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Constitutional Law - Family Law - Grandparent Visitation Rights - Constitutional Considerations and the Need to Define the Best Interest of the Child Standard - Goff v. Goff

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Casenotes

CONSTITUTIONAL LAW—FAMILY LAW—Grandparent Visitation Rights—Constitutional Considerations and the Need to Define the “Best Interest of the Child” Standard. *Goff v. Goff*, 844 P.2d 1087 (Wyo. 1993).

William E. Goff III divorced his first wife in the latter part of 1982.¹ The divorce decree gave him custody of his daughter.² From December of 1982 until December of 1986, Goff’s daughter resided with his parents, the daughter’s grandparents, William E. Goff and Helen Goff, in their Kingston, Arkansas, home.³ In December of 1986, William E. Goff III moved with his daughter and new wife to Casper, Wyoming.⁴

Since the move to Wyoming, the grandparents, William E. Goff and Helen Goff, had only one extended visit, which occurred in 1987, with their grandchild.⁵ After that extended visit, the grandparents had only limited visitation with their grandchild, typically under the supervision of the custodial parents.⁶ The justification for the limited access to visitation with the grandchild consisted of the grandparents’ alleged failure “to adhere to the custodial parents’ disciplinary guidelines.”⁷

In 1991, the grandparents filed a Petition to Establish Grandparent Visitation Rights in the district court in Park County, Wyoming.⁸ Using

1. *Goff v. Goff*, 844 P.2d 1087, 1089 (Wyo. 1993).

2. *Id.*

3. *Id.* During that period, William E. Goff III was in nursing school. The arrangement helped him to complete his degree and gain employment. *Id.*

4. *Id.* Goff’s second wife is not the biological mother of the child but did become a custodial parent pursuant to adoption in 1990. *Id.*

5. *Id.*

6. *Id.*

7. *Id.* The opinion specifically denotes these “failure[s] to adhere to the custodial parents’ disciplinary guidelines” as including “the grandparents allow[ing] the grandchild to watch a video the custodial parents considered inappropriate, and the grandparents purchas[ing] a jean jacket for the grandchild contrary to the wishes of the custodial parents.” *Id.* The video the custodial parents found inappropriate was Steven Spielberg’s “*The Goonies*.” Brief for Appellee at 5, *Goff v. Goff*, 844 P.2d 1087 (Wyo. 1993) (No. 92-3) [hereinafter Appellee’s Brief].

8. *Goff*, 844 P.2d at 1089.

Wyoming's new grandparent visitation statute,⁹ the grandparents asserted that the custodial parents had denied them reasonable visitation to their grandchild.¹⁰ The district court held for the grandparents and outlined a visitation schedule for the grandparents and the grandchild.¹¹

The custodial parents, William and Mary, appealed the district court's order to the Wyoming Supreme Court.¹² They alleged that Wyoming Statute section 20-7-101 did not extend to their situation, where the custodial parent is a natural child of the grandparents seeking visitation.¹³

The Supreme Court of Wyoming rejected the custodial parents' argument, stating that the statute is unambiguous and "conveys a clear and defi-

9. The Wyoming Statutes list Wyoming's grandparent visitation statute as section 20-7-101. The statute provides that:

(a) A grandparent may bring an original action against any person having custody of the grandparent's minor grandchild to establish reasonable visitation rights to the child if:

(i) The grandparent's child who is the parent of the minor grandchild has died or has divorced the minor grandchild's other parent and the person having custody of the minor grandchild has refused reasonable visitation rights to the grandparent; or

(ii) An unmarried minor grandchild has resided with the grandparent for a period in excess of six (6) consecutive months before being returned to the custody of the minor grandchild's parents and the parents have refused reasonable visitation rights to the grandparent.

(b) In any action or proceeding under subsection (a) of this section, the court may grant reasonable visitation rights to the grandparent of a child if the court finds, after a hearing, that visitation would be in the best interest of the child and that the rights of the child's parents are not substantially impaired.

(c) No action to establish visitation rights may be brought by a grandparent under subsection (a) of this section if the minor grandchild has been adopted and neither adopting parent is a natural parent of the child.

(d) In any action or proceeding in which visitation rights have been granted to a grandparent under this section, the court may for good cause upon petition of the person having custody or who is the guardian of the child, revoke or amend the visitation rights granted to the grandparent.

WYO. STAT. § 20-7-101 (Supp. 1993).

Prior to 1991, Wyoming's grandparent visitation statute provided:

(c) Subsequent to the death or remarriage of one (1) or both parents or after a divorce or judicial separation, the court may, upon petition of a grandparent, grant reasonable visitation rights to the grandparent of the children, if the court finds, after a hearing, that the visitation would be in the best interest of the child.

WYO. STAT. § 20-2-113 (1987).

10. *Goff*, 844 P.2d at 1089.

11. *Id.* The visitation schedule "provided, in substance, that, during the months of June, July, or August, the grandparents would be allowed a consecutive ten-day period of visitation with their grandchild . . ." This ten-day period was to be unsupervised and in the grandparents' Kingston, Arkansas, home "if that were their choice." In addition, the court set aside one weekend per month for unsupervised visitation. And finally, during the Christmas holiday, the court allowed visitation from December 26 through December 30. *Id.*

12. *Id.*

13. *Id.*

nite meaning.”¹⁴ The statute applies even where a custodial parent is the natural child of the grandparents seeking visitation. The Supreme Court affirmed the district court’s decision to grant grandparent visitation rights.¹⁵

This casenote addresses Wyoming’s grandparent visitation statute and argues that the Wyoming Supreme Court’s interpretation of the current grandparent visitation statute in *Goff* is correct. This note also discusses the constitutionality of grandparent visitation statutes. This piece categorizes various familial situations and suggests how the statute applies to each without violating the United States Constitution.¹⁶ Finally, the note concludes that, as written, the “best interest of the child” standard of review for Wyoming’s grandparent visitation statute is vague and provides little guidance for Wyoming courts. This note proposes an amendment to alleviate that problem.

BACKGROUND

I. Development of the Law

At common law, grandparents had no legal rights to visitation with their minor grandchildren.¹⁷ The policy reasons underlying the common law rule’s recognition of a parent’s right to deny grandparents visitation with their grandchildren included the following:

- 1) A parent’s obligation to allow grandparent visitation is moral, not legal;
- 2) Judicial enforcement of grandparent visitation divides and hinders parental authority;
- 3) Producing a conflict of authority between grandparent and parent is not in the “best interest of the child;”
- 4) A parent alone should judge whether visitation with grandparents is appropriate;
- 5) Natural relations, and not judicial intervention, are the only effective means of restoring normal family relations.¹⁸

14. *Id.* The Wyoming rule states that “if the language of a statute is plain and unambiguous and conveys a clear and definite meaning, [the court does] not resort to any rules of statutory construction in applying it.” *Id.* See *Matter of Adoption of RDS*, 787 P.2d 968 (Wyo. 1990); *Haliburton Company v. McAdams, Roux and Associates, Inc.*, 773 P.2d 153 (Wyo. 1989).

15. *Goff*, 844 P.2d at 1089. The court also upheld the lower court’s visitation schedule. *Id.*

16. See generally Judith L. Shandling, Note, *The Constitutional Constraints on Grandparents’ Visitation Statutes*, 86 COLUM. L. REV. 118, 133-37 (1986). Three common familial situations are (1) the intact family, (2) the non-intact family with a related grandparent, and (3) the non-intact family with a non-related grandparent. The analysis gives an in-depth discussion on these familial situations. *Id.*

17. *Succession of Reiss*, 15 So. 151 (La. 1894).

