents of children born out of wedlock, many states have failed to include these children in their statutes at all.[13] Are children born out of wedlock skipped over not by choice but by inadvertence? Or, are children born out of wedlock recognized in a category purposefully not accounted for?

State grandparent visitation statutes that exclude children born out of wedlock are inconsistent with the legislative purpose of these statutes—"to protect relationships that are important for the welfare of the children" and to promote "the best interests of the grandchildren."[14] Moreover, denying children born out of wedlock the opportunity for their grandparents to simply *petition* for visitation rights because of their parents' marital status constitutes a deprivation of equal protection rights with regard to both the grandparent(s) and grandchild.[15] Accordingly, rather than focusing on the

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10. *See* Shandling, *supra* note 8, at 119.

11. *See* Harpring, *supra* note 5, at 1660-61; MD. CODE ANN., FAM. LAW § 9-102 (Supp. 1996); N.J. STAT. ANN. § 9:2-7-1 (West Supp. 1997); OKLA. STAT. tit. 10, § 60.16 (West Supp. 1997).

12. *See* Brown, *supra* note 9, at 133 (stating that a majority of the states permit only grandparent visitation where parents have separated or divorced or where one parent has died); *see also* Harpring, *supra* note 5, at 1659.

13. *See* ALASKA STAT. § 25.24.150 (Michie 1996); ARK. CODE ANN. § 9-13-103 (Michie 1993); COLO. REV. STAT. § 19-1-117 (Supp. 1996); CAL. FAM. CODE § 3102-3104 (West 1994); 775 ILL. COMP. STAT. 5/11-7.1 (West 1992); WIS. STAT. ANN. § 48.925 (West 1987); WIS. STAT. ANN. § 767.245 (West 1993); WIS. STAT. ANN § 880.155 (West 1991).

14. Catherine M. Gillman, Note, *One Big, Happy Family? In Search of a More Reasoned Approach to Grandparent Visitation in Minnesota*, 79 MINN. L. REV. 1279, 1286-87 (1995) (quoting Catherine Bostock, *Does the Expansion of Grandparent Visitation Rights Promote the Best Interests of the Child?: A Survey of Grandparent Visitation Laws in the Fifty States*, 27 COLUM. J.L. & SOC. PROBS. 319, 321 (1994)); *see also* Roberts v. Ward, 493 A.2d 478, 481 (N.H. 1985); Flint v. Flint, 65 N.W. 272, 273 (Minn. 1895).

15. *See* U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."); King v. King, 828 S.W.2d. 630, 632 (Ky. 1992).

nature of the parents' relationship, when considering whether visitation should be granted to grandparents, only the concept of "the best interests of the child" should control in order to achieve the state's objective of its grandparent visitation statute.[16]

States' statutes regarding grandparent visitation rights must be amended to include children born out of wedlock to provide these children with the same protection that children born in wedlock receive. Since this statutory right for grandparents constitutes only the right to *seek* visitation—and thus *receive* visitation if, after evaluating the relevant circumstances specific to each child's situation, the trial court determines that grandparent visitation is in the child's best interest—including *all* children in grandparent visitation statutes would help guarantee that each child's best interests are being promoted.[17] Yet, due to the lack of uniformity among the states' grandparent visitation statutes, and lack of clearly defined guidelines for granting grandparent visitation rights, parents and grandparents are unclear on their rights.[18] In addition, ambiguity among the statutes increased litigation, which may have a severe and negative impact on the children involved.[19] Thus, to ensure that each child is treated equally with his or her best interests as paramount concern, a widely adopted model with clearly defined guidelines needs to be constructed.[20] This open-ended model statute should reflect the changes in today's family structure and offer all children and their grandparents an equal opportunity to be heard—allowing them the opportunity to take advantage of the grandparent-grandchild relationship if the trial court concludes that such visitation is in their best interests.[21]

Part II of this note will examine the history and development of grandparent visitation statutes. Part III will review the purpose of grandparent visitation rights statutes, while Part IV will explore the constitutional background of parental rights and review the theory behind the states' *parens patriae* power. Part V will explain the importance and benefits of the grandparent-grandchild relationship. Part VI will analyze

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16. *See generally* Christine Davik-Galbraith, Note, *"Grandma, Grandpa, Where are You?"—Putting the Focus of Grandparent Visitation Statutes on the Best Interests of the Child*, 3 ELDER L.J. 143 (1995) (discussing that classifications based on the legitimacy of a child frustrates the legislative intent in ensuring that the best interests of the child take first priority).

17. *See Roberts*, 493 A.2d at 481-82.

18. *See* Jackson, *supra* note 1, at 568-69.

19. *See id.* at 569.

20. *See* Davik-Galbraith, *supra* note 16, at 147.

21. *See* Frame v. Nehls, 550 N.W.2d 739, 751 (Mich. 1996) (Levin, J., dissenting) (arguing that Michigan's child custody laws should be liberally construed to best safeguard the child's rights).

the constitutionality of grandparent visitation statutes that exclude children born out of wedlock and discuss the equal protection challenges involved. Part VII will address the need for uniform, clear, and concise grandparent visitation statutes and will conclude with sections of a proposed model statute that focuses on the best interests of the child.

II. HISTORY

Under common law, grandparents who sought visitation with their grandchildren had no legal rights.[22] The right to visit with a grandchild was considered a moral rather than a legal right.[23] Courts rarely ordered visitation between grandparents and grandchildren as a means to protect the grandchild from family disruption.[24] If a parent decided that the grandparent should not be allowed to visit with the grandchild—even if a long, meaningful relationship had developed between the grandparents and grandchild—the parent's decision was final, regardless of the effect on the grandchild.[25] In the last two decades, however, in response to the dramatic increase in the divorce rate, and the number of children born to lesbian, gay, and unmarried parents, together with politically active grandparents and the expansive role that they have come to play in their grandchildren's lives, states have enacted legislation giving grandparents a statutory right to petition for visitation with their grandchildren.[26] Scholars recognize that the modern family differs significantly from the traditional, nuclear family of the past.[27] A frequent consequence of the decline of the traditional, nuclear family is for children to develop close, personal attachments between themselves and adults outside their immediate families, especially their grandparents.[28] Accordingly, states have amended and continue to amend their grandparent visitation statutes providing grandparents with legal rights that were historically denied.[29]

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22. *See* Jackson, *supra* note 1, at 573.

23. *See id.* at 573 n.61.

24. *See* Gillman, *supra* note 14, at 1280.

25. *See id.* at 1280, 1283.

