GRANDPARENTAL VISITATION: ITS EVOLUTION IN NEW YORK STATE

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Dedicated in Loving Honor and Memory of
Angela Susan Scheinberg

INTRODUCTION

The subject matter discussed herein was inspired by a case that involved the parents of a mother killed in the World Trade Center attacks, on September 11, 2001.[1] Her surviving spouse denied the mother's parents any access to their eight-year-old grandson notwithstanding the child's extensive history with the maternal grandparents, including, but not limited to, spending entire summers in the grandparents' home in Europe, and receiving daily care and nurturing from them immediately following the radical Islamic terrorist attack.

Mr. and Mrs. Gavrusinas, the grandparents, filed a petition, *pro se*, in Family Court seeking visitation with their grandchild. On the return date of the motion, despite governing law to the contrary, Family Court summarily dismissed their petition without a hearing. The Court stated that it could not compel visitation over the surviving parent's objection because of the obvious "friction" between the grandparents and the surviving parent.[2] The father was permitted to unleash an unfettered litany of allegations against the grandparents, but the Family Court impermissibly muzzled the grandparents. The Court stated that the grandparents' "opinion did not count" and refused to allow the grandparents to utter even a syllable, whether legal (in support of their case of automatic

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1 Gavrusinas v. Melnichenko, 760 N.Y.S.2d 518 (App. Div. 2003).

2 *Id* at 519.

standing and the concomitant right to a hearing on the petition) or factual (in defense of the allegations made against them).[3]

The grandparents, with the author's assistance, brought a motion to reargue.[4] Upon reargument, Family Court conceded its error in the original ruling, which disregarded their automatic standing to file such a petition. This correction notwithstanding, Family Court, nevertheless, summarily rejected their petition, again. The court based its ruling on the best interests of the child – a rather bewildering decision in light of the settled law mandating the resolution of issues relating to custody and visitation via a plenary hearing and in no other fashion.[5] An appeal followed.[6]

The purpose of this paper is to elucidate the governing law regarding all aspects of grandparental visitation including, but not limited, to constitutional challenges to the New York State grandparental visitation statutes[7] and post adoption petitions for visitation. The governing law on this issue, decisional and statutory, should not be viewed as an administrative rubber stamping formality, but rather as a weave of inextricably intertwined inquiries which, at each stage, cloak and shield the children from potentially adverse developmental consequences.

Children are wards of the state, an inviolable stewardship zealously guarded by our courts. Although it may be initially tempting to respond emotionally when an aging grandparent asks the court to intervene on his or her behalf, the final analysis requires the court to balance

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[3] The pertinent part of the colloquy is as follows:

> THE COURT: All right. I have to dismiss this petition. I really can't force visitation between grandparent and child if the parents don't want it . . . . So, I'll dismiss it without prejudice. You may try again if you're in the United Stated for any longer time, and if you manage to rebuild the bridges between yourself and your son-in-law.
> THE INTERPRETER: He's [the grandfather] asking why you are not asking his opinion.
> THE COURT: Because, unfortunately, your opinion doesn't count. The child is living with his father, and if his father doesn't want to see certain other relatives I can't force it. I'm not allowed to force it. And it seems to be whatever, there seems to be some friction between the two of you and I would suggest you do your best to smooth over the friction because if you do so successfully you won't need me. The father will happily let you see you grandson. I have that feeling, and I see him nodding. So, I think he and I agree on that much anyhow. All right. We're done.

Trial Court Record at __, Gavrusinas v. Melnichenko, 760 N.Y.S.2d 518 (App. Div. 2003)(docket number).CITE NEEDED FROM AUTHOR

[4] Elliot Scheinberg worked *pro bono* on this case.

[5] *Gavrusinas*, 760 N.Y.S.2d at 519.

[6] *Id.* at 518.

[7] N.Y. DOM. REL. LAW § 72 (McKinney 2002).

the grandparents' wishes and the child's right and need for access to his ancestral heritage with the child's well being. Accordingly, grandparental visitation is not an open door with guaranteed access simply for the asking, quite the contrary. Visitation must be earned and demonstrated, in large measure, by the emotional history between the grandparent and the child. Evidence that the child enjoyed a prior ongoing, nurturing relationship with his or her grandparent(s) is the *sine qua non* to a grandparent's standing to seek, and hopefully gain visitation.[8]

I. COMMON LAW RIGHTS OF GRANDPARENTS PRIOR TO THE 1966 STATUTE

The heartfelt rush generated by a grandparent bouncing a grandchild on his or her lap, or taking a grandchild for a walk in the park and sharing stories on a summer day evokes imagery from Norman Rockwell's Americana. It does not conjure images of grandparents fighting in dark courtrooms for the right to see their issue, yet that is what has happened. The development of this recondite branch of law dedicated to grandchildren and grandparents originated nearly two generations ago in 1965. It has trekked arduous legislative and judicial paths for more than forty years to negotiate the lines of demarcation between otherwise inconceivably incongruous combatants: resistant parents asserting their constitutional autonomy to raise their children without state intervention and the newly create rights of senescent grandparents seeking to link their grandchildren to their heritage.

The right to seek and obtain grandparental visitation did not exist at common law.[9] "At common law, grandparents had no standing to assert rights of visitation against a custodial parent: a petition seeking such relief would necessarily have been dismissed."[10] Grandparental vis-

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[8] Cole v. Goodrich, 707 N.Y.S.2d 553 (App. Div. 2000), *aff'd*, 714 N.Y.S.2d 706 (2001); Emanuel S. v. Joseph E., 573 N.Y.S.2d 36 (1991).

[9] *See* People *ex rel.* Marks v. Grenier, 293 N.Y.S. 364 (App. Div. 1937), *aff'd,* 274 N.Y. 613 (1937) ("In processing the custody of children the courts have reiterated that their sole point of view is the welfare of the child . . . . No end of difficulties would arise should judges try to tell parents how to bring up their children. Only when moral, mental and physical conditions are so bad as to seriously affect the health or morals of children should the courts be called upon to act"); People *ex rel.* Schachter v. Kahn, 269 N.Y.S. 173 (App. Div. 1934). *See also* Application of Boses, 105 N.Y.S.2d 569 (App. Div. 1951); People *ex rel.* Hacker v. Strongson, 141 N.Y.S.2d 859 (Sup. Ct. 1955); Geri v. Famto, 61 N.Y.S.2d 984 (Fam. Ct. 1974); Whitney v. Harrison, 127 N.Y.S.2d 227, 228 (Fam. Ct. 1953).

[10] *Emanuel S.*, 573 N.Y.S.2d at 37. *See also* C.M. v. M.M., 672 N.Y.S.2d 1012, 1016 (Fam. Ct. 1998); Cynthia L. Greene, *Grandparents' Visitation Rights: Is the Tide Turning?*, 12 J. ACAD. MATRIMONIAL LAW. 1, 53 (1994) ("Parents were said to have a moral obligation to allow grandparental

itation also is not a constitutional right, but rather an equitable right granted when a child's wellbeing has been compromised by a parent.

In 1953, the court mused over the "paucity of case law" in New York State with respect to grandparental visitation.[11] The *Cox* court, in the course of commenting on a perceived lack of clarity in the law with respect to grandparental visitation when both parents are fit, viewed grandparent-grandchild contact as a naturally wholesome activity for a child.[12] Regardless of the positive nature of the relationship, the court denied visitation because such relief was not then available absent "proof that the welfare of the child is being seriously impaired."[13]

Later, the court held that "[N]o matter how sympathetic the court may be with the desire of the maternal grandparents to see their granddaughter, there is no power in the court to deprive the natural parent of the right to the custody of his child, in the absence of proof that the welfare of the child is impaired."[14]

The *Cox* court, however, was not the first to weigh in on grandparental visitation rights. The 1950 decision in *Noll v. Noll*[15] held that a petition for grandparental visitation was proper because it was "addressed to the equity side of court a *parens patriae* and is appropriate when the intervention is necessary for the welfare of the child."[16] This is a more relaxed standard than set forth in *Cox* because *Noll* considered only the "welfare" of the child, whereas *Cox* required a showing of serious impairment. The Second Department decided a case the following year and in *Application of Boses* the court declared:

> The court is without power to deprive the parent of the natural right to custody of his children in the absence of the proof that the welfare of the children is being seriously impaired. The burden of showing that the welfare of the child is not being promoted by present custody is not carried by showing only that it might be desirable to have children visit their grandparents.[17]

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visitation, but the failure of the parents to adhere to such a moral code left the grandparents with no avenue to seek judicial relief.").

11 *Ex parte* People *ex rel*. Cox, 124 N.Y.S.2d 511, at 515 (Sup. Ct. 1953). *See also* People *ex rel.* Scalise v. Naccari, 118 N.Y.S.2d 90 (App. Div. 1953).

12 *Cox*, 124 N.Y.S.2d at 515.

13 *Id.*

14 *People ex rel. Hacker v. Strongson*, 141 N.Y.S.2d 859, 860 (N.Y. Sup. Ct. 1955).

15 98 N.Y.S.2d 938, 939 (App. Div. 1950).

16 *Id.*

17 *Boses,* 105 N.Y.S.2d at 589.

In *Anonymous v. Anonymous*,[18] another decision before grandparental visitation statutes were passed, the grandmother filed a petition seeking a continuation order of visitation which permitted her to visit with three grandchildren on a weekly basis following the institutionalization of the children's father due to an emotional breakdown.[19] The grandmother filed several neglect petitions against the mother, but after a dispositional hearing the children were paroled to the custody of the respondent mother.[20] The court also placed the respondent on probation due to psychological problems, and merely referred the parties to Catholic Charities or to an appropriate agency for family counseling. This was done in the hope that the family divide could be mended in the best interests of the infant children.[21] The Family Court went on to explain, "[t]he authority to entertain petitioner's application for visitation rights is not dependent on any statute but rests on the broad power of equity to make such determination as is dictated by concern for the welfare of the children."[22]

The Family Court has the power to "make any order in matters within its jurisdiction to permit and establish times and rules of visitation."[23] The court continued that "the law places the greatest emphasis on the welfare of the children involved," and "[t]he primary concern of the courts should be the welfare of the child."[24] Thus, according to the *Anonymous* court, "[t]he overriding question to be answered herein is 'will visitation by the paternal grandmother in any way impair the health and well-being of the grandchildren?'"[25]

The court in *Anonymous* granted the grandmother visitation subject to the mother's ability to return and petition for a modification should it be demonstrated that the children's emotional well being is damaged by the visitation.[26] The court warned that it would not permit the grandmother to pit the children against their mother, but clearly decided this case with its heart as many courts had done before:

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18 269 N.Y.S.2d 500 (Fam. Ct. 1966).

19 *Id.*

20 *Id.* at 501.

21 *Id.*

22 *Id.* at 502.

23 *Id.*

24 *Id.*

25 *Id.*

26 *Id.* at 503.

> It is regrettable that children who, in their infancy, have already been deprived of the love, affection and inspirational guidance of a doting father should also be made the pawn of a suspicious grandmother and a mother who perforce must act as both mother and father. Too many children in this era, when disease takes its toll of young and old alike, grow up without benefit of any grandparent and are in a sense denied. This court is not prone to severe the ties between the paternal grandmother and her three grandchildren.[27]

Catherine Bostock aptly summarized the common law philosophy *vis a vis* grandparental visitation. She stated that courts believed "ordinarily, the parents' obligation to allow the grandparents visitation is a moral, not legal one."[28] On top of that courts felt, "judicial enforcement of a grandparent's visitation rights would divide parental authority, thereby hindering it."[29] The court's third rationale was that the "best interests of the child are not furthered by forcing the child into the center of conflict between the parents and the grandparents."[30] Bostock urged that when a conflict exists between a parent and a grandparent, the parent should not have to account to anyone for his motives in denying the visitation.[31] Finally and most basically, conventional wisdom dictates that "the ties of nature are the only efficacious means of restoring normal family relations and not the coercive measures which follow judicial intervention."[32]

Cynthia Greene explains the departure from the above common law mentality and offers insight into the surge in the passage of grandparental visitation statutes:

> In 1985, the National Survey of Family Law in the United States, published each year in the *Family Law Quarterly*, referred to the enactment of grandparental visitation statutes as "a recent phenomenon." By 1993—-just eight years later—-every state in the United States had adopted a statute providing either specifically for grandparental visitation or generally for visitation rights of third parties over the objection

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27 *Id.* at 503. *But see* Higuchi v. Brown, 611 N.Y.S.2d 625 (App. Div. 1994); Smith v. Jones, 587 N.Y.S.2d 506, 508 (Fam. Ct. 1992).

28 Catherine Bostock, *Does the Expansion of Grandparental Visitation Rights Promote the Best Interest of the Child?: A survey of Grandparental Visitation Laws in the Fifty States,* 27 COLUM. J.L. & SOC. PROBS. 319 (1994).

29 *See id.* at 324.

30 *Id.*

31 *Id.*

32 *Id.* at 325.

> of the parents. During the 1960s and 1970s, a movement developed to legislate a legal right of grandparents' visitation. The movement may be attributed to the increase in the divorce rate and the recognition that the love and affection that grandparents have for their grandchildren does not necessarily diminish upon dissolution of the parents' marriage.[33]

Catherine Bostock traces the surge of grandparental visitation statutes to societal perceptions of the role of the grandparent in the family reinforced by the voting power of the growing number of senior citizens in our nation:

> The growth of grandparental visitation statutes came at a time of demographic changes both in family structure and in the age of the American population. Because of these changes, there was a change in the societal perception of the importance of grandparents in the family. Furthermore, the demographic composition of the voting public has increased the political power of older Americans. These developments have altered the rationale for grandparent access to grandchildren and have contributed to the expansion of grandparental rights.
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> The rising divorce rate in the 1960s and 1970s and the decline in the family size have contributed to a renewed interest in the role of grandparents. In particular, a sense of crisis in the family has contributed to the popularity of the image of the extended family in the minds of the public, politicians, and courts. The popular media have depicted grandparents in sentimental images of strong loving families. In 1978, the attention focused on grandparents led to a joint resolution of Congress asking the president to proclaim Grandparents Day.

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[33] Greene, *supra* note 10, at 51 (citing Judith L. Shandling, Note, *The Constitutional Constraints on Grandparents' Visitation Statutes*, 86 COLUM. L. REV. 118, 119 (1986); Edward M. Burns, *Grandparental Visitation Rights: Is It Time for the Pendulum to Fall?*, 25 FAM. L. Q. 59 (1991)). Ms. Green elaborates on the origin and strength of the movement: **R**

> According to on published report, "approximately seventy five percent of all older American are grandparents" and "an estimated one million of their grandchildren each experience the divorce of their parents." Not surprisingly, given the numbers, national "grandparent rights" organizations began to be formed in the early 1980s . . . and these united grandparents have besieged their legislators with the requests to pass laws giving them the right to visit with their grandchildren.

Greene, *supra* note 10, at 71 (citing Alicia C. Klyman, Note, *Hawk v. Hawk, Grandparental Visitation Rights—-Court Protects Paternal Privacy Rights Over Child's Vest Interest's*, 24 MEMPHIS ST. U. L. REV. 413, 414 n.12 (1994) (citing Elin McCoy, *Grandparents Seek Rights to Visit With a Grandchild*, N.Y. TIMES, Oct. 4, 1984, at C9.)). **R**

> The fact that only eight House members opposed this legislation demonstrates the strength of the grandparent image.
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> The political power of grandparents is directly related to the trend toward an older population. As one member of the House of Representatives noted, "[t]he older population, of which a estimated seventy-five to eighty-five percent are grandparents, are [sic] retiring earlier, living longer, and are becoming much more politically active in promoting grandparent-related issues." Another representative, formerly on the House Select Committee on Aging, commented, "[i]t is a well-known fact that seniors are the most active lobby in the country, and when it comes to grandparents there is no one group more united in their purpose." Observers, remarking on the influence of the senior lobby agreed: "[s]tate legislators who work for grandparents' rights undoubtedly were motivated by the increasing proportion of older voters . . . voting against grandparents is political suicide.[34]

II. Domestic Relations Law § 72 and Family Court Act § 651 Authorizing Grandparental Visitation

A. *Statute receives broad judicial construction*

"Grandparents, unlike a non-custodial parent, are not afforded a natural right to visitation."[35] The power to direct grandparental visitation is codified in two statutory schemes, Domestic Relations Law § 72 regarding "special proceeding or habeas corpus to obtain visitation rights in respect to certain infant grandchildren"[36] and its counterpart, Family Court Act § 651:

> Where either or both of the parents of a minor child, residing within the state, is or are deceased, or where circumstances show that conditions exist which equity would see fit to intervene, a grandparent or grandparents of such children may apply to the supreme court by commencing a special proceeding or for a writ of habeas corpus to have such child brought before such court, or may apply to the family court pursuant to subdivision (b) of section six hundred fifty-one of the family court act; and on the return thereof, 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

[34] Bostock, *supra* note 28, at 330. R

[35] Principato v. Lombardi, N.Y.L.J., Sept. 3, 2003 (N.Y. Sup. Ct., Kings Co. Sept. 2, 2003).

[36] N.Y. Dom. Rel. Law § 72 (McKinney 2002).

> of the child require, for visitation rights for such grandparent or grandparents in respect to such child.[37]

This statute applied in Mr. and Mrs. Gavrusinas' action; accordingly, the Family Court clearly erred in concluding that it was without the authority to award Mr. and Mrs. Gavrusinas visitation if the father refused to grant it voluntarily.

B. *Overview of the history of DRL § 72*

The original grandparental visitation statute, enacted in 1966, conferred standing only to grandparents who lost their own child.[38] The 1975 amendment dramatically extended the statutory horizon by adding the language "where circumstances show that conditions exist which equity would see fit to intervene."[39] During *Emanuel S. v. Joseph E.*'s journey up to the Court of Appeals, the Appellate Division paused to briefly trace the legislative history behind the 1975 amendment:

> In 1975, the statute was amended to provide that an application for grandparental visitation could be brought not only where one or both of the grandchild's parents were deceased but also where "circumstances show that conditions exist which equity would see fit to intervene." Moreover, the requirement that it be a grandparent's own child who is deceased was deleted.[40]

Memoranda accompanying the amendment to Domestic Relations Law § 72 indicate a legislative recognition that "[i]n the context of today's society with a high divorce rate, many disinterested parents do not concern themselves with the welfare of a child who is in the custody of the other parent."[41] Visitation with grandchildren, in the custody of one parent, can become a tool for manipulation "in situations of material conflict between the parents of the grandchildren."[42] However, it "is important to the children to continue contact with their family espe-

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37 *Id.*

38 *See Emanuel S.*, 573 N.Y.S.2d 36, 37 (1991).

39 *Id.* at 38 (quoting N.Y. DOM. REL. LAW § 72).