18. *Mimkon v. Ford*, 332 A.2d 199, 201 (N.J. 1975). See also Patricia S. Fernandez, *Grandparent Access: A Model Statute*, 6 YALE L. & POL’Y REV. 109, 114-15 (1988).

Thus, it was nearly impossible for grandparents to visit their grandchildren at common law if the parents did not allow it. As society matured, courts began to recognize the limited right of grandparents to legally force visitation.¹⁹ Courts' modification of modern common law allowed grandparent visitation if the "welfare" of the child favored such visitation.²⁰ Although courts permitted limited opportunities for visitation, most visitation was still based on a moral, and not a legal, obligation.²¹ Many grandparents were not happy with these limited opportunities.²²

Accordingly, as courts continued to deny grandparents visitation with their grandchildren under common law theories, grandparents turned to various state legislatures, advocating statutory enactments favoring grandparent visitation.²³ To date, almost every state has passed a statute which provides grandparents an opportunity to visit with their grandchildren if certain conditions are met. These state statutes abrogate the common law and yield easier access for grandparent visitation in various situations.²⁴

The earliest statutes for grandparent visitation relied on a derivative rights theory.²⁵ Under a derivative rights theory, a grandparent acquired a right to petition for visitation only upon the legal absence of a related parent.²⁶ The most common "legal absence" was death,²⁷ and visitation al-

19. *Mimkon*, 332 A.2d 199. *Mimkon* involved a grandmother who brought action to obtain visitation rights with granddaughter. Court held that grandparent visitation statute changes common law and creates a right with grandparents to petition for visitation. *Id.*

20. *Id.* at 200. If the child's welfare did not favor grandparent visits, then the grandparents did not have a right to petition for visitation against parents' wishes. "In matters involving custody and visitation the ultimate concern of our courts is always for the welfare of the infant. This is the controlling element. In the past where the child's welfare did not dictate otherwise, the grandparents had neither a right to custody nor to visitation as against a parent. This was the common law. . . ." *Id.*

21. *Succession of Reiss*, 15 So. at 152. "Without doubt it is desirable that the ties of affection that nature creates between the ascendants and their grandchildren be strengthened and unceasing, but, if there is a conflict, the father alone or the mother should be the judge." *Id.*

22. Cheryl Stockman Gan, Notes and Comments, *Grandparental Visitation Rights in Oklahoma*, 26 TULSA L.J. 245, 247 (1990).

23. *Id.*

24. No longer must courts rely on the common law "welfare of the child" test and the policy reasons against grandparent visitation. Most historical and modern grandparent visitation statutes create specific situations (family relationship, status, etc.) that must exist for a court to even consider whether visitation is appropriate. See *supra* note 22, at 264. Although judicial discretion still exists, it is not quite as broad as that which existed under common law. Thus, statutes offer grandparents a better chance of obtaining visitation with their grandchildren.

25. Stockman Gan, *supra* note 22, at 249-50 (citing Foster & Freed, *Grandparent Visitation: Vagaries and Vicissitudes*, 23 ST. LOUIS U. L.J. 643, 645-46 (1979)). See also Elaine D. Ingulli, *Grandparent Visitation Rights: Social Policies and Legal Rights*, 87 W. VA. L. REV. 295, 311 (1985) (discussing early state statutes and the derivative rights theory). As with most new statutes, trial and error allowed the early statutory laws to evolve into today's laws with a more comprehensive and fair approach in the determination of whether to grant visitation.

26. Fernandez, *supra* note 18, at 118.

lowed the surviving grandparent to represent his or her side of the family to guarantee a connection to that bloodline.²⁸ Today, grandparent visitation statutes expand beyond the derivative rights theory to include many more situations than just a "legal absence" of a related parent.²⁹

A *parens patriae*³⁰ philosophy is the basis of modern grandparent visitation statutes.³¹ These powers allow states to intervene in family relationships if the welfare of the child is at stake.³² *Parens patriae* powers restrict and regulate natural and constitutional rights of a parent over various aspects of a child's life.³³ The *parens patriae* philosophy has helped establish the modern standards of review for grandparent visitation statutes.³⁴

The most common standard of review for modern grandparent visitation statutes is the "best interest of the child" standard.³⁵ Today, the majority of states use the "best interest of the child" as the guiding principle in determining whether visitation by grandparents with grandchildren is appropriate.³⁶

27. *Id.*

28. Ingulli, *supra* note 25, at 311.

29. A weakness of the derivative rights theory was limited access to grandchildren in divorce situations. Under a derivative rights theory, a court could not grant a petition for visitation following a divorce. *See* Fernandez, *supra* note 18, at 118-19.

30. "PARENS PATRIAE. [R]efers traditionally to the role of the state as sovereign and guardian of persons under legal disability. 440 F.2d 1079, 1089. The term is a concept of standing often used by courts of equity when acting on behalf of the state to protect and control the property and custody of minors and incompetent persons." BARRON'S LAW DICTIONARY 341-42 (3d ed. 1991).

31. Stockman Gan, *supra* note 22, at 264. *See also Developments in the Law—The Constitution and the Family*, 93 HARV. L. REV. 1156, 1201-10 (1980).

32. *Id.* The state may exercise unlimited supervision and control over minors when the child's welfare is at issue. *See also* Pierce v. Society of Sisters, 268 U.S. 510, 512 (1924).

33. *See* Stanley v. Illinois, 405 U.S. 645 (1972). In certain cases of neglect, etc., the state might assume custody of the children. Thus, the state acts in a pseudo-parent capacity and assumes many duties and functions of the parent. *See generally* 59 Am. Jur. 2d *Parent and Child* § 11 (1987).

34. *See infra* notes 36-39.

35. *See infra* note 36.

36. The following states all list a "best interest of the child" standard as at least part of their standard of review. The items in parenthesis list, in part, situations when grandparents have a right to petition for visitation within the individual state.

ALASKA STAT. § 25.24.150 (1991) (divorce); ARIZ. REV. STAT. ANN. § 25-337.01 (Supp. 1993) (marriage dissolved, death, missing parent and wedlock); ARK. CODE ANN. § 9-13-103 (Michie 1991) (death, divorce and legal separation); CAL. Fam.C. § 3102 (West 1993) (death); COLO. REV. STAT. ANN. § 19-1-117 (West 1990 and Supp. 1992) (invalid or dissolved marriage, death of grandparent's child and legal custody to party other than parent); CONN. GEN. STAT. ANN. § 46b-59 (West 1986) (application in accordance with court's best judgment); FLA. STAT. ANN. § 61.13 (2)(b)2.c (West Supp. 1994) (divorce); GA. CODE ANN. § 19-7-3 (Supp. 1993) (custody action, divorce, termination of parental rights and adoption by blood relative or stepparent); ILL. ANN. STAT. ch. 750, para. 5/607 (Smith-Hurd 1993) (divorce, separation, absent parent with whereabouts unknown, death, parent joinder with grandparent in petition and state custody of child); KAN. STAT. ANN. § 38-129

The states that do not rely exclusively on a “best interest of the child” standard utilize a “discretion of the court” standard,³⁷ a “substantial relationship” standard,³⁸ or no standard at all.³⁹