26. *See* Hicks v. Enlow, 764 S.W.2d 68 (Ky. 1989); *see also* Edward M. Burns, *Grandparents Visitation Rights: Is It Time for the Pendulum to Fall?*, 25 FAM. L.Q. 59 (1991).

27. *See* Bartlett, *supra* note 2, at 880.

28. *See* Roberts v. Ward, 493 A.2d 478, 481 (N.H. 1985) (citing to Bartlett, *supra* note 2, at 881).

29. *See* Burns, *supra* note 26, at 81.

These statutes do not give grandparents an absolute right to visitation.[30] They are merely a means of petitioning for visitation and thus provide visitation rights to those grandparents who have standing, if a trial court would find visitation to be in the child's best interests.[31] Additionally, these statutes are far from consistent.[32] Some states have enacted "open-ended" or "wide-open" statutes, such as Alaska, Maryland, New Jersey, Oklahoma, and Utah, which award visitation to grandparents whenever it is found to be in "the best interests of the child," regardless of the family circumstances.[33] However, not all states have reacted as quickly to expand grandparent visitation rights and have enacted narrowly tailored statutes, granting standing to grandparents only in specific family situations.[34] These situations generally include circumstances where the nuclear family has been disrupted by divorce, legal separation, or the death of a parent.[35] Only after this threshold is met, will a court determine if granting visitation would be in the child's best interests.[36] Thus, such statutes deny standing to all grandparents who do not meet the statutory criteria and will not recognize grandparent visitation rights in other situations, such as for children born out of wedlock.[37]

Some states do recognize children born out of wedlock in their statutes, but still place limitations on standing for the grandparents of these children.[38] One example of such limitations includes allowing a grandparent to petition for visitation only after a putative father acknowledges paternity. Other examples include limitations that are more specific to whether the petitioning grandparents are the maternal or paternal grandparents such as allowing grandparents to petition for

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30. *See* Jackson, *supra* note 1, at 565.

31. *See* Harpring, *supra* note 5, at 1660.

32. *See* Jackson, *supra* note 1, at 565-66.

33. *See* Harpring, *supra* note 5, at 1660-61; ALA. CODE § 30-3-4 (Supp. 1996); MD. CODE ANN., FAM. LAW § 9-102 (Supp. 1996); N.J. STAT. ANN. § 9:2-7-1 (West Supp. 1997); OKLA. STAT. tit. 10 § 60.16 (West Supp. 1997).

34. *See* ALASKA STAT. § 25.24.150 (Michie 1996); ARK. CODE ANN. § 9-13-103 (Michie 1993); COLO. REV. STAT. § 19-1-117 (1996 Supp.); CAL. FAM. CODE § 3102-3104 (West 1994); 775 ILL. COMP. STAT. 5/11-7.1 (West 1992); WIS. STAT. ANN. § 48.925 (West 1987); WIS. STAT. ANN. § 767.245 (West 1993); WIS. STAT. ANN. § 880.155 (West 1991).

35. *See* Brown, *supra* note 9, at 133.

36. *See* Beagle v. Beagle, 678 So. 2d 1271, 1272 (Fla. 1996); Davik-Galbraith, *supra* note 16, at 145-46.

37. *See* Harpring, *supra* note 5, at 1659-60.

38. *See* Cheryl Stockman Gan, Note, *Grandparental Visitation Rights in Oklahoma*, 26 TULSA L.J. 245, 258 (1990); IOWA CODE ANN. § 598.35 (1996); MICH. STAT. ANN. § 25.312(7b) (Supp 1997); OHIO REV. CODE. ANN. § 3109.11-3109.12 (Anderson 1994); NEB. REV. STAT. § 4301802 (1993).

visitation when they are the maternal grandparents of the illegitimate child, or when they are the paternal grandparent of the illegitimate child and paternity has been established.[39] However, some states have dispensed with the distinction between maternal and paternal grandparents.[40]

Even though some states have expanded their statutes to include children born to non-traditional families, such as children born out of wedlock, as the above discussion demonstrates, states' statutes lack uniformity.[41] And, when considering grandparent visitation rights, it is up to each state's legislature to determine the legal entitlement of such family matters, for the United States Supreme Court has yet to decide a case involving third-party access to children.[42] To determine how each state weighs the interests of the parent, grandparent, and child depends on whether its grandparent visitation statutes are narrowly-tailored or open-ended.[43] Grandparent visitation laws that are broadly drawn, however, seem to be the only statutes that serve the states' purpose for enacting them in the first place—to promote the best interests of the child.[44]

III. PURPOSE OF STATUTE

The paramount consideration for the court in any grandparent visitation dispute is the best interests of the child.[45] The concept of "best interests of the child" should control, and all parties who have a significant relationship with the child should be afforded a right to a hearing affecting those interests.[46] However, before such a determination may be made, a

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39. *See* OKLA. STAT. ANN. tit. 10, § 5(A)(2) (West Supp. 1997); *see also* ARK. CODE ANN. § 9-13-103 (Michie 1993).

40. *See* ARIZ. REV. STAT. ANN. § 25-337.01 (Supp. 1994).

41. *See* FLA. STAT. ANN. § 752.01 (West 1993); *cf.* MD. CODE ANN., FAM. LAW § 9-102 (Supp. 1996); *cf.* MO. ANN. STAT. § 452-402 (West 1996); *cf.* N.J. STAT. ANN. § 9:2-7-1 (Supp. 1997); *see also* Jackson, *supra* note 1, at 588 (arguing that states need to adopt a model grandparent visitation statute).

42. *See* Davik-Galbraith, *supra* note 16, at 143.

43. *See, e.g.*, Hawk v. Hawk, 855 S.W.2d 573 (Tenn. 1993) (The Tennessee Supreme Court addressed grandparent visitation rights in an intact family and concluded that imposing the court's opinion of what is in the best interests of the child over the parents' objections is an unjustified intrusion into the "protected sphere of family life."); *cf.* Goff v. Goff, 844 A.2d 1087, 1091 (Wyo. 1993) (ruling that court-ordered grandparent visitation is in the grandchild's best interests even when awarded against the parents' objections).

44. *See* Gillman, *supra* note 14, at 1287; Harpring, *supra* note 5, at 1673.

45. *See* Gillman, *supra* note 14, at 1287.

