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COMMENT

**GRANDPARENTS ACT AS THE 'NATIONAL GUARD' OF
THEIR FAMILIES — ALWAYS EAGER AND READY TO
RESPOND WHEN IN NEED: A CALL FOR EXPANSION OF
GRANDPARENT VISITATION RIGHTS IN NORTH
CAROLINA**

TRICIA V. ARGENTINE*

I. INTRODUCTION

Charles and Janice, two loving North Carolina grandparents, eagerly assumed an increased child care and child custody role of their granddaughter, Taylor, when their son, Michael, separated from his wife and needed a place to live.¹ During this time, Charles and Janice warmly opened their home to provide for their son and granddaughter and acted as the primary care givers of their granddaughter when her parents had to work.² Taylor would consistently spend at least four consecutive days living with her grandparents every week.³ Tragically, when Michael was killed in a car accident, Taylor's mother refused Charles and Janice any further visitation.⁴ Despite the constant care provided to Taylor by her grandparents, Taylor's mother wrongfully removed her from the nurturing environment to which she was accustomed.⁵ Seeking to preserve the only family that Taylor had ever known, and to provide support during Taylor's heartbreaking loss of her father, Charles and Janice petitioned a North Carolina court for visitation.⁶

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1. Plaintiff-Appellant's Brief at 3, *Montgomery v. Montgomery*, 524 S.E.2d 360 (N.C. Ct. App. 2000) (No. COA99-315), 1999 WL 33760472 at *3.

2. *Id.* at 10–11.

3. *Id.* at 10.

4. *Id.* at 11.

5. *Id.*

6. *Montgomery v. Montgomery*, 524 S.E.2d 360, 361 (N.C. Ct. App. 2000).

The North Carolina Court of Appeals denied Charles and Janice standing to seek visitation with their granddaughter.⁷ The Court held that, despite the fact that Taylor had previously lived with her grandparents, the petition for visitation was filed at a time when the child was residing with her mother, in what North Carolina considers an “intact family.”⁸ North Carolina General Statute § 50-13.1(a) prohibits standing for grandparents seeking visitation rights when: (1) there is no ongoing custody proceeding; and (2) the grandchild’s family is intact.⁹ Consequently, there was no ongoing custody proceeding and Taylor, their grandchild, lived in an “intact family” at the time of their action. Thus, Janice and Charles were unable to seek visitation with their granddaughter, who once lived with them and for whom they previously provided primary care.¹⁰

This story is all too familiar for many North Carolina grandparents who lack the statutory standing to seek visitation with their grandchildren. This article will discuss the need for expansion of grandparent visitation rights in North Carolina. The focus of this discussion will be on supporting the repeal of the now restrictive statutes, and replacing them with a balanced statute that will provide for the needed protection of both grandparents and parents of North Carolina.

II. THE IMPORTANCE OF THE GRANDPARENT-GRANDCHILD RELATIONSHIP

The role that grandparents play in their grandchildren’s lives continues to grow as the family structure in the United States becomes more diverse.¹¹ Factors such as single parenthood, divorce, economic hardship, incarceration, and drug and alcohol abuse continue to influence this role.¹² The U.S. Census Bureau reported that between the years 2000 and 2010, the unmarried population grew forty-one percent, which was more than four times as fast as the overall household population (ten percent).¹³ Further, in 2011, the divorce rate in the U.S. was 52.9 %, ¹⁴ and North Carolina’s divorce rate

7. *Id.* at 362.

8. *Id.*

9. *Id.* at 362.

10. *Id.* at 362.

11. Jeff Atkinson, *Shifts in the Law Regarding the Rights of Third Parties to Seek Visitation and Custody of Children*, 47 FAM. L.Q. 1 (Spring 2013).

12. Tammy L. Henderson, *Grandparent Visitation Rights: Justices’ Interpretation of the Best Interests of the Child Standard*, 26 J. FAM. ISSUES 638, 639 (2005).

13. DAPHNE LOFQUIST, TERRY LUGAILA, MARTIN O’CONNELL & SARAH FELIZ, HOUSEHOLDS AND FAMILIES: 2010, 3 (U.S. Census Bureau ed. C2010B-14) (2012), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-14.pdf>.

14. Centers for Disease Control and Prevention, *National Marriage and Divorce Rate Trends*, http://www.cdc.gov/nchs/nvss/marriage_divorce_tables.htm (last updated Feb. 19, 2013).

was fifty-five percent.¹⁵ In 2009, the South had a higher rate of divorce than any other region of the country.¹⁶ Research shows that grandparents continue to exchange services with their children after divorce, including tangible and intangible support such as financial, emotional, and child care.¹⁷ These contributions have implications for grandparent visitation decisions in cases involving remarriage, adoption, divorce, and parental death.¹⁸

Grandparents are also part of the fastest growing population: the elderly, with more than 185 million adults in the United States being grandparents in 2011.¹⁹ Of this population, more than 7 million grandparents in the U.S. had children under the age of eighteen living with them, with 2.7 million of these grandparents maintaining responsibility for the basic needs of their grandchildren.²⁰ In North Carolina, 7.8 percent of the children under the age of eighteen live in homes where the householders are grandparents.²¹ Of these children, more than 35,000 do not have parents living in the home.²² Additionally, 89,622 grandparents in North Carolina are the householders who are responsible for their grandchildren.²³

Research supports that facilitating the grandparent-grandchild relationship can be particularly significant during adolescence, as this “is a time of transition that impacts both closeness and conflict in parent-child relationship, and is a time when adolescents perceive grandparents to be more un-

15. Centers for Disease Control and Prevention, *Divorce rates by State: 1990, 1995, and 1999–2011*, http://www.cdc.gov/nchs/data/dvs/divorce_rates_90_95_99-11.pdf (last visited Apr. 14, 2014); Centers for Disease Control and Prevention, *Marriage rates by State: 1990, 1995, and 1999–2011*, http://www.cdc.gov/nchs/data/dvs/marriage_rates_90_95_99-11.pdf (last visited Apr. 14, 2014).

16. Diana B. Elliott & Tavia Simmons, MARITAL EVENTS OF AMERICANS: 2009, 3–5 (U.S. Census Bureau, ed. ACS-13) (Aug. 2011), available at <http://www.census.gov/prod/2011pubs/acs-13.pdf> (10.2 per 1,000 for men and 11.1 per 1,000 for women. Southern states range from 10.0 to 13.5 per 1,000 for divorce rates, which was higher than the U.S. average); see also Centers for Disease Control and Prevention, *Divorce Rates by State: 1990, 1995, and 1999–2011*, http://www.cdc.gov/nchs/data/dvs/divorce_rates_90_95_99-11.pdf (last visited Apr. 14, 2014); Centers for Disease Control and Prevention, *Marriage rates by State: 1990, 1995, and 1999–2011*, http://www.cdc.gov/nchs/data/dvs/marriage_rates_90_95_99-11.pdf (last visited Apr. 14, 2014).