(1993) (divorce pursuant to § 60-1616, death and substantial relationship); KY. REV. STAT. ANN. § 405.021 (Michie/Bobbs-Merrill 1984) (divorce proceeding and best interest of child); LA. REV. STAT. ANN. § 9:572 (West 1991) (divorce and death); ME. REV. STAT. ANN. tit. 19, §§ 1001-04 (West Supp. 1993) (death, sufficient relationship and attempt to establish sufficient relationship); MASS. ANN. LAWS ch. 119, § 39D (Law. Co-op. Supp. 1993) (divorce, separation, temporary order or judgment of separate support, death and birth out of wedlock); MICH. COMP. LAWS ANN. § 722.27b (West 1993) (child custody dispute (invalid or dissolved marriage, legal custody with someone besides parent), death and adoption by stepparent); MINN. STAT. ANN. § 257.022 (West 1992) (death, family court proceedings (dissolution, custody, legal separation, annulment or parenting subsequent to commencement of proceeding), child resided with grandparents for a period of 12 months or more and child resided with other person for two years or more); MO. ANN. STAT. § 452.402 (Vernon Supp. 1993) (divorce, death and unreasonable denial of visitation); MONT. CODE ANN. § 40-9-102 (1993) (divorce and best interest of child); NEB. REV. STAT. § 43-1802 (1988) (death, divorce and when parents never married but legal paternity was established); NEV. REV. STAT. ANN. § 125A.330 (Michie 1993) (death, divorce, termination of parental rights and state custody of child); N.H. REV. STAT. ANN. § 458:17-d (1992) (divorce, legal separation, death, stepparent adoption and unwed parents); N.J. STAT. ANN. § 9:2-7.1 (West 1993) (death, divorce and separation); N.M. STAT. ANN. § 40-9-2 (Michie Supp. 1993) (divorce, death, grandchild resided with grandparents at least three months and under six years old, grandchild resided with grandparents at least six months and six years or older, and adoption by stepparent, relative, person designated by deceased parent’s will or person who sponsored grandchild at baptism or confirmation conducted by recognized religious organization); N.Y. DOM. REL. LAW § 72 (McKinney Supp. 1994) (death and circumstances show that conditions exist which equity would see fit to intervene); N.D. CENT. CODE § 14-09-05.1 (Supp. 1993) (divorce); OHIO REV. CODE ANN. § 3109.051(B) (Baldwin 1992) (divorce, dissolution or marriage, legal separation, annulment and child support proceeding); OKLA. STAT. ANN. tit. 10, § 5 (West Supp. 1994) (death, divorce, termination of grandparent’s child’s parental rights); 23 PA. CONS. STAT. ANN. §§ 5311-5314 (1991) (death, separation, dissolution and grandchild resided with grandparents for 12 months or more); R.I. GEN. LAWS §§ 15-5-24.1 to -24.3 (1988 and Supp. 1993) (death and divorce); S.D. CODIFIED LAWS ANN. §§ 25-4-52 & -54 (1992) (divorce); TENN. CODE ANN. § 36-6-301 (1991) (removal of child from the custody of parents, guardian, or legal custodian and child placed in foster home); TEX. FAM. CODE ANN. §§ 14.03 (e)-(g) (West Supp. 1994) (incarceration, divorce, child abuse or neglect, delinquent child, termination of grandparent’s child’s parental rights, grandchild resided with grandparents for at least six months within a 24-month period preceding the filing of petition); UTAH CODE ANN. § 30-3-5 (Supp. 1993) (divorce); VT. STAT. ANN. tit. 15, § 1011 (1989) (custody action); VA. CODE ANN. § 20-107.2 (Michie Supp. 1993) (divorce and dissolution); WASH. REV. CODE ANN. § 26.09.240 (West Supp. 1994) (dissolution of marriage); W. VA. CODE § 48-2B-1 to -9 (Supp. 1993) (divorce, annulment, death, grandchild resided with grandparents six months within two years of filing of petition and wedlock); WIS. STAT. ANN. § 880.155 (West 1991) (death); WYO. STAT. § 20-7-101 (Supp. 1993) (death or divorce and person having custody has refused reasonable visitation rights to grandparent and grandchild resided with grandparent for six months or more).

37. A “discretion of the court” standard is arguably more vague than a “best interest of the child” standard. The following states adopted this standard at least in part.

ALA. CODE § 30-3-4 (1989) (dissolution of marriage, death and grandparent unreasonably denied visitation for 90 days); DEL. CODE ANN. tit. 10, § 950(7) (Supp. 1992) (regardless of marital status except when both parents are together and object to visitation); HAW. REV. STAT. § 571-46.3 (Supp. 1993) (death, divorce, separation); LA. REV. STAT. ANN. § 9:572 (West 1991) (death and divorce); MISS. CODE ANN. §§ 93-16-1 to -7 (Supp. 1993) (any child custody matters, death, substantial relationship, best interest); MO. ANN. STAT. § 452.402 (Vernon Supp. 1993) (divorce, death and unreasonable denial of visitation); N.C. GEN. STAT. § 50-13.2(b1) (1984) (any order for custody).

38. A “substantial relationship” is required between the grandparent and grandchild. The following

II. Development of Wyoming Law

The Wyoming Legislature enacted Wyoming's first grandparent visitation statute in 1987.⁴⁰ Section (c) of that statute allowed grandparents to petition for visitation in the legal absence, most notably death or remarriage, of one of the parents, or after a divorce or judicial separation.⁴¹ The statute used the "best interest of the child" standard to determine whether visitation was appropriate.⁴²

The first case to reach the Wyoming Supreme Court under Wyoming's first grandparent visitation statute was *Nation v. Nation*.⁴³ The *Nation* court held that granting visitation rights to grandparents required a finding by the court that such visitation was in the "best interest of the child."⁴⁴

The second case to reach the Wyoming Supreme Court under the first statute was *Matter of Adoption of RDS*.⁴⁵ In that case, a maternal grandmother tried, using section 20-2-113(c), to obtain visitation rights with her grandchild when the mother had relinquished her parental rights to the child by means of adoption.⁴⁶ The court applied section 20-2-113(c)

states adopted this standard at least in part.

IDAHO CODE § 32-1008 (1983) (grandparent established substantial relationship with grandchild); KAN. STAT. ANN. § 38-129 (1986) (divorce pursuant to § 60-1616, death and substantial relationship); NEB. REV. STAT. § 43-1802 (1988) (death, divorce, no marriage but legal paternity); N.M. STAT. ANN. § 40-9-2 (Michie Supp. 1993) (divorce, death, grandchild resided with grandparents at least three months and under six years old, grandchild resided with grandparents at least six months and six years or older, and adoption by stepparent, relative, person designated by deceased parent's will or person who sponsored grandchild at baptism or confirmation conducted by recognized religious organization); N.C. GEN. STAT. § 50-13.2(b1) (1984) (any order for custody); N.D. CENT. CODE § 14-09-05.1 (Supp. 1993) (divorce); OR. REV. STAT. § 109.121 (1990) (divorce and dissolution).

39. IND. CODE ANN. § 31-1-11.7-2 (Burns Supp. 1993) (death, child born out of wedlock, marriage dissolved and adoption by blood relative); IOWA CODE ANN. § 598.35 (West Supp. 1994) (divorce, death of grandparent's child and child in foster home); MD. CODE ANN. FAM. LAW § 9-102 (Supp. 1993) (divorce, annulment, death); S.C. CODE ANN. § 20-7-420(33) (Law. Co-op. 1976) (anything within jurisdiction of family court).

40. WYO. STAT. § 20-2-113(c) (1987); see *supra* note 9 and accompanying text.

41. *Id.* Unlike many of the early grandparent visitation statutes, Wyoming's statute was not based on a derivative rights theory. A derivative rights theory essentially limited visitation to cases of death and excluded cases of divorce. See *supra* note 25 and accompanying text.