46. *See* Davik-Galbraith, *supra* note 16, at 160.

grandparent must have standing.[47] And yet, in many states, unless a grandparent meets the statutory criteria, the court will not have the opportunity to determine whether granting the petition for visitation rights would in fact be in the child's best interests.[48] To deny or deprive a child a best interests hearing and decide issues strictly on a child's parents' marital status—which are reasons unrelated to the appropriateness of visitation—without first engaging in an examination of what would be in each individual child's best interests is contrary to what should be the state's goal: to serve the best interests of the *child.*[49] These statutes are designed to protect relationships that are important for the welfare of the children; visitation awarded to the grandparents fulfills the needs of the child.[50] The inquiry should not be narrowly focused on the nature of the parents' relationship, but rather on the nature of the grandparent-grandchild relationship and whether continued visitation would be in the *child's* best interests.[51] A child born out of wedlock may have a relationship with his grandparents fully comparable to that of a child of a divorced family. It could certainly be the case where a grandparent of a child born out of wedlock (whose parents had lived together for many years as if they were married before ending their relationship) has participated in the rearing of her grandchild and has acted as a loving grandparent to that child for many years, is denied visitation with her grandchild because of the selfish reasons of the mother or father of the child. This grandparent may have no right to petition for continued visitation merely because children born out of wedlock are not included in that state's statute.[52] Yet, in that same state, a grandparent of a divorced family who has little or no contact with his or her grandchild is allowed to petition for visitation rights because children of a divorced family are included in that statute.[53] Would suddenly denying the child born out of wedlock the right to visit with his or her grandparent appear to be in *this* child's best interests? As discussed in *Roberts v. Ward*, "[i]t makes little sense to consider the child's interest by according grandparents visitation

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47. *See* Harpring, *supra* note 5, at 1660.

48. *See id.*

49. *See* Gillman, *supra* note 14, at 1286; *see also* Roberts v. Ward, 493 A.2d 478, 481 (N.H. 1985); Flint v. Flint, 65 N.W. 272, 273 (Minn. 1895).

50. *See* Shandling, *supra* note 8, at 119.

51. *See id.*

52. *See Roberts*, 493 A.2d at 479; *see also* Samuel V. Schoonmaker III et al., *Constitutional Issues Raised by Third-Party Access to Children*, 25 FAM. L.Q. 95 (1991) (discussing the types of grandparent visitation statutes and the limitations of grandparents under the various statutes).

53. *See* Frame v. Nehls, 550 N.W.2d 739, 747-50 (Mich. 1996) (Levin, J., dissenting).

rights . . . when a two-parent family dissolves, but to withhold such rights in a case . . . where a traditional two-parent family has never existed."[54] Without an independent examination of all of the relevant factors in each case, a state cannot determine what is in a particular child's best interests, nor can it determine that a certain child needs less love and support from a grandparent merely because his or her parents never married. A state whose statute would authorize the court to enter an order for grandparent visitation on a finding that visitation is in the child's best interest *only* when the union of a legitimate child's parents has been dissolved by death, divorce, or separation hardly seems to be ensuring that the best interests of *every* child come first.[55] The only way to ensure that each child's best interests is being served is for every state to enact statutes that allow all grandparents the right to petition for visitation rights with their grandchildren.[56] Since visitation cannot be granted until a judge finds that the best interests of the child would be served by granting or denying visitation, these wide-open statutes would remove arbitrary limitations and protect the interests of all parents, all grandparents, and every child.[57]

IV. THE PARENTS' ISSUE

"To understand the gravity of creating grandparent visitation rights, it is necessary to analyze the rights traditionally held by parents."[58] When determining the legal entitlement of such family matters, including grandparents' visitation rights, it is the state legislatures and state courts that generally create and control such laws.[59] Nevertheless, the United States Supreme Court has found certain fundamental rights related to marriage, family relationships, child rearing, and the education of children

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54. *Roberts*, 493 A.2d at 481.

55. *See generally* Davik-Galbraith, *supra* note 16, at 156-58 (discussing the idea of a model amendment to the U.S. Constitution that would provide protective rights for all children).

56. *See* Jackson, *supra* note 1, at 601.

57. *See* Gillman, *supra* note 14, at 1287-88.

58. Jackson, *supra* note 1, at 570.

59. *See* U.S. CONST. art. I, § 8 (enunciating powers of Congress which do not encompass power over grandparent visitation rights matters); U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the states respectively, or to the people."); *see also* CHAIRMAN OF THE HOUSE SUBCOMM. ON HUMAN SERVICES OF THE SELECT COMM. ON AGING, 102D CONG., 2D SESS., GRANDPARENTS: NEW ROLES AND RESPONSIBILITIES 1 (Comm. Print 1992) (stating that Congress does not have authority over family law matters).

to be areas protected by the United States Constitution.[60] Courts have consistently protected family autonomy and have recognized a long-standing and fundamental liberty interest of parents in determining the care and upbringing of their children free from government interference.[61] In *Moore v. City of East Cleveland*, the Supreme Court explained that "[t]his Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."[62] Thus, in a grandparent visitation dispute, parents generally contend that they have a basic constitutional right to raise their children as they see fit, free from state intrusion, and that such intrusion violates their constitutional right to privacy and infringes upon their rights as parents to raise their children.[63]

Courts recognize that this constitutional right of personal choice in matters of marriage and family life under the Due Process Clause of the Fourteenth Amendment is not absolute.[64] For example, parents are required by law to see that their children are educated and that they are inoculated against disease, and parents cannot abuse their children.[65] In *Prince v. Massachusetts*, the Supreme Court recognized that a state "has a wide range of power for limiting parental freedom" and "may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways."[66] So, while the state does have an interest in protecting the integrity of the family unit, it also has an interest in pursuing the best interests of the child, and sometimes these interests may conflict.[67] Accordingly, states have enacted legislation to protect the physical and emotional welfare of its children.[68] And when

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60. *See, e.g.*, Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977) (quoting from Cleveland Bd. of Ed. v. LaFleur, 414 U.S. 632, 639-40 (1974)).

61. *See id.* at 507 (Brennan, J., concurring).

62. *Id.* at 499; *see also* Wisconsin v. Yoder, 406 U.S. 205 (1972); Prince v. Massachusetts, 321 U.S. 158 (1944); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

63. *See* Padgett v. Department of Health and Rehabilitative Services, 577 So. 2d 565, 570 (Fla. 1991).

64. *See* Herndon v. Tuhey, 857 S.W.2d 203, 207 (Mo. 1993).

65. *See* King v. King, 828 S.W.2d 630, 631 (Ky. 1992) (stating that the right to rear children without undue governmental interference is not inviolate).

66. *Prince*, 321 U.S. at 166-67 (quoting Cleveland Bd. of Ed. v. LaFleur, 414 U.S. 632, 639-40 (1974)).

67. *See id.* at 166-67; *see also* Oldfield v. Benavidez, 867 P.2d 1167, 1172 (N.M. 1994).