17. Henderson, *supra* note 12.

18. *Id.*

19. U.S. Census Bureau, *Grandparents Living With Own Grandchildren Under 18 Years*, http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_11_1YR_B10050&prodType=table.html (last visited Apr. 14, 2014).

20. Press Release, U.S. Census Bureau, National Grandparents Day 2013: Sept. 8 (July 8, 2013), available at https://www.census.gov/content/dam/Census/newsroom/facts-for-features/2013/cb13-ff18_grandpar.pdf.

21. Am. Ass’n of Retired Perss., *Grandfacts: State fact sheets for grandparents and other relatives raising children*, 1, available at <http://www.aarp.org/content/dam/aarp/relationships/friends-family/grandfacts/grandfacts-northcarolina.pdf> (last visited Apr. 14, 2014).

22. *Id.*

23. *Id.* (Noting of these grandparents: 52 percent of them are White and not Hispanic, 40 percent are Black/African American, 3 percent are American Indian and Alaska Native, and 5 percent are Hispanic/Latino. Further, 45 percent of these grandparents are in a home where no parents of the children are present, and 70 percent are under the age of 60, with 23 percent living in poverty.).

derstanding and patient than parents.”²⁴ For children from divorced families, this relationship is said to be the most stable in the child’s life, with grandparents being seen as “friends, mentors, and advisors to children as they transition from adolescence to adulthood.”²⁵ Further, research shows the importance of grandparents’ emotional involvement with adolescents.²⁶ The child’s “closeness with grandparents is related to lower internalizing and externalizing behaviors; and reduced depressive symptoms; and that grandparents’ involvement is related to lower emotional distress and higher levels of prosocial behavior.”²⁷ Moreover, grandparents’ financial involvement has been positively associated with adolescent school engagement and academic success.²⁸

III. HISTORY AND CONSTITUTIONAL BASES OF GRANDPARENT VISITATION LAWS

“At common law, grandparents had no standing to sue for visitation of their grandchildren.”²⁹ Grandparent visitation was considered a moral, but not a legal right provided by parents.³⁰ The first grandparent visitation statute was enacted in 1966, in New York; while the last state to enact a grandparent visitation statute (prior to *Troxel v. Granville*)³¹ was Nebraska in 1986.³² Historically, parents have had the ultimate right to raise their children, including the right to determine with whom they may visit, without interference from the courts.³³ This principle is rooted in the Fourteenth Amendment, which establishes an American’s right to privacy.³⁴ The right to privacy, as held by the United States Supreme Court, includes the familial relationship.³⁵ As such, the courts have held that parents have a “fundamental, constitutionally-protected right to determine what is best for their

24. Jeremy B. Yorgason, Laura Padilla-Walker & Jami Jackson, *Nonresidential Grandparents’ Emotional and Financial Involvement in Relation to Early Adolescent Grandchild Outcomes*, 21(3) J. RES. ON ADOLESCENCE 552, 552 (2011).

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 556.

29. *Montgomery v. Montgomery*, 524 S.E.2d 360, 361 (N.C. Ct. App. 2000).

30. *Atkinson*, *supra* note 11, at 2.

31. 530 U.S. 57 (2000) (*Troxel* is a U.S. Supreme Court case in which the Court addressed the constitutionality of a Washington state statute that allowed grandparents the standing to petition the court for visitation.).

32. *Atkinson*, *supra* note 11, at 2.

33. Victoria Roth, *Grandparents’ Right to Visitation*, 1 ELDER’S ADVISOR 51, 52 (2000).

34. *Id.*

35. *Id.*

children.”³⁶ Furthermore, courts have held that the “custody, care, and nurture of the child resides first with the parent.”³⁷

In contrast to a parent’s constitutional protection, the state also has a duty, under the *parens patriae* doctrine, to protect the best interest of the child.³⁸ This doctrine allows a state to interfere with a parent’s rights when a child’s health, welfare, or well-being is of concern.³⁹ In order to align this duty with that of the constitutional rights of parents, the courts have required that states have a compelling interest in order to interfere with a family relationship.⁴⁰ As such, visitation statutes revolve around the events that trigger a state to intervene on behalf of a child.⁴¹

The most common visitation statutes allow standing upon the divorce or separation of the parents (thirty-six states) or upon the death of a parent (thirty states).⁴² Grandparents have standing in eleven states to seek visitation if the grandchild was living with them for a specific time period, usually between six and twelve months.⁴³ Twenty states allow grandparents standing for visitation of children who are born out of wedlock.⁴⁴ Many of these statutes list common factors that a court should consider when deciding whether to grant visitation, including: (1) the time and quality of contact; (2) the relationship with the child’s parents; (3) the effect of or absence of the relationship with the child and the third party; (4) the preference of the child; (5) the health of all individuals; and (6) any history of domestic violence or child abuse.⁴⁵

A. *Troxel v. Granville*

For the first time, in 2000, the United States Supreme Court addressed the constitutionality of a statute that allowed grandparents the standing to petition the court for visitation.⁴⁶ The Supreme Court addressed a section of the Revised Code of Washington which permitted “any person” to petition for visitation rights at “any time,” allowing the court to grant visitation when it would be in the best interest of the child.⁴⁷ The paternal grandpar-

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. Atkinson, *supra* note 11, at 2–3.

43. *Id.* at 3.

44. *Id.*

45. See Atkinson, *supra* note 11 app., at 18–24 (providing a chart with citations and descriptions of the statutes across the nation).

46. *Troxel v. Granville*, 530 U.S. 57 (2000).

47. *Id.* at 60 (“Section 26.10.160(3) [of the Revised Code of Washington] provides: ‘Any person may petition the court for visitation rights at any time including, but not limited to, custody proceedings.

ents petitioned the Washington Superior Court for the right to visit their granddaughters.⁴⁸ The petitioners' son, Brad, had a relationship with the children's mother, Tommie, that ended in June 1991.⁴⁹ The two never married, and after they separated in 1991, Brad moved in with his parents and brought his daughters to his parents' house for weekend visitation.⁵⁰ In May 1993, Brad committed suicide.⁵¹ Petitioners continued to visit with their granddaughters until October 1993, when the mother limited the visitation to one short visit per month.⁵² The grandparents then petitioned the Washington Superior Court in December 1993 to obtain visitation rights with their granddaughters.⁵³

Finding that the petitioners were a part of a loving family and could provide the children with activities, music, and visits with their cousins, the Washington Superior Court ordered visitation one weekend per month, one week during the summer, and four hours on both of the petitioning grandparents' birthdays.⁵⁴ The Washington Court of Appeals reversed, holding that the non-parents lacked standing to seek visitation under the statute unless a custody action was ongoing.⁵⁵ The Washington Supreme Court reviewed the case and disagreed with the Court of Appeals' decision regarding the literal reading of the statute; nevertheless, it still held that the petitioners could not obtain visitation.⁵⁶ The court focused its decision on the U.S. Constitution, holding that the statute "unconstitutionally infringes on the fundamental right of parents to rear their children."⁵⁷ Further, the Washington Supreme Court held that the Constitution permits a state to interfere with the fundamental right of the parents only to prevent harm or potential harm to the children.⁵⁸

The United States Supreme Court granted certiorari and affirmed the judgment of the Washington Supreme Court on different grounds.⁵⁹ The Court looked to the Due Process Clause of the Fourteenth Amendment and the substantive component of the Clause that "provides heightened protection against government interference with certain fundamental rights and

The court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances.'").