40 Emanuel S. v. Joseph E, 560 N.Y.S.2d 211, 213 (App. Div. 1990).

41 Letter from Giuffreda, N.Y. State Senator, to Counsel for the Governor (June 19, 1975).

42 Memorandum from the State Board of Social Welfare (June 23, 1975, Bill Jacket L. 1975, child. 431), 1975 New York Legis. Ann, at 51.

cially where the parents have separated or been divorced."[43] The memorandum, submitted by the sponsoring Senator states that:

> One of the areas of increasing concern is the welfare of the children. Cases of child abuse and child neglect are all too familiar. This bill seeks to enable the Court to intervene in certain situations to provide visitation rights for grandparents in respect to their grandchild if the situation warrants it. There appears to be a variety of potential situations where the utilization of such a resource could be of invaluable consequences to the children and ultimately the society.[44]

C. *Construction and interpretation of the statute*

There are no definitions or guidelines to direct the court in interpreting these statutes. Courts continue to wrestle with the phrase "where circumstances show that conditions exist which equity would see fit to intervene," and have infused it with judicial individualism. Rarely does a court reveal its personal animus regarding this extraordinarily sensitive issue. Although not offering any definitions or guidelines, the Court of Appeals, in *Emmanuel S.* admonished the judiciary against a narrow construction of the aforementioned language:

> We have never defined the "circumstances" or "conditions" under which "equity would see fit to intervene" to allow standing. The Appellate Division interprets the statute narrowly, concluding that the clause permitted standing only in cases where there was "a change in the status of the nuclear family, or interference with a "derivative" right, or some abdication of parental responsibility". . . . We conclude that the statute is not so limited.[45]

Doe v. Smith[46] similarly observed that although the Court of Appeals in *Emanuel S.*[47] committed the issue of standing to the court's discretion, it did not "articulat[e] any 'bright-line' criteria as to what constitutes 'equitable circumstances' which give rise to standing."[48] The absence of a bright-line test should not, however, be construed as a li-

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43 *Id.*

44 *Id.*

45 *Emanuel S.,* 573 N.Y.S.2d at 40.

46 595 N.Y.S.2d 624 (Fam. Ct. 1993).

47 *Emanuel S.,* 573 N.Y.S.2d at 39.

48 *Doe,* 595 N.Y.S.2d at 625.

cense for courts to abandon this avenue of inquiry. Furthermore, the term "equity" which appears in DRL § 72, or its variant form, "equitable," appears in innumerable judicial pronouncements as the barometer of the holding and yet, it remains juridically amorphous and unyieldingly unfriendly to precise measure or quantification.[49] An accompanying definition is seldom, if ever, offered. It is akin to the United States Supreme Court's definition of pornography: We cannot define it, but we know it when we see it.

Despite its formless nature, "equity" has served as a judicial beacon in innumerable decisions and has been described in varying ways. In *Doe v. Smith*, Family Court ventured to essay a definition:

> Equity has . . . been defined as the application of the dictates of conscience or the principles of natural justice to the settlement of controversies . . . . Equity in its broadest most general signification denotes the spirit and the habit of fairness, justice and right dealing which would regulate the intercourse of men with men, the rule of doing to all others as desire they should do to us.[50]

Black's Law Dictionary defines equity to be "fairness, impartiality, evenhanded dealing; the body of principles constituting what is fair and right; and the recourse to principles of justice to correct or supplement the law as applied to particular circumstances."[51]

It might be defined as a natural law that emanates from within mankind. It is the human and compassionate component of the law; the concept where our collective conscience is stirred by basic instincts of fairness and the innate distinction between right and wrong sufficient to warrant a focal shift beyond the strict black letter.

"The best interest of the child" is another pithy case specific phrase which, again, takes us on a journey through the realm of the amorphous[52] and bespeaks the inescapable conclusion that not all legal pronouncements are susceptible to or even capable of reduction to a bright

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49 Smith v. Jones, 587 N.Y.S.2d 506, 510 (Fam. Ct. 1992)(stressing that the terms "equity" and "best interest" are extremely vague).

50 *Doe,* 595 N.Y.S.2d at 625 (citing 55 N.Y. JUR. 2D *Equity* § 1 (1990)).

51 BLACK'S LAW DICTIONARY 560 (7th ed. 1999).

52 Stephen Newman, *Overburdened Child's Best-Interest Test,* N.Y. L.J., May 28, 2003, at 2. Professor Newman writes:

> The "best interest of the child" standard reverberates through countless judicial opinions involving children. Despite steady criticism of its indeterminacy and vagueness, it persists and even expands its legal domain. . . Of course, the words lack all content,

line test, especially those involving human spirit and angst. Significantly, in *Matter of Michael B.*,[53] the Court of Appeals emphasized that the "'[b]est interest(s) of the child' is a term that pervades the law relating to children—-appearing innumerable times in the pertinent statutes, judicial decisions and literature—-yet eludes ready definition."[54] The glaringly ineluctable conclusion, that the Court of Appeals favors a fluid application of "the best interests of the child" test, and rejects a conveniently graded yardstick approach as neither possible nor desirable, is readily gleaned from three Court of Appeals decisions, two of which are among the most cited cases in child custody literature. In *Friederwitzer v. Friederwitzer*,[55] the court stated "the only absolute in the law governing custody of children is that there are no absolutes."[56] While in *Eschbach v. Eschbach*,[57] the court warned that "any court in considering questions of child custody must make every effort to determine what is for the best interest of the child, and what will best promote its welfare and happiness . . . [but] there are no absolutes in making these determinations; rather there are policies designed not to bind courts, but to guide them in determining what is in the best interest of the child."[58] The Court of Appeals has defined "the best interest of the child" when necessary. For instance, in *Matter of Michael B.,* the court defined the term for cases arising under Social Service Law § 392(5)(a) exclusively; thereby limiting the definition.[59]

The quantum of evidence necessary to satisfy the "best interest of the child" test is the same in custody and visitation cases because "implicit in the constitutional right to determine 'custody' must be the right to determine 'visitation'—-the greater term (custody) as encompassing the lesser term (visitation)."[60] Courts have nevertheless, applied an expansive reading of DRL § 72 to permit grandparental visitation even in

and the courts have developed more particular criteria to in use the standard with meaning and a modest degree of predictability.

Id.

53 590 N.Y.S.2d 60 (1992).

54 *Id.* at 123.

55 447 N.Y.S.2d 893 (1982).

56 *Id.* at 895.

57 451 N.Y.S.2d 658 (1982).

58 *Id.* at 660.

59 *Michael B.,* 590 N.Y.S.2d at 62.

60 Juan R. v. Necta V., N.Y.S.2d 126, 128 (App. Div. 1982) ("In the history of Domestic Relations Law, visitation has oft been described as a form of 'quasi' or limited custody . . . and it is now well established that the standard of adjudication in either instance is precisely the same, i.e., the *best interest of the child*") (emphasis added).

the face of an intact nuclear family[61] or where a child has been placed for adoption.[62] Domestic Relations Law § 72 was never intended to give grandparents an absolute or automatic right of visitation even when their child had died. Instead, it is merely a procedural vehicle.[63] Only after standing has been established, may a court consider whether grandparental visitation is in the best interests of the child.[64] Otherwise stated, DRL § 72 did not create a substantive right merely a parental one.

D. *Eligibility to petition for visitation must be strictly construed*

Domestic Relations Law § 72 is a creature of statute, demanding strict construction—-a Court may not, therefore, breathe any additional rights or relief into the statute which are not specifically contemplated within the four corners of the statutory framework.[65] "[T]he failure of the Legislature to include a matter within a particular statute is an indication that its exclusion was intended."[66] "A court cannot extend the reach of the statute [because] change, if deemed advisable, must come from the Legislature."[67] Accordingly, the term "grandparent" has a pre-

61 *See* Kenyon v. Kenyon, 674 N.Y.S.2d 455 (App. Div. 1998) (both parents still living); Luma v. Kawalchuk , 658 N.Y.S.2d 744 (App. Div. 1997) (biological parents are alive); Coulter v. Barber, 632 N.Y.S.2d 270, 270 (App. Div. 1995).

62 *See generally,* Loretta D. v. Comm'r of Soc. Serv. 576 N.Y.S.2d 164, 165 (App. Div. 1991) ("Nor is the grandparents' standing to seek visitation rights with the grand child in any way negated by the fact that the child has been freed for adoption); Anthony L. v. Seymour S., 492 N.Y.S.2d 705, 706 (Fam. Ct. 1985) ("The Court of Appeals has refused to blindly follow the legal fiction that adoption wipes out all traces of a prior family"); Layton v. Foster, 466 N.Y.S.2d 723, 724 (App. Div. 1983); Sibley v. Sheppard, 445 N.Y.S.2d 420, 424 (1981); Scranton v. Hutter, 339 N.Y.S.2d 708, 711 (App. Div. 1973).

63 People *ex rel.* Simmons v. Sheridan, 414 N.Y.S.2d 83, 84 (1981), *aff'd*, 435 N.Y.S.2d 871 (App. Div. 1980); Wilson v. McGlinchey, No. 57, 2004 WL 1064484 (N.Y. May 13, 2004); Lo Presti v. Lo Presti, 387 N.Y.S.2d 412 (1976).

64 *See Lo Presti*, 387 N.Y.S.2d 412; Sibley *ex rel.* Sheppard v. Sheppard, 445 N.Y.S.2d 420 (1981)

65 *See* David M. v. Lisa M., 615 N.Y.S.2d 783, 784 (App. Div. 1994); Brady v. Brady, 486 N.Y.S.2d 891, 895 (1985); *Pajak v. Pajak*, 452 N.Y.S.2d 381, 382 (1982) (holding that "he failure of the Legislature to include a matter within a particular statute is an indication that its exclusion was intended"); Covington v. Walker, 762 N.Y.S.2d 906 (App. Div. 2003); N.Y. STATUTES § 74 (McKinney 1999)

66 N.Y. STATUTES § 74 (McKinney 1999); Pajak v. Pajak, 452 N.Y.S.2d 381, 382 (1982).

67 Northrup v. Northrup, 402 N.Y.S.2d 997, 1000 (1978); The Comment to § 72 of New York Statutes that addresses statutory construction states:

> As otherwise expressed, the judicial function is to interpret, declare, and enforce the law, not to make it, and it is not for the courts to correct supposed errors, omissions or defects in legislation. A statute must be read and given effect as it is written by the Legislature, not as the court may think it should or would have been written if the Legislature had envisaged all of the problems and complications which might arise in

cise meaning: either a biological grandparent or a grandparent by adoption.[68] The term may not be expanded to include any other classes or categories, irrespective of benevolent intentions—-it does not confer the right to seek visitation upon a great-grandparent[69] or a step-grandparent.[70] In sum, "the New York courts have been careful to strictly and narrowly construe the statute to the category of relative contained in the statutory language."[71]

Nor are awards of counsel fees available in grandparental visitation cases because DRL § 237(b), with its genesis in the legislature similarly requiring strict construction, delineates the availability of counsel fees to specifically enumerated actions or proceedings only.[72]

III. Grandparental Standing and Visitation

A. *Governing law confers absolute standing upon grandparents to seek visitation upon the death of either parent*

The Court of Appeals held that subsequent to the 1975 amendment grandparents have an absolute right to petition for visitation where either or both of the child's parents are deceased.[73]

> the course of its administration; and no matter what disastrous consequences may result from following the expressed intent of the Legislature, the Judiciary cannot avoid its duty.

N.Y. Dom. Rel. Law § 72, comment 1 (McKinney 2002).

68 *See* Gross v. Siegman, 642 N.Y.S.2d 44, 45 (App. Div. 1996); Hantman v. Heller, 624 N.Y.S.2d 64, 65 (App. Div. 1995).

69 Rosella G. v. Eileen B., 715 N.Y.S.2d 756, 757 (App. Div. 2000); People *ex. rel.* Antonini o/b/o Daniel David L. v. Tracey L., 646 N.Y.S.2d 703 (App. Div. 1996).

70 *See* Anthony L. v. Seymour S., 492 N.Y.S.2d 705, 706 (Fam. Ct. 1985).

71 Fitzpatrick v. Youngs, 717 N.Y.S.2d 503, 505 (Fam. Ct. 2000). The *Fitzpatrick* Court also analogized this with New York's strict construction of visitation cases in other situations where there has been a rigid adherence to legislatively created categories:

> The grandparent and sibling statute and visitation rules generally do not apply to permit visitation for a person who has no biological or legal connection to the child's mother, even though the non-relative resides with the child's mother and was listed as the father on the child's birth certificate, but legally was not. Nor have New York Courts allowed visitation for a lesbian life partner who was a biological stranger to the child.

Id. at 505 (citing Ronald F.F. v. Cindy G.G., 517 N.Y.S.2d 932 (1987); Alison D. v. Virginia M., 569 N.Y.S.2d 586 (1991)).

72 *Follum v. Follum*, 755 N.Y.S.2d 145, 146 (App. Div. 2003); *Matter of Coulter v. Barber*, 632 N.Y.S.2d 270, 271 (App. Div. 1995); *Pfohl v. Marabella,* 602 N.Y.S.2d 577 (App.Div. 1993); *Lewin v. Caplan*, 553 N.Y.S.2d 3, 4 (App. Div. 1990); *Matter of Koch v. Koch*, 415 N.Y.S.2d 369, 369 (Fam. Ct. . 1979)

73 *See* Emanuel S. v. Joseph E., 573 N.Y.S.2d 36, 37 (1991). *But see* Gavrusinas v. Melnichenko, 760 N.Y.S.2d 518 (App. Div. 2003).

> In 1966 the Legislature enacted section 72 of the Domestic Relations Law and for the first time granted grandparents standing to seek visitation rights. Not all grandparents were within the statute, however. As originally enacted, visitation was available only when the grandparents' child had died. Grandparents had no independent standing to maintain the proceeding; their rights were derived entirely from the deceased parent.
>
> In 1975, the statute was amended to allow standing not only where a parent has dies, but also 'where circumstances show that conditions exist which equity would see fit to intervene.' The amendment also removed the clause limiting standing to grandparents whose child had died. Thus, a petition for grandparental visitation may now be entertained in two situations. Where either parent of the grandchild has died, the grandparents have an absolute right to standing. In all other circumstances, grandparents will have standing only if they can establish circumstances in which equity would see fit to intervene.[74]

The legislature's goal was to grant grandparents the automatic right to petition for visitation in two circumstances: (1) when a parent has died, or (2) when it is equitable to intervene.[75] However, the mere fact that a grandparent declares that visitation is in the "best interests of the child" does not talismanically guarantee grandparental visitation; rather, New York requires that the court make an independent determination regarding whether visitation is actually in the best interests of the child.[76]

The Court of Appeals held that the right to petition for visitation where a parent has not died requires the establishment of standing on independent grounds via a two step process. The appeals court held:

> When grandparents seek visitation under either provision the court is faced with two questions. First, it must find standing based on death or equitable circumstances which permit the court to entertain the petition. If it concludes that the grandparents have established the

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74 *Emanuel S.,* 573 N.Y.S.2d at 37.

75 *Id.*

76 *Fitzpatrick*, 717 N.Y.S.2d at 506. *See also Emanuel S.*, 573 N.Y.S.2d at 37 ("When grandparents seek visitation under either provision the court is faced with two questions. First, it must find standing based on the death or equitable circumstances which [sic] permit the court to entertain the petition. If it concludes that the grandparents have established the right to be heard, then it must determine if the visitation is in the best interest of the grandchild."); Wilson v. McGlinchey, No. 57, 2004 WL 1064484 (N.Y. May 13, 2004).

> right to be heard, then it must determine if visitation is in the best interest of the grandchild.[77]

In *Ziarno v. Ziarno,*[78] the court elaborated on the aforementioned two step process:

> The determination of grandparent visitation applications is a two-step process . . . . The threshold question to be decided is petitioner's standing. Where, as here, one of the child's biological parents is deceased, the grandparents have standing to pursue visitation . . . . Where both parents are alive, the threshold standing question is resolved by determining whether the circumstances of the case show that "conditions exist which equity would see fit to intervene. Once standing is established, either automatically or in equity, the court turns to the second step—-a determination of whether visitation by the grandparents is in the child's best interest.[79]

"Standing should be conferred by the court, in its discretion, only after it has examined all the relevant facts."[80] Once standing has been established the trial court must proceed to the best interests test.[81]

B. *Grandparents seeking visitation must demonstrate proactive efforts to maintain or establish a relationship with their grandchild*

The sequence of the aforementioned two-step process is critical; a court may not first explore the reason behind the termination of visitation and only thereafter begin to probe what, if anything, the grandparents have done to preserve their relationship with their grandchild.[82]

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77 *Emanuel S. v. Joseph E.,* 573 N.Y.S.2d at 38.

78 726, N.Y.S.2d. 820 (App. Div. 2001).

79 *Id.* at 821.

> The equitable circumstances standing question and the best interest of the child analysis entail inquiries which are similar—-if not essentially indistinguishable—-"since the factors that are relevant in determining standing are also germane to the issue of best interest" . . . . Accordingly, in our "best interest" review, we find it appropriate to rely on the equitable circumstances guidance provided by Emanuel S. v. Joseph E.

Id. See Follum v. Follum, 755 N.Y.S.2d 145 (App. Div. 2003); C.M. v. M.M, 672 N.Y.S.2d 1012, 1016 (Fam. Ct. 1998); Luma v. Kawalchuk, 658 N.Y.S.2d 744, 745 (App. Div. 1997). *See also infra* notes 109-111 and accompanying text. R

80 *Emanuel S.,* 573 N.Y.S.2d at38; Lyng v. Lyng, 490 N.Y.S.2d 940, 941 (App. Div.1985).

81 *Emanuel S.,* 573 N.Y.S.2d 36, 38 (1991); *See Gavrusinas*, 760 N.Y.S.2d 518 (App. Div. 2003).

82 *Luma,* 658 N.Y.S.2d at 744 ("[T]he hearing court must first determine whether equitable circumstances exist which provide the grandparents with standing and, if such circumstances exist, whether visitation would be in the grandchild's best interest); Coulter v. Barber, 632 N.Y.S.2d 270

When both parents are alive, the most critical component behind the standing requirement is the nature and extent of the existing grandparent-grandchild relationship.[83] A grandparent must either: (1) make a showing of an ongoing existing relationship, or (2) demonstrate efforts made to establish a relationship measured against the reasonableness of the circumstances "so that the court perceives it as one deserving the court's intervention."[84] Allegations of love and affection for the grandchild, alone, are insufficient.[85] In *Emanuel S.,* the Court of Appeals held: "If the grandparents have done nothing to foster a relationship or demonstrate their attachment to the grandchild, despite opportunities to do so, then they will be unable to establish that conditions exist where equity would see fit to intervene."[86]

In *Smolen v. Smolen* the court addressed this issue because both parents were alive:

> To summarize, the two-part analysis under Domestic Relations Law §72 . . . first requires an examination of the parties' behavior. What, if anything, have the grandparents done to be deserving or undeserving of court intervention, and what is the basis of parental objections to visitation? When both parents are living, the standard is conferred only when there are special factors which make court intrusion into family autonomy appropriate, i.e. where there is possible harm to the child, or where the parental decision making is based on factors which are immaterial to the child's best interest. Only after standing is conferred, does the court have authority to turn to the second part of the analysis and possibly award visitation in the child's best interest.[87]

(App. Div. 1995) ("The question of the best interests of the grandchild arises only if petitioners first meet their burden on the standing issue"); *Emanuel S.,* 573 N.Y.S.2d at 38.