68. *See King*, 828 S.W.2d at 631.

considering the well-being of its children, such state regulation may be proper and within the state's constitutional power to regulate.[69]

The state's power to intervene in grandparent visitation disputes is derived from its "parens patriae power."[70] The doctrine of *parens patriae* is the basis for considering the best interests of the child as the paramount issue in granting grandparent visitation rights.[71] This power allows the state to act when the welfare of an individual who lacks the capacity to protect her own interests (the child in this case) is at stake.[72] Thus, visitation over the objections of the parents would only be imposed on a showing that failure to do so would not promote the child's welfare.[73] Such state interference is permissible when the need to interfere with these interests is compelling.[74] Certainly, a compelling interest could be the protection of a child if that child's welfare is being jeopardized in some way.[75] Various jurisdictions recognize that a compelling state interest, in fact, exists when the grandparent-grandchild relationship is being threatened and utilize its *parens patriae* power to permit grandparent visitation if it is in the best interests of the child.[76] An example of a court allowing the visitation rights of grandparents to impinge upon parental autonomy is illustrated in *King v. King*.[77] Although the child was born to married parents,[78] the *King* decision is relevant. Mr. King, the child's grandfather, petitioned the court for visitation rights with his

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69. *See id.*; *see generally* Ginsberg v. New York, 390 U.S. 629, 640 (1968) (holding that a New York criminal obscenity statute applying to minors under 17 a more restricted right to "judge and determine for themselves what sex material they may read or see" is constitutionally permissible).

70. *See* Shandling, *supra* note 8, at 129.

71. *See id.*

72. *See* Davik-Galbraith, *supra* note 16, at 151.

73. *See* Beagle v. Beagle, 678 So. 2d 1271 (Fla. 1996).

74. *See* Shandling, *supra* note 8, at 135.

75. *See generally* Michael v. Hertzler, 900 P.2d 1144 (Wyo. 1995) (finding that state has a compelling interest in protecting a child's best interest, and state also has a compelling interest in maintaining the right of association of grandparents and grandchildren); *see also* Schoonmaker et al., *supra* note 52, at 113 (explaining that visitation may become a compelling interest if research proves that a child's development will be significantly stunted by lack of relationship with a child's grandparents).

76. *See* Sketo v. Brown, 559 So. 2d 381 (Fla. Dist. Ct. App. 1990); Ridenour v. Ridenour, 901 P.2d 770 (N.M. Ct. App. 1995); *Michael*, 900 P.2d at 1149; Campbell v. Campbell, 896 P.2d 635 (Utah Ct. App. 1995).

77. 828 S.W.2d 630, 631 (Ky. 1992).

78. *See id.* at 630.

granddaughter after her parents denied him permission to visit with her.[79] Mr. King had had contact with his granddaughter almost every day for sixteen months while her parents lived and worked on Mr. King's farm.[80] When the relations with Mr. King and the child's parents deteriorated, the parents moved from Mr. King's farm and denied him permission to visit with his granddaughter.[81] Accordingly, Mr. King petitioned the court for visitation rights.[82] The Kentucky Supreme Court found that there was no reason to permit a trivial disagreement between a father and son to deprive a grandchild and grandparent from developing a natural bond that ordinarily exists between these individuals.[83]

Additionally, in *Roberts v. Ward*, the Supreme Court of New Hampshire stated that it "may use its parens patriae power to decide whether the welfare of the child warrants court-ordered visitation with grandparents to whom close personal attachments have been made."[84] In *Roberts*, the child born out of wedlock and her mother lived in the home of the maternal grandparents for a year and a half after the child's birth.[85] Although the living arrangement was terminated by the mother, the grandparents maintained regular contact with their grandchild. For three years they cared for her almost every weekend, picked her up from day care, and provided her with meals, while her mother spent her evenings working and dating.[86] The mother soon married and denied the grandparents any personal contact with the child.[87] The grandparents asserted that they were the single stabilizing factor in their grandchild's life, since she has had no fewer than ten homes and five schools in her ten years, and that the child strongly desired visitation with her grandparents.[88] The court stated that "[p]arental autonomy is grounded in the assumption that natural parents raise their own children in nuclear families, consisting of a married couple and their children."[89] However, the realities of modern living show that "the validity of according almost absolute judicial deference to parental rights has become less compelling as the foundation

79. *See id.* at 631.

80. *See id.* at 630.

81. *See id.* at 630-31.

82. *See id.* at 631.

83. *See id.* at 632-33.

84. 493 A.2d 478, 481 (N.H. 1985).

85. *See id.* at 479.

86. *See id.* at 479-80 (discussing the extensive interaction between the grandparents and their granddaughter).

87. *See id.* at 480.

88. *See id.*

89. *Id.* at 481.

upon which they are premised, the traditional nuclear family, has eroded."[90] The court also noted that "[i]t would be shortsighted indeed, for this court not to recognize the realities and complexities of modern family life, by holding that a child has no rights, over the objection of a parent, to maintain a close extra-parental relationship which has formed in the absence of a nuclear family."[91]

Furthermore, a state should be able to promote the physical and emotional welfare of children by using its *parens patriae* power even at the expense of parental autonomy.[92] In *Herndon v. Tuhey,* the relationship between the grandparents and their son-in-law became strained when the grandparents decided to terminate their son-in-law's employment with their business.[93] Shortly thereafter, the child's parents' marriage began to deteriorate, and when the two separated, the child moved away with his mother.[94] During this time, however, the child maintained a close relationship with his grandparents. From preschool age throughout his elementary years, his grandparents attended his sporting events, his grandmother took him to the library frequently and regularly taught his Sunday school class, and his grandfather coached his basketball team.[95] However, due to the argument between the child's father and the grandparents, both the child's mother and father refused to allow the grandparents to visit their grandson.[96] The Supreme Court of Missouri found that visitation by the child's grandparents was in the best interests of their grandchild and would not endanger his physical health or impair his emotional development.[97] Thus, the *King*,[98] *Roberts*,[99] and *Herndon*[100]

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90. *Id.*

91. *Id.*; *see also* King v. King, 828 S.W.2d 630, 631-33 (Ky. 1992) (granting paternal grandfather the right to visit with his granddaughter over the objections of the child's married parents).

92. *See* Bailey v. Menzie, 542 N.E.2d 1015, 1020 (Ind. Ct. App. 1989) (finding grandparent visitation to be only a minimal intrusion on the family relationship, therefore protecting the interests of the child and the grandparents); *see also* Zablocki v. Redhail, 434 U.S. 374, 386 (1978) (the state may impose reasonable regulations that do not substantially interfere with the parents' fundamental rights); Ridenour v. Ridenour, 901 P.2d 770 (N.M. Ct. App. 1995).