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 61.

53. *Id.*

54. *Id.*

55. *Id.* at 62.

56. *Id.* at 62–63.

57. *Id.* at 63.

58. *Id.*

59. *Id.* at 63–67.

liberty interest.”⁶⁰ The Court, in a plurality opinion, held that the Washington statute unconstitutionally infringed on the fundamental right of a fit parent to rear his or her child.⁶¹ The Court stated that the interest of parents in the care, custody, and control of their children is the oldest fundamental right recognized by the Court.⁶² The Court further held that the Washington non-parental visitation statute was “breathtakingly broad” because it allowed any person, at any time, to petition a court for visitation, and further provided no requirement that a court accord the parent’s decision any presumption or weight.⁶³

In applying these findings to the facts of the case, the Court held the statute exceeded the bounds of the Due Process Clause.⁶⁴ First, the Court found error in that the petitioners did not allege, nor did the lower court find, that the mother was unfit, as there is a presumption that fit parents act in the best interest of their children.⁶⁵ The Court also noted that the problem in this case was not that the court intervened, but more so that the court did not give any special weight to the mother’s decision on what was in the best interest of her daughters.⁶⁶ The Court also noted that there was no allegation that the mother ever completely cut-off the grandparents from visitation, but rather that she wished to limit it.⁶⁷ Additionally, the Court held that it was unconstitutional for the statute to place no limits on the party bringing the petition, as well as for the statute to provide no direction for when the court may grant the petition.⁶⁸ The Court did not consider the constitutional question of whether the Due Process Clause requires all non-parental visitation statutes to include a showing of harm or potential harm.⁶⁹

The Court in *Troxel* did not preclude grandparent visitation; it only suggested that “special factors” be shown in order to seek visitation, and that deference must be given to the parents.⁷⁰ The Court stated, “[b]ecause much state-court adjudication in this context occurs on a case-by-case basis, we would be hesitant to hold that specific non-parental visitation statutes violate the Due Process Clause as a *per se* matter.”⁷¹

60. *Id.* at 65.

61. *Id.* at 65, 67.

62. *Id.* at 65.

63. *Id.* at 71.

64. *Id.* at 68.

65. *Id.*

66. *Id.* at 69.

67. *Id.* at 71.

68. *Id.* at 73.

69. *Id.*

70. Atkinson, *supra* note 11, at 1.

71. *Troxel*, 530 U.S. at 73.

B. *Changes Following Troxel*

After the U.S. Supreme Court plurality decision in *Troxel*, many changes in state law arose from actions taken by both legislatures and court decisions.⁷² Thirteen states modified their visitation statutes to provide more protections for the rights of parents.⁷³ These protections included: (1) a presumption that the parents' decision is correct;⁷⁴ (2) a requirement that allowing grandparent visitation will not adversely interfere with the parent-child relationship;⁷⁵ and (3) a heightened burden of proof on the grandparent—showing by clear and convincing evidence that visitation is in the best interest of the child or that denial of visitation is unreasonable.⁷⁶ Moreover, although the decision in *Troxel* did not require a finding of harm to the child, some states require the grandparents to prove that the child will be harmed if visitation is not granted.⁷⁷ Since *Troxel*, the supreme courts of at least six states have struck down their grandparent visitation statutes as being overly broad.⁷⁸ Other state supreme courts have upheld their statutes as constitutional, and some have added safeguards for parents by setting requirements for grandparents to show in order to petition and gain visitation rights.⁷⁹

IV. WHERE STATES STAND NOW — “PERMISSIVE” AND “RESTRICTIVE” STATES

States vary greatly on who may petition for visitation rights, under what circumstances a party may file, and when the petition will be granted by the court.⁸⁰ States that view grandparent visitation as only a small infringement on a parent's right and focus more on the “best interests of the child” analysis are known as “permissive” states.⁸¹ In some permissive states any third party may petition the court for visitation.⁸² Additionally in these states, grandparents can petition for visitation, even in cases where the family is

72. Atkinson, *supra* note 11, at 5.

73. *Id.*

74. *Id.* (citing thirteen states: Arkansas, California, Illinois, Michigan, Missouri, Montana, Nevada, Oklahoma, Oregon, Rhode Island, South Carolina, Texas, and Virginia).

75. *Id.* (citing nine states: Maine, Minnesota, Nebraska, North Dakota, Pennsylvania, South Carolina, South Dakota, West Virginia, and Wyoming).

76. *Id.* (citing eleven states: Delaware, Iowa, Kentucky, Montana, Nebraska, Nevada, Oklahoma, Rhode Island, South Carolina, Utah, and Virginia).

77. *Id.*

78. *Id.* (citing six states: Florida, Hawaii, Illinois, Iowa, Michigan, and Washington).

79. *Id.*

80. Andrew Hook, *Grandparent Visitation Rights*, OAST & HOOK NEWS, (Oast & Hook, P.C., Elizabeth City, N.C.), Apr. 24, 2009, at 1.

81. *Id.*

82. *Id.*

considered “intact.”⁸³ Conversely, in “restrictive” states, parents in “intact” families are given the ultimate deference and grandparents may not petition for visitation unless, for example, there is an ongoing custody dispute, one or both parents have died, or the child is born out of wedlock.⁸⁴

New York is one of the most permissive states, allowing grandparents to seek visitation when one or both parents are deceased, or circumstances show that conditions exist which would allow intervention.⁸⁵ The court may then grant visitation when it is within the best interest of the child.⁸⁶ The New York Court of Appeals held that the statute “derogates” from the common-law rule that grandparents have no standing to seek visitation, and it “rests on the humanitarian concern that visits with a grandparent are often a precious part of a child’s experience and there are benefits which devolve upon the grandchild . . . which he cannot derive from any other relations.”⁸⁷ In 2007, the New York Court of Appeals upheld this statute as constitutional, and in distinguishing it from the Washington State statute found unconstitutional in *Troxel*, the court held that the statute:

[C]an be, and has been, interpreted to accord deference to a parent’s decision, although the statute itself does not specifically require such deference. Further, [the statute] is drafted much more narrowly than the Washington statute considered in *Troxel*. If the United States Supreme Court did not declare the “breathhtakingly broad” Washington statute to be facially invalid, then certainly the more narrowly drafted New York statute is not unconstitutional on its face. In fact, the Court indicated that it would be hesitant to hold specific nonparental visitation statutes unconstitutional per se because much state-court adjudication in this context occurs on a case-by case basis. *Troxel* does not prohibit judicial intervention when a fit parent refuses visitation, but only requires that a court accord some special weight to the parent’s own determination when applying a nonparental visitation statute.⁸⁸

83. *Id.*

84. *Id.* at 1–2.