83 Kenyon v. Kenyon, 674 N.Y.S.2d 455, 456 (App. Div. 1998); *Emanuel S.,* 573 N.Y.S.2d 36 (1991).

84 Principato v. Lombardi, N.Y.L.J., Sept. 3, 2003, (N.Y. Sup. Ct., Kings Co. Sept. 2, 2003); Ziarno v. Ziarno, 726 N.Y.S.2d 820 (App. Div. 2001); Wenskoski v. Wenskoski, 699 N.Y.S.2d 150 (App. Div. 1999); Richard YY v. Sue ZZ, 673 N.Y.S.2d 219 (App. Div. 1998); *Emanuel S.,* 573 N.Y.S.2d 36 (1991).

85 Canales v. Aulet, 744 N.Y.S.2d 851 (App. Div. 2002); Herbert PP v. Chenango Co. Dept. of Soc. Serv., 751 N.Y.S.2d 96 (App. Div. 2002); Ann M.C. v. Orange Co. Dept. of Soc. Serv., 682 N.Y.S.2s 62, 65 (App. Div. 1998) *appeal dismissed*, 694 N.Y.S.2d 634 (1999); Smolen v. Smolen, 713 N.Y.S.2d 903, 906 (Fam. Ct. 2000); C.M. v. M.M., 672 N.Y.S.2d 1012, 1016 (Fam. Ct. 1998); Theodore R. v. Loretta J., 476 N.Y.S.2d 720 (Fam. Ct., 1984); *Emanuel S.,* 573 N.Y.S.2d at 38; *Wenskoski,* 699 N.Y.S.2d at 151; Agusta v. Carousso, 617 N.Y.S.2d 189 (App. Div. 1994), *appeal dismissed*, 624 N.Y.S.2d 375 (1995); *Luma,* 658 N.Y.S.2d at 746; Seymour S. v. Glen S., 592 N.Y.S.2d 410 (App. Div. 1993).

86 *Emanuel S.,* 573 N.Y.S.2d at 39.

87 *Smolen*, 713 N.Y.S.2d at 906.

In addition to the two-step inquiry the court must also take into account the nature and basis for the parents' objection to visitation[88] so as to accord greater weight to the wishes of the parents. In *Agusta v. Carousso*,[89] the Second Department held that a grandfather who "made a concerted effort to establish contact with [his grandchildren]" by "unavailingly [writing] letters, sen[ding] gifts, ma[king] telephone calls, visit[ing] the home of one daughter, and enlist[ing] the assistance of third party intermediaries" had established standing to seek visitation of his grandchildren.[90]

The Appellate Division reversed the Family Court's dismissal of the grandfather's petition for visitation and remitted the case to a different judge.[91] In *Agusta*, the grandfather had standing because he had done, without contrivance, "all he could reasonably have done in the face of his daughters' adamant refusal to permit him to visit his grandchildren."[92] The Second Department held that the Family Court erred because it simply applied a one-dimensional analysis regarding the existence of a grandparent-grandchild relationship without delving into the significant, although unsuccessful, efforts made by the grandparent to establish such a relationship.[93]

In *Matter of Kaywonne M*.[94] the Appellate Division unanimously affirmed the Family Court's refusal to grant visitation where the grandchild was living "in a preadoptive home in South Carolina, [and] there was no evidence that attempted visitation had been frustrated."[95] There was also evidence that no grandparent-grandchild relationship existed for nearly five years prior to the hearing. However, one court did find standing even though the grandmother failed to petition for visitation until two years after the child had already been placed in a preadoptive foster care program. The record established that due to the paternal grandmother's grief over her son's death, the mother did not

88 Luma v. Kawalchuk, 658 N.Y.S.2d 744, 746 (App. Div. 1997).

89 617 N.Y.S.2d 189 (App. Div. 1994).

90 *Id.* at 190-191.

91 *Id.*

92 *Id.* at 190-191 (The evidence established that from the time he learned of the birth of his grandchildren, the grandfather made a concerted effort to establish contact with them. Specifically, he unavailingly wrote letters, sent gifts, made telephone calls, visited the home of one daughter, and enlisted the assistance of third-party intermediaries.).

93 *Id.*

94 619 N.Y.S.2d 279 (App. Div. 1994).

95 *Id.*

tell the grandmother that her grandchild was in foster care.[96] Accordingly, the grandmother did not learn about the grandchild's placement until her son's murder trial.[97] The decision was silent as to why the grandmother had not made an earlier effort to reach out to her grandchild.

In *Seymour S. v. Glen S.*[98] the grandfather was denied standing to seek visitation because: (1) he failed to make sufficient efforts to establish contact with his granddaughter from the date of her birth to the date of the visitation proceeding five years later; and, (2) he alienated both his sons; in particular, he did not have any contact for two years with the son who was the father of the subject child.[99] The grandfather failed to satisfy either of the prongs set forth in *Emanuel S.* and, thus, could not establish equitable circumstances under which the court could intervene.

In *Augustine B.C. v. Micheal B.*[100] the grandfather had supervised visitation between the mother and his grandchildren during a three-year period because the mother was mentally ill and periodically institutionalized.[101] The father opposed grandparental visitation due to the grandfather's failure to establish that he had reasonably been denied an opportunity for visitation.[102] Although the father was "gratified" by the grandfather's interest in the children and was "happy" to allow him to visit the children, he, nevertheless, resisted a formal order of visitation with a "structured and rigid time scheme, as counter-productive" because it interfered with the development of the children's new family.[103] The Appellate Division held that the grandfather's ongoing service as a supervisor evidenced that visitation would be in the children's best interests and, thus, earned him biweekly visitation co-extensive with that of the mother.[104] The court also stressed that the grandfather's right of visitation was independent of the mother's rights.[105]

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96 *See* Loretta D. v. Comm'r of Soc. Serv., 576 N.Y.S.2d 164 (App. Div. 1991).

97 *Id.* at 165.

98 592 N.Y.S.2d 410 (App. Div. 1993).

99 *Id.* at 411.

100 443 N.Y.S.2d 739 (App. Div. 1981).

101 *Id.*

102 *Id.*

103 *Id.* at 740.

104 *Id.*

105 *Id.*

In *Kenyon v. Kenyon*[106] the Appellate Division affirmed the Family Court's finding of standing and subsequent award of visitation because the grandparents satisfied both aspects of the two prong test, i.e., equitable circumstances existed to confer standing upon them, and grandparental visitation was in the child's best interest.[107]

> It is clear that petitioners had substantial ongoing contact with their grandchildren from his birth until when respondent refused to permit further contact. The record reflected that during the child's infancy, the grandmother cared for him virtually day and night for approximately a year due to respondent's illness. Additionally, petitioners took the child on frequent family camping trips and regularly exchanged birthday and greeting cards with the child over the years. Respondent's stated reason for the cessation of contact between her parents and her child was that the petitioners were undermining her parental authority. Family Court found, however, that respondent's states objection was pretextual.[108]

C. *Bifurcation of trial on standing and best interests*

Courts refrain from bifurcating proceedings on standing and best interests because the "inquiries are seemingly discrete and intertwined since the factors that are relevant in determining standing are also germane to the issue of the best interest."[109] The Third Department held that there is "no compelling reason to bifurcate the hearings."[110] In *Follum v. Follum*, the Fourth Department remitted the issue of standing

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106 674 N.Y.S.2d 455 (App. Div. 1998).

107 *Id.*

108 *Id.*

109 N.Y. DOM. REL. LAW § 72 (McKinney 2002). In the practice commentary, Alan D. Scheinkman offers additional insight against bifurcation:

> Once the court concludes that a hearing should be held, the issues of standing and best interests are usually so intertwined in these grandparent visitation cases as to make it difficult, if not impossible, to make a clear distinction. Indeed, if the court bifurcates the issue of standing, the ultimate resolution of the case can be substantially delayed if the standing decision is separately appealed and results, as in *Agusta*, in a remand for a best interest hearing. Moreover, the evidence that a parent resisting visitation may offer on best interest probably bears on the standing question also. *Emmanuel S.* posits standing, where the parents are alive, on the existence of equitable circumstances. The same kinds of facts that would bear on best interests would also seem to bear on the existence of equitable circumstances.

Id. at § 72 practice commentary.

110 Luma v. Kawalchuk, 658 N.Y.S.2d 744, 745 (App. Div. 1997).

and the best interest of the child for a joint hearing because: "the issues of standing and best interest involve similar inquiries, and the resolution of both of those issues may be based on many of the same factors."[111]

D. *Interim grandparental visitation pending final determination*

Courts may also award grandparental visitation pending a final hearing and determination regarding the issue of permanent visitation between the parents. In *Marallo v. Marallo,*[112] the Second Department rejected the mother's argument that there was no authority to grant an interim order of grandparental visitation pending the final determination of the same issue:

> Similarly unavailing is the mother's contention that the court erred in granting temporary visitation in favor of the petitioners. There is no evidence in the record to indicate that such visits pending a hearing and determination of the request for permanent visitation are not in the best interest of the children, nor did the mother advance any concrete reasons against temporary visitation to the Family Court. As such, the Court's ordering visitation did not constitute an abuse of discretion, and the mother may present any evidence concerning the impact of such visitation upon the children at the hearing on the petition for permanent visitation.[113]

E. *Best interests of the child may not be summarily resolved*

Once standing has been validated there is no absolute authority which permits a summary disposition of the petition for visitation based on conflicting and recriminatory affidavits because the best interest of the child may not be determined without a hearing, "standing," in and of itself, is denuded and rendered meaningless. Case law addressing the areas of grandparental visitation and parental visitation disputes cite each other interchangeably as authority in support of the proposition that visitation may only be resolved via a plenary hearing.[114] The stan-

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111 Follum v. Follum, 755 N.Y.S.2d 145, 146 (App. Div. 2003).

112 513 N.Y.S.2d 204, 205 (App. Div. 1987). *See also* Smith v. Jones, 587 N.Y.S.2d 506, 508 (Fam. Ct. 1992).

113 *Marallo*, 513 N.Y.S.2d at 206 (citing Lyng v. Lyng, 490 N.Y.S.2d 940 (App. Div. 1985)).

114 *See* Mallory v. Mashack, 698 N.Y.S.2d 387, 388 (App. Div. 1999) (citing *In re* Erie Co. Dept. of Soc. Serv. *ex rel.* Elizabeth D., 513 N.Y.S.2d 56 (App. Div. 1987); Nakis-Batos v. Nakis, 594 N.Y.S.2d 59, 60 (App. Div. 1993) ("Even if the petition for modification had been before the court, it would have been error to modify the original visitation provision without a hearing"); Fura v.

dard for resolving issues of visitation, irrespective of whether in the context of interspousal disputes or grandparent-parent conflicts, remains the same: it must be determined via a hearing because standing establishes a right to be heard, and nothing else.[115]

In *Guvrusinases v. Melnidchenko*,[116] the Family Court summarily stripped the grandparents of their right to a hearing in the first instance notwithstanding the fact that they had automatic standing under DRL § 72. In remitting the case for a hearing to determine the issue of the "best interest of the child," the Appellate Court held that the Family Court committed a triple error by: (1) considering the father's substantive allegations in his opposing affidavit to the grandparents' petition for visitation; (2) steadfastly refusing to permit the grandparents to mount a defense; and, 3) having reached a substantive conclusion on a procedural application.[117]

F. *A Court's failure to recite the crucial facts behind a decision in custody and visitation matters is per se defective*

It is significant to note that a trial court may not simply dismiss or grant a request for grandparental visitation without offering any underlying reasons. In *Apeker v. Malchak*,[118] the grandparents appealed from a Family Court order, which dismissed their petition for visitation with their two grandchildren.[119] The evidence showed that the relationship between the petitioner-grandparents and the respondent-parents deteriorated after the respondents' first child of several months choked and died on a toy given by the grandparents.[120] The parents thereafter de-

Seddon, 576 N.Y.S.2d 738 (App. Div. 1991) ("the issue of visitation should be determined only after a plenary hearing based on the best interest of the child"); Quintela v. Ranieri, 499 N.Y.S.2d 562 (App. Div. 1986) (citing Kresnicka v. Kresnicka, 369 N.Y.S.2d 522 (App. Div. 1975) (holding in an interspousal visitation case as authority that the best interests of the child can not he made without a full evidentiary hearing)).

115 C.M. v. M.M., 672 N.Y.S.2d 1012, 1016 (Fam. Ct. 1998). *See also* Gavrusinas v. Melnichenko, 760 N.Y.S.2d 518 (App. Div. 2003) ("Once the right to be heard has been established, whether visitation should be permitted is dependent upon a judicial assessment of the best interest of the child").

116 760 N.Y.S.2d 518 (App. Div. 2003).

117 *Gavrusinas*, 760 N.Y.S.2d at 518-20 ("The Family Court erred in making a determination regarding the best interest of the child based upon the father's submissions where the issue before it on reargument strictly concerned the Family Court's error in dismissing the proceeding on the ground of lack of standing and where the Family court afforded the grandparents no opportunity to present evidence or testimony.").

118 490 N.Y.S.2d 923 (App. Div. 1985).

119 *Id.*

120 *Id.* at 924.

nied the grandparents' access to their children following the birth of their third child.[121] The grandparents testified to their love for the children and their continued but unsuccessful efforts to maintain contact with them.[122] They explained their failure to seek judicial assistance was due to their unawareness regarding the availability of relief.[123] The Family Court concluded that the "children have never had any meaningful relationship with their grandparents," and "there would likely be a traumatic and devastating impact on the Malchak family if visitations were to be established at this late date."[124]

In the case, the Appellate Division, citing *Giordano v. Giordano*,[125] addressed the *nisi prius'* failure to set forth the facts which were essential to its decision as is required under CPLR § 4213(b).[126] In custody and visitation cases a court must set forth "the facts it deems essential to its determination, not evidentiary facts," but the "ultimate facts upon which the rights and liabilities of the parties depend" in order to permit

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121 *Id.*

122 *Id.*

123 *Id.*

124 *Id.*

125 463 N.Y.S.2d 97 (App. Div. 1993).

126 N.Y. C.P.L.R § 4213(b) (McKinney 2002). The Statute requires:

> The decision of the court may be oral or in writing and shall state the facts it deems essential. In a medical, dental or podiatric malpractice action or in an action against a public employer or a public employee who is subject to indemnification by a public employer with respect to such action or both, as such terms are defined in subdivision (b) of section forty-five hundred forty-five, for personal injury or wrongful death arising out of an injury sustained by a public employee while acting within the scope of his public employment or duties, and in any other action brought to recover damages for personal injury, injury to property, or wrongful death, a decision awarding damages shall specify the applicable elements of special and general damages upon which the award is based and the amount assigned to each element, including but not limited to medical expenses, dental expenses, podiatric expenses, loss of earnings, impairment of earning ability, and pain and suffering. In a medical, dental or podiatric malpractice action, and in any other action brought to recover damages for personal injury, injury to property, or wrongful death, each element shall be further itemized into amounts intended to compensate for damages which have been incurred prior to the decision and amounts intended to compensate for damages to be incurred in the future. In itemizing amounts intended to compensate for future damages, the court shall set forth the period of years over which such amounts are intended to provide compensation. In computing said damages, the court shall award the full amount of future damages, as calculated, without reduction to present value.

Id.

a meaningful appellate review.[127] In *Giordano*, the Family Court, judge, in granting respondents' motion to dismiss, merely explained: "I am going to grant the motion. I just can't force [visitation]. I cannot do it."[128]

The Court of Appeals admonished lower courts for the additional layer of protection accorded to CPLR § 4213(b) when applied to custody, visitation and neglect proceedings. The Court emphasized that the language of CPLR § 4213(b) is sufficiently firm to suggest that the requirement is almost jurisdictional in nature and cannot be waived:

> Effective appellate review, whatever the case but especially in child visitation, custody or neglect proceedings, requires that appropriate factual findings be made by the trial court the court best able to measure the credibility of the witness. This weighty responsibility cannot be shirked, as in this case, by reference to an ultimate conclusion of the court rather than a statement of its required findings of fact.[129]

G. *The benefits to the child as envisioned by the legislature and judiciary are the soothing emotional nurturing a grandparent can give following the loss of a parent*

Most courts, including the United States Supreme Court and the New York Court of Appeals, have hailed the wisdom behind grandparental visitation legislation for its salutary value to the child. As such, forty-eight states have adopted grandparental visitation statutes.[130]

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127 *Giordano,* 463 N.Y.S.2d at 97 (citing Matter of Jose L., 389 N.E.2d 1059, 1060 (1979), 416 N.Y.S.2d 537, 538 (1979)). *See also* In re Kaitlyn R. 719 N.Y.S.2d 760 (App. Div. 2001); Allen v. Black, 712 N.Y.S.2d 487 (App. Div. 2001); Graci v. Graci, 590 N.Y.S.2d 377 (App. Div. 1992).

128 *Giordano*, 463 N.Y.S.2d at 97. This language is very similar to that used by the Family Court in *Gavursinas v. Melnichenko*, 760 N.Y.S.2d 518 (App. Div. 2003).

129 *Jose L.,* 416 N.Y.S.2d at 539.

130 ALA. CODE § 30-3-4 (1989); ALASKA STAT. ANN, § 25.20.065 (Michie 1998); ARIZ. REV. STAT. ANN. § 25-409 (West 1994); ARK. CODE ANN. § 9-13-103 (Michie 1998); COLO. REV. STAT. § 19-1-117 (1999); CONN. GEN. STAT. § 46b-59 (1995); DEL. CODE ANN. Tit. 10 § 1031(7) (1999); FLA. STAT. Ch. 752.01 (1997); GA. CODE ANN. § 19-7-3 (1991); HAW. REV. STAT. § 571-46.3 (1999); IDAHO CODE § 32-719 (1999); 750 ILL. COMP. STAT. 5/607 (West 1998); IND. CODE § 31-17-5-1 (1999); IOWA CODE § 598.35 (1999); KAN. STAT. ANN. § 38-129 (1993); KY. REV. STAT. ANN. § 405.021 (Banks-Baldwin 1990); LA. REV. STAT. ANN. § 9:344 (West 2000); LA. CIV. CODE ANN. art. 136 (West 2000); ME. REV. STAT. ANN. tit. 19a §1803 (West 1998); MD. CODE ANN. FAM. LAW § 9-102 (1999); MASS. GEN. LAWS. ch. ch. 119 § 39D (1996); MICH. COMP. LAWS ANN. § 722.27B (West 1999); MINN. STAT. § 257.022 (1998); MISS. CODE ANN. § 93-16-3 (1994); MO. REV. STAT. § 452.402 (1999); MONT. CODE ANN. § 40-9-102 (1997); NEB. REV. STAT. § 43-1802 (1998); NEV. REV. STAT. § 125C.050 (1999); N.H. REV. STAT. ANN. § 458.17-D (1992); N.J. STAT. ANN. § 9:2-71 (West 1999); N.M. STAT. ANN. § 40-9-2 (Michie 1999); N.Y.