42. WYO. STAT. § 20-2-113(c) (1987); see *supra* note 9 and accompanying text.

43. 715 P.2d 198 (Wyo. 1986). The father and paternal grandparents petitioned to seek grandparent visitation privileges subsequent to the divorce decree. The court held that "[g]randparent visitation claims under W.S.1977, § 20-2-113(c) may be litigated by independent proceeding or by permissive intervention pursuant to Rules Civ. Proc., Rule 24(b) in exercise of discretion of court, when requisite facts under such rule exist." *Id.*

44. *Id.* at 204. The court emphasized that to determine what actually is in "the best interest of the child" required a mandatory hearing and written finding. *Id.*

45. 787 P.2d 968 (Wyo. 1990).

46. *Id.* at 970. According to WYO. STAT. § 1-22-114(a) (1977), upon adoption, former parents do not have any rights to the child. The adoptive parents receive all rights previously held by the

literally and held that the grandparent visitation statute did not apply to matters of adoption, only death and divorce.⁴⁷

In 1991, following the national trend towards greater opportunities for visitation rights by grandparents, Wyoming adopted a new grandparent visitation statute.⁴⁸ The new statute retains the "best interest of the child" standard of review.⁴⁹ Still, the new statute expanded and revised Wyoming's old grandparent visitation statute.⁵⁰

Wyoming's new grandparent visitation statute has not changed any fact situations which permit visitation,⁵¹ but instead has added a situation. The new statute allows grandparents to petition for visitation rights when the unmarried minor grandchild resided with a grandparent for a period exceeding six (6) consecutive months at sometime in the past.⁵² In other words, if a grandchild resides with a grandparent for more than six consecutive months at any time in the past, then those grandparents have a right to petition for visitation.

Another addition to the new statute requires that the custodial parents refuse to allow reasonable visitation with the grandchild before a grandparent can file a petition. A grandparent can no longer petition for visitation when a custodial parent allows the grandparent reasonable visitation with the grandchild.⁵³ The last major addition to the statute is a parental rights standard—as long as "the rights of the child's parents are not substantially impaired," the court may grant reasonable visitation rights.⁵⁴

To date, only one case has come before the Wyoming Supreme Court under the current statute. That case, *Goff v. Goff*,⁵⁵ is the focus of this note.

natural parents. See *Voss v. Ralston*, 550 P.2d 481 (Wyo. 1976) (adoption decree severs parent-child relationship). See also *Heard v. Coleman*, 354 S.E.2d 164 (Ga. 1987); *In re W.E.G.*, 710 P.2d 410 (Alaska 1985); and *Bikos v. Nobliski*, 276 N.W.2d 541 (Mich. 1979).

47. *Matter of Adoption*, 787 P.2d at 970. "The reach of § 20-2-113(c) is limited by its unambiguous terms." *Id.*

48. WYO. STAT. § 20-7-101 (Supp. 1993). See *supra* note 9 and accompanying text. "Although Laws 1991, ch. 119, § 1, enacted this section as § 20-6-701, it was apparently intended to be enacted as § 20-7-101." *Id.* at Editor's Note.

49. See WYO. STAT. § 20-7-101(b) (Supp. 1993).

50. WYO. STAT. § 20-2-113 (1987).

51. *Id.* (death and divorce).

52. See WYO. STAT. § 20-7-101(a)(ii) (Supp. 1993).

53. Although grandparents may have some visitation rights with a grandchild, they might petition for visitation rights through court order because they want more extensive visitation. Thus, according to Wyoming's new visitation statute, if a parent allows a grandparent reasonable visitation, then a grandparent cannot file. See WYO. STAT. § 20-7-101 (Supp. 1993), *supra* note 9.

54. WYO. STAT. § 20-7-101(b) (Supp. 1993).

55. 844 P.2d 1087 (Wyo. 1993).

PRINCIPAL CASE

In *Goff v. Goff*,⁵⁶ the custodial parents (appellants) advanced two issues.⁵⁷ In the first issue, the parent Goffs asked whether the lower court erroneously found that the grandparents had a cause of action for grandparent visitation rights pursuant to sections 20-2-113(c)⁵⁸ and 20-7-101 of the Wyoming Statutes.⁵⁹ Here, the primary task of the Wyoming Supreme Court was to determine whether Wyoming's grandparent visitation statute applies equally to custodial parents of both direct and indirect lineage.⁶⁰

The custodial parents asserted that section 20-7-101 should not apply since William, a custodial parent, was the child of the grandparents.⁶¹ The custodial parents argued that the statute applied only when the custodial parent is not the natural child of the grandparent.⁶²

The Wyoming Supreme Court disagreed with the custodial parents' argument.⁶³ The court ruled that the custodial parents' argument could not be supported by reference to the statute.⁶⁴ The court pointed out that the statute clearly states that a grandparent may bring an original action against *any person* having custody of the minor grandchild.⁶⁵ Therefore, Goff's argument lacked merit because the statute was unambiguous.

56. *Id.*

57. *Id.* at 1088. The first issue addressed the validity of whether grandparent visitation rights were properly granted in this case; the second issue questioned the extent of the visitation schedule. *Id.*

58. *Id.* The custodial parents argued WYO. STAT. § 20-2-113(c) (Supp. 1992) but subsequently conceded that it did not apply in this case. This case did not "take place in the context of a divorce, a judicial separation, or a juvenile proceeding." *Goff*, 844 P.2d at 1089 n.1.

59. *Goff*, 844 P.2d at 1088. See also *supra* note 9 and accompanying text.

60. Direct lineage is a situation where the grandparent and custodial parent are related through a blood relationship. Indirect lineage, on the other hand, exists where the grandparent and custodial parent are related only through marriage (e.g., the petitioning grandparents want to enforce visitation through their child's former spouse who has custody of the grandchild). See generally Shandling, *supra* note 16.

61. *Goff*, 844 P.2d at 1089.

62. *Id.* Therefore, because William E. Goff III, the custodial father of the child, was the son of the grandparents, the grandparents were without a right upon which to bring an action for visitation rights with their grandchild. *Id.*

63. *Id.*

64. *Id.* The majority opinion cited both subparts (i) and (ii) of W.S. § 20-7-101(a) as "plain and unambiguous and convey[ing] a clear and definite meaning." A Wyoming rule of law states: if the language of a statute is plain and unambiguous and conveys a clear and definite meaning, we do not resort to any rules of statutory construction in applying it. *Id.* (citing *Matter of Adoption of RDS*, 787 P.2d 968 (Wyo. 1990); *Halliburton Company v. McAdams, Roux and Associates, Inc.*, 773 P.2d 153 (Wyo. 1989)).

65. *Goff*, 844 P.2d at 1089 (emphasis added). The statute does not restrict, in any way, the identity of the person seeking visitation. *Id.* at 1089-90.

Justice Thomas, the author of the majority opinion, then noted that a decision in this case was as simple as reading the language of the statute, but because "the case was of novel and substantial import to many people," a more in-depth discussion on the applicable law was needed.⁶⁶

In justifying its decision on this first issue concerning the status of a custodial parent, the majority noted that the statute's statement of purpose did not limit visitation rights when a grandparent's own child is the custodial parent.⁶⁷ Additionally, the statute specifically states that a grandparent could seek visitation rights from *any* person having custody.⁶⁸

The court continued with an analysis of the unbreakable links of heredity between a grandparent and grandchild⁶⁹ and also discussed the distinctive "symbolic roles" that grandparents play in a familial relationship.⁷⁰ Both of these examples emphasize the importance of good relations between a grandparent and grandchild.⁷¹

66. *Id.* at 1090.

67. *Id.* The enactment clause reads:

AN ACT to create W.S. 20-6-701; and to amend W.S. 20-2-113(c) relating to grandparent visitation rights; specifying when grandparents may commence original action to establish visitation rights to a minor grandchild; providing that courts may grant reasonable visitation rights to grandparents if in the best interest of the child; providing procedures; and providing for an effective date.