85. Mary M. Janicki, *Grandparents’ Visitation Rights*, OLR Research Report, 2011-R-0079 (2011), available at <http://www.cga.ct.gov/2011/rpt/2011-R-0079.htm> (citing N.Y. Dom. Rel. Law § 72 (McKinney, Westlaw through 2014 legislation)) (“Where either or both of the parents of a minor child, residing within this state, is or are deceased, or where circumstances show that conditions exist which equity would see fit to intervene, a grandparent or the grandparents of such child may apply to [supreme or family court] and . . . the court, by order, after due notice to the parent or any other person or party having the care, custody, and control of such child, to be given in such manner as the court shall prescribe, may make such directions as the best interest of the child may require, for visitation rights for such grandparent or grandparents in respect to such child.”).

86. *Id.* at 1–2.

87. *Id.* (citing *E.S. v. P.D.*, 863 N.E.2d 100, 105–06 (N.Y. 2007)).

88. *E.S.*, 863 N.E.2d at 105–06 (alterations omitted) (internal quotation marks omitted) (quoting *Matter of Hertz v. Hertz*, 738 N.Y.S.2d 62, 65 (2002)).

California also takes a permissive approach to grandparent visitation, allowing an award for visitation rights (1) in a divorce, annulment, separation proceeding, or a custody hearing; or (2) on a grandparent's petition to the court.⁸⁹ The court will then determine the best interest of the child and apply a rebuttable presumption that it is not within the child's best interest if the parents agree that the grandparent should not be allowed to visit their children.⁹⁰ A petition can be filed: (1) when the parents are unmarried or living separately and apart; (2) if one parent has been absent for at least one month and his or her whereabouts are unknown; (3) if one parent joins in on the grandparents' petition; (4) if the child does not live with either parent; or (5) if the child has been adopted by a stepparent.⁹¹ The court may then award visitation if it finds a preexisting relationship with the grandparents and the child that serves in the child's best interest.⁹² The court balances the interest of the child against the parents' right.⁹³

V. NORTH CAROLINA GRANDPARENT VISITATION STATUTES

North Carolina is a "restrictive" state and has enacted four statutes that provide grandparents limited standing to seek visitation.⁹⁴ These four statutes will be analyzed individually below.

A. North Carolina General Statute § 50-13.1(a) — Action for Custody of Minor Child

The first statute, § 50-13.1(a) of the North Carolina General Statutes, grants general standing to any person claiming a right to custody or visita-

89. Janicki, *supra* note 85 (citing CAL. FAM. CODE § 3103 (West, Westlaw through 2014 legislation)) ("(a) Notwithstanding any other provision of law, in a proceeding described in Section 3021, the court may grant reasonable visitation to a grandparent of a minor child of a party to the proceeding if the court determines that visitation by the grandparent is in the best interest of the child. (b) If a protective order as defined in Section 6218 has been directed to the grandparent during the pendency of the proceeding, the court shall consider whether the best interest of the child requires that visitation by the grandparent be denied. (c) The petitioner shall give notice of the petition to each of the parents of the child, any stepparent, and any person who has physical custody of the child, by certified mail, return receipt requested, postage prepaid, to the person's last known address, or to the attorneys of record of the parties to the proceeding. (d) There is a rebuttable presumption affecting the burden of proof that the visitation of a grandparent is not in the best interest of a minor child if the child's parents agree that the grandparent should not be granted visitation rights.").

90. *Id.* at 3.

91. *Id.* (citing CAL. FAM. CODE § 3104 (West, Westlaw through 2014 legislation)).

92. *Id.* at 4.

93. *Id.*

94. Cheryl Howell, *Third Party Custody and Visitation Actions: 2010 Update to the State of the Law in North Carolina*, 25 FAM. L. BULL. 1, 22, UNC School of Government (2011) available at <http://sogpubs.unc.edu/electronicversions/pdfs/flb25.pdf>.

tion.⁹⁵ This statute was at issue in both *Peterson v. Rogers*⁹⁶ and *Price v. Howard*.⁹⁷

N.C. Gen. Stat. § 50-13.1(a) states:

Any parent, relative, or other person, agency, organization or institution claiming the right to custody of a minor child may institute an action or proceeding for the custody of such child, as hereinafter provided. Any person whose actions resulted in a conviction under G.S. 14-27.2, G.S. 14-27.2A, or G.S. 14-27.3 and the conception of the minor child may not claim the right to custody of that minor child. Unless a contrary intent is clear, the word “custody” shall be deemed to include custody or visitation or both.⁹⁸

Reading N.C. Gen. Stat. § 50-13.1(a) literally, the statute seems to grant broad standing to grandparents seeking custody or visitation at any time.⁹⁹ The statute further provides that custody shall be deemed to include visitation.¹⁰⁰ However, the North Carolina Supreme Court has applied canons of statutory construction to hold that the statute only grants grandparents standing for custody, not visitation.¹⁰¹ In *McIntyre v. McIntyre*,¹⁰² the North Carolina Supreme Court held that reading the statute in conjunction with N.C. Gen. Stat. §§ 50-13.2(b1), 50-13.5(j), and 50-13.2A, strongly suggests that the legislature did not intend for “custody” and “visitation” to be synonymous in grandparents’ rights.¹⁰³ The three statutes that provide standing for grandparents to seek visitation only apply to specified situations.¹⁰⁴ Therefore, in order to be clear, the Court held that § 50-13.1(a) “does not grant [grandparents] the right to sue for visitation when no custody proceeding is ongoing and the minor children’s family is intact.”¹⁰⁵

B. North Carolina General Statute § 50-13.2(b1) — Visitation Rights for Grandparents

N.C. Gen. Stat. § 50-13.2(b1) provides grandparents standing to seek visitation only during an ongoing custody dispute.¹⁰⁶ According to the N. C. Court of Appeals, the statute does not allow grandparents to initiate an in-

95. *Id.*

96. 445 S.E.2d 901 (N.C. 1994).

97. 484 S.E.2d 528 (N.C. 1997).

98. N.C. GEN. STAT. § 50-13.1(a) (2013).

99. Howell, *supra* note 94, at 2.

100. N.C. GEN. STAT. § 50-13.1(a) (2013).

101. *Wellons v. White*, 748 S.E.2d 709 (N.C. 2013).

102. 641 S.E.2d 745 (N.C. 1995).

103. *Id.* at 749.

104. *Id.* at 749–50.