Early cases emphasized a seemingly common social wisdom, whereby every parent "understood" that grandparental visitation was in the best interest of the child. In *Ex parte People ex rel. Cox,* the court considered grandparental visitation a given, or a tenet of "natural law:"

> In this state the law does not seem to be wholly clear as to what rights, if any, grandparents have to an order of this court permitting them to visit their grandchildren against the wishes of the parent or parents having lawful custody of the child and not unfit to enjoy such custody. In all probability the paucity of case law is due to the fact that most parents adhering to the natural law and understanding the normal love and affection held by most grandparents for their grandchildren have gladly permitted such visitation, thereby bringing joy to the hearts of the grandparents and benefiting the child morally and spiritually by contrast with loving and devoted grandparents, rich in the experience of living. It is unfortunate for both grandparent and child when circumstances do not permit such normal and beneficial relationships.[131]

In *People ex rel. Scalise v. Naccari*,[132] the court went further by addressing the benefit children obtain through contact with their extended family, not only their grandmother: "it is to be hoped that the father will see the wisdom of permitting the children to receive visits" from "the grandparents, the aunt, and from the maternal relatives."[133] Subsequent legislative and decisional pronouncements addressed the additional benefits of extended family visitation: "visitation has a separate and distinct meaning to foster positive and meaningful relationships on a long-term basis."[134] In *People ex rel. Sibley v. Sheppard* the Court of

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DOM. REL. LAW § 72 (McKinney 1999); N.C. GEN. STAT. §§ 50-13.2, 50-13.2A (1999); N.D. CENT. CODE § 14-09-05.1 (1997); OHIO REV. CODE ANN. §§ 3109.051, 3109.11 (Anderson 1999); OKLA. STAT. Tit. 10 § 5 (1999); OR. REV. STAT. § 109.121 (1997); 23 PA. CONS. STAT. §§ 5311-5313 (1991); R.I. GEN. LAWS §§ 15-5-24 to 15-5-24.3 (1999); S.C. CODE ANN. § 20-7-420 (Law. Co-op. 1999); S.D. CODIFIED LAWS § 25-4-52 (Michie 1999); TENN. CODE ANN. §§ 36-6-306, 36-6-307 (1999); TEX. FAM CODE ANN. § 153.433 (West 2000); UTAH CODE ANN. § 30-5-2 (1998); VT. STAT. ANN. tit. 15 §§ 1011-1013 (1989); VA. CODE ANN. § 20-124.2 (Michie 1995); W.VA. CODE §§ 48-2B-1 to 48-2B-7 (1999); WIS. STAT. §§ 767.245, 880.155 (1993); WYO. STAT. ANN. § 20-7-101 (Michie 1999). *See also* Troxel v. Granville, 530 U.S. 70 (2000).

131 People *ex. rel.* Cox, 124 N.Y.S.2d 511, 515 (Sup. Ct. 1953).

132 118 N.Y.S.2d 90, 91 (App. Div. 1953).

133 *Id.*

134 Shadders v. Brock, 420 N.Y.S.2d 697, 700 (Fam. Ct. 1979); *cf.* Smith v. Jones, 587 N.Y.S.2d 506 (Fam. Ct. 1992) (Court held that grandparental visitation is not a long term issue like visitation between parents and children which is intended to preserve contact between children and parents on a permanent basis). The Court went on to say:

Appeals reasoned that, in its role of *parens patriae*, the court may grant such visitation "to alleviate the child's misery."[135]

In *Emanuel S. v. Joseph E.* the Court of Appeals was touched by the humanitarian motivation fueling DRL § 72: "the amended statute, as several courts have recognized, rests on the humanitarian concern that visits with the 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 relationship."[136] *Ehrlich v. Ressner* emphasizes the implicit legislative intention behind New York's grandparental visitation statute:

> Section 72 of the Domestic Relations Law was enacted to enable children deprived of the society of their grandparents by the ultimate death of a parent to maintain the bonds of kinship . . . . The humanistic concern evinced by the Legislature in enacting this section is an implicit recognition 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 relation-

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> When considering the best interest issue as to normal parents, the importance and veneration given to the relationship and often the severe psychological impact of severing such relationship often promotes the court to provide visitation even though there may be attendant short term complications and problems (i.e. supervised or other restrictions). The "problems" are dealt with because the objective is to establish and/or maintain the life long natural bond in child parent relationships. Furthermore, it has been established that if the bond is broken it may cause the child psychological damage at some later point in his or her life. In grandparental matters, the best interest question involved is much more objective and "now" oriented. Is it beneficial to this child to visit with this grandparent now? The relationship is indeed important, but the parent-child bond is inestimably more important by tradition and by simple reality, than that of the grandparent-child.

Smith, 587 N.Y.S.2d at 507.

135 *See* People *ex rel.* Sibley v. Sheppard, 445 N.Y.S.2d 420 (1981).

> The State, in its role as *parens patriae*, has determined that, under certain limited circumstances, grandparents should have continuing contacts with the child's development if it is in the child's best interest. When one or both of the parents have died, the child usually suffers great emotional stress. By enacting § 72, the legislature has recognized that, particularly where a relationship between the grandparents and the grandchild has been established, the child should not undergo the added burden of being severed from his or her grandparents, who may also provide the natural warmth, interest and support that will alleviate the child's misery.

Id. at 327; *cf. Smith*, 587 N.Y.S.2d at 511 ("Even with regards to grandparents and siblings this Court finds that States do not posses all encompassing general *parens patriae* role in parenting"). *See also* Lehrer v. Davis, 571 A.2d 691 (Conn. 1990); Barry v. Barry, 598 S.W.2d 574 (Mo. 1980); DeWeese v. Crawford, 520 S.W.2d 522 (Tx. 1975).

136 Emanuel S. v. Joseph E., 573 N.Y.S.2d 36, 37 (1991).

> ship' . . . . While control over visitation rests upon the sound discretion of the court, it must be guided by the humanitarian purpose of the statute and by an independent evaluation of the best interest of the children affected.[137]

In *DiBerardino v. DiBerardino*[138] the Court stated that in determining the appropriateness of visitation the court should apply an "enlightened, objective, and independent evaluation of the circumstances."[139] Earlier, the Fourth Department held that "[t]he courts have recognized that visits with grandparents are a beneficial experience for the child and are to be encouraged."[140] Even before that statement, in a case involving a post adoption application for grandparental visitation, the Appellate Division wrote:

> There are many cases on record where parents who have lost their only child have been unable to apply to the Courts for leave to be granted the right to visit the children of their deceased child. The Courts in these cases, although sympathetic to the application made by the grandparents, stated that the Court had no jurisdiction to entertain the application because their [sic] was nothing in the law giving them the right to rule on such applications. Grandparents in this manner have been deprived unjustly of the rights to visit their grandchildren.

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137 Ehrlich v. Ressner, 391 N.Y.S.2d 152, 153, (App. Div. 1977). *See also* Johansen v. Lanphear, 464 N.Y.S.2d 301, 303 (App. Div. 1983); Vacula v. Blume, 384 N.Y.S.2d 208 (App. Div. 1976) ("Neither the Legislature not this Court is blind to the human truths which grandparents and grandchildren have always known"); Troxel v. Granville, 530 U.S. 57 (2000). Justice Stevens underscored the silent, yet central theme underlying the dispute which led to grandparental visitation statutes—-the child:

> Cases like this do not present a bipolar struggle between the parents and the State over who has final authority to determine what is in the child's best inters. There is at a minimum a third individual, whose interests are implicated in every case to which the statute applies – the child.

Troxel, 530 U.S. at 86 (Stevens J., dissenting). In *Fitzpatrick v. Youngs* the Court emphasized the importance of extending the kinship between siblings and grandparents in the face of an untimely death:

> This Court views the New York Legislature, and many of the comments in *Troxel*, as telling parents and grandparents alike that, given the apparent disappearance of the traditional family, children's best interests require the opportunity for participation by the siblings and grandparents to be sure that the moral obligations of familial relationships are carried out.

717 N.Y.S.2d 503, 506 (Fam. Ct. 2000). *See also* Toney v. Randace-Toney, N.Y.L.J., Sept. 30, 2002, at 36 (N.Y. Sup. Ct., Nassau Co. Sept. 29, 2002).

138 645 N.Y.S.2d 848, 849 (App. Div. 1996)

139 *Id.*

140 Lyng v. Lyng, 490 N.Y.S.2d 940, 941 (App. Div. 1985).

> How tragic it must be when grandparents lose their only child and not be able to visit the child or children of their deceased child because there is no law enacted by the legislature to give them at least the opportunity to apply to the Court for this right. Section 72 provides for the relief sough after notice to any parent having custody of the grandchild.[141]

It is noteworthy that one court, standing alone, viewed grandparental visitation as a heart balm suit for grandparents rather than from the perspective of the best interests of the grandchild.[142] Because, as the court in *Davis* remarked, "a child cannot be loved by too many people."[143]

In *Principato v. Lombardi* the court noted:

> The loss of one or both parents is a traumatic experience that usually causes the child to suffer great emotional stress. The Legislature's enactment of Domestic Relations Law, Section 72 ("DRL §72") in 1966 exhibited a recognition that in those situations where a grandparent-grandchild relationship surpasses the biological bond and is nurturing, the child should be spared the additional hardship of being separated from their grandparents. This is especially crucial where the relationship established can provide love, warmth, support and 'unique benefits which a grandchild can derive from a strong relationship with his natural grandparents' . . . . It is well settled that DRL § 72 'was enacted to enable children deprived of the society of their grandparents by the untimely death of a parent to maintain the bonds of kinship' . . . 'The humanistic concern evinced by the Legislature in enacting this section is implicit recognition that' "visits with a grandparent are often a precious part of a child's experience and there are benefits

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141 Scranton v. Hutter, 339 N.Y.S.2d 708, 710 (App. Div. 1973). *See also* Bishop v. Piller, 637 A.2d 976, 978 (Pa. 1994) ("children derive a greater sense of worthiness from grandparental attention and better see their place in the continuum of family history . . . wisdom is imparted that can be attained nowhere else"). *But see In re* Adoption of N., 355 N.Y.S.2d 956, 960 (Sur. Ct. 1974) ("section 72 of Domestic Relations Law grants parents of a deceased parent certain rights of visitation with respect to their minor grandchildren, but the reasoning behind the legislation is based upon the heartbreak of the grandparents rather than the best interest of the child").

142 In the case *In re Adoption of N.*, 355 N.Y.S.2d 956, 960 (N.Y. Surr. Ct. 1974), the Surrogates Court stated: "And section 72 of the Domestic Relations Law grants parents of a deceased parent certain rights of visitation with respect to their minor grandchildren; but the reasoning behind the legislation is based upon the heartbreak of the grandparents rather than the best interests of the child." *Id.*

143 Davis v. Davis, 717 N.Y.S.2d 503 (Fam. Ct. 2001).

> which devolve upon the grandchild . . .which cannot derive from any other relationship" . . . .[144]

On October 7, 2003, Domestic Relations Law § 72,[145] the Family Court Act §§ 651(b) and (d),[146] and Social Services Law § 384-a(1-a)[147] were amended to enhance the procedural rights of grandparents seeking custody of their minor grandchildren. The pertinent portion of the preamble to the proposed legislation is compellingly instructive regarding the Legislature's esteem for the significant contributions made by grandparents in the lives of their grandchildren:

> The legislature hereby finds that, with 413,000 children living in grandparent headed households in New York State, grandparents play a special role in the lives of their grandchildren and are increasingly functioning as caregivers in their grandchildren's lives. In recognition of this crucial role that many grandparents play in the lives of their grandchildren, the legislature finds it necessary to provide guidance regarding the ability of grandparents to obtain standing in custody proceedings involving their grandchildren.[148]

H. *The authority to award visitation in the face of an intact family*

In *Emanuel S. v. Joseph E.,*[149] the Court of Appeals addressed the narrow issue whether DRL § 72 may grant standing to grandparents when opposed by an intact nuclear family. The lower court made extensive factual findings and concluded that: (1) the animosity between the parents and grandparents did not constitute a sufficient reason to deny the visitation, (2) the same criteria used in grandparent visitation cases for non-intact families should be applied to intact families, and (3) visitation by the grandparents was in the child's best interests. Based on the narrowest of readings of DRL § 72 the Appellate Division reversed holding that the statute precluded visitation where the child's natural

144 Principato v. Lombardi, N.Y.L.J., Sept. 3, 2003, (N.Y. Sup. Ct., Kings Co. Sept. 2, 2003).

145 N.Y. DOM. REL. LAW § 72 (McKinney 2003) (amending N. Y. DOM. REL. LAW § 72 (McKinney 1999)).

146 N.Y. FAM. CT. ACT § 651(b)&(d) (McKinney 2003) (amending N.Y. FAM. CT. ACT § 651(b)&(d) (McKinney 1999)).

147 N.Y. SOC. SERV. LAW § 384-a(1-a) (McKinney 2003) (amending N.Y. SOC. SERV. LAW § 384-a(1-a)(McKinney 1998)).

148 *Id.*

149 573 N.Y.S.2d 36 (1991).

parents object and there has been no forfeiture of parental responsibility.[150]

The Court of Appeals reversed stating that, although it had never defined the phrases "circumstances" or "conditions" under which "equity would see fit to intervene" to allow standing, the Appellate Division's interpretation of the statute was exceedingly narrow because it permitted standing only in cases where there was "a change in the status of the nuclear family, or interference with a 'derivative' right, or some abdication of parental responsibility."[151] The high court rejected the derivative standard outright holding that the statutory amendment broadened and liberalized its application:

> The equitable circumstances clause of section 72 does not establish a derivative right to standing for grandparents based upon some void in the nuclear family created by death, divorce or similar disability or by forfeiture resulting from neglect. On the contrary, the 1975 amendment adding this clause liberalized the law and granted all grandparents a right to seek standing that was no longer dependent upon the status of the parents. Moreover, the statute neither expressly nor implicitly excludes from its provisions grandparents of children who are part of an intact nuclear family. The sponsor of the bill noted that the new provision broadened the statute when he stated that the amend-

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150 *See id.*

151 The relevant segment of the Appellate Division's ruling follows:

> It is also clear from the memoranda accompanying the legislation (see, McKinney's Consolidated Laws of N.Y., Book 1, Statutes §§ 124, 125[b]) that by enacting the 1975 amendment to Domestic Relations Law §72, the Legislature intended to extend the right to seek, but not necessarily to obtain (see, e.g., Lo Presti v. Lo Presti, 40 N.Y.2d 522, supra, at 526, 387 N.Y.S.2d 412, 355 N.E.2d 372; cf., Matter of Jessica R., 163 A.D.2d 553, 558 N.Y.S.2d 616), visitation with a grandchild to grandparents beyond those who have had the misfortune of being predeceased by a child of their own. Had the Legislature intended to extend the right to seek judicial intervention to 'any grandparent', it could have easily so specified. Since it did not do so, and since we presume that the phrase: 'or where circumstances show that conditions exist which equity would see fit to intervene' (L.1966, child. 631, as amended by L.1975, child. 431), was intended to have some meaning (see, McKinney's Consolidated Laws of N.Y., Book 1, Statutes § 231), we conclude that a petition for an order authorizing visitation pursuant to Domestic Relations Law §72 must demonstrate the existence of some circumstance or condition, such as untoward disruption of an established grandparent-grandchild relationship because of, e.g., a change in the status of the nuclear family, or interference with a 'derivative' right, or some abdication of parental responsibility, before judicial examination of the best interests of the child with its attendant trauma, increased animosity, and financial drain is to be undertaken.

Emanuel S. v. Joseph E., 560 N.Y.S.2d 211, 214 (App. Div. 1990).

> ment would apply in a 'variety of potential situations where the utilization of such a resource [i.e., visitation] could be of invaluable consequence to the children and ultimately the society' (1975 NY Legislature Ann, at 51). Accordingly, we find nothing in the statutory language or legislative history foreclosing petitioner solely on the grounds that the grandchild resides with fit parents in an intact nuclear family.[152]

The court in *Doe v. Smith*[153] held that an intact nuclear family does not shield against grandparental visitation:

> Although 'an intact family is not beyond the reach of the statute,' that fact and the nature and basis of the parents' objection to visitation are among the several circumstances which should be considered by courts deciding the standing question. Also an essential part of the inquiry is the nature and extent of the grandparent-grandchild relationship.[154]

In *Coulter v. Barber,*[155] the court sustained Family Court's dismissal of the grandparent's petition for visitation. The testimony showed that the grandparents had formerly enjoyed regular visitation with the grandchildren which was terminated after the parents' relationship with the grandparents soured. The evidence further showed that the grandparents had waited three years before commencing the proceeding. *Coulter*, cited two Court of Appeals' decisions: *Emanuel S. v. Joseph E.,* and *Matter of Alison D. v. Virginia M.*[156] *Emanuel S.* stands for the proposition that grandparents seeking visitation with a child who lives with "fit parents in an intact nuclear family bear the burden of establishing standing. . .by showing that conditions exist under which equity would see fit to intervene" after which time the issue of best interests may be probed.[157]

In *Theodore R. v. Loretta J.*[158] the Family Court rejected the grandparent's petition summarily because it held that it did not have the right to interfere with the constitutionally vested decision making power of fit parents who opposed such visitation in light of the grandparent's failure

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152 Emanuel S. v. Joseph E., 573 N.Y.S.2d. 36, 38 (1991).

153 595 N.Y.S.2d 624 (Fam. Ct. 1993).

154 *Id.* at 625.

155 632 N.Y.S.2d 270 (App. Div. 1995).

156 569 N.Y.S.2d 586 (1991).

157 *Id.* at 270.

158 476 N.Y.S.2d 720 (Fam. Ct., 1984).

to present conditions or circumstances sufficiently compelling to justify the intervention of equity.

The court in *Coulter* stated that "as fit parents, respondents have the right to choose with whom their children should associate."[159]

I. *Consolidation of grandparental visitation proceedings with the forum hearing visitation issues of the non-custodial parent*

In *Follum v. Follum*[160] the grandfather/petitioner appealed an order granting the mother's motion to dismiss his *pro se* petition for visitation with the mother's two children while the mother was seeking a divorce from the petitioner's son.[161] The trial court directed that the grandfather pay the mother $500 for fees, costs and expenses incurred in connection with the motion to dismiss. The Appellate Division reinstated the grandfather's petition for visitation and consolidated it with the divorce action, thereby directing the divorce court to hear the issue of the grandfather's standing. In its review of the two-prong grandparental visitation test, the Second Department held that the divorce action and the determination of grandparental standing are unrelated:

> We conclude that the court erred in summarily dismissing the petition for grandparent visitation based on the pendency of respondent's action for divorce, which involves the issues of parental visitation. Even assuming, *arguendo*, that the pendency of such divorce action is relevant to a determination of petitioner's standing, i.e., petitioner's ability to demonstrate the existence of "circumstances" or "conditions" under "which equity would see fit to intervene" (§ 72), we conclude that it is not dispositive of that issue of standing.[162]

In *Grossbardt v. Grossbardt*[163] the grandparents filed a writ to seek visitation while the grandchildren's parents' divorce was pending. In "the interests of economy of the time and expense of the court and the parties," the Appellate Division deferred the issue of independent grandparental visitation to the trial court considering the underlying matrimonial action.[164]

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159 *Coulter*, 632 N.Y.S.2d at 271.

160 755 N.Y.S.2d 145 (App. Div. 2003).

161 *Id.*

162 *Id.* at 145 ("The issues of standing and best interests involve similar inquiries, and the resolution of both of those issues may be based on many of the same factors").