Id.

68. WYO. STAT. § 20-7-101 (Supp. 1993). *See supra* note 9.

69. *Id.* at 1090-91. The court cited specific language about grandparent-grandchild relationships from *Mimkon v. Ford*, 332 A.2d 199, 204-05 (N.J. 1975). The court observed:

It is [a] biological fact that grandparents are bound to their grandchildren by the unbreakable links of heredity. It is common human experience that the concern and interest grandparents take in the welfare of their grandchildren far exceeds anything explicable in purely biological terms. A very special relationship often arises and continues between grandparents and grandchildren. The tensions and conflicts which commonly mar relations between parents and children are often absent between those very same parents and their grandchildren. Visits with a grandparent are often a precious part of a child's experience and there are benefits which devolve upon the grandchild from the relationship with his grandparents which he cannot derive from any other relationship. Neither the Legislature nor this Court is blind to human truths which grandparents and grandchildren have always known.

Id.

70. *Goff*, 844 P.2d at 1091. *See also* Fernandez, *supra* note 18, at 109-10 (footnotes omitted) (citing V. Bengston, *Diversity and Symbols In Grandparental Roles, in Grandparenthood* 21-24 (V. Bengston & J. Robertson eds. 1985)).

"Symbolic" roles of grandparents include:

- | | |
|------------------------|---|
| (1) "Being there" | —requires nothing more than a grandparent's presence and guidance |
| (2) "Family watch-dog" | —alert for signs of abuse |
| (3) "Arbitrating" | —active negotiators between parents and children |
| (4) "Interpreter" | —family history (past, present, future) |

Id.

71. *See supra* notes 69 and 70.

The second issue that the custodial parents advanced questioned the court-ordered visitation schedule. Here, the custodial parents questioned whether the lower court abused its discretion because the visitation ordered was excessive, substantially impaired the custodial parents rights, and was not in the best interest of the child.⁷²

The Wyoming Supreme Court held that under Wyoming law, scheduling grandparent and grandchild visitation is left to the discretion of the trial court.⁷³ Unless a clear abuse of discretion is found, the lower court's decision will stand.⁷⁴ The *Goff* visitation schedule was determined after testimony by not only the grandparents and custodial parents, but also an expert psychologist.⁷⁵ The court concluded that the relevant facts developed through this testimony were the primary considerations in establishing a visitation schedule.⁷⁶ Generally, any visitation schedule not inherently unreasonable or excessive is valid.⁷⁷

The final, and possibly the most important issue raised in this case concerned the constitutional ramifications of grandparent visitation. Nevertheless, the custodial parents did not raise the constitutional issue in the lower court. Therefore, the Wyoming Supreme Court, following its usual approach towards issues not raised in the lower court, refused to consider the issue raised for the first time on appeal.⁷⁸

Still, the constitutional issue, raised by the custodial parents in their brief, deserves discussion.⁷⁹ The custodial parents asserted that no constitutional right exists for grandparents to demand visitation with grandchildren.⁸⁰ Their primary argument relied on a "general rule that there is not

72. *Goff*, 844 P.2d at 1088. The custodial parents presented this issue on the assumption that the statute did apply and visitation was viable. *Id.*

73. *Id.* at 1092 (citing *C.f. Rowan v. Rowan*, 786 P.2d 886 (Wyo. 1990)).

74. *Id.* A court abuses its discretion only when it acts in a manner that exceeds the bounds of reason under the circumstances. *Id.* (citing *Deen v. Deen*, 774 P.2d 621 (Wyo. 1989)).

75. *Id.* The psychologist "testified about the importance of grandparent and grandchild relationships in general, as well as the impact this type of visitation dispute can have on the child." *Id.*

76. *Goff*, 844 P.2d at 1093. The court concluded all the testimony in the record supported the view that grandparent visitation was in the "best interest of the child." The judge assessed the credibility of the witnesses and weighed their testimony. No abuse of discretion was evident. *Id.*

77. *Id.*

78. *Id.* See also *Oatts v. Jorgenson*, 821 P.2d 108, 111 (Wyo. 1991); *Epple v. Clark*, 804 P.2d 678 (Wyo. 1991); *Thatcher & Sons, Inc. v. Norwest Bank Casper, N.A.*, 750 P.2d 1324 (Wyo. 1988); *White v. Fisher*, 689 P.2d 102 (Wyo. 1984); *ABC Builders Inc. v. Phillips*, 632 P.2d 925 (Wyo. 1981); and *Schaefer v. Lampert Lumber Company*, 591 P.2d 1225 (Wyo. 1979).

79. Maintaining a grandparent's right to petition for visitation is important. Thus, recognizing and discussing some of the inherent problems in grandparent visitation statutes helps ensure that these rights continue to exist.

80. Brief for Appellant at 19, *Goff v. Goff*, 844 P.2d 1087 (Wyo. 1993) (No. 92-3). [Herein-after Appellant's Brief].

independent grandparent's visitation rights, but that the privilege of visitation by the grandparents is derivative from their own children."⁸¹ Thus, because the custodial father of the grandchild was the child of the petitioning grandparents, any visitation derived from that parent. That parent was still alive and had the constitutional right to decide who would visit his child. The custodial parents' general premise was that grandparent visitation statutes were constitutionally invalid in any form.⁸²

ANALYSIS

The Wyoming Supreme Court correctly interpreted the Wyoming grandparent visitation statute in *Goff v. Goff*.⁸³ Wyoming's grandparent visitation statute allows a grandparent to bring an action for visitation against *any* person having custody of the minor grandchild.⁸⁴ If the court had denied the grandparents visitation in the *Goff* case, the court would have overtly disregarded Wyoming law. Other important questions raised by *Goff* include the constitutional issues presented by grandparent visitation statutes and the standard of review for grandparent visitation rights.

Determining whether grandparent visitation statutes are constitutional is not a new question.⁸⁵ Most constitutional challenges have involved the Fourteenth Amendment of the United States Constitution. The most common issue is whether a parent's right to raise a child without state intrusion, a Fourteenth Amendment liberty right, is absolute, or subject to limitations.⁸⁶ The

81. *Id.* Their argument relied primarily on a parent's Fourteenth Amendment constitutional right to raise children without state intrusion. *Id.* at 19-20. The appellants relied upon various case law in support of their argument that grandparent visitation rights violate parent's constitutional rights. See *Bellotti v. Baird*, 443 U.S. 622 (1979) (abortion with both parents consent); *Carey v. Population Services International*, 431 U.S. 678 (1977) (condoms); *Wisconsin v. Yorder*, 406 U.S. 205 (1972) (requiring Amish to attend school after eighth grade); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (requiring only English to be taught until the eighth grade); *Santosky v. Cramer*, 455 U.S. 745 (1988) (termination of parental rights upon finding that child is "permanently neglected"); *Bowers v. Hardwick*, 478 U.S. 186 (1986) (Georgia sodomy law); and *Prince v. Massachusetts*, 321 U.S. 158 (1944) (statute restricting the sale of any article by a minor).

82. See *supra* note 81 and *infra* note 85.

83. 844 P.2d 1087 (Wyo. 1993).