105. *Id.*

106. N.C. GEN. STAT. § 50-13.2 (b1) (2013).

dependent action for visitation.¹⁰⁷ Although the North Carolina appellate courts have not expressly addressed the constitutionality of the grandparent visitation statutes, a point of contention remains regarding whether the courts have implicitly done so by limiting the application of this statute to where parents are involved in an “ongoing” custody dispute.¹⁰⁸

N.C. Gen. Stat. § 50-13.2(b1) provides:

An order for custody of a minor child may provide visitation rights for any grandparent of the child as the court, in its discretion, deems appropriate. As used by this subsection, ‘grandparent’ includes a biological grandparent of a child adopted by a stepparent or a relative of the child where a substantial relationship exists between the grandparent and the child. Under no circumstances shall a biological grandparent of a child adopted by adoptive parents, neither of whom is related to the child and where parental rights of both biological parents have been terminated, be entitled to visitation rights.¹⁰⁹

In *Smith v. Bardour*,¹¹⁰ the N.C. Court of Appeals held that the grandparents had standing to petition for visitation of their grandchild.¹¹¹ In this case, the lower court entered a custody order and left open possible visitation rights to the mother.¹¹² The court held the custody order was still “at issue” and “ongoing,” granting standing to the grandparents and permitting the grandparents to seek intervention under the statute.¹¹³ Further, in *Quesinberry v. Quesinberry*,¹¹⁴ the N.C. Court of Appeals held that a settlement between parents about custody did not dissolve the court’s jurisdiction in hearing the grandparents’ suit to visitation, as the grandparents brought the petition when there was an ongoing custody dispute.¹¹⁵

C. North Carolina General Statute § 50-13.5(j): Custody and Visitation Rights of Grandparents

N.C. Gen. Stat. § 50-13.5(j) provides:

In any action in which the custody of a minor child has been determined, upon a motion in the cause and a showing of changed circumstances pursuant to G.S. 50-13.7, the grandparents of the child are entitled to such custody or visitation rights as the court, in its discretion, deems appropriate. As used in this subsection, “grandparent” includes a biological grand-

107. Howell, *supra* note 94, at 22.

108. *Id.*

109. N.C. GEN. STAT. § 50-13.2 (b1) (2013).

110. 671 S.E.2d 578 (N.C. Ct. App. 2009).

111. *Id.* at 583.

112. *Id.*

113. *Id.*

114. 674 S.E.2d 775 (N.C. Ct. App. 2009).

115. *Id.*

parent of a child adopted by a stepparent or a relative of the child where a substantial relationship exists between the grandparent and the child. Under no circumstances shall a biological grandparent of a child adopted by adoptive parents, neither of whom is related to the child and where parental rights of both biological parents have been terminated, be entitled to visitation rights.¹¹⁶

This statute allows for courts to retain jurisdiction in prior orders regarding visitation and custody of a child.¹¹⁷ It also permits reconsideration of prior orders if the party seeking modification can show a "substantial change of circumstances" has occurred since the original order, and that a modification is in the best interest of the child.¹¹⁸ The "substantial change of circumstances" can be demonstrated by showing that the grandparents were able to visit the children prior to the custody order but were then denied visitation.¹¹⁹ The courts have held that this statute may not be used to allow intervention "in a custody action between parents after one of the parents dies because the action actually abates upon the death of one party."¹²⁰

In *Eakett v. Eakett*,¹²¹ the paternal grandfather cared for his grandson following a divorce proceeding and custody order granting the child's mother full custody.¹²² The paternal grandfather continued to care for his grandson for approximately three months until the mother ended her employment and refused to allow the grandfather any contact with his grandson.¹²³ The grandfather petitioned the court seeking visitation rights, arguing that N.C. Gen. Stat. § 50-13.5(j) allows intervention by grandparents after custody of the minor child has been ordered and no ongoing custody dispute exists.¹²⁴ The grandfather argued that once he shows a "substantial change in circumstances" has occurred, he should be awarded visitation.¹²⁵ The trial court disagreed and the N.C. Court of Appeals affirmed.¹²⁶

The N.C. Court of Appeals held that in a case that does not involve adoption by a stepparent or other relative, the party seeking visitation must prove that the child's family is not "intact" before intervention may take

116. N.C. GEN. STAT. § 50-13.5(j) (2013).

117. Howell, *supra* note 94, at 24.

118. *Id.*

119. Hedrick v. Hedrick, 368 S.E.2d 14 (N.C. Ct. App. 1988).

120. Howell, *supra* note 94, at 25; *see also* Price v. Breddlove, 530 S.E.2d 559 (N.C. Ct. App. 2000) (holding that when one parent of a custody order died, the court lost jurisdiction over the case and thus there was no action in which the grandparents could intervene).

121. 579 S.E.2d 486 (N.C. Ct. App. 2003).

122. *Id.* at 487.

123. *Id.*

124. *Id.* at 488.

125. *Id.*

126. *Id.*

place.¹²⁷ The Court stated the “intact family” rule protects the parents’ right to determine who their children may associate with.¹²⁸ The “intact family” rule protects a stable family from being disrupted by a grandparent where no disruption previously existed.¹²⁹ Further, the Court held “[a] single parent and her child can constitute an “intact family” for the purposes of this rule.”¹³⁰ The Court, applying this reasoning, held that the grandfather in *Eakett* failed to show the absence of an “intact family.”¹³¹ In *Eakett*, the Court reasoned that “no action had been taken in reference to the child’s custody for over one year before intervenor [grandfather] filed his complaint,” and the mother and child were considered an “intact family.”¹³² Therefore, the grandfather lacked standing to intervene.¹³³

D. North Carolina General Statute § 50-13.2A — Action for Visitation of an Adopted Grandchild

N.C. Gen. Stat. § 50-13.2A, the final North Carolina grandparent visitation statute states:

A biological grandparent may institute an action or proceeding for visitation rights with a child adopted by a stepparent or a relative of the child where a substantial relationship exists between the grandparent and the child. Under no circumstances shall a biological grandparent of a child adopted by adoptive parents, neither of whom is related to the child and where parental rights of both biological parents have been terminated, be entitled to visitation rights. A court may award visitation rights if it determines that visitation is in the best interest of the child. An order awarding visitation rights shall contain findings of fact which support the determination by the judge of the best interest of the child. Procedure, venue, and jurisdiction shall be as in an action for custody.¹³⁴

The three previous statutes provide that, “[u]nder no circumstances shall a biological grandparent of a child adopted by adoptive parents, neither of whom is related to the child and where parental rights of both parents have been terminated, be entitled to visitation rights.”¹³⁵ N.C. Gen. Stat. § 50-13.2A, however, makes an exception to this provision when a relative

127. *Id.* at 488; see also *Montgomery v. Montgomery*, 524 S.E.2d 360 (N.C. Ct. App. 2000) (“Grandparents have standing to seek visitation with their grandchildren when those children are not living in a *McIntyre* ‘intact family.’”).

128. *Eakett*, 478 S.E.2d at 489.

129. *Id.*

130. *Id.* (citing *Fisher v. Gaydon*, 477 S.E.2d 251 (N.C. Ct. App. 1996)).