163 464 N.Y.S.2d 4 (App. Div. 1983).

164 *Id.*

In *Weisman v. Weisman,*[165] the grandparents appealed from three separate orders:(a) two from Family Court (i) the first which declined to exercise jurisdiction over their proceeding seeking visitation, pursuant to FCA § 651,[166] and (ii) the second order which dismissed the proceeding in its entirety, and (b) an order from the Supreme Court in a matrimonial action between the parents of the grandchildren which denied the grandparents' motion for consolidation of their visitation proceeding with the matrimonial action.[167] The Appellate Division dismissed the appeals concerning the two Family Court orders, but reversed and remitted the Supreme Court's denial of the grandparent's consolidation motion.[168]

Citing the landmark *res judicata* decision, *Schwartz v. Public Administrator of County of Bronx,*[169] the Appellate Division reversed the Supreme Court for having erroneously rejected the grandparents' petition on the ground of *res judicata* based on the court's mistaken theory that a prior order appointing the grandparents to supervise visitation in the divorce action between the parents, to which they were not parties, had finally determined their rights.[170] The court reasoned that "the grandparents have not had a full and fair hearing as to their right, if any, to independent visitation, and *res judicata* is not applicable.[171]"

Prof. Alan Scheinkman agrees that one court ought to resolve both parental and grandparental visitation issues. He cautions, however, that grandparental visitation may not be determined until the issue of parental visitation has been resolved: ". . . the child's time with each parent is carefully rationed, and the imposition of an independent schedule of grandparental visitation may unduly burden the custodial parent, the non-custodial parent, and the child, fairness may require that the court refuse any independent grandparental visitation, with the grandparent being able to visit the child through arrangement with the grandparent's own child."[172]

In *Lyng v. Lyng*, a post-divorce proceeding, the custodial parent of a nine year old child appealed from a Family Court order which granted

165 484 N.Y.S.2d 640 (App. Div.1985).

166 N.Y. FAM. CT. ACT § 651 (McKinney 2001).

167 *Id.*

168 *Id.*

169 298 N.Y.S.2d 955 (1969).

170 *Weisman*, 484 N.Y.S.2d at 642.

171 *Id.*

172 N.Y. DOM. REL. LAW § 72 practice commentary (McKinney 1999) (Grandparental Visitation).

the child's paternal grandmother visitation one weekend per month because it simultaneously expanded the visitation rights of the child's father who had moved to Florida.[173] In a terse and deductively reasoned decision, the Third Department affirmed the Family Court's order. The court held that "[s]ince there is nothing in the record to indicate that visitation with her paternal grandmother would not be beneficial to Erin, we agree with Family Court that it would be in her best interest to continue such relationship."[174]

J. *Animosity between a parents and a grandparent is an impermissible reason to deny grandparental visitation*

Prior to the 1966 enactment of DRL § 72, case law considered the presence or absence of animosity as a key factor in awarding or denying grandparental visitation. The court in *People ex rel. Scalise v. Naccari* precatorily stated:

> While it is to be hoped that the father will see the wisdom of permitting the children to receive visits from the maternal relatives, such visits should not be mandated by judicial order. Such judicial mandate might aggravate the conflicts that should subside in the interests of the children. Moreover, the father being a fit custodian of the children, the court should not seek to supervise that custody unless it should appear that the custody is not administered in the best interests of the children.[175]

It is worthwhile to note that at the time the court reached its decision in *Scalise*, no common law right to grandparental visitation existed, however, the trial court treated the grandparent's petition as though it had been vested with such authority.[176] In *Lo Presti v. Lo Presti,* the

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[173] 490 N.Y.S.2d 940 (App. Div. 1985).

[174] *Id*. at 29. *Lyng* further added

> [W]e note that Family Court properly accorded little weight to the testimony of the child psychiatrist whom respondent had retained to examine Erin. Because of the limited contact she had with Erin, and the fact that the evaluation of petitioner was based solely on what she had been told by respondent, her testimony was of little value.

Id. at 30 (citing Twersky v. Twersky, 477 N.Y.S.2d 409 (1984)).

[175] 118 N.Y.S.2d 90, 91 (App. Div. 1953). *See also Ex parte* People *ex rel.* Cox, 124 N.Y.S.2d 511, 515 (Sup. Ct. 1953).

[176] *Scalise,* 118 N.Y.S.2d at 91. *See also* People *ex rel.* Hacker v. Strongson, 141 N.Y.S.2d 859 (N.Y. Sup., 1955) ("No matter how sympathetic the court may be with the desire of the maternal grandparents to see their granddaughter, there is no power in the court to deprive the natural parent

Court of Appeals broke new ground holding that animosity is an impermissible factor to consider in grandparental visitation disputes.[177] The high court added, anecdotally and a bit wryly, that "where grandparents must resort to legal procedures to gain visitation rights. . .some degree of animosity exists between them and the party having custody of the child or children. Were it otherwise, visitation could be achieved by agreement."[178] In *Gloria R. v. Alfred R.*[179] the court created a seemingly logical presumption, rephrasing the Court of Appeals holding in *Lo Presti*, when it stated that "animosity between the parties must be presumed in such situations."[180]

In *Cole v. Goodrich*[181] the mother sustained a traumatic brain injury, which caused a change in her cognitive abilities and a seizure disorder.[182] Twelve years later, she gave birth to a daughter while living with her mother, the petitioner.[183] Due to disagreements with the petitioner regarding the care of the child, the mother moved in with her boyfriend approximately ten months later, leaving her daughter with the petitioner.[184] The parties reached a so-ordered agreement, which established joint legal custody and appointed the grandmother as the primary physical custodian. The mother was granted three hours of unsupervised daily visitation.[185] In response to the mother's motion for contempt against the grandmother for interfering with her visitation, the grandmother filed a modification petition seeking sole custody of the child; a

of the right to the custody of his child, in the absence of proof that the welfare of the child is impaired."); Whitney v. Harrison, 127 N.Y.S.2d 227 (Fam. Ct. 1953); Application of Boses, 105 N.Y.S.2d 569 (App. Div. 1951); Geri v. Fanto, 361 N.Y.S.2d 984 (Fam.Ct. 1974); People *ex rel.* Schachter *v.* Kahn, 269 N.Y.S. 173 (App. Div. 1934); People *ex rel.* Marks *v.* Grenier, 293 N.Y.S. 364 (App. Div. 1937), *aff'd*, 274 N.Y. 613 (Sup. Ct. 1937).

177 387 N.Y.S.2d 412, 414 (1976). *See also* Kampf v. Worth, 485 N.Y.S.2d 344 (App. Div. 1985) ("It would be inequitable to deprive petitioners of the pleasure of their granddaughter's company merely because of the animosity which exists between them and the mother of the child"); Lachow v. Barasch, 394 N.Y.S.2d 284, 284 (App. Div. 1977); Vacula v. Blume, 384 N.Y.S.2d 208, 208 (App. Div. 1976).

178 *Lo Presti,* 387 N.Y.S.2d at 414.

179 618 N.Y.S.2d 24 (App. Div. 1994), *appeal dismissed in part, denied in part*, 626 N.Y.S.2d 752 (1995). *But see, e.g.,* Smith v. Jones, 587 N.Y.S.2d 506 (Fam. Ct. 1992).

180 *Id*. at 179. Underlying the principle of "presumption" is its availability to rebuttal. However, it is often impracticable to essay an objective rebuttal to an emotionally charged subjective presumption. The subjective feelings can, at best, be curbed via a court directive, such as an order of protection, to contain or entirely refrain from certain undesirable conduct.

181 707 N.Y.S.2d 553 (App. Div. 2000).

182 *Id.*

183 *Id.*

184 *Id.*

185 *Id.*

counter petition for custody was filed by the mother.[186] After a hearing, the Family Court awarded the mother sole custody of the child and petitioner was granted visitation. Both parties appealed.[187]

The *Cole* court began its analysis by repeating the Court of Appeals' standard required in custody disputes between parents and non-parents as articulated in the landmark decision, *Matter of Bennett v. Jeffreys.*[188]

> A biological parent's right to custody of his or her child is superior to all others unless, as is relevant here, it is established that the parent is unfit. . .or other equivalent but rare extraordinary circumstance which would drastically affect the welfare of the child is extant . . . . Moreover, the fact that another person may be more suitable in the parental role is insufficient to deprive a biological parent of his or her right to custody.[189]

According substantial deference to the Family Court's decision in *Cole*, the Third Department gave short shrift to the issue of acrimony between the mother and the grandmother and sustained the order because: (1) the mother had completed a first-aid class in her efforts towards becoming a certified health aide, and (2) she consistently visited her child when the grandmother had custody. The Appellate Division, however, affirmed the Family Court's award of visitation to the grandmother based on her "healthy and close relationship with her grandchild."[190]

In *Principato v. Lombardi*:

> The father terminated visitation alleging that the grandparents had made disparaging remarks about him in front of the children at the party for his daughter's first communion as well as other remarks directly to the children. Additionally, he contended that their manner towards him changed after learning that he began to date and was engaged to be married. The grandparents alleged a "constant contact" with the children predating their daughter's death which included multiple visits every week and their eventual role as "joint caretakers for the children" from the date of the death of their daughter until the

186 *Id.*

187 *Id.*

188 387 N.Y.S.2d 821 (1976).

189 Cole v. Goodrich, 707 N.Y.S.2d 553 (App. Div. 2000) (citing *Bennett*, 387 N.Y.S.2d at 823.).

190 Principato v. Lombardi, N.Y.L.J., Sept. 3, 2003, (N.Y. Sup. Ct., Kings Co. Sept. 2, 2003).

> time that the father moved from their home. The father did, however, confirm the existence of "a loving and caring relationship from the time the children were born until the visits were stopped." The trial court found that the grandparent's had standing to bring the petition and analyzed the 'strengths, weaknesses and abilities' of all concerned.[191]

The Court held that absent "other factors," such as dysfunction, animosity, "which is to be presumed," is an impermissible determinant in grandparental visitation cases.[192] In *Cole,* the evidence, clearly, did not support the presence of "other factors." Neither party testified as to hating the other, rather the grandmother insisted on the preservation of a good relationship with the father for the benefit of the grandchildren, while the father did not reject visitation outright, but merely sought to impose conditions on the mode of visitation.[193]

> Proof of animosity alone fails to 'provide a basis to deny visitation'. . .In cases where the court found animosity to exist. . .and denied visitation, *other factors* were also present (such as family dysfunction). . . and played integral parts in the decisions of courts to deny the parents or grandparents visitation. . .In the case at bar there are no allegations of harmful action by the petitioners toward their grandchildren or any expert testimony as to family dysfunction.[194]

Prof. Alan Scheinkman has also weighed in on the issue of animosity in his Practice Commentaries:

> If animosity was a basis for denying visitation, the statute would accomplish very little since, if there was no animosity, visitation would have been arranged by agreement and there would have been no need for judicial proceedings. . . .The reason why animosity between grandparent and parent does not preclude visitation is to prevent conflicts between adults from poisoning the precious relationship between grandparents and grandchildren.[195]

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191 *Id.*

192 *Cole,* 707 N.Y.S.2d at 554.

193 *Id.*

194 Principato v. Lombardi, N.Y.L.J., Sept. 3, 2003 (N.Y. Sup. Ct., Kings Co. Sept. 2, 2003)(citing DiBerardino v. DiBerardino, 645 N.Y.S.2d 848 (App. Div. 1996)) (emphasis original). *See also* Matter of Layton v. Foster, 466 N.Y.S.2d 723, 724 (App. Div. 1983); Kampf v. Worth, 485 N.Y.S.2d 344 (App. Div. 1985).

195 N.Y. DOM. REL. LAW § 72 practice commentary (McKinney 1999) (Grandparental Visitation). The Court reviewed New York's affirmance of the constitutionality of DRL § 72 in light of

K. *The Appellate Division recrafted "Animosity" into a new term to circumvent the Lo Presti injunction; the new term of art is "Dysfunction"*

What's in a name? In three fact-bare decisions the First and Second Departments tersely sidestepped the interdiction against implementing animosity as a tool to deny grandparental visitation.[196] Without mentioning *Lo Presti*,[197] the three opinions, perfunctorily and mechanically recited the catechism against using animosity as criteria, each, however, drew authority from other sources: (1) *Gloria R.*[198] (a First Department case, cited by the Second Department in *Lachow v. Barasch*[199]), (2) *DiBerardino*[200] (a Second Department decision, cited by the Third Department in *Layton v. Foster*[201]), and (3) *Liantonio*[202] (a Second Department ruling, which relied on DRL §72, *Emanuel S. v. Joseph E.,*[203]and *Higuchi v. Brown,*[204] a Second Department opinion).

The unifying thread linking the three decisions is that, without discussing the facts underlying each case, the courts denied visitation based on "dysfunctionality." The First, Second, and Third Departments have transparently recast the nomenclature from animosity to dysfunctionality, in order, to seemingly obviate an overt transgression of the high court's ruling while achieving the intended result.[205] In *Janczuk v.*

Troxel v. Granville, provided it is interpreted to grant special weight to the parent(s)' objection(s) to the visitation: "A court according special weight to the preference of parents during a proceeding under DRL § 72 will remove the possibility of constitutional doubt or violation of the parent's substantive due process rights regarding their right to make decisions concerning the visitation. This would also permit the parent to enjoy the presumption of acting in the best interest of the child without unwarranted judicial interference."

Id. (citation omitted).

196 Gloria R. v. Alfred R., 618 N.Y.S.2d 24 (App. Div. 1994), *appeal dismissed in part, denied in part*, 626 N.Y.S.2d 752 (1995); Liantonio v. Davanzo, 756 N.Y.S.2d 480 (App. Div. 2003) ("The record also supports the Family Court's finding that in light of the animosity and dysfunction in the family, allowing the petitioner to visit her grandchildren would not be in the best interests of either child."); DiBerardino v. DiBerardino, 645 N.Y.S.2d 848 (App. Div. 1996).

197 *Lopresti,* 387 N.Y.S.2d 412 (1976).

198 N.Y.S.2d 24 (App. Div. 1994), *appeal dismissed in part, denied in part*, 626 N.Y.S.2d 752 (1995).

199 394 N.Y.S.2d 284 (App. Div. 1977).

200 645 N.Y.S.2d 848 (App. Div. 1996).

201 466 N.Y.S.2d 723 (App. Div. 1983).

202 756, N.Y.S.2d 480 (App. Div. 2003).

203 573 N.Y.S.2d 36 (1991).

204 611 N.Y.S.2d 625 (App. Div. 1994).

205 *See Gloria R.,* 618 N.Y.S.2d at 25; *Liantonio,* 756 N.Y.S.2d at 480; *DiBerardino,* 645 N.Y.S.2d at 848.

Janczuk,[206] a similarly fact sparse ruling, the Second Department relied on *DiBerardino* and *Gloria R.*, without repeating the animosity catechism, thereby, presenting "dysfunction" as the *fait accompli* standard.

In *Wilson v. McGlinchey*,[207] a 2003 decision from the Third Department, the respondents were the parents of the petitioner, Carol A. Wilson and grandparents to Carol Wilson's two daughters.[208] The Third Department, citing *Liantonio v. Davanzo*, found changed circumstances such that continued grandparental visitation was no longer in the child's best interest.[209] The appellate court's reference to "dysfunc-

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206 760 N.Y.S.2d 222 (App. Div. 2003); In *Janczuk* the grandmother appealed from Family Court's denial of her petition for custody of her grandchild and from the court's vacatur of a prior consent order which granted her visitation with the grandchild. The Second Department held that the grandmother had "failed to make a threshold showing of the existence of extraordinary circumstances" to warrant a proceeding on the issue, thus, resulting in a proper dismissal of her proceeding.

207 760 N.Y.S.2d 577 (App. Div. 2003).

208 *Id.* In October 1999, the grandparents, who were estranged from their daughter since before her marriage, filed a petition for visitation with their granddaughter alleging that from the time of the child's birth, petitioners had refused to allow them visitation despite respondents' efforts. Although the Wilsons moved to dismiss the petition contending that the grandparents lacked standing, they entered into a so-ordered agreement permitting visitation for "a minimum of eight hours per month." *Id.* at 578. In March 2001, the Wilsons filed a petition alleging a change in circumstances since the entry of the stipulated order simultaneously seeking to vacate said order. In April 2001, the grandparents filed a petition seeking visitation with the second child, Samantha, then about five months old. Family Court denied the Wilsons' motion to dismiss based on a lack of standing. *Id.* After a three-day hearing on both petitions Family Court dismissed the Wilsons' petition to vacate, finding that no change in circumstances had occurred, but, nevertheless, denied the grandparents' petition on the merits, to wit, the child's best interests. *Id.* at 579. The Wilsons appealed from that branch of Family Court's order dismissing their petition to vacate pertaining to the older child (the grandparent's did not appeal and, thus, there was no issue for review regarding the court's denial of their petition pertaining to Samantha. *Id.* The Third Department also considered an issue never reached by Family Court:

> Thus, we turn to reviewing the record on appeal to determine whether the continuation of the existing agreed-to visitation order over the strenuous objections of petitioners is in the best interest of Sarah (see Domestic Relations Law § 72), a determination never reached by Family Court, guided by the principle that, in grandparent visitation cases such as this, "it is well settled that the primary consideration is the best interest of the child" (Matter of Beers v. Beers, 220 A.D.2d 839, 840 [1995], citing Matter of Emanuel S. v. Joseph E., supra at 181, 573 N.Y.S.2d 36, 577 N.E.2d 27). On appeal, petitioners' challenge to Family Court's dismissal of their petition to vacate the visitation order is based solely on the argument that they demonstrated a change in circumstances warranting termination of the visitation order as in Sarah's best interest. They have not addressed the issue of whether the change in circumstances analysis utilized in cases between parents seeking to modify agreed-to custody or visitation orders (see Matter of Murray v. McLean, —- A.D.2d —— [Apr. 3, 2003], slip op p 2) is applicable) here, or the weight that should be accorded to their stipulation.

Wilson, 760 N.Y.S.2d at 579.

209 *Id.* at 579 (citing Liantonio v. Davanzo, 756 N.Y.S.2d 480 (2d Dept. 2003)).

tion" telegraphed its intent to discontinue visitation. Significantly, *Wilson* did not cite *Lo Presti* with respect to animosity as an impermissible determinant, but rather cited Second and Third Department decisions, probably to return the bar to its original position without unveiling its true intention to inconspicuously digress from the high court's pronouncement:

> Although animosity between the parties cannot alone provide the basis for denying visitation, the relations between these adults are such that they have been, and in all likelihood will continue to be, incapable of preventing their feelings toward one another from infecting any visitation. Exposing Sarah to the coldness, stress, tension and battling hostility which have characterized the voluntary visitation experience and the parties' interactions—which has caused the grandmother, the mother and the child to suffer emotionally, either before or after visitations—is not in her best interest. Moreover, given the minimal, agreed-to visitation routine, which has taken place in an artificial environment under limited conditions and absent any real life, nurturing experiences, respondents—while expressing their love and concern for Sarah—have not established a meaningful relationship with the child.[210]

Notwithstanding the finding that "bad faith" by the child's parents contributed to the emotional maelstrom, the court in *Wilson*, nevertheless, accorded greater weight to the parents' objections because of their superior status as parents thereby militating against forced visitation.[211] Moreover, many of the "matter of fact" observations posited by the *Wilson* court raise more questions than answers. The Third Department's unreferenced comment about the "nature and basis"[212] behind the parents' objections to visitation is rather curious; the appellate court, otherwise known for fact rich opinions, offered not one fact to justify or explain either "the nature" or "the basis" warranting a dismantling of the visitation. The court is concerned if "the mother and the child suffer emotionally," but the Appellate Division is silent as to what emo-

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[210] *Id*. at 579 (internal cites omitted).