93. 857 S.W.2d 203, 205 (Mo. 1993).

94. *See id.*

95. *See id.*

96. *See id.*

97. *See id.* at 212.

98. King v. King, 828 S.W.2d 630, 631 (Ky. 1992).

99. Roberts v. Ward, 493 A.2d 478, 481 (N.H. 1985).

100. Herndon v. Tuhey, 857 S.W.2d 203, 205 (Mo. 1993).

decisions support the position that there should be a hearing for *all* grandparents—irrespective of the grandchild's parents' marital status—conducted before a judge who will determine, upon a full evidentiary hearing of the facts in the particular case, that the best interests of the child will be served by granting or denying visitation. Thus, grandparent visitation interferes with a parent's interest only to observe the state's *parens patriae* duty to promote the best interests of the child.

V. BEST INTERESTS OF THE CHILD

As discussed above in Part III of this note, the paramount objective in continuing the grandparent-grandchild relationship is to protect the welfare of the children and promote their best interests.[101] Thus, state interference is justified when a state uses its *parens patriae* power to permit grandparent visitation when it is found to be in the best interests of the child in order to further the policy underlying the statute—to ensure the continuity of relationships between children and their grandparents.[102] Experience and research has shown that maintaining a grandparent-grandchild relationship is in the child's best interests.[103] Such a relationship is separate and distinct from that of parents and children.[104] Psychiatrists and psychologists generally agree that children should maintain and retain meaningful relationships with their grandparents and that to deny them continuing contact is a deprivation, since both the grandchild and the grandparent lose something quite valuable.[105] Erik Erikson, a prominent psychologist, explains that benefits derived by a grandchild from her

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101. *See* Gillman, *supra* note 14, at 1287-88; Harpring, *supra* note 5, at 1662.

102. *See* Bartlett, *supra* note 2, at 879-80, 887-90.

103. *See generally* Brown, *supra* note 9; *see also* JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD (1979) (stating that the adverse consequences of discontinuity may be severe); ARTHUR KORNHABER, M.D. & KENNETH L. WOODWARD, GRANDPARENTS/GRANDCHILDREN: THE VITAL CONNECTION (1985) (researchers concluded grandchildren feel a "natural connection between themselves and their grandparents," and that children possess a "strong emotional need for close attachments to at least one grandparent").

104. *See* Mimkon v. Ford, 332 A.2d 199, 204-05 (N.J. 1975) (where the court stated, "[v]isits 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."); *see also* ARTHUR KORNHABER, M.D., & SONDRA FORSYTH, GRANDPARENT POWER (Crown Publishers, Inc. 1994).

105. *See* Davik-Galbraith, *supra* note 16, at 143-44 (analyzing the role both the grandparent and grandchild plays in each other's life).

grandparents should not be lightly regarded by our judicial system.[106] One psychological study performed, which focused specifically on the ties between grandparents and grandchildren, found that children who maintained close relationships with their grandparents were more comfortable with the elderly, generally more emotionally secure with their peers, and less likely to be abused by their parents or become dependent on drugs since grandparents form "the first line of support when children have problems with their parents."[107] Additionally, the General Assembly has acknowledged the benefits that the grandchild as well as the grandparent may derive from the grandparent-grandchild relationship:

> 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 part of an aging parent's life.[108]

Furthermore, attorneys and case law have recognized the importance of the grandparent-grandchild relationship.[109] Richard S. Victor, an attorney specializing in grandparent visitation rights disputes, stated "[a] child has an urgent need to maintain close relationships with meaningful persons in his or her life including his or her grandparents." In *Bishop v. Piller*, the paternal grandparents of a child born out of wedlock petitioned the court for visitation rights despite the fact that their son, the child's father, had no legal relationship with the child or mother.[110] The Pennsylvania Supreme Court, in holding that the grandparents were entitled to visitation rights, discussed the importance of grandparents in the lives of grandchildren, emphasizing that "[c]hildren derive a greater sense of worthwhileness from grandparental attention and better see their place in the continuum of family history. Wisdom is imparted that can be attained

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106. *See* ERIK H. ERIKSON, A WAY OF LOOKING AT THINGS, 560-61, 640-41 (W.W. Norton and Co. 1987).

107. *See* Brown, *supra* note 9, at 148.

108. King v. King, 828 S.W.2d 630, 632 (Ky. 1992).

109. *See, e.g.*, Roberts v. Ward, 493 A.2d 478, 478 (N.H. 1985); *see also* Mimkon v. Ford, 332 A.2d 199, 204-05 (N.J. 1975).

110. *See* 637 A.2d 976, 976-77 (Pa. 1994) (discussing the issue of whether or not a paternal grandparent of a child born out of wedlock may be awarded visitation rights when the child's father has no legal relationship with the mother).

nowhere else."[111] The essence of the court's holding was that if the court decided that spending time with a grandparent was in the best interest of the child, then a grandparent could be entitled to visitation rights regardless of whether the parents of the child ever had an extended relationship.[112] Dr. Arthur Kornhaber, author of *Grandparent Power* and *Grandparent/Grandchildren: The Vital Connection*, noted the consequences of denying a grandchild of such a significant relationship: "[t]o deny children access to their heritage and to prevent them from carrying that legacy into the future is a grave error which inflicts profound psychological wounds on all concerned."[113] Accordingly, "[such denial] constitutes abuse of the children, not in their best interests," for the adverse consequences of discontinuing the grandparent-grandchild relationship may be severe.[114] Thus, since denying a grandchild the natural right to benefit from an existing relationship she has with her grandparent would not promote her welfare and best interests, state intervention could be compelling and justified despite parental objections.

Conversely, some states argue that the "best interests of the child" standard does not merit constitutional protection and cannot outweigh the parents' constitutionally protected right to raise their child as they see fit.[115] These states argue that the value of the grandparent-grandchild relationship is not compelling enough to justify state interference on the family.[116] This view suggests that these states are overlooking the research and evidence that confirms that both the child and grandparent derive benefits from this relationship and that prohibiting the continuance of a developed relationship can hardly further the state's interest in protecting the welfare of its children.[117] Indeed, there are situations where state interference is not justified as in the case of *Norris v. Tearney*, where the court found that visitation by the paternal grandparents would not be in the best interests of their grandson where he was born out of wedlock during his parents' hospitalization for depression, where his father had ended the relationship with his mother and married another woman, and where

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111. *Id.* at 978-79.

112. *See id.*

113. KORNHABER & FORSYTH, *supra* note 104, at 245.

114. *Id.*

115. *See* Traci Dallas, *Rebutting the Marital Presumption: A Developed Relationship Test,* 88 COLUM. L. REV. 369, 377 (1988).