84. WYO. STAT. § 20-7-101 (Supp. 1993). The familial relationship between grandparent and custodial parent, according to the Wyoming statute, is irrelevant. *Id.*

85. See generally *Lockhart v. Lockhart*, 603 N.E.2d 864 (Ind. 1992); *Matter of C.G.F.*, 483 N.W.2d 803 (Wis. 1992); *King v. King*, 828 S.W.2d 630 (Ky. 1992); *In re Gibson*, 573 N.E.2d 1074 (Ohio 1991); *Lehrer v. Davis*, 571 A.2d 691 (Conn. 1990); *Spradling v. Harris*, 778 P.2d 365 (Kan.App. 1989); *In re Marriage of Herreras*, 768 P.2d 673 (Ariz. App. 1989); and *Ward v. Ward*, 537 A.2d 1063 (Del. Fam. Ct. 1987).

86. U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law."). Although not within the scope of

crucial factor determining whether the state can utilize *parens patriae* powers and infringe upon a parent's constitutional right to raise his/her child without state intrusion is the family's status as an intact or non-intact family.

A family is considered intact when both natural parents live together.⁸⁷ Some states other than Wyoming define an intact family to include an adoptive parent. An intact family dispute arises when the natural parents refuse the grandparents visitation. Today's trend on grandparent visitation and the intact family follows the common law, which hold that no such visitation privileges exists.⁸⁸ Therefore, when a family is intact, parents have a constitutional right to raise their children without any state intrusion.⁸⁹

Today's grandparent visitation statutes are cognizant of a parent's fundamental Fourteenth Amendment right to raise an intact family without state intrusion. To respect these constitutionally protected rights, states have designed statutes which give the parents of an intact family an absolute right, but limit parents' rights when the familial relationship is not intact.⁹⁰

this note, both equal protection and due process constitutional questions are prevalent. These constitutional questions could include rights for the parent, the grandparent, the grandchild, or all.

87. See Shandling, *supra* note 16. Grandparent visitation statutes are usually specific on whether the term, "parents," includes a natural parent or an adoptive parent when discussing a parent's right to refuse a grandparent visitation. *Id.* No Wyoming statute specifically enumerates any provision which gives an adoptive parent a power of refusal to a blood grandparent.

88. See *supra* note 17 and accompanying text. The intact family and grandparent visitation view developed through a number of cases. The first major case was *Meyer v. Nebraska*, 262 U.S. 390 (1923). Although the issue in *Meyer* did not concern grandparent visitation, *Meyer* did contribute to the common law prohibiting grandparent visitation. There, the Court said that:

[w]ithout doubt, [the Fourteenth Amendment] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and *bring up children*, to worship God according to the dictates of his own conscience, and *generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.*

Id. at 399. (Emphasis added.)

The year after *Meyer*, the Supreme Court held that a family should be free from state intrusion by recognizing that parents have a fundamental right to raise children autonomously. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (citing *Pierce v. Society of Sisters*, 268 U.S. 510 (1924)). Finally, in 1972, the Supreme Court recognized the intact family distinction. *Stanley v. Illinois*, 405 U.S. 645, 649-51 (1972), held that when the status of a family is *intact and functional*, Fourteenth Amendment protections extend to parents and their right to raise children as they see fit. Following the Court's prior decisions, any grandparent visitation statute that "guarantee[s] grandparents the right to seek visitation in circumstances where the family is intact and functional preempt[s] the constitutionally recognized liberty of the family" and is facially invalid. Stockman Gan, *supra* note 22, at 246. See also *Stanley*, 405 U.S. 645.

89. Notable exceptions to parents' Constitutional rights include situations of neglect, abuse, etc.

90. See *supra* notes 36-39 and accompanying statutory-defined fact situations in which grandparents can petition for visitation. Today's grandparent visitation statutes limit parents' rights when it is both in the "best interest of the child" to allow visitation, and when certain statutory familial status situations occur.

A non-intact familial status can lead to limitations on a parent's Constitutional rights and give rise to grandparent visitation rights.⁹¹ The terminology of a non-intact family is very broad. The easiest method of defining a non-intact family is by setting out some distinct examples. The clearest and most common examples of a non-intact family status, which give rise to grandparent visitation rights, is subsequent to either the death of one or more parents, or the divorce of the parents. Another obvious example is when one or both parents are absent.⁹² The last example, as demonstrated in the Texas grandparent visitation statute, is a situation where parents are present, but are not acting like parents.⁹³

Policy for allowing grandparents a right to petition for visitation in a non-intact family situation derives from the state's interest that a child receive adequate parental supervision and guidance. When a parent dies, grandparent visitation allows the grandparent to receive the deceased parent's parental rights.⁹⁴ When parents divorce, visitation allows the grandparent a limited means of ensuring that the custodial parent addresses the child's "best interests." When parents allow a grandchild to reside with the grandparents in excess of six months, parents have relinquished some of their parental rights.⁹⁵ Allowing grandparents to petition for visitation pursuant to a non-intact family situation helps the state adequately enforce its *parens patriae* powers for the "best interest of the child."⁹⁶

91. *Id.*

92. See *infra* note 93 for various examples of when a parent is "absent" as set out in the Texas grandparent visitation statute.

93. The Texas grandparent visitation statute illustrates various situations when a parent is considered not to be "acting like a parent." When a parent so acts, grandparent visitation rights then arise. The Texas statute allows a petition for visitation if:

(1) the grandparent seeking access to the child is a parent of a parent of the child and that parent of the child has been *incarcerated in jail or prison* during the three-month period preceding the filing of the petition or has been found by a court to be *incompetent* or *is dead*; or

(2) the parents of the child are *divorced* or have been *living apart* for the three-month period preceding the filing of the petition or a suit for the *dissolution* of the parents' marriage is pending; or

(3) the child has been *abused or neglected by a parent* of the child; or

(4) the child has been adjudicated to be a *child in need of supervision* or a *delinquent child* under Title 3 of this code; or

(5) the grandparent seeking access to the child is the parent of a person whose *parent-child relationship with the child has been terminated* by court decree; or

(6) the child has *resided* with the grandparent seeking access to the child for at least six months within the 24-month period preceding the filing of the petition.

TEX. FAM. CODE ANN. § 14.03(e) (West Supp. 1994). (Emphasis added.)

94. See generally Ingulli, *supra* note 25, at 310-323.

95. *Id.*

96. See *supra* notes 30-36 and accompanying text. Although the best interest of the child standard is the common form of review, some people advocate a two-tiered system of review when the

Thus, maintaining constitutional grandparent visitation statutes is important. Grandparents benefit by obtaining a limited right to visit with their grandchildren when custodial parents refuse reasonable visitation. Grandchildren benefit in that they have an additional role model. This is especially important when the family is not intact or is somewhat troubled. Although custodial parents may not appreciate the state's interference with their family, a healthy grandparent/grandchild relationship outweighs the slight burdens a custodial parent incurs by means of court-ordered visitation.⁹⁷ *Goff* supported the policy that visitation is appropriate in some situations.

The custodial parents in *Goff* argued that no limitations exist to restrict a parent's right to raise a family without state intrusion.⁹⁸ Nevertheless, the custodial parents' view does not follow the reasoning from the long line of cases on grandparent visitation rights. Overwhelmingly, case law supports the view that grandparent visitation statutes are constitutional, but subject to certain limitations.⁹⁹

The primary case cited by the Goffs in their constitutional argument was *Ward v. Ward*.¹⁰⁰ The *Ward* decision upheld a Delaware statute that refused a grandparent's petition for visitation with their grandchildren if both custodial parents, whether natural or adoptive,¹⁰¹ objected to the visitation.¹⁰²

Ward and *Goff*, however, involve different statutes—the Delaware statute is not analogous to the Wyoming statute. Consequently, the appellants were correct in their assertion that grandparents do not have any constitutional right to visitation with their grandchildren,¹⁰³ but that asser-

family is not intact. The distinction is whether a one-family or two-family dispute exists. While a two-family dispute (custodial parent not related to petitioning grandparent) would continue with a "best interest" standard, one-family disputes (grandparents seek to obtain visitation rights with their grandchild through their own child) would adopt a "compelling need" test. For a complete discussion on the advantages and disadvantages of distinguishing the two tests, see Shandling, *supra* note 16, at 132-37.