[211] *Id.* at 580 (citing Emanuel S. v. Joseph E., 573 N.Y.S.2d 36 (1991); Ziarno v. Ziarno, 726 N.Y.S.2d 820 (2001), *lv denied*, 737 N.Y.S.2d 52 (2001)).

[212] *Id.* at 580 ("Although there is evidence of bad faith on the part of petitioners in their resistance to the stipulated order, they are the child's parents and the "nature and basis" of their objections are very relevant, compelling factors militating against forcing visitation").

tional damage may have been sustained by a one-year-old child due to the dispute.[213]

It is beyond cavil that a party to any dispute invariably sees himself or herself as the victim of the other's emotional stress, nevertheless, it is the court's reference to emotional damage to the child that is curious. There is no elucidation on the meaning of the "artificial environment" which rendered continued visitation pernicious to the child's well being.

Additionally, the general notion of visitation, even for a non-custodial parent, resonates temporal, and perhaps, also, spatial limitations. The unique parameters behind a meaningful relationship with a one-year-old child are confined to a gradual maturation process where bonding occurs across regular and ongoing contact leading to emotional and cognitive development. This process was frustrated by the parents, the Family Court, and the Appellate Division alike. By chiding the grandparents for having failed to develop a meaningful relationship with the child, the grandparents were, in effect, thrown into a Catch-22 situation irrespective of their compliance with decisional authority or a court order.

Under *Wilson* the grandparents can never successfully comply with *Emanuel S.,*[214] which requires them *either* to make a showing of an ongoing existing relationship, *or* to prove all efforts made to establish a relationship measured against the reasonableness of the circumstances "so that the court perceives it as one deserving the court's intervention."[215] Not only could the grandparents not meet the threshold for standing by demonstrating a history of ongoing contact with their grandchild, but even their full compliance with the minimal amount of grandparental visitation awarded to them was deemed insufficient to justify granting them standing to seek visitation with their grandchild. Ergo, a no win situation for grandparents was created.

The facts in *Wilson* are somewhat akin to those in *Agusta v. Carousso*,[216] which resulted in a happier conclusion for the grandfather. *Agusta* found the grandfather's attempts to establish a relationship with the grandchildren since their birth to be significant. Thus, the court concluded that he "had done all he could reasonably have done in face of his daughters' adamant refusal to permit him to visit his grandchil-

213 *Id.*at 579.

214 573 N.Y.S.2d 36 (1991).

215 *Id.* at 39.

216 617 N.Y.S.2d 189 (App. Div. 1994).

dren";[217] these efforts were similar to those exerted by the grandparents in *Wilson*.[218] Thus, it appears that the only distinction is in the Court's perception of "dysfunctionality."

In *Beers v. Beers*[219] the Third Department affirmed the Family Court's award of grandparental visitation over the strong objections of the mother. *Beers* involved an extremely stormy imbroglio leading to multiple findings of contempt against the mother including her prison confinement.[220] Having filed for visitation after her son's incarceration, the paternal grandmother was granted alternating weekend visitations and one week of visitation during the child's summer vacation.[221] Two years later, due to the mother's and her relative's acrimonious behavior toward the grandmother during child visitation exchanges, the Family Court modified its previous order by requiring that the mother prevent the attendance of her relatives at exchanges, and that respondent turn the child over promptly, without either party making "diminishing" comments about the other in the child's presence.[222] The tumultuous situation, however, deteriorated further and ultimately led to a finding of contempt against the mother for which she served a 10-day jail term.

Strife, attributable to the mother's malicious behavior, continued to permeate the exchanges even after her release from prison resulting in a petition for a modification of visitation. After a three day trial, the Family Court found that while the mother was no longer engaged in the yelling and making of physical threats, she was using "more subtle attempts to impede the visitation by manipulative statements, postures and conduct in the child's presence," and she would "do all in her power to discourage" visitation.[223] Finding that respondent was unable to avoid intermeddling by her own mother, the court changed the place of the exchanges from respondent's home to a local police station repeating its prior order that the mother was to "prevent attendance by any of her relatives" at the exchanges, neither party was to make diminishing comments in the child's presence, and the exchanges were to be promptly made.[224]

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217 *Id.* at 190.

218 Wilson v. McGlinchey, 760 N.Y.S.2d 577 (App. Div. 2003).

219 632 N.Y.S.2d 257 (App. Div. 1995).

220 *Id.* at 258.

221 *Id.*

222 *Id.*

223 *Id*. at 840

224 *Id.*

Within a month the mother was, again, violating the court order, which resulted in, yet, another petition for a modification of visitation. After viewing a videotape of the exchange, the court again found the mother in contempt issuing, still, another order with respect to visitation, this time requiring respondent to deliver the child to petitioner's home for visitation. The mother appealed from both the contempt order as well as the last modified order of visitation.

Beers took note of the grandmother's good relationship with the child. Also, both the Law Guardian and the mental health evaluations advocated in favor of continued visitation.[225] Although separated by six years and different benches,[226] the Third Department only cited *Apker*[227] in both *Wilson* and *Beers* with respect to animosity as a consideration, but then cited *LoPresti*[228] in *Beers* alone in support of the proposition that "the question of visitation is a matter within the trial court's discretion."[229] Logic dictates that if the Appellate Division intended to cite *LoPresti* it would have done so for its obvious landmark value (regarding animosity as an impermissible ingredient) instead of for its holding that visitation is within the ambit of the trial court. There is no lack of decisional authority, which could have been selected for that premise; thus, it was not necessary to cite *Apker* for the principle regarding animosity.

The appellate court took note of the mother's persistent effort to disrupt the visitation and, thus, rejected the mother's argument that "the child [was] adversely affected by the great degree of animosity between the parties and the tension during the exchanges, and that therefore visitation [was] not in the child's best interest,"[230] making any reconciliation between the *Beers* and *Wilson* decisions even more troubling. Not only did *Beers* transcend all levels of "civilized common" animosity or strife between warring families, but, rather it was saturated with some of the most disturbing examples of vindictive malevolence between former family members. Nevertheless, the Appellate Division calmly suggested that the situation could be remedied because "[t]he pressure on the child during visitation exchanges would be lessened if

225 The child was, clearly, older than the child in *Wilson* otherwise the appointment of a Law Guardian would not have made any sense.

226 Only JJ. Mercure and Spain participated in both decisions.

227 490 N.Y.S.2d 923 (App. Div. 1985).

228 387 N.Y.S.2d 412 (1976).

229 *Id.* at 841.

230 *Id.* at 840.

respondent simply refrained from such activities."[231] If *Beers* was susceptible to resolution via such a gentle reprimand then why not *Wilson*? What happened in the intervening years to make the Third Department gun shy in a case involving a dramatically less turbulent fact pattern?

The recency of *Wilson*, *Liantonio,* and *Janczuk* augur an apparent collective appellate rethinking, which has widened the schism between the Appellate Division and the Court of Appeals on this issue. It is fair to posit that it will hardly be surprising if future opinions return to pre-*Lo Presti* days under the new banner of "dysfunctionality."[232]

Significant to *Liantonio*,[233] its fact barren opinion notwithstanding, is the Second Department's statement: "The record also supports the Family Court's finding that in light of *the animosity and dysfunction* in the family, allowing the petitioner to visit her grandchildren would not be in the best interests of either child."[234] Similarly noteworthy is the Second Department's reference to acrimony and dysfunction in *Janczuk's*[235] fact lean ruling: "The Family Court also properly vacated the visitation order which was previously entered on consent in light of the *extremely acrimonious and dysfunctional* relationship between the petitioner grandmother and the mother, which had an emotionally traumatic effect on the child."[236]

Although the Appellate Division has grouped the terms into phrases in its past few decisions, to wit, "animosity and dysfunction" and "extreme acrimony and dysfunction," it did not, however, offer any guidance, precedent, or instruction as to their distinctions, if any. And, if they are, indeed, to be treated discriminately apart, what is the standard governing each, or is the standard as vague as "the best interests of the child" test so as to provide the trier of fact with broad latitude? Which generates the highest threshold or burden or proof, animosity, acrimony, or dysfunction? Which one follows? What is the difference between ordinary acrimony and extreme acrimony – is extreme acrimony the same as animosity or is it more? Or is it less? Is there any difference between ordinary acrimony and animosity? If so, what is it?

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231 *Id*. at 841.

232 *See Principato v. Lombardi*, N.Y.L.J. Sept. 3, 2003, (Sup. Ct, Kings Co. (Johnson, J.)). Even though *Principato* stressed that animosity had to be accompanied by "other factors", such as dysfunction, this could be a step in that direction.

233 *Liantonio v. Davanzo*, 756, N.Y.S.2d 480 (App. Div. 2003).

234 *Id.* at 480 (citations omitted).

235 Janczuk v. Janczuk, 760 N.Y.S.2d 222 (App. Div. 2003).

236 *Id.* at 223.

What, if anything, is the difference between dysfunction and animosity? When does ordinary acrimony become extreme acrimony? When does dysfunction become acrimony or animosity? Is there a bright line test for any of these?

It may be theorized, at first blush, that dysfunctionality is a stricter standard, which does not require the same display of fangs and venom, which might be expected to accompany animosity or acrimony. Rather, a mere showing that a situation is incapable of smooth implementation for any reason at all should suffice to deny grandparental visitation. But is such a view faithfully consistent with the legislative intent behind DRL § 72? Are all of these terms and phrases synonymous, like the phrase "to have and to hold"? The path of grandparental visitation has been arduously mined with unwitting traps throughout every step of the proceeding; the legal arsenal facing grandparents is fraught with amorphous chameleon-like adjectives which can, in Lewis Carroll's world, mean anything at any time that the court wants them to mean—-without warning.

Since *Janczuk* represents the Second Department's most recent pronouncement on the issue, it is fair to say that "dysfunctionality", whether standing alone or synthesized with any other emotion-steeped term the Appellate Division decides to link with it, is here to stay. Notwithstanding the fact that no bench, yet, has addressed any of the aforementioned questions, squarely places grandparents at a disadvantage.

On May 13, 2004, the Court of Appeals decided the conflict in *Wilson v. McGlinchey.*[237] The court made a rare fact finding determination, under CPLR § 5501(b),[238] by reviewing the record to determine which findings more closely comport with the weight of the evidence here courts below reach different factual conclusions.[239] Affirming the

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237 2004 WL 1064484 (2004).

238 *Id.*

> (a) Court of appeals. The court of appeals shall review questions of law only, except that it shall also review questions of fact where the appellate division, on reversing or modifying a final or interlocutory judgment, has expressly or impliedly found new facts and a final judgment pursuant thereto is entered. On an appeal pursuant to subdivision (d) of section fifty-six hundred one, or subparagraph (ii) of paragraph one of subdivision (a) of section fifty- six hundred two, or subparagraph (ii) of paragraph two of subdivision (b) of section fifty-six hundred two, only the non-final determination of the appellate division shall be reviewed.; Matter of Jaclyn P., 635 N.Y.S.2d 169, 170 (1995).

Id.

239 *Id.*

Appellate Division's findings, the Court of Appeals terminated the visitation between the older child and grandparents based on the intensified hostility which culminated in a request by the mother for police intervention.[240]

Citing its precedent case, *Lo Presti v. Lo Presti*,[241] for the proposition that "animus between litigants is not uncommon, particularly in emotionally-charged family matters", the court in *Wilson*, however, underscored that "although enmity between parents of a child may not affect a parent's visitation rights,[242] grandparent visitation implicates different equitable concerns.[243]

The court also gave great weight to the testimony of the mother's therapist "whom she consulted both prior to and during this dispute," regarding the mother's "post-traumatic stress as a result of the visitation and that her tension and anxiety affected her ability to parent and could be sensed by the children."[244] The impact on the children was confirmed by the Law Guardian.[245]

The court balanced the "precious part of a child's experience" presented by visits with grandparents which "cannot [be] derive[d] from any other relationship" against the reality of the situation and concluded that "this interest must yield where the circumstances of the child's family—including the worsening relations between the litigants and the strenuous objection to grandparent visitation by both parents—render the continuation of visitation with the grandparents not in the child's best interest."[246] The interesting language in *Wilson* is that the court's ruling sets forth its concern regarding "animosity *and* dysfunction."[247] Interestingly, the court's ruling seems to have created a hybrid: firstly, it revived the term "animosity", which the various appellate courts had abandoned in favor of "dysfunction" but it, nevertheless, wove "dysfunction" into its ruling.

The same questions resurface: is animosity still the exclusive test? Must a resistant parent also establish dysfunction in addition to animos-

240 *Id.*

241 387 N.Y.S.2d 412 (1976).

242 *Wilson*, 2004 WL 1064484 (2004) (citing, N.Y. DOM. REL. LAW § 240; FAM. CT. ACT § 651).

243 *Id.* (citing Emanuel S. v. Joseph E., 573 N.Y.S.2d 36 (1991)).

244 *Id.*

245 *Id.*

246 *Id.*

247 *Id.*

ity? Does logic not dictate that dysfunction is subsumed under animosity, after all, as the court observed that "animus between litigants is not uncommon, particularly in emotionally-charged family matters."[248]

Also, very significant is the Court of Appeals' declining the opportunity to rule on the constitutionality of DRL § 72.[249]

l. *Grandparental wrongdoing is a factor in denying visitation*

A grandparent may not seek visitation when he or she is guilty of wrongdoing, which caused or contributed to the rift between them and the parent(s) and/or the grandchildren.

In *Canales v. Aulet*[250] the Appellate Division affirmed the Family Court's dismissal of the petition for visitation because the grandparents lacked standing. In a terse opinion, the Second Department repeated the predicate principle of law:

> To be afforded standing to seek grandparental visitation over the objection of a biological parent, the petitioning grandparent must establish an existing relationship with the grandchild, or sufficient efforts to establish one that have been unjustifiably frustrated by the parent. Only after such a favorable showing of the equities has been made will the court, considering all relevant facts and circumstances, determine whether the application deserves judicial intervention.[251]

The evidence showed that the grandmother's disruptive and sometimes violent propensities, including the repeated filing of unfounded charges regarding the mother's unfitness with child welfare authorities, led to an acrimonious relationship between the grandmother and the mother, leading to reciprocal orders of protection. The Appellate Division held that "equity did not require intervention" in this matter.[252]

In *Grant v. Richardson*[253] the maternal grandmother sought visitation with the children, who, after their mother's death, resided with their father and respondent. The respondent was given letters of guardianship for the children who continued to live with her after the children's father died. The Appellate Division noted that although the

248 *Id.*
249 *Id.*
250 744 N.Y.S.2d 851 (App. Div. 2002).
251 *Id.* at 851 (citations omitted).
252 *Id.*
253 697 N.Y.S.2d 17 (App. Div. 1999).

grandmother had correctly been granted standing due to the death of the children's mother, the denial of visitation was supported by evidence that: (1) the grandmother caused the children stress by telling them that the man they knew as their father was not their real father; (2) the grandmother allowed the children to live with her in the same house as her husband who was prone to domestic violence against her and whom one of the children had accused of sexual abuse; and (3) the children were adamantly opposed to any visitation with her.

In *Higuchi v. Brown*,[254] a fact bare opinion, the grandmother was granted standing in light of her daughter's disappearance which was deemed to constitute a circumstance "[in] which equity would see fit to intervene."[255] Visitation, however, was denied because the petitioner believed that the respondent was responsible for her disappearance and communicated these suspicions to others, including the respondent. The record also showed that "[t]he independent evaluators recommended supervised visitation because of the risk that the petitioner would convey her suspicions to the children."[256] Further, the respondent testified that the petitioner made him "uncomfortable and irritable" and that if he had to deal with her it would affect how he deals with his children on a day-to-day basis.[257] The Family Court found that, in addition to "plac[ing] the children at further risk in view of the loss that they had already suffered,"[258] visitation would be detrimental because it would confuse the children's feelings for their father and would create great difficulty in the father's attempts to properly raise the children.

The facts in *Smith v. Jones*[259] parallel those in *Higuchi* where the mother, too, had disappeared inexplicably, which the court found as a circumstance which equity would see fit to intervene. The court in *Smith* began its analysis by distinguishing the purposes and goals of parental visitation, which are long term in nature, with grandparental visitation, which addresses an immediate situation.[260]

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254 611 N.Y.S.2d 625 (App. Div. 1994).

255 *Id.* at 626 (citing N.Y. DOM. REL. LAW § 72).

256 *Id*.

257 The words "irritable" and "uncomfortable" sound like synonyms for animosity and "dysfunctionality."

258 *Higuchi,* 611 N.Y.S.2d at 626.

259 587 N.Y.S.2d 506 (Fam. Ct. 1992).

260 *Id*. at 508.

> The usual issues relating to best interest involve natural parents and are geared toward determining the form of visitation best suited for the child. With natural parents, there is a very strong presumption that visitation should take place. Indeed it is said

Although the court emphasized that animosity may not be a factor in determining the ultimate issue, it did, however, draw a line between ordinary animosity and accusations of unproved uxorcide, which, if conveyed to the children, might destroy their relationship with their surviving parent. After a review of many of the United States Supreme Court decisions[261] regarding the fundamental right of parents to raise their children, the court also noted that the role of *parens patriae* is not unfetteredly absolute, but rather has limitations.[262] The court, thus, rejected the recommendations of the neutral experts and the Law Guardian and denied the grandmother's petitioner for visitation. The court's principal concern was the risk to the children:

> Since the disappearance she has felt that Respondent caused the disappearance and has articulated that feeling to Respondent and to others . . . [t]he risk here is that Petitioner would convey her feelings to the children and thus undermine Respondent's relationship with them. The credible evidence supports this trepidation[263]

In *Fitzpatrick v. Youngs,*[264] the court also offered several examples of grandparental wrongdoing which might result in the denial of visita-

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> that a complete denial of visitation between a child and a natural parent is a drastic measure . . . . The considerations for grandparent visitation are different. Grandparent visitation is a creature of statute; the parent-child relationship however precedes government itself and has been described as an "intrinsic human right." . . . . A fundamental constitutional right regarding grandparents and grandchildren as similar to that between a parent and child has not been articulated. When considering the "best interest" issue as to natural parents, the importance and veneration given to the relationship and often the severe psychological impact of severing such relationship often prompts the court to provide visitation even though there may be attendant short term complications and problems (i.e. supervised—or other restrictions). The "problems" are dealt with because the objective is to establish and/or maintain the life long natural bond in child parent relationships. Furthermore, it has been established that if the bond is broken it may cause the child psychological damage at some later point in his or her life. In grandparent matters, the best interest question involved is much more objective and "now" oriented. Is it beneficial to this child to visit with this grandparent now? The relationship is indeed important, but the parent-child bond is inestimably more important by tradition and by simple reality, than that of the grandparent-child.