116. *See id.*

117. *See, e.g.*, Moses v. Cober, 641 N.E.2d 668, 672 (Ind. Ct. App. 1994); *see also* Gillman, *supra* note 14, at 1303 (noting that the legislature, due to the lack of foresight, has unnecessarily limited standing to the exclusion of situations where visitation otherwise might be justifiable and beneficial to the child).

although the paternal grandparents demonstrated their love toward and involvement with their grandson, the court found that visitation would further the child's mother's depression and affect her ability to care for her child.[118] However, state interference is justified, as discussed above in the cases of *King v. King*[119] and *Roberts v. Ward*,[120] when a grandparent-grandchild relationship has already been established and is suddenly severed simply because the parent and grandparent are at odds with each other. This is true because the tensions and conflicts which commonly damage the relations between parents and grandparents are often absent between those same grandparents and their grandchildren.[121] One of the main purposes of the statute is to prevent a family quarrel of little significance from disrupting a relationship which should be encouraged rather than destroyed.[122] Thus, intrusion here would not be a substantial interference on the parents' autonomy and would, therefore, be an appropriate mechanism by which the state could balance the parties' competing interests.[123]

Therefore, statutes that deny children born out of wedlock the right to visit with their grandparents, but grant this right to children born in wedlock, are directly contrary to their purpose—to promote the best interests of the child.[124] Simply because a child is born to unmarried parents should not preclude him or her from being able to benefit from a relationship with his or her grandparents.[125] The fact that the parents are not legally married does not mean that they do not live together as if they were married.[126] Consequently, such statutory classifications limiting which grandchildren, and thus which grandparents, may benefit from the grandchild-grandparent relationship, are unfair and ineffectual.

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118. 619 A.2d 339 (Pa. Super. Ct. 1993).

119. 828 S.W.2d 630, 638 (Ky. 1992).

120. 493 A.2d 478, 478 (N.H. 1985).

121. *See id.*

122. *See King*, 828 S.W.2d at 632.

123. *See id.* (discussing that such considerations by the state do not go too far in intruding into the fundamental rights of the parents).

124. *See* Frame v. Nehls, 550 N.W.2d 739, 750 (Mich. 1996) (Levin, J., dissenting).

125. *See, e.g.*, Goff v. Goff, 844 P.2d 1087, 1091 (Wyo. 1993) (concluding the relationship between the grandparent and grandchild and its emotional implications are the same regardless of the marital status of the parents).

126. *See id.*

VI. EQUAL PROTECTION ISSUE

In addition to being unfair and ineffectual, statutory restrictions on grandparents' standing to petition for visitation rights based on the child's parents' marital status are unconstitutional, for they deny children born out of wedlock, and the grandparents of such children, equal protection of the laws.[127] Grandparent visitation statutes that allow grandparents of only those children whose parents' relationship has been disrupted by divorce, separation, or death, to petition for visitation rights, or even statutes that treat maternal and paternal grandparents of children born out of wedlock differently, deny a substantial group potential access to their grandparents.[128] This denial is based on a system of classification that *only* takes into account the parents' marital relationship.[129] Where the focus is supposed to be on the child's best interests, a state cannot treat all children equally and protect every child's best interests when it creates such a classification without first examining whether, in each specific situation, visitation with the child's grandparents would or would not benefit the parties involved.[130] The Equal Protection Clause of the Fourteenth Amendment provides that "no state shall deny to any person . . . equal protection of the laws."[131] A child is a person. Thus, this right is guaranteed to every child. Grandparents act as surrogates for their grandchildren who are too young to fight for their rights alone.[132] These rights are to be treated with equal dignity as the rights of children whose parents are divorced, separated, or where one parent has died.[133] While the terms "separated" or "where one parent has died" could be interpreted as to apply to a child born out of wedlock whose parents are living "separately" or whose parent has died (regardless of whether the parents are living together or not, so long as the child was born out of wedlock and one parent has died), these terms are understood to apply to those

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127. *See id.*

128. *See* Davik-Galbraith, *supra* note 16, at 158.

129. *See id.*

130. *See, e.g.*, Maner v. Stephenson, 677 A.2d 560, 564 (Md. 1996) ("[I]n every grandparent visitation case . . . the trial court must examine the totality of the circumstances and determine whether granting the petition would be in the child's best interests."); *see also* Fairbanks v. McCarter, 622 A.2d 121, 126 (Md. 1993). ("The trial court must concern itself solely with the welfare . . . of the child. In doing so, the court should assess in their totality all relevant factors and circumstances pertaining to the child's best interests.") *Id.*

131. U.S. CONST. amend. XIV, cl. 1.

132. *See* Frame v. Nehls, 550 N.W.2d 739 (Mich. 1996) (Levin, J., dissenting).

133. *See id.*

children of parents who were once legally married.[134] Construction of such statutes, seemingly based upon the fortuity of a marriage contract, violates the child's and the grandparents' equal protection rights under the Fourteenth Amendment and is thus unconstitutional.[135]

Discriminatory classifications based on illegitimacy are subject to intermediate or heightened scrutiny under the Equal Protection Clause of the Fourteenth Amendment.[136] To withstand intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective.[137] With respect to grandparent visitation rights, no important governmental objective would be advanced by providing an opportunity for grandparent visitation when the union of the parents of a legitimate child has been disrupted, and denying such an opportunity when the union of an illegitimate child's parents has been disrupted.[138] No well-founded justification exists for granting standing to a grandparent of a divorced couple's child whom he never sees, yet denying standing to a grandparent of a child born out of wedlock with whom he frequently visits. Research does not support a distinction between children born to married parents whose marriage ended by divorce, separation, or death, and children born out of wedlock.[139] A classification seemingly based upon the fortuity of a marriage contract of a child's parents, without an independent review of the circumstances of each case, makes little sense.

When examining the legislative history of some of the grandparent visitation statutes, one rationale that states offer for rigidly restricting grandparent visitation rights to a child of divorced or separated parents, or to a child whose parent has died, is that disagreements between the grandparents and their former son-in-law or daughter-in-law may occur and result in unreasonable denial of grandparent communication.[140] These legislatures were presuming that such a disruption causes harm to the child sufficient to justify the statutory classifications and state interference into parental autonomy.[141] Although this is a legitimate goal, it serves the states' objectives marginally, at best, because the very same consequences of divorce, separation, or a death of a parent could certainly be present

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134. *See id.* at 749.

135. *See Frame*, 550 N.W.2d at 750 (Levin, J., dissenting) (Levin cites language from the Court of Appeals noting that construction of such statutes based on the fortuity of a marriage contract violates the child's and the grandparents' equal protection rights).