97. See generally Shandling, *supra* note 16.

98. Appellant's Brief at 19-20, *Goff* (No. 92-3).

99. See *supra* note 85 for examples of case law with constitutional issues involving grandparent visitation rights.

100. 537 A.2d 1063 (Fam. Ct. Del. 1987).

101. DEL. CODE ANN. tit. 10, § 950(7) (Supp. 1992). The only distinction between the common law and *Ward* was that the Delaware statute allowed an adoptive parent to object to grandparent visitation. This distinction was important in the *Ward* decision, but Wyoming Statutes do not allow an adoptive parent the power to refuse natural grandparents the right to visitation with their grandchildren.

102. DEL. CODE ANN. tit. 10, § 950(7) (Supp. 1992). The *Ward* decision involved an intact family situation which, constitutionally, allows parents to raise their family without state intrusion. *Ward*, 537 A.2d at 1064.

103. Appellant's Brief at 19, *Goff* (No. 92-3).

tion applies only when the family is intact.¹⁰⁴ In *Goff*, the natural parents of the grandchild were divorced, thus producing a non-intact family under Wyoming law.¹⁰⁵

Wyoming's grandparent visitation statute

Wyoming's grandparent visitation statute allows petitions for visitation by "any person having custody of the grandparent's minor grandchild" in non-intact familial situations including divorce, death and the grandchild's residence with the grandparent in excess of six months at sometime in the past. Wyoming's statute does not allow a grandparent to petition for visitation rights unless one of those criteria exist and the custodial parents refuse the grandparents visitation. If the criteria are met, the court must then hold a hearing to determine whether grandparent visitation outweighs any burdens to the parents.¹⁰⁶ Thus, the Wyoming legislature recognized the constitutional constraints on grandparent visitation statutes and enacted a statute that falls outside of any of those constraints.¹⁰⁷ Therefore, the Wyoming grandparent visitation statute is constitutional.

Standard of Review

Grandparent visitation statutes typically specify the required standard of review for grandparent visitation actions. Today, the majority of states, including Wyoming, have adopted the "best interest of the child" standard.¹⁰⁸ A "best interest" standard requires courts to decide whether grandparent visitation serves the "best interest" of the grandchild.¹⁰⁹ Assuming a case meets the statute's requirements as to family status, i.e. divorce, death, etc., the "best interest of the child" standard is the crucial element in deciding the appropriateness of grandparent visitation.¹¹⁰

104. This assertion also assumes that the Wyoming statute does not apply to an adoptive parent, such as the case in *Ward*.

105. If the statute in *Ward* also applied in Wyoming, the rights of the custodial parents in *Goff* to raise a family as they saw fit would be absolute, and the grandparents had no right to visitation as a matter of law. See generally *Goff*, 844 P.2d 1087 and *Ward v. Ward*, 537 A.2d 1063 (Del. Fam. Ct. 1987).

106. WYO. STAT. § 20-7-101 (Supp. 1993); see *supra* note 9.

107. "Intact" in Wyoming refers to two natural parents living together with the child. See *supra* note 16 and accompanying text.

108. See *supra* note 36.

109. The court typically has the discretion to allow for as much or as little visitation as it deems appropriate. See generally *Goff*, 844 P.2d at 1092-93.

110. For a general and in-depth discussion on the "best interest of the child," see JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD (1973) and JOSEPH GOLDSTEIN ET AL., BEFORE THE BEST INTERESTS OF THE CHILD (1979).

The problem with the "best interest" standard is the actual determination of the child's "best interest." The "best interest of the child" standard is vague¹¹¹ and often results in judicial orders that infringe upon parental interests protected by the Fourteenth Amendment of the United States Constitution.¹¹² This vagueness results in confusion as to how the appropriate standard should operate.

Obviously a "best interest of the child" standard is easily determinable in cases of physical abuse or deprivation of basic necessities of life.¹¹³ However, most cases provide varying facts that make an analysis of a child's "best interest" difficult.¹¹⁴ Where an analysis is complex, judges' opinions often differ as to what is the "best interest of the child." When judicial opinions differ, results are often arbitrary and unfair.

To alleviate this problem, legislatures or courts can adopt guiding criteria to help courts determine a child's "best interest"—a small minority of states have done so.¹¹⁵ The remaining majority of state statutes with

111. "VAGUE. Indefinite. Uncertain; not susceptible of being understood. For purposes of determining whether a statute is constitutionally infirm by reason of being vague, statute is "vague" if its prohibitions are not clearly defined, *State v. Fry*, 357 N.W.2d 216, 218; or if it does not provide explicit standards for its enforcement, *Pliscow v. Holtville Unified School Dist.*, D.C.Cal., 411 F.Supp. 842, 850." BLACK'S LAW DICTIONARY 1549 (6th ed. 1990). Simply limiting a court's discretion to the "best interest of the child" is vague because of its lack of explicit standards for its enforcement. Without any standards, courts of different classifications or opinions, i.e., race, religion, family values, etc., may apply the "best interest of the child" standard differently. This possible disparate treatment is unfair and not the desired result of courts of law.

112. Shandling, *supra* note 16, at 123. Although the "best interest of the child" standard probably infringes upon the parental and grandparental interests less than other standards, it is still unacceptable for an advanced society to allow a court such broad discretion without any formalized justification in such a sensitive family area.

113. Shandling, *supra* note 16, at 123. See also Mnookin, *Child-Custody Adjudication: Judicial Functions in the face of Indeterminacy*, LAW & CONTEMP. PROBS. 226, 261 (Summer 1975).

114. See Shandling, *supra* note 16, at 123 n.23. The author pointed out that unlimited discretion allows judges to impose their own views and values on their decisions:

Painter v. Bannister, 258 Iowa 1390, 140 N.W.2d 152, cert. denied, 385 U.S. 949 (1966), which involved a custody dispute between a father and maternal grandparents, rather than a visitation suit, illustrates in an analogous situation what can happen when a judge feels free to decide a case solely on the basis of the 'best interests' of the child. The *Painter* court compared at great length the 'stable, dependable, conventional, middle-class, middlewestern' grandparents with the agnostic, politically liberal, 'Bohemian' father who attended his wife's funeral in a sport shirt and sweater, and decided that granting custody to the grandparents was in the child's best interests.

See *id.* at 1392, 140 N.W.2d at 154-56.

115. These states have had the insight to understand and resolve the problems of a simple "best interest of the child" standard by developing formal criteria to be followed. By formalizing criteria within statutes, these states have limited a court's discretion which forces the court to justify its ruling by means of the criteria. This justification helps both parties understand the decision and should inevitably help limit appeals because courts' decisions will no longer be shrouded in mystery. North Dakota's statute is one of the most recently enacted statutes. N.D. CENT. CODE § 14-09-05.1 (Supp.

a “best interest” standard lack any criteria to guide their courts in applying the standard.¹¹⁶

Wyoming follows the majority—the Wyoming statute does not enumerate any criteria to guide the judiciary in the determination of a child’s “best interest.” Under the statute, “the court may grant reasonable visitation rights to the grandparent of a child if the court finds, after a hearing, that visitation would be *in the best interest of the child*.”¹¹⁷ When the Wyoming legislature passed the revised grandparent visitation statute, it followed the majority of states by enacting a standard of review without any guiding criteria.¹¹⁸

Without any guiding criteria, judges can decide similar fact situations differently. Inconsistent results prevent potential litigants from being able to reasonably predict their possibilities. Additionally, without guiding criteria, the potential for judicial abuse of the statute is conceivable. The “best interest of the child” standard, without further guidelines, gives judges wide discretion.¹¹⁹ This wide discretion allows judges to cloak biased decisions in the vague framework of the elusive “best interest” standard. Furthermore, proving possible bias is extremely difficult on appeal because the court hearing the appeal must give deference to the broad discretion of the lower court.¹²⁰ Biased decisions are unfair and unjust. Without any criteria to guide the judiciary in determining a child’s “best interest,” a trail of ambiguity results, every judge with different, personal guidelines.