Id. (internal citations omitted).

261 *See also infra* notes 306-325 and accompanying text (discussing *Troxel v. Granville,* 530 U.S. 57 (2000) and other Supreme Court cases). R

262 "We know from pronouncements by the Court that the Privacy right of parenting is not absolute and that there is a role of "parens patriae" appropriate to the State." *Id.* at 259

263 *Id*. at 258.

264 717 N.Y.S.2d 503 (Fam. Ct. 2000).

tion, including: (1) a grandparent who failed to protect or prevent a child from being a victim of domestic violence; (2) a grandparent who failed to respond to "inappropriate sexual contact;" or (3) a grandparent who has a volatile relationship with the child's parent.[265]

In *Smolen v. Smolen,*[266] the court also spoke to the issue of wrongdoing:

> While mere animosity between the parties is not considered sufficient to deny standing . . . if the animosity stems from the grandparents' behavior or attitudes, then standing will not be conferred. Some examples include: emotional and physical abuse by grandfather, domineering and critical behavior by grandparents . . . .[267]

In *La Porte v. Rivers,*[268] the children's parents were both alive and the grandmother sued for visitation under the provision establishing grandparental visitation "'where circumstances show that conditions exist which equity would see fit to intervene' and where it is in the best interests of the children."[269] The court found that circumstances were not present for an equitable intervention to occur. The grandmother appealed.

The Third Department affirmed the lower court's decision based upon the grandmother's admissions that: (1) she had not seen the children for two years prior to the hearing date; (2) when she did live only a short distance from the children, she had only seen them about once a month; (3) she had allowed one of her granddaughters to stay in the same house with a man whom she knew had been accused of sexual abuse; and (4) she did not know how the child would benefit from

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265 *Id.* at 505.

> Visitation with a grandparent who had knowledge of domestic violence and took no action to prevent it or protect the child is not in the best interests of the child, and a parent's action denying visitation is reasonable . . . . An inadequate response by a paternal grandfather to inappropriate sexual contact can result in visitation denial . . . . If the situation between grandparents and a parent is volatile, that affects best interests and grandparent visitation . . . . On the other hand, adoption alone does not preclude the allowance of visitation, and the privacy rights of the adoptive parents are not invaded . . . . If the visitation will be harmful to the child, New York Courts deny it.

Id. (internal citations omitted).

266 713 N.Y.S.2d 903 (Fam. Ct. 2000).

267 *Id.* at 906 (internal citations omitted).

268 534 N.Y.S.2d 586 (App. Div. 1988).

269 *Id.* at 587 (quoting N.Y. DOM. REL. LAW § 72)

grandparental visitation.[270] Furthermore, a social worker testified that visitation would be of no benefit to the grandchildren. The Appellate Division found that despite the grandmother's "manifestations of concern for the children and having good relations with them, the record shows no meaningful relationship and only infrequent contact."[271]

In *Wenskoski v. Wenskoski*[272] the child's parents separated and a divorce action was pending between them; the child continued to reside with his mother. The paternal grandmother commenced a proceeding for visitation. Although she was determined to have standing, the Family Court, nevertheless, denied the requested visitation.[273]

In its affirmance of the Family Court ruling, the Third Department found that the record amply supported the granting of standing to the grandmother pursuant to DRL § 72 "where circumstances show that conditions exist which equity would see fit to intervene." The Appellate Division continued: "[T]he equitable circumstances requirement will be met with a showing of a sufficient existing relationship with [the] grandchild, or in cases where that has been frustrated by the parents, a sufficient effort to establish one, so that the court perceives it as one deserving the court's intervention."[274]

The evidence showed that the grandmother had substantial ongoing contact with the child for twelve years, from his birth until the time of the commencement of the divorce action, when his father moved out of the family home and pursued an extramarital affair. The grandmother had also lived in the marital home and took care of the child. Even after the grandmother moved out of the family home when the child was four years old, she frequently visited the child and watched him during the day in the year before he began kindergarten.[275] Thereafter, she continued to care for him after school and when he was sick and could not attend school. The grandmother even placed an advertisement in a newspaper in 1998 wishing the child a happy birthday, thereby demonstrating her efforts to maintain contact with the child during the three months that they were estranged.[276]

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270 *Id.*

271 *Id.*

272 699 N.Y.S.2d 150 (App. Div. 1999).

273 *Id.* at 151.

274 *Id.* (citing Matter of Emanuel S. v. Joseph E., 573 N.Y.S.2d 36 (1991)).

275 Id. at 151.

276 *Id.*

The Third Department then shifted its focus to the question of the child's best interests (which determination lies solely within the trial court's discretion).[277] The appellate court found that notwithstanding the evidence regarding the existing relationship between the grandmother and the child, the affirmance of the denial of visitation was warranted because the child told the court that he did not want to visit with his grandmother. The linchpin was the grandmother's disparaging remarks about the child's mother stating that "the father had found a more 'suitable mate' and urging [the child] and his brother to leave their mother and move in with their father," creating the impression with the child that the grandmother approved of the father's abandonment of the mother and the family.[278] The Appellate Division concluded that "[i]n view of Andrew's obvious psychological difficulty in dealing with the polarization of his family, we are not persuaded to disturb Family Court's determination."[279]

In a matter of first impression, the court in *C.M. v. M.M.*[280] reviewed whether the domestic violence statute relating to interspousal custody disputes[281] applies to grandparental visitation cases, when a grandparent witnesses violence committed by her son against the child's mother in the presence of the child. In this case, the court described the facts of the mother's "tragic" life in great detail.[282] These unparalleled facts of extreme violence clearly influenced the court's decision:

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277 *Id*. at 152.

278 *Id.*

279 *Id*.

280 672 N.Y.S.2d 1012 (Fam. Ct. 1998).

281 DRL § 240(1) sets forth, in pertinent part: "Where either party to an action concerning custody of or a right to visitation with a child alleges in a sworn petition or complaint or sworn answer, cross-petition, counterclaim or other sworn responsive pleading that the other party has committed an act of domestic violence against the party making the allegation or a family or household member of either party, as such family or household member is defined in article eight of the family court act, and such allegations are proven by a preponderance of the evidence, the court must consider the effect of such domestic violence upon the best interests of the child, together with such other facts and circumstances as the court deems relevant in making a direction pursuant to this section."

282 [The grandmother's son], her then husband, was handcuffing respondent in the bathroom for the entire day. he slept on the bathroom floor while handcuffed. The only time he would "let her out" was to put the child on the school bus or to eat with him. She sustained multiple injuries at his hands including a twice broken nose, broken ankle and two broken ribs. He tore the hair out of her head. He beat her up daily, threatening to kill her. On the date of the arrest while they were driving he punched her in the face and her blood "splattered." He threatened to kill her and her father. She asked him to stop for gas. When he pulled up to the gas station, she ran from the car screaming. The police were called and arrested him.

> The domestic violence in this case was shocking and brutal. This Court is aware of no case on point regarding domestic violence in the context of a determination of standing in a grandparent visitation application.[283]

In addition to her infrequent and minimal contact with the grandchild over a five year period, the trial record also showed that although she never helped the mother or the grandchild financially after expelling them from her home, the grandmother, nevertheless, chose to support her son financially, to the detriment of her grandchild by (1) giving money to her son to "fight" having to give child support to this child; (2) borrowing $4,000 to hire a lawyer to represent him in connection with the criminal proceeding arising from the domestic violence perpetrated against the mother; and (3) paying $5,000 to an attorney to represent her son in the divorce action brought by the mother.[284] Notwithstanding her awareness of the son's extreme violence towards the mother, the grandmother (1) did not take any steps to protect her grandchild or the mother, and (2) testified that (a) she believed that her son was a good father, despite his having pled guilty to two counts of "felony assault," and (b) that the mother's petition for an Order of Protection was "cruel."[285]

Applying settled law regarding the threshold to be satisfied when both parents are alive including "the nature and extent of the grandparent-grandchild relationship and the nature and basis of the parents' objection to visitation," as well as the efforts required to foster a grandparent-grandchild relationship, *C.M.* set forth a lengthy list of what the grandmother could have done to foster a relationship and to "have made herself an important person in this child's life, but failed to do."[286]

C.M. noted the lack of direct applicability of the amended domestic violence statute, DRL § 240(1), to grandparental visitation cases, but, nevertheless, examined domestic violence as it relates to the best

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> . . . At the wake for the grandmother's own mother, the child's mother had black eyes and bruises on her face. Petitioner told respondent to make certain to wear a hat and makeup because she "did not want anyone to think anything." On no occasion did petitioner ask respondent if she or the child were safe.

672 N.Y.S.2d at 1015.

283 *Id.* at 1018.

284 *Id.* at 1017.

285 *Id.* at 1018.

286 *Id.* at 1017.

interests of a child in typical custody and visitation disputes between parents. The court next applied the legislative intent behind the domestic violence statute to grandparental visitation cases.[287]

The Court rebuked the grandmother for having failed to protect the mother from her son, which translated into the grandmother's failure to protect the grandchild.

> The petitioner failed to protect . . . the mother of the child, her daughter-in-law, from the serious physical and emotional abuse perpetrated by her son . . . in the presence of the grandchild. The petitioner failed to obtain help of any kind for this mother and her grandchild. Rather, at every juncture, she chose to ignore the violence, and, in fact, ask[ed] respondent to conceal it from others. She should have realized the impact the violence had on her grandchild, who was of tender years. Her failure to protect this mother was also a failure to protect her grandchild.[288]

Not surprisingly, *C.M.* found no equitable circumstances to confer standing, thus, obviating the need to reach the issue of best interests.[289]

In *Geri v. Fanto,*[290] a pre-1975 amendment decision, the paternal grandparents sought visitation with their grandchildren after the death of their son. The record showed that the grandparents were rather ill tempered and unpleasant. The Family Court made the following findings: (1) "regrettable acrimony" existed between the grandparents and

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287 *Id.* at 1018. The court reasoned:

> In the legislative findings regarding the amendment of DRL Section 240(1), it is stated that "[t]he legislature finds and declares that there has been a growing recognition across the country that domestic violence should be a weighty consideration in custody and visitation cases." L.1996, child. 85, Sec. 1, eff. May 21, 1996. In 1994, the Model Code on Domestic and Family Violence of the National Council of Juvenile and Family Court Judges "called upon the court to consider as primary the safety and well-being of the child and the abused parent in setting visitation . . ." The legislative findings also provide that: The legislature recognizes the wealth of research demonstrating the effects of domestic violence upon children, even when the children have not been physically abused themselves or witnessed the violence. Studies indicate that children raised in a violent home experience shock, fear, and guilt and suffer anxiety, depression, somatic symptoms, low self-esteem, and developmental and socialization difficulties. Additionally, children raised by a violent parent face increased risk of abuse. A high correlation has been found between spouse abuse and child abuse. L.1996, child. 85, § 1, eff. May 21, 1996.

Id.

288 *Id.* at 1018.

289 *Id.*

290 361 N.Y.S.2d 984 (Fam.Ct. 1974).

mother; (2) the absence of civility as reflected in the grandparents' refusal to acknowledge or speak to the mother's new husband and refused to acknowledge him as the children's father, even though he adopted them; (3) the grandparents offered no assistance to the mother and child who were relying upon public assistance due to their son's failure to pay income taxes; (4) the grandparents never visited their grandchildren when they were residing with their maternal grandparents; (5) the grandparents were upsetting the children "by telling them that their deceased son was the real father and that respondent's present husband was not;" and (6) the grandparents had not seen their grandchildren for two years prior to the visitation proceeding.[291]

The Family Court held that "to encourage such a relationship in this case would hinder the adoptive relationship" and, then, musingly opined that to grant grandparental visitation under these circumstances "would serve as a deterrent to adoptions."[292]

Coulter,[293] the court also exposed the grandparents' contributory role in the acrimony:

> 'What is required of grandparents must always be measured against what they could reasonably have done under the circumstances' . . . It is clear that petitioners refused to accept any responsibility for the deterioration of the parties' relationship, and the evidence establishes that Robert Coulter made no effort to refrain from the criticism and demeaning comments which created the family turmoil. Accordingly, petitioners could reasonably have done more in the circumstances.[294]

While, the pivotal issue influencing the court's decision in *Clarabelle K. v. Christman*[295] was the fact that grandmother had lost parental rights to her own child, the child's mother, due to abuse and neglect. The court commented that even if standing would have been found, the grandmother's less than stellar parenting skills would have ultimately resulted in a rejection of her petition: "it is also evident that she has yet to grasp that she treated her children improperly, and she has

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291 *Id.* at 986-87.

292 *Id*. at 987.

293 Coulter v. Barber, 632 N.Y.S.2d 270 (App. Div. 1995).

294 *Id*. at 271 (internal citations omitted). *See also* Emanuel S. v. Joseph E., 573 N.Y.S.2d 36, 37 (1991).

295 639 N.Y.S.2d 578 (App. Div. 1996).

not shown that she has taken any steps in the intervening 11 years to improve her parenting skills."[296]

In *Barry v. Chefales,*[297] the grandmother had standing, but was denied visitation because: (1) a social worker who, after meeting with the child on numerous occasions, recommended denial of visitation rights, (2) *inter alia,*[298] profiles prepared by a court-appointed psychologist, also, recommended a denial of visitation rights, and (3) continued visitation by the grandmother would continue to have a detrimental impact upon the child's mental well-being.[299]

M. *Denial of Court ordered visitation with grandparents may not be used as a form of discipline*

The fulcrum in *Shadders v. Brock*,[300] a case of first impression, was most unique because the mother sought to deny the grandparents' court ordered visitation to take the child on an annual trip as a measure of discipline attributable to the child's behavioral infractions and to reinforce her authority as primary custodian. There was no dispute that the grandparents had enjoyed frequent contact with the child including the yearly out of state vacations.

After "balanc[ing] three basic meaningful rights: (1) the right of a parent to exercise authority over a child, (2) the right of a child to visit with grandparents,[301] and (3) the right of grandparents to enforce a prior order granting them visitation rights," the court commented on social reality in our society: "historically, parental authority in discipline matters has been exercised within the family unit and [was] without appeal," whereas "today's family unit may rely on outside agencies or

296 *Id.* at 579.

297 586 N.Y.S.2d 989 (App. Div. 1992).

298 The opinion does not identify what the "*inter alia*" refers to.

299 *Id.* at 990.

300 420 N.Y.S.2d 697 (Fam. Ct. 1979).

301 The judicially expressed concern in this case regarding the child's right to know his grandparents is akin to the Court of Appeals pronouncement that it is a child' right to have visitation with the non-custodial parent. *See* Weiss v. Weiss, 436 N.Y.S.2d 862 (1981)(representing the first time that any court had recognized a right vested in a child – rather than limiting the right to the non-custodial parent to have visitation with the child); Lyng v. Lyng, 490 N.Y.S.2d 940, 941 (App. Div. 1985). It seems that this court and Frances E. v. Peter E., 479 N.Y.S.2d 319 (Fam. Ct. 1984), have created a new right. The court order in *Shadders* is logically read to have simply directed grandparental visitation in that case without having created a new right. Furthermore, in light of the fact that DRL § 72 and FCA § 651 are legislative creatures requiring strict construction (as discussed, above), it is improbable that such a judicial right would withstand scrutiny. *See supra* notes 55-72 and accompanying text. R

the court system to assist in enforcing lawful authority and structure scheme."[302]

The court in *Shadders* stumbled through its reasoning and contained any potential broad scale fallout therefrom by limiting its decision to the facts of the case. The court superceded the mother's role as disciplinarian by holding that the child was not "as bad" as the mother described, as evidenced by the absence of truancy petitions, PINS petitions, and Juvenile Delinquency petitions, which would rise to the level of deserving a punishment abrogating ordered visitation.[303]

Citing *Vacula v. Blume*,[304] the court in *Shadders* concluded that "[n]either the Legislature or this court is blind to human truths which grandparents and grandchildren have always known . . . Section 240 of the Domestic Relations Law, as interpreted by this court, is not restrictive or conditional upon acts of the child."[305]

Shadders is a seemingly *sui generis* case limited to its facts based upon the prior history between the grandparents and the grandchild and cannot be expected to have any expansive reading or precedential value.

IV. The Constitutionality of Grandparental Visitation

A. Troxel v. Granville

Constitutional challenges to DRL § 72 emerged immediately on the heels of the United States Supreme Court ruling in *Troxel v. Granville.*[306] Brad Troxel's parents enjoyed regular visitation with their out of wedlock grandchildren following their son's suicide. The mother, Tommie Granville, unilaterally decided to restrict their visitation to one short visit per month without any overnight stays. The grandparents filed for visitation pursuant to two Washington statutes,[307] one of which traveled up to the U.S. Supreme Court. Section 26.10.160(3) provides: "*Any* person may petition the court for visitation rights at any time including, but not limited to, custody proceedings. The court may order visitation rights for any person when visitation may serve the best inter-

302 *Shadders*, 420 N.Y.S.2d at 700.

303 *Id.*

304 384 N.Y.S.2d 208 (App. Div. 1976).

305 *Shadders*, 420 N.Y.S.2d at 700.

306 530 U.S. 57 (2000).

307 Wash. Rev Code §§ 26.09.240 and 26.10.160(3) (1994)

est of the child whether or not there has been any change of circumstances."[308]

The Superior Court entered a decree, ordering visitation one weekend per month, one week during the summer, and four hours on both of the grandparents' birthdays. The mother appealed. On remand, Superior Court found that visitation was in the children's best interests.[309]

In its review of the case, the Supreme Court took note of a social dynamic regarding "demographic changes" in the composition of the family unit across the past hundred years: "in single-parent households, persons outside the nuclear family are called upon with increasing frequency to assist in the everyday tasks of child rearing."[310]

> In many cases, grandparents play an important role . . . . Because grandparents and other relatives undertake duties of a parental nature in many households, States have sought to ensure the welfare of the children therein by protecting the relationships those children form with such third parties. The States' nonparental visitation statutes are further supported by a recognition, which varies from State to State, that children should have the opportunity to benefit from relationships with statutorily specified persons—for example, their grandparents.[311]

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308 WASH. REV CODE § 26.10.160(3) (1994) (emphasis added).

309 *Id.*

> "The Petitioners [the Troxels] are part of a large, central, loving family, all located in this area, and the Petitioners can provide opportunities for the children in the areas of cousins and music . . . . The children would be benefitted from spending quality time with the Petitioners, provided that that time is balanced with time with the childrens' [sic] nuclear family."

Id. at 61.

310 *Id*. at 64.