131. *Id.*

132. *Id.*

133. *Id.*

134. N.C. GEN. STAT. § 50-13.2A (2013).

135. *Howell*, *supra* note 94, at 26.

adopts a child, or when a parent has given up his or her rights and a step-parent or another relative has legally taken on the parental role.¹³⁶ The N.C. Court of Appeals held that this statute promotes a “legitimate governmental interest” by maintaining a biological family bond.¹³⁷

The statute further requires that the grandparents have a substantial relationship with the child.¹³⁸ The court determined in one North Carolina case that a sufficient relationship existed where the grandparents regularly visited with the child since birth, had the child stay over at their home, and took the child on outings such as shopping.¹³⁹ In another case, the court held that there was a substantial relationship where a grandparent had been involved in the caretaking of her grandchildren since birth, and the children resided with her for more than eight months prior to the adoption by the aunt.¹⁴⁰

E. North Carolina Grandparent Visitation Statutes Read Together

The four aforementioned statutes present the only ways a grandparent may gain access to the courts in North Carolina in order to seek visitation of the grandchild. A grandparent may only bring a visitation action in North Carolina when: (1) there is an ongoing custody proceeding; (2) there has been a change in circumstances since an existing custody order has been entered; or (3) the child has been adopted by a relative or stepparent.¹⁴¹ Moreover, as required by North Carolina case law, actions may not be brought for visitation if a child is part of an “intact family” as defined to include a child living in a single-parent home.¹⁴²

VI. LEADING NORTH CAROLINA CASES ON THIRD PARTY CUSTODY AND VISITATION: *PETERSON V. ROGERS* AND *PRICE V. HOWARD*

As stated, the literal reading of the North Carolina “grandparent visitation” statutes appears to award possible custody and/or visitation to any person able to prove that it is in the best interest of the child, regardless of the party’s relationship to the child.¹⁴³ However, during the 1990s, the North Carolina Supreme Court issued two opinions rejecting such a broad reading of the statutes.¹⁴⁴ *Peterson v. Rogers*¹⁴⁵ involved a custody dispute

136. *Id.* at 26–27.

137. *Id.* at 27.

138. *Id.*

139. *Id.*; see *Hedrick v. Hedrick*, 368 S.E.2d 14 (N.C. Ct. App. 1988).

140. *Id.*; see also *Hill v. Newman*, 509 S.E.2d 226 (N.C. Ct. App. 1998).

141. N.C. GEN. STAT. §§ 50-13.2(b1), 13.5(j), 13.2A (2013).

142. Howell, *supra* note 94, at 25.

143. *Id.* at 27.

144. *Id.* at 2.

145. 445 S.E.2d 901 (N.C. 1994).

between adoptive and natural parents.¹⁴⁶ The natural mother placed her child with the State Department of Social Services (DSS) upon the child's birth, and the adoptive parents took physical custody of the child within days.¹⁴⁷ Upon taking physical custody of the child, the adoptive parents petitioned for adoption.¹⁴⁸ This petition was granted but then set aside by the N.C. Supreme Court.¹⁴⁹ DSS then placed the child in the custody of the adoptive parents, who immediately filed for custody against the natural parents pursuant to N.C. Gen. Stat. § 50-13.1.¹⁵⁰ The trial court denied visitation to the adoptive parents.¹⁵¹ Moreover, the court applied the best interest analysis and ordered the custody of the child to the natural parents.¹⁵² The N.C. Supreme Court held that the trial court's only option was to award custody to the natural parents, as they were deemed to be "fit and proper" and the child's welfare had not been neglected.¹⁵³

The N.C. Supreme Court in *Petersen* relied on the United States Supreme Court, which held "[t]he rights to conceive and to raise one's children have been deemed 'essential,' 'basic civil rights of man,' and 'rights far more precious . . . than property rights.'"¹⁵⁴ The U.S. Supreme Court also held:

[I]t is cardinal with us that the custody, care, and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment and the Ninth Amendment.¹⁵⁵

As held in *Stanley v. Illinois*,¹⁵⁶ the U.S. Supreme Court stated that as long as a parent is "shown to be fit," the state's interest in the child is minimal.¹⁵⁷ The Court concluded that "absent a finding that parents (i) are unfit or (ii) have neglected the welfare of their children, the constitutionally-protected paramount right of parents to custody, care, and control of their children must prevail."¹⁵⁸ In reference to visitation, the *Petersen* Court held that the legislature did not intend for N.C. Gen. Stat. § 50-12.1(a) to overrule that in general, "North Carolina law grants to parents who have lawful

146. Howell, *supra* note 94, at 2.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* at 3.

152. *Id.*

153. *Id.*

154. *Petersen v. Rogers*, 445 S.E.2d 901, 903 (N.C. 1994).

155. *Id.* (citations omitted).

156. 405 U.S. 645 (1972).

157. *Id.* at 651.

158. *Petersen*, 445 S.E.2d at 905.

custody of their children the prerogative of determining with whom their children associate."¹⁵⁹

The N. C. Supreme Court revisited the issue of parental rights in 1997 with *Price v. Howard*.¹⁶⁰ In *Price*, the Court reaffirmed the analysis and holding of *Peterson*, but found that other circumstances, in addition to unfitness and neglect, could require application of the "best interest of the child test."¹⁶¹ The Court held:

Unfitness, neglect, and abandonment clearly constitute conduct inconsistent with the protected status parents may enjoy. Other types of conduct, which must be viewed on a case-by-case basis, can also rise to this level so as to be inconsistent with the protected status of natural parents. Where such conduct is properly found by the trier of fact, based on evidence in the record, custody should be determined by the "best interest of the child" test mandated by statute.¹⁶²

Peterson and *Price* state the requirements for standing to bring a custody or visitation claim in North Carolina.¹⁶³ In order for a third party to have such standing, he must prove that a parent is "unfit, has neglected the welfare of the child, or has otherwise acted in a manner inconsistent with his or her protected status as parent."¹⁶⁴ The court may then proceed to the application of the best interest of the child standard.¹⁶⁵ Thus, as held by *Peterson* and *Price*, if a third party is unable to show that a parent has acted inconsistent with their parental status, he will be unable to bring a claim for custody or visitation of the child.¹⁶⁶

VII. NORTH CAROLINA LEGISLATIVE RESEARCH COMMISSION REPORT IN 1997

In 1995, the North Carolina General Assembly authorized the Legislative Research Committee to study grandparent visitation rights by considering House Joint Resolution 872 and Senate Bill 841 when determining the nature, scope, and aspects of the study.¹⁶⁷ In part, Section 1 of the report reads:

159. *Id.* at 906.

160. 484 S.E.2d 528 (N.C. 1997).

161. Howell, *supra* note 94, at 6.

162. *Price*, 484 S.E.2d at 534-35.

163. Howell, *supra* note 94, at 6.

164. *Id.*

165. *Id.*

166. *Id.*

167. LEGIS. RESEARCH COMM'N, GRANDPARENT VISITATION RIGHTS REP. TO THE 1997 GEN. ASSEMB. OF N.C., 1997 Reg. Sess., at 1 (1997) available at <http://ncleg.net/Library/studies/1997/st11472.pdf>.