136. *See* Clark v. Jeter, 486 U.S. 456, 461 (1988).

137. *See id.*

138. *See Frame*, 550 N.W.2d at 750 (Levin, J., dissenting).

139. *See id.*

140. *See id.* at 752.

141. *See* Roberts v. Ward, 493 A.2d 478, 481 (N.H. 1985).

when there is a breakdown in the relationship of unmarried parents.[142] The same risks of vindictiveness and limited visitation could exist.[143] A grandparent of an illegitimate child could very well have occupied an important place in the child's life, and suddenly severing this love and affection could emotionally harm an illegitimate child the same as it would a legitimate child.[144] Thus, it appears that states that do not extend grandparent visitation rights to *all* children are assuming that not all children need as much love and support as others.[145] States are assuming that children born out of wedlock might not benefit from the grandparent-grandchild relationship the same way a child born in wedlock could. All children deserve the care of a loving and supportive family. Why penalize an innocent child simply because he or she was born out of wedlock? The fact that grandparent visitation statutes exist at all, coupled with the fact that some grandparents—whether they be those of grandchildren whose parent has died or those of grandchildren whose parents are divorced or separated—are granted standing to determine whether visitation would be in the child's best interests suggests that states recognize that visitation could be beneficial to the child and the love and support that stems from the grandparent-grandchild relationship could be in the child's best interests.[146] However, creating a statutory classification based on a child's parents' relationship suggests that a state is focusing on the parents' interests, rather than on the most important interest involved—the best interests of the child.[147]

It should be emphasized that this issue concerns whether there should be a *hearing* concerning what is in the child's best interests, not whether visitation should be ordered regardless of the love or availability of these grandparents.[148] If a court cannot presume that visitation is in the best interests of a child whose parents' relationship has been disrupted by death, divorce, or separation without first examining the facts in each

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142. *See generally Frame*, 550 N.W.2d at 752 (Levin, J., dissenting) (explaining that a disruption can occur whether parents are married or not).

143. *See id.*

144. *See id.*

145. *See id.*

146. *See, e.g., Roberts*, 493 A.2d 478, 481; King v. King, 828 S.W.2d 630, 632 (Ky. 1992).

147. *See generally* Davik-Galbraith, *supra* note 16, at 160 (discussing that visitation statutes stipulating that grandparents of only those children whose parents are divorced, separated, etc. may petition for visitation rights deny a substantial group access to their grandparents and these classifications only take into account the parents' relationship, thus discriminating among children, without their best interests being taken into account).

148. *See* Frame v. Nehls, 550 N.W.2d 739, 751 (Mich. 1996) (Levin, J., dissenting).

situation, then how can a court presume that visitation is *not* in a child's best interests without examining the facts in each individual situation? Visitation statutes that create discriminatory classifications, either by excluding children born out of wedlock altogether or by distinguishing between maternal and paternal grandparents of children born out of wedlock, frustrate the legislative intent of such statutes which is to ensure that the best interests of the child take first priority.[149] It seems logical to infer that upon creating such statutory classifications, states are presuming that visitation would not be in the best interests of *all* children born out of wedlock. To presume this without making individual determinations concerning whether visitation would be in each individual child's best interests constitutes denial of that child's equal protection rights.[150]

The Supreme Court has frequently been confronted with questions regarding equal protection rights of illegitimate children and invalidated classifications that burden illegitimate children for the sake of punishing the illegitimate relationships of their parents.[151] For purposes of evaluating equal protection challenges to statutes limiting the rights of illegitimate children, the Court's analysis is relevant here. In cases involving tort actions where illegitimate children were denied the same recovery rights as were granted to legitimate children, such as *Levy v. Louisiana*, which involved a statute barring an illegitimate child from recovering for the wrongful death of his mother when such recovery by a legitimate child was authorized, the Supreme Court has rejected such discriminatory classifications.[152] The Court has frequently stated that there is no constitutionally sufficient justification for denying such essential rights to children simply because their natural mother did not marry their natural father.[153] States have attempted to justify such a discrimination of children in order to promote normal family relationships by discouraging birth outside of wedlock or to prevent prosecution of fraudulent claims.[154] However, even where fraudulent claims by illegitimate children are more frequent than by legitimate children, the Supreme Court has rejected this

149. *See id.*

150. *See generally* Gillman, *supra* note 14, at 1285-1303 (discussing grandparent visitation rights when the parents object).

151. *See* U.S. CONST. art. I, § 8 (enunciating powers of Congress which do not encompass power over grandparent visitation rights matters); U.S. CONST. amend. X ("The powers not delegated to the United Stated by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."); *see also* Glona v. American Guarantee & Liab. Ins. Co., 391 U.S. 73 (1968); Levy v. Louisiana, 391 U.S. 68 (1968).

152. *See Levy*, 391 U.S. at 68.

153. *See id.*

154. *See id.* at 70.

justification and has consistently maintained that the child's birth out of wedlock bears no reasonable relation to the purpose of wrongful-death statutes, which is to compensate children for the death of a mother. Therefore, statutes distinguishing between legitimate and illegitimate children deny illegitimate children equal protection rights of the laws.[155] The Court has found this discriminatory classification "illogical," "unjust," and unsupported by any legitimate state interest.[156]

In *Trimble v. Gordon*,[157] the Supreme Court held that a provision of the Illinois Probate Act which allowed children born out of wedlock to inherit by intestate succession only from their mothers, whereas children born in wedlock could inherit by intestate succession from both their mothers and fathers, denied equal protection to children born out of wedlock.[158] There, the Court concluded that the statutory discrimination against children born out of wedlock was unjustified.[159] Additionally, in *Weber v. Aetna Casualty & Surety Co.*,[160] a Louisiana workmen's compensation law discriminated against the class of children born out of wedlock, denying them the benefits of workmen's compensation.[161] The Court rejected the state's justification for its classification for protecting legitimate family relations, stating that "no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent."[162] And here too, where the rights being denied involve the opportunity to *know* and *love* a grandparent or to *continue* an already established, meaningful relationship with a grandparent if it is determined to be in that child's best interests, and not the opportunity to *recover* from a tort action involving a *monetary award*, discriminatory classifications in grandparent visitation statutes based on a child's parents' decision not to marry are equally, if not more, "illogical," "unjust," and unsupported by any legitimate state interest.

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155. *See id.* at 68.

156. *See id.* at 71.

157. 430 U.S. 762 (1977).

158. *See id.* at 765-66.

159. *See id.* at 766.

160. 406 U.S. 164 (1972).

161. *See id.* at 173.