Proposed Amendment to Wyoming’s Grandparent Visitation Statute

Wyoming should amend its grandparent visitation statute to assist judges, attorneys, and litigants in determining the child’s “best interests.” Two states, New Hampshire¹²¹ and Nevada,¹²² have statutes which require

1993); Alaska Stat. § 25.24.150 (1991); CAL. FAM.C. § 3022 (West 1993); ME. REV. STAT. ANN. tit. 19, § 1003(2) (West Supp. 1993); NEV. REV. STAT. ANN. § 125A.330 (Michie 1993); N.H. REV. STAT. ANN. § 458:17-d (1992); OHIO REV. CODE ANN. §3109.051 (Baldwin 1992) (although Ohio’s statute does not refer its criteria to a “best interest of the child” standard, the criteria are similar to those states that specifically refer their criteria to a “best interest of the child” standard); VA. CODE ANN. § 20-107.2 (Michie Supp. 1993) (although Virginia’s criteria specifically refers only to “determining custody and visitation only,” the criteria are similar to the “best interest of the child” standard referred to in other states).

116. See *supra* note 36.

117. WYO. STAT. § 20-7-101(b) (Supp. 1993) (emphasis added). See *supra* note 9. Admittedly, Wyoming requires a hearing to determine a child’s “best interest,” but nevertheless, nothing requires this hearing to follow any criteria to guide judges with that determination. *Id.*

118. WYO. STAT. § 20-7-101 (Supp. 1993); see *supra* note 9 and accompanying text.

119. *Id.* A judge’s discretion is not unlimited, but bad or unfair reasons often can be masked behind more acceptable justifications. Such possibilities illustrate that if a judge desires to rule one way, they likely can find acceptable justifications for their reasoning.

120. See generally *Goff*, 844 P.2d at 1092-93.

121. N.H. REV. STAT. ANN. § 458:17-d (1992).

their courts to follow established criteria when determining questions of a child's "best interest" in grandparent visitation actions.¹²³ These criteria ensure a concrete analysis of what is actually the child's "best interest." The Wyoming legislature should follow the innovative lead of these states' statutes. If the legislature does not amend the Wyoming statute accordingly, courts should, on their own, consistently utilize these criteria in determining the "best interest of the child." Doing so would help clarify the "best interest" standard for Wyoming.

A proposed amendment to Wyoming's grandparent visitation statute follows:

Proposed Amendment to WYO. STAT. § 20-7-101¹²⁴

WYO. STAT. § 20-7-101(e)

(e) In any action or proceeding under subsection (a) of this section where a determination of the best interest of the child is needed, a hearing shall consider the following factors:

(i) Whether such visitation would interfere with any parent-child relationship or with a parent's authority over the child; and

(ii) The nature of and prior relationship between the grandparent and the minor child; and

(iii) The nature of the relationship between the grandparent and the custodial parent of the minor child, including friction between the grandparent and custodial parent, and the effect such friction would have on the child; and

(iv) The capacity of the party seeking visitation to provide love, affection and guidance; and

(v) The capacity of the party seeking visitation to provide food, clothing, health care, medical care, and any other material needs during visitation; and

(vi) The moral fitness, mental health, and physical health of the person seeking visitation; and

122. NEV. REV. STAT. ANN. § 125A.330 (Michie 1993).

123. Both states follow very similar lines of reasoning with their criteria. See *supra* notes 121 and 122.

124. Although the proposed amendment refers specifically to WYO. STAT. § 20-7-101, the legislature could easily take the proposal and enact a separate statute. Making the amendment its own statute could help the courts to determine a child's "best interest" in cases other than actions for grandparent visitation. The "best interest" standard applies to many of the Wyoming statutes dealing with the parent and the child and a separate statute could alleviate problems in any of the numerous situations when a "best interest" question presents itself. See N.D. CENT. CODE § 14-09-06.2 (Supp. 1993) for a statute that sets out "best interest" standards in a general format.

- (vii) Any reasonable preference of the child, if the child is of sufficient maturity to express a preference; and
- (viii) Recommendations made by impartial, knowledgeable third parties; and
- (ix) Any such other factors as the court may find appropriate or relevant to the petition for visitation.¹²⁵

The proposed amendment to Wyoming's grandparent visitation statute is, of course, subject to modification. Nevertheless, each criterion relates to the desired goal—an accurate determination of a child's "best interest." Even though the proposal offers specific criteria, subpart (e)(ix) gives the court the opportunity to look at anything that, in its discretion, is relevant. Thus, every fact situation, no matter how varied, has an opportunity for a fair review.

The value of establishing criteria to help in the determination of a child's "best interest" is immeasurable. Criteria not only would help judges determine a child's "best interest," but also would explain to litigants how the judge balanced varying factors and came to a conclusion. Another advantage of enumerating criteria is to help reduce the number of appeals in grandparent visitation actions. Judicial opinions would need to list and explain each criterion and its relevant weight.¹²⁶ If a court does not explain its reasoning, an appeal is more probable. Thus, mandating specific criteria for "best interest" determinations is a positive step towards judicial economy.¹²⁷

CONCLUSION

The Wyoming Legislature and Supreme Court are on the right track with their acknowledgment of the importance of grandparent visitation. Wyoming's grandparent visitation statute is broad in that it allows a grandparent to petition for visitation through *any* person with custody when a family is not intact.

Nevertheless, Wyoming's grandparent visitation statute is still inadequate. The statute follows the most common standard of review, the "best interest of the child" standard, which is vague and leads to many unnecessary

125. The proposed amendment follows both the Nevada and New Hampshire statutes. Parts of the proposal are verbatim reproductions of the established statutes. See N.H. REV. STAT. ANN. § 458:17-d (1992) and NEV. REV. STAT. ANN. § 125A.330 (Michie 1993).

126. With a clarification of the judge's logic and reasoning, appeals will notably decrease.

127. Although judges generally do not like to be told the way they must conduct their court, the "best interest" criteria will help all parties and the courts to understand the potential problems and strengths of each distinctive case. The benefits to the litigants outweigh any burden the criteria may impose on a judge and the manner in which a judge conducts his/her court.

problems. Adoption of specific criteria by either the legislature or courts would help alleviate the majority of the problems in interpreting a child's "best interest." Wyoming should amend its statutes to enumerate criteria which help in the actual determination of a child's "best interest." Relevant criteria will help the judiciary be more efficient, fair and predictable.

Wyoming also needs to recognize the different constitutional aspects of grandparent visitation. No longer do parents realize and act upon their moral duty to allow a grandparent to visitation with a grandchild. Therefore, advocating the continuance of grandparent visitation statutes is important to maintaining healthy grandparent/grandchild relationships.

Wyoming should adopt criteria to guide the Wyoming courts in the determination of a child's "best interest" and recognize the various constitutional considerations and their constraints. These necessary modifications will cement Wyoming's role as a leader in equality and fairness in petitions for grandparent visitation.

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