- (1) Whether grandparents should have a right of action for court-ordered visitation with grandchildren independent of whether a divorce or custody action has been filed;
- (2) Whether there should be a rebuttable presumption in the law that grandparents promote the best interest of the grandchild;
- (3) What remedies other than contempt should be established to ensure that the court-ordered grandparent visitation is enforced;
- (4) Whether there should be an established judicial district and an expedited process for enforcing visitation orders; and
- (5) Any other issues related to grandparent visitation matters.¹⁶⁸

The Legislative Research Commission's Committee on Grandparent Visitation Rights met eight times to study the above issues.¹⁶⁹ The committee found that the "relationships between grandparents and grandchildren are valuable and should be encouraged."¹⁷⁰ The Committee advised that the current law should be amended to allow a grandparent to seek visitation of a grandchild living in an intact family.¹⁷¹ By addressing the constitutional issues involved, the proposed bill provided for protections of the intact family, while also allowing grandparents standing in court.¹⁷²

The bill proposed by the Committee allowed a grandparent to initiate an action for visitation with her grandchild, at any time.¹⁷³ The bill also granted a court the ability to allow such visitation rights if such rights were found to be in the best interest of the grandchild.¹⁷⁴ Addressing the constitutional issues involved, the proposed legislation also provided for added protections of an intact family.¹⁷⁵ If the grandchild's legal parents are married and living together, the court will not have the authority to grant visitation unless it is determined by clear and convincing evidence that: (1) there is either a preexisting relationship between the grandparent and the grandchild that has engendered a bond, or that the grandparent has made a substantial effort to establish a bond, such that visitation is in the best interest of the grandchild, and (2) that the amount and circumstances of the visitation awarded will not substantially interfere with the right of the parents to exercise their parental authority.¹⁷⁶

The proposed legislation further provided that when the grandchild's legal parents are married and living together and agree that the grandparent

168. *Id.* at 1–2.

169. *Id.* at 3.

170. *Id.* at 13.

171. *Id.*

172. *Id.*

173. *Id.* at 29.

174. *Id.* at 30.

175. *Id.*

176. *Id.*

should not be granted visitation, it creates a presumption that visitation is not in the best interest of the child.¹⁷⁷ This presumption may only be rebutted by clear and convincing evidence by the grandparents.¹⁷⁸ However, while the proposed bill was recommended to the N.C. General Assembly, it was not ratified.¹⁷⁹

VIII. RECENT NORTH CAROLINA PROPOSED BILLS TO EXPAND GRANDPARENT VISITATION RIGHTS

In 2011, another bill was presented to the North Carolina General Assembly that would expand grandparents' rights regarding visitation.¹⁸⁰ This bill, sponsored by Representatives William Brission, Julie Howard, and Pat Hurley, would have changed the law pertaining to visitation.¹⁸¹ The bill would have allowed courts to determine grandparent visitation on a case-by-case basis in all situations, except for when a child has been adopted and both biological parents' rights have been terminated.¹⁸² The court then would determine visitation based on the best interest of the child, taking into account the following considerations:

- (1) Whether there is a preexisting relationship between the grandparent and the child, or the willingness of the grandparent to encourage a close relationship between the child and the parent.
- (2) The willingness of the child to develop a relationship with the grandparent, if the court determines that the child is of sufficient maturity to make that decision.
- (3) The reasonableness or lack of reasonableness of the custodial parent in allowing, restricting, or denying visitation to the grandparent in the past.
- (4) The mental and physical health of the child.
- (5) The mental and physical health of the grandparent.
- (6) Whether the circumstances and amount of visitation will substantially interfere with the right of the parent to exercise his or her parental authority.

177. *Id.*

178. *Id.*

179. LEGIS. RESEARCH COMM'N., REP. TO THE 1999 GEN. ASSEMB. OF N.C., STATISTICAL SUMMARY REP. OF ACTIONS IN THE 1997 GEN. ASSEMB. OF N.C., 1999 Reg. Sess. at 3 (1999) available at <http://ncleg.net/Library/studies/1997/st10962.pdf>.

180. H.B. 239, 2011 Gen. Assem., Reg. Sess. (N.C. 2011), available at www.ncleg.net/Sessions/2011/Bills/House/PDF/H239v1.pdf.

181. *Id.*

182. *Id.*

(7) Any other factors the court deems necessary in determining the best interest of the child.¹⁸³

Further, the bill provided that an agreement by the child's parents that the grandparent should not be awarded visitation rights established a rebuttable presumption that such visitation was not in the best interest of the child.¹⁸⁴ The bill, however, went to the Judiciary Subcommittee of the House and died in the Committee on Rules and Operations of the Senate in April 2011.¹⁸⁵

In 2013, a bill to establish the Joint Legislative Study Committee on grandparent visitation rights and child custody in North Carolina was primarily sponsored by Senator Floyd B. McKissick, Jr.¹⁸⁶ The bill permitted the Committee to study grandparent visitation rights, including: (1) issues related to the state's current laws regarding grandparent visitation; (2) legislation adopted by other states addressing grandparent visitation rights; (3) circumstances under which grandparents should be granted visitation; (4) the legal impact of expanding grandparent visitation rights; and (5) whether the court should consider supervised or unsupervised grandparent visitation.¹⁸⁷ The Committee made a final report of its findings and recommendations to the 2014 Regular Session of the 2013 General Assembly, prior to its convening.¹⁸⁸ This bill too, however, died on April 3, 2013 in the Committee on Rules and Operations of the Senate.¹⁸⁹

VIII. RECOMMENDATIONS FOR AN EXPANDED GRANDPARENT VISITATION STATUTE IN NORTH CAROLINA

As the Supreme Court held in *Troxel*, it is necessary for all courts to give deference to the decisions of "fit" parents.¹⁹⁰ However, it is also important for states to protect the relationships between children and grandparents who serve as parent-figures to the child.¹⁹¹ The grandparent also has an interest that states should protect.¹⁹² As to finding a balance between competing interests of the parents and grandparents, the courts have consistently

183. *Id.*

184. *Id.*

185. See N.C. Gen. Assemb., *Grandparents' Visitation Rights* (Dec. 15, 2014), <http://www.ncleg.net/gascripts/BillLookup/BillLookup.pl?Session=2011&BillID=H239>.

186. S.B. 627, 2013 Gen. Assem., Reg. Sess. (N.C. 2013), available at <http://www.ncga.state.nc.us/Sessions/2013/Bills/Senate/PDF/S627v1.pdf>.

187. *Id.*

188. *Id.*

189. See N.C. Gen. Assemb., *Study Grandparent Visitation Rights* (Dec. 15, 2014), <http://www.ncleg.net/gascripts/billlookup/billlookup.pl?Session=2013&BillID=S627>.