162. *Id.* at 175.

VII. MODEL STATUTE

When considering whether a grandparent should be granted visitation, a court must focus on the child's best interests.[163] However, most grandparent visitation statutes lack specific criteria for determining what constitutes "best interests of the child."[164] Thus, what appears to be an important factor to one judge may be insignificant to another judge.[165] In addition to the inconsistent interpretations of the best interests standard, the lack of uniformity among grandparent visitation statutes creates difficulties for both parents and grandparents in fully understanding their rights regarding the children.[166] Consequently, while the courtroom is not the ideal forum to resolve conflicts involving children, it has become the last resort for settlement.[167] Without clearly defined guidelines, it is the child, who is supposed to benefit from these statutes, that often suffers the most.[168] Therefore, it is imperative to have clear and concise statutes to protect not only the rights of the children born out of wedlock, but also the rights of all children.[169]

The model statute that this note proposes will hold the best interests of the child as paramount and automatically grant standing to all grandparents. It will balance the rights of parents (married, unmarried, widowed, or divorced), grandparents, and the child; however, the focus remains on the needs of the child. The statute will mirror Maine's subsection on best interests[170] and will include the following sections, among others:

1. Standing to Petition for Visitation Rights:[171] *Any* grandparent of a minor child shall have the right and privilege to petition the court for visitation rights.

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163. *See* Richard S. Victor, *Grandparent Rights to Visitation*, 16 FAM. ADVOC. 40 (1993).

164. *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-337.01 (West 1989 & Supp. 1992); MD. CODE ANN., FAM. LAW § 9-102 (1991); WASH. REV. CODE ANN. § 26.09.240 (West 1989 & Supp. 1992); *see also* Jackson, *supra* note 1, at 566-67 (commenting that most visitation statutes do not indicate how to determine what is in the best interests of the child).

165. *See* Jackson, *supra* note 1, at 569.

166. *See id.*

167. *See id.*

168. *See* Davik-Galbraith, *supra* note 16, at 163; Shandling, *supra* note 8, at 133.

169. *See* Jackson, *supra* note 1, at 591.

170. ME. REV. STAT. ANN. tit. 19, § 1003(2) (West 1995).

171. *Id.*

2. Mediation:[172] Upon petitioning for visitation, the court may refer the grandparent(s) and the child's legal parents to mediation and may require that the parties have made a good faith effort to mediate the issue and resolve the family conflict before bringing the matter before a judge in order to lessen the trauma for the child. If mediation should fail, however, the case shall be brought before a judge. After an *independent examination of the totality of the circumstances* in each case, the judge, along with other appropriate professionals, counselors, and therapists as needed, will grant grandparent visitation privileges on a showing that such visitation would be in the child's best interests.[173]

3. Best interests of the child:[174]

> The court may grant a grandparent reasonable rights of visitation or access to a minor child upon finding that rights of visitation or access would be in the best interest of the child and would not significantly interfere with any parent-child relationship or with the parent's rightful authority over the child. In applying this standard the court shall consider the following factors:
>
> A. The age of the child;
> B. The relationship of the child with the child's grandparents, including the amount of previous contact;
> C. The preference of the child if old enough to express a meaningful preference;
> D. The duration and adequacy of the child's current living arrangements and the desirability of maintaining continuity with the child's grandparent(s);
> E. The stability of any proposed living arrangements for the child;
> F. The motivation of the parties involved and their capacities to give the child love, affection, and guidance;
> G. The child's adjustment to the child's present home, school, and community;

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172. *Id.* § 1003-a.

173. Factors which the court may consider in determining whether or not to grant grandparents visitation include: whether the child has lived with the grandparents and the length of that residence; whether the grandparents have stood in loco parentis to the child; the effect on the child's physical and emotional health engendered by visitation or lack of it; the circumstances regarding visitation; friction between the parents and grandparents. *See generally* Victor, *supra* note 163, at 40 (discussing various factors that the court should consider for granting grandparent visitation rights).

174. ME. REV. STAT. ANN. tit. 19, § 1003(2) (West 1995).

H. The capacity of the parent and grandparent to cooperate or to learn to cooperate in child care;
I. Methods of assisting cooperation and resolving disputes, and each person's willingness to use those methods; and
J. Any other factor having a reasonable bearing on the physical and psychological well-being of the child.[175]

By adopting a similar, open-ended statute with clearly defined guidelines for granting visitation rights, states can ensure that the rights of every grandparent and grandchild, regardless of the child's parents' marital status, are being protected by providing all grandparents with an equal opportunity to be heard.[176] Merely granting all grandparents the opportunity to *petition* for visitation with their grandchildren, and not guaranteeing that all grandparents will automatically *receive visitation* without a thorough examination of the facts in each particular situation will ensure the protection of such rights.[177] Additionally, the statute would respect parental autonomy, for the child's best interests. And, if states work together to construct a more consistent set of visitation laws which focus on the most important interests of all, the best interests of the child, then the purpose of the grandparent visitation rights statute will be served.

VIII. CONCLUSION

The rights of children born out of wedlock have been ignored too long. Legislatures need to stop punishing the innocent children born out of wedlock and start granting them the same rights as children born in wedlock whose parents are no longer living together. To close the door on an entire segment of children merely based on their parents' marital status is wrong. For purposes of grandparent visitation statutes, there should be no difference between these two groups of children. These children should not be considered to have less rights than other children. Accordingly, grandparent visitation laws need to reflect sociological changes in modern family life. That the nuclear family is no longer so prevalent and that grandparents may have an active role in a child's life are realities today. These concepts must be dealt with in our laws so as to fill the void that presently exists in many of the states' grandparent visitation statutes. If a grandparent has been a part of his or her grandchild's life and wishes to continue this nurturing relationship, our laws should protect that right for the grandparent and grandchild whether born in wedlock or out of wedlock. This does not mean courts should

175. *Id.*

176. *See* Jackson, *supra* note 1, at 570.

177. *See id.* at 590-91, 593-96.

grant visitation to every grandparent involved in a child's life. However, if visitation proves to be in the child's best interests, and is being unreasonably denied by a parent because of family bickering unrelated to the love and support that that grandparent has offered and would continue to offer the child, then there should be a forum available wherein requests for visitation may be heard.[178] This forum could be available in every state through the adoption of open-ended statutes.[179] It is time to stop ignoring children born out of wedlock and pass laws which fundamentally respect the needs of all children in our country.

Nicole E. Miller

178. *See* Richard S. Victor, *The Right to Visit*, 1986 OAKLAND COUNTY B. ASS'N 8.

179. *See* Victor, *supra* note 163, at 40.