190. Atkinson, *supra* note 11, at 13.

191. *Id.*

192. *Id.*

given parents the initial preference.¹⁹³ Placing a heightened burden on the grandparent provides protection for the parents.¹⁹⁴ However, allowing exceptions if the grandparent has strong enough facts to overcome the inference protects the grandparent.¹⁹⁵ It is misguided for states to require that grandparent visitation not adversely interfere with the child's relationship with his or her parent.¹⁹⁶ By its very nature, a court-ordered visitation will cause some type of interference in the parent-child relationship.¹⁹⁷ The better alternative is to determine if the interference is justified.¹⁹⁸ If the grandparent has served as a *de facto* parent to the child, the interference should generally be justified and visitation ordered, as there is a strong relationship already in place.¹⁹⁹

An issue gaining relevance in recent years is the right of third parties to seek visitation on their status as *de facto* parents.²⁰⁰ In 2011, the N. C. Court of Appeals granted visitation to an adoptive mother's boyfriend who was serving as a *de facto* parent over the objection of the child's adopted mother.²⁰¹ The Court found that the mother acted inconsistently with her parental duties when she held her boyfriend out to be the child's father.²⁰² When the two ended their relationship, the Court ordered continued visitation with the child, in favor of the boyfriend.²⁰³ The quality and duration of this relationship is important and should be protected by the courts, as "children will grow up with more stability and good outlook on life when they are able to maintain positive relationships with persons who have been acting as parents."²⁰⁴

Many states, including North Carolina, require specific events to take place before standing will be allowed for a visitation action.²⁰⁵ These events in North Carolina include: (1) an ongoing custody proceeding; (2) a substantial change in circumstances of a preexisting custody order (a third party does not have standing when the family is "intact"); or (3) the child is adopted by a relative or stepparent.²⁰⁶ Other states include events such as

193. *Id.*

194. *Id.*

195. *Id.* at 14.

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.* at 10.

201. *Best v. Gallup*, 715 S.E.2d 597 (N.C. Ct. App. 2011).

202. *Id.* at 601.

203. *Id.*

204. *Atkinson*, *supra* note 11, at 15–16.

205. *Id.* at 15.

206. N.C. GEN. STAT. §§ 50-13.2(b1), 50-13.5(j), and 50-13.2A (2013).

separation, divorce, death of a parent, or a child born out of wedlock.²⁰⁷ “Since most of these events, by themselves, do not provide a reliable indicator of whether third-party visitation . . . will be allowed, it is better to focus on the factors . . . particularly closeness of the relationship between the child and the third party.”²⁰⁸

The following “Model North Carolina Grandparent Visitation Act” was made in conjunction with the “Model Third-Party Custody and Visitation Act.”²⁰⁹ This Act was developed by a committee of the Family Law Section of the American Bar Association, using the above-mentioned recommendations.²¹⁰ This Act allows for the needed protection of both grandparents and parents of North Carolina by creating a balanced statute that focuses on the substantial relationship formed between grandparents and grandchildren, while also protecting the constitutional protections of parents.

A. *Model North Carolina Grandparent Visitation Act*

Section 1: Standing

A grandparent has standing to seek visitation if: (1) the denial of visitation would be a detriment to the child, and (2) a substantial relationship exists between the child and the grandparent. A detriment to the child means “harm to the child’s physical or physiological wellbeing, including harm resulting from interruption of a substantial beneficial relationship with the child or removal of the child from a stable placement of a child with a de facto parent.”²¹¹

These two factors reflect the holding of the U.S. Supreme Court in *Troxel*, as they provide special considerations that justify the state’s interference with a parent’s fundamental right to make decisions concerning his or her children.²¹² Thus, these standing factors will withstand a parental right constitutional challenge.

Section 2: Presumptions and Burden of Proof

There shall be a rebuttable presumption that the parent’s decision regarding visitation is in the best interest of the child.²¹³ In order to rebut the pre-

207. Atkinson, *supra* note 11, at 15.

208. *Id.*

209. *Id.* at 25–34.

210. *Id.* at 25.

211. *Id.* at 27.

212. *Id.* at 29–30.

213. *Id.* at 30.

sumption, the grandparent would have to show by clear and convincing evidence that (1) denying visitation would be to the detriment to the child, or that special facts exist to justify the visitation; and (2) the visitation will be in the best interest of the child. Further, if a child has been in the custody of a grandparent, then the grandparent may be granted visitation if they establish by a preponderance of the evidence that visitation is in the best interests of the child.²¹⁴

The presumption and burden of proof required above applies to the standard given in *Troxel v. Granville*.²¹⁵ The U.S. Supreme Court reasoned that there must be a "requirement that a court accord the parent's decision any presumption of validity or any weight whatsoever."²¹⁶ Thus, this section pertaining to presumption and burden of proof shall also contend with parental constitutional challenges, as it provides safeguards and protections to the parents.

Section 3. Factors Considered

When making a determination of grandparent visitation, the court must consider the best interest of the child, and:

- (1) The quality of relationship between the child and the parent and the child and the grandparent, including whether the grandparent has served as a *de facto* parent of the child;
- (2) The frequency and continuity of contact between the child and the grandparent;
- (3) The views of the child, having regard to the child's age and maturity;
- (4) The willingness of the parents and grandparents to facilitate, as appropriate, a positive relationship between the child, the parties to the proceedings, and family members of the child;
- (5) The mental and physical health of all individuals involved;
- (6) A history of or threat of domestic violence, child abuse, or child neglect;
- (7) The reasons for the parties' positions regarding visitation; and
- (8) Any other relevant factor affecting the best interest of the child.

Providing courts with a set of factors to be used when making a determination regarding visitation promotes efficiency and consistency in cases that will follow. These factors further guide courts when making decisions regarding the best interest of the child.

214. *Id.* at 30.

215. *Id.* at 31.

216. *Id.* (citing *Troxel*, at 68).

Section 4: Repeals

The following statutes are hereby repealed: N.C. General Statutes, §§ 50-13.2A, 50-13.5(j), and 50-13.2(b1).

IX. CONCLUSION

As families in North Carolina continue to grow more diverse, there is no doubt that the need for an expanded grandparent visitation statute will be required. North Carolina will continually have to consider future bills pertaining to grandparents' rights. The state, thus, should allow a new Legislative Research Committee to research and create an in-depth report on the constitutionality of expanding the visitation statutes into a similar model statute, as presented above. An updated report, outlining the immediate need for an expanded grandparent visitation statute, with recommendations and a platform for a model statute to be set, would need to be presented to the General Assembly. There are safeguards in the above model statute, including the special factors for when a court may interfere with a parent's fundamental right of rearing their child. Further, the above model statute provides the rebuttable presumption that a fit parent's decision regarding with whom his or her child may associate is in the best interest of the child. Moreover, by outlining factors that a court must consider when applying the best interest of a child analysis, the statute will pass potential constitutional challenges that a child's parent may raise.

Repealing the now restrictive statutes and replacing them with a balanced statute, as presented above, will provide the needed protection for both grandparents and parents of North Carolina. Focusing the statute on the substantial relationship formed between grandparents and grandchildren will provide all parties the constitutional protection they are entitled to, and will help grow and foster these important relationships formed in a child's life. In this way, expanding grandparent visitation rights in North Carolina will ultimately provide for the best interest of the child.