311 Different commentators have presented opposing views with respect to merits of grandparental visitation. Nicole Miller capsulizes many studies in broad support of grandparental visitation, she states: "Scholars recognize that the modern family differs significantly from the traditional nuclear family of the past. A frequent consequence of the decline of the traditional nuclear family is for the children to develop close personal attachments between themselves and adults outside their immediate families, especially their grandparents." Nicole E. Miller, *The Best Interests of all Children: an Examination of Grandparent Visitation Rights Regarding Children Born Out of Wedlock,* 42 N.Y.L. SCH. L. REV. 179 (1998). Catherine Bostock, presents traditional and classical arguments in favor of grandparental visitation ((1) the stereotype of 'precious' grandparent relationships, (2) grandparents as bearers of family history and as socializers, and (3) grandparents as mitigators of nuclear family stress) which are, however, immediately offset and tempered by countervailing studies and other arguments in a tenor which seemingly reflects the predisposition of her monograph against grandparental visitation except in the most limitedly unique and monitored cases. Bostock, *supra* note 28, at 324. R

The foundation of the Court's decision was anchored in several landmark theses:

(1) ". . . the [Fourteenth] Amendment's Due Process Clause, like its Fifth Amendment counterpart, 'guarantees more than fair process;"[312]
(2) the Fourteenth Amendment includes a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests" which includes "the protection of the fundamental right of parents to make decisions concerning the care, custody, and control of their children;"[313]
(3) "the liberty interest. . .of parents in the care, custody, and control of their children—-is perhaps the oldest of the fundamental liberty interests recognized by this Court;"more than 75 years ago[314] . . . we held that the "liberty" protected by the Due Process Clause includes the right of parents to "establish a home and bring up children" and "to control the education of their own."
(4) that "the "liberty of parents and guardians" includes the right "to direct the upbringing and education of children under their control."[315]
(5) "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[316]
(6) "there is a constitutional dimension to the right of parents to direct the upbringing of their children."[317]
(7) "It 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."[318]
(8) ". . .The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and

312 *Id*. at 65.

313 *Id*. at 57. *But see* Smith v. Jones, 587 N.Y.S.2d 506 (Fam. Ct. 1992) ("Grandparent visitation is a creature of statute; the parent-child relationship however precedes government itself and has been described as an 'intrinsic human right.' A fundamental constitutional right regarding grandparents and grandchildren as similar to that between a parent and child has not been articulated.") (citations omitted).

314 *Id*. at 65 (citing Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).

315 *Id*. at 65 (citing Pierce v. Society of Sisters, 268 U.S. 510, 534-535 (1925)).

316 *Id*.

317 *Id*. at 66 (citing Prince v. Massachusetts, 321 U.S. 158 (1944)).

318 *Id*.

capacity for judgment required for making life's difficult decisions."[319]

(9) ". . . so long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children."[320]

Justice Sandra Day O'Connor, writing for the majority, held that the Washington Statute was "breathtakingly overbroad" because it permitted any third party seeking visitation to subject any decision by a parent concerning visitation of the parent's children to state-court review without according any deference, or, "special weight," to the parents' decision; that Washington "failed to provide any protection for Granville's fundamental constitutional right to make decisions concerning the rearing of her own daughters."[321]

That the Supreme Court did not intend to sweepingly strike down all third party visitation statutes as constitutionally defective, *per se*, irrespective of whether they contain "a condition precedent" directing that a showing first be made that a denial of visitation will not harm the child, may be gleaned from within the text of the opinion: (1) *Troxel* made it eminently clear that the ruling was limited to Mrs. Granville,[322] and (2) the Supreme Court also included the following limiting language in its decision:

> We do not, and need not, define today the precise scope of the parental due process right in the visitation context . . . . Because much state-court adjudication in this context occurs on a case-by-case basis, we would be hesitant to hold that specific nonparental visitation statutes violate the Due Process Clause as a per se matter.[323]

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319 *Id*. at 68 (citing Parham v. J. R., 442 U.S. 584, 602 (1979)).

320 *Id*. at 58 (citing Reno v. Flores, 507 U.S. 292, 301-302 (1993)).

321 "In an ideal world, parents might always seek to cultivate the bonds between grandparents and their grandchildren. Needless to say, however, our world is far from perfect, and in it the decision whether such an intergenerational relationship would be beneficial in any specific case is for the parent to make in the first instance. And, if a fit parent's decision of the kind at issue here becomes subject to judicial review, the court must accord at least some special weight to the parent's own determination." *Id*. at 70.

322 *Id*. at 67 (law unconstitutionally infringes on that fundamental parental right.).

323 *Id*. at 73.

In *dicta*, the Supreme Court had sympathy for the litigants and refused to remand the case to the Washington State Court for further proceedings because of: (1) "the burden of litigating a domestic relations proceeding can itself be 'so disruptive of the parent-child relationship that the constitutional right of a custodial parent to make certain basic determinations for the child's welfare becomes implicated,'"[324] and (2) the hemorrhaging litigation costs already sustained and likely to be incurred.[325]

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[324] *Id*. at 75.

[325] Merry Jean Chan, *The Authorial Parent: An Intellectual Property Model of Parental Rights,* 78 N.Y.U. L. REV. 1186, 1195 (2003). Merry Jean Chan summarizes the opinions of the other Justices:

> Every opinion acknowledged that "the interest of parents in the care, custody, and control of their children" was "perhaps the oldest of the fundamental liberty interests recognized by this Court." However, each also expressed discomfort with substantive due process—though for different reasons—and attempted to limit the inquiry.
>
> Justice Scalia offered the most skeptical view in his dissent. He noted that the theory of unenumerated parental rights was from "an era rich in substantive due process holdings that have since been repudiated," and that while he would not overrule cases establishing parental rights as a Fourteenth Amendment guarantee, "neither would [he] extend the theory upon which they rested to this new context." Indeed, Justice Scalia remarked upon the "sheer diversity" of Troxel opinions as evidence that "the theory of unenumerated parental rights . . . has small claim to stare decisis protection."
>
> In his concurrence, Justice Thomas also reserved for "another day" the right to decide the question of whether an "original understanding" of the Due Process Clause would preclude judicial enforcement of "unenumerated rights." Justice Stevens, dissenting, would never have granted certiorari, thus avoiding any elaboration of substantive due process parental rights.
>
> Justice Souter, concurring, indicated that he would have decided the case in a more limited manner. So as to avoid "turning any fresh furrows in the 'treacherous field' of substantive due process," he would have affirmed on the basis of overbreadth and avoided an as-applied analysis. In fact, as noted above, the plurality opinion itself declined to address the question of "whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation," even though it recognized this as the primary constitutional question addressed by the Washington Supreme Court. In this respect, the plurality agreed with Justice Kennedy, who in dissent stressed that great care should be taken in the elaboration of the scope of parental due process rights.
>
> Regardless of the precise theoretical criticisms of substantive due process, the multiple opinions in Troxel suggest the Court is uncomfortable with substantive due process to the point where it cannot agree and is unwilling to develop parental rights jurisprudence. Because substantive due process has the tendency to freeze the status quo and because Supreme Court Justices are very reluctant to elaborate the scope of substantive due process, an alternative grounding for constitutional parental rights would be helpful.

Id.

b. *New York's decisional authority has consistently held that DRL § 72 is in compliance with Troxel*

New York decisional authority has repeatedly rejected any constitutional attacks on its own grandparental visitation statute re-enforcing the statute's conformity and compliance with *Troxel*.

In *Sibley v. Sheppard*,[326] the Court of Appeals echoed the constitutional history behind judicial interloping in family matters and addressed the challenge as follows:[327]

> It is well settled that parents generally have a right under the Fourteenth Amendment to raise their families as they see fit.[328] As stated by the Supreme Court, "the custody, care and nurture of the child [should] reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."[329] Constitutional protection notwithstanding, parents are not totally free to act as they please. "[T]he family itself is not beyond regulation in the public interest . . . and . . . rights of parenthood are [not] beyond limitation."[330] In determining whether a State's interference with the family relationship is proper, the action will not be reviewed under exacting scrutiny, but according to a less rigorous standard of whether there is a "reasonable relation to any end within the competency of the State."[331]

Sibley dispelled the constitutional attack due to the State's supervening role as *parens patriae*:[332]

> Permitting grandparent visitation over the adoptive parents' objection does not unconstitutionally impinge upon the integrity of the adoptive family. The State, in its role as parens patriae, has determined that, under certain limited circumstances, grandparents should have continuing contacts with the child's development if it is in the child's best interest.[333]

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326 445 N.Y.S.2d 420 (1981).

327 *Id.* at 326.

328 *Id.* (citing Prince v. Massachusetts, 321 U.S. 158 (1944); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. State of Nebraska, 262 U.S. 390 (1923); People *ex rel.* Kropp v. Shepsky, 305 N.Y. 465 (1953); Matter of Zorach v. Clauson, 303 N.Y. 161 (1951) *aff'd*. 343 U.S. 306 (1952).

329 *Id.* (citing *Prince,* 321 U.S. at 166).

330 *Id.*

331 *Id.* (citing *Meyer*, 262 U.S. at 403.); *See also* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 643 (1974); *Pierce,* 268 U.S. at 535.

332 *Id.* at 327.

333 *Id.* at 327.

In *Hertz v. Hertz,*[334] the Second Department struck down the lower Court's ruling that DRL § 72 was unconstitutional in light of *Troxel*. The Appellate Division distinguished between the defective Washington State statute and DRL § 72 and found that New York's statute passed the constitutional litmus test because it was "much more narrowly [tailored] than the Washington statute" which was not facially invalid. The court held that "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."[335]

The *Hertz* court further held:

> A facial challenge to a legislative Act is . . . the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that a statute might operate unconstitutionally under some circumstances is insufficient to render it entirely invalid. Legislative enactments are presumptively valid and a party challenging a statute must demonstrate its invalidity beyond a reasonable doubt.[336]

In *Morgan v. Grzesik,*[337]the Court reviewed the appellate trial in *Troxel* underscoring its foundation that "parents have the fundamental right under the Due Process Clause to make decisions concerning the care, custody, and control of their children, including the right to make decisions concerning visitation with their children."[338] *Morgan* emphasized that the key tenet in *Troxel*, to wit, is the "traditional presumption that a fit parent will act in the best interest of his or her child."[339]

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334 738 N.Y.S.2d 62 (App. Div. 2002).

335 *Id.* at 94.

> Domestic Relations Law §72 can be, and has been, interpreted to accord deference to a parent's decision, although the statute itself does not specifically require such deference . . . . Domestic Relations Law §72 is drafted much more narrowly than the Washington statute. If the United States Supreme Court did not declare the "breathtakingly 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."

Id. (internal citations omitted).

336 *Id.* at 94 (internal citations omitted).

337 732 N.Y.S.2d 773 (App. Div. 2001).

338 *Id.* at 154.

339 *Id.*

The Appellate Division, tracked precedential decisions, concluding that DRL § 72 is readily distinguishable from the Washington statute in *Troxel* by virtue of: (1) its narrow drafting which limits its range only to grandparents and no other third parties, (2) declining automatic standing except in the event of the death of either or both parents, (3) its mandate that all other grandparents "establish circumstances in which equity would see fit to intervene,"[340] and (4) the obligation that the court examine all the relevant facts, including "the nature and basis of the parents' objection to visitation" and "the nature and extent of the grandparent-grandchild relationship"[341] the sum total of which accords parents a weighted voice in the decision making.

In *Davis v. Davis*[342] the Court sustained DRL § 72, when examined against the backdrop of *Troxel,* as long as it is interpreted to give special weight to the wishes of the parent(s), and permits grandparental visitation over parental objection "only in extreme cases." The Court of Appeals' ruling in *Emanuel S. v. Joseph E.* that the death of a parent is, in and of itself, sufficient to confer automatic standing upon a grandparent establishes that death is an "extraordinary circumstance" warranting judicial intervention over the objections of the parents.[343]

The court in *Davis*, citing *LoPresti*[344] and *Wenskoski,*[345] also expressed concern that New York judicial interpretations of DRL § 72 could very well run afoul of *Troxel* in that the statute permits intervention without an *on its face direction* that any special weight or deference be accorded to the parents' choice. *Davis*, therefore, opted to salvage the statute's constitutionality by applying "a venerable canon of construction, endorsed by the Court of Appeals, [which] requires that a 'statute should be construed when possible in [a] manner which would remove doubt of its constitutionality,'[346] so that any constitutional challenge to the Legislature's failure to specifically so provide within the

340 *Id*. (citing Emanuel S. v. Joseph E., 573 N.Y.S.2d 36, 37 (1991)).

341 *Id.* (citing *Emanuel S.,* 573 N.Y.S.2d at 37).

342 725 N.Y.S.2d 812 (Fam. Ct. 2001).

343 *Emanuel S.,* 573 N.Y.S.2d at 37.

344 387 N.Y.S.2d 412 (1976).

345 699 N.Y.S.2d 150 (App. Div. 1999).

346 *Id*. at 83 (citing People v. Barber, 289 N.Y. 378, 385, a concurrent principle is that it is judicial policy to construe legislative enactment so as to preserve its constitutionality and continuing vitality (*Seitz v. Drogheo*, 287 N.Y.S.2d 29, 32 (1967)).

context of the statute could be remedied by judicial fiat 'by requiring that special weight be accorded the preference of parents.' "[347]

Fitzpatrick v. Youngs[348] fended off a constitutional assault on DRL § 72 by balancing New York State legislative policy against the issue of "whether the judicial infringement is 'overly broad' as applied so that such application in effect emasculates the parental primacy right." Making reference to Family Court Act §§ 3, 7, 10, 651 and DRL § 5 as examples of State intervention in parental relationships with children, the court in *Fitzpatrick* held:

> The best interests of the child is the governing standard in many of these situations, to the point that best interests of a child in most cases justify intervention by the State as parens patriae. In short, the legislative policy of this State appears clear that, in an appropriate case, the best interests of the child can take precedence over the parent's right to the care, custody and control of the child. An infant's welfare is accorded a higher place on the pedestal of personal human rights in this State than parental control of that child.[349]

The court in *Fitzpatrick* analyzed *Troxel* against the backdrop of the legislative policy behind DRL §72:

> . . . the Washington statute . . . equated parental rights with grandparent rights, and the rights of any other person, related or not. It apparently provided no parental primacy in connection with the care and control of their children.
>
> There is no question that parents have a fundamental right to make decisions regarding the care, custody and control of their children . . . . Notwithstanding such fundamental right, such parental primacy rights are not unfettered or absolute . . . and Courts are often called upon to determine custody and visitation issues between parents themselves . . . to the point that best interests of a child in most cases justify intervention by the State as parens patriae.
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> . . . the legislative policy of this State appears clear that, in an appropriate case, the best interests of the child can take precedence over the

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347 Bennett v. Jeffreys, 387 N.Y.S.2d 821 (1976). The Court held that, in custody disputes between a biological parent and someone else, the biological parent must be afforded custody "absent extraordinary circumstances. Our interpretation of DRL Sec. 72 achieves the same dual effect as Bennett v. Jeffreys: It recognizes the primacy of parents, while leaving open the rare case where such primacy must give way." *Id.* at 824.

348 717 N.Y.S.2d 503 (Fam. Ct. 2000).

349 *Id.* at 347.

> parent's right to the care, custody and control of the child. An infant's welfare is accorded a higher place on the pedestal of personal human rights in this State than parental control of that child.
>
> The issue becomes whether the infringement which occurs is "overly broad" as so applied that such application in effect emasculates the parental primacy right. . . . New York, of course, has the standing issue, but it also has the relationship issue, safeguards which are not present in the Washington statute deemed defective in Troxel.
>
> . . . Troxel cautions that parental decision making must be given some deference, and as applied this has occurred in New York. Although the presumption of parental decision making as being appropriate in the first instance is not statutorily present in New York, nonetheless, by imposing the burden of proof upon the petitioning grandparents, the parental decision has already been given some presumptive weight.[350]

In *Fitzpatrick,* the court captured the essence of *Troxel*: "The fact that a grandparent action may be the mechanism triggering the assertion of the child's best interests does not automatically give rise to a declaration of infirmity of the parent's Constitutional rights."[351]

In *Boden v. Jackson-Silver*[352] the mother sought to terminate court-ordered visitation between her child and the child's paternal grandmother. The Appellate Division held that although the Family Court properly dismissed the mother's constitutional challenge to DRL § 72 on its face, the court, nevertheless, erred in dismissing that part of the motion which alleged the unconstitutionality of the statute as applied to the mother's case because such a determination requires a hearing.[353]

Simmons v. Sheridan[354] thwarted a constitutional challenge to DRL § 72 where the grandmother sought visitation after the grandchild's adoption:

> It is true that respondents are now the child's parents and that a parent's right to bring up his or her children as each sees fit is a right protected by the constitution.[355] However, a parent's right to be free of interference must always give way to valid legislation in the child's

350 *Id.* at 346 (internal citations omitted).

351 *Id.* at 347.

352 737 N.Y.S.2d 462 (App. Div. 2002).

353 *Id.* at 463.

354 414 N.Y.S.2d 83, 85 *aff'd by*, 435 N.Y.S.2d 871, *order aff'd by* 445 N.Y.S.2d 420 (1981).

355 *Id.* at 332 (citing Pierce v. Society of Sisters, 268 U.S. 510 (1925)).

> best interests. Furthermore, the Court is required to uphold the constitutionality of a statute whenever possible.[356]

In *Frances E. v. Peter E.*,[357] the parents, citing *Prince v. Massachusetts*[358] and *Santosky v. Kramer,*[359] argued that: (1) the Fourteenth Amendment guarantees parents the right to raise their families as they see fit, ergo, intact families are not covered under DRL § 72; (2) the "right to be free from state interference, however, inures to all parents and should have no greater application to parents who are married and residing together in an 'intact family;'"[360] and (3) "to assert that, as a matter of law, a widowed, divorced, remarried, or unmarried parent is subject to greater state interference than a married parent would be to assert that the former is less fit than the latter to raise his or her own child."[361]

The court rebuffed the parents' effort to limit DRL § 72 to "a derivative right of visitation based upon the right of the deceased or non-custodial parent" because the legislature intended the statute to be read broadly and "to provide a vehicle for visitation in cases where a marriage either never existed or continues to exist,"[362] as well as, when a child continues to live in an intact family.

In its review of the history of the grandparental visitation statute, the court in *Frances E.* emphasized the legislative declaration that a child has a right to know his grandparents,[363] and offered examples of how a narrow, "derivative" reading of § 72 would produce untenable results by eliminating umbrella protection to certain cases clearly contemplated by the statute:

> [U]nder this type of strictly derivative statute, a maternal grandfather could not petition for visitation during the mother's lifetime with a grandchild born out of wedlock or a grandchild whose father had died, even in a case where the maternal grandfather might be the only living male relative available to the child.[364]

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356 *Id.*

357 479 N.Y.S.2d 319 (Fam. Ct. 1984).

358 321 U.S. 158 (1944).

359 455 U.S. 745.

360 *Frances E.,* 479 N.Y.S.2d at 322.

361 *Id.*

362 *Id.*

363 *Id.* at 322.

364 *Id.*

In *Frances E.,* the court also sought guidance from *Sibley v. Sheppard*[365] "recognizing, as a general principle, that the family itself is not beyond regulation in the public interest; DRL § 72 should be tested under the standard of whether the state's interest in regulating the family relationship bears 'a reasonable relation to any end within the competency of the state.'"[366]

The facts in *Smolen v. Smolen*[367] demonstrated an extraordinary involvement between grandparent and grandchild since birth. The mother had, surprisingly, terminated the contact "without warning."

> [The grandchild] and her mother lived with them in their household until she was two and one half years old, that they saw her on an almost daily basis after that until she was four, and that they continued to see her frequently, including baby sitting for her two days per week. In addition, they had taken her on numerous special outings and vacations, to various lessons, and on most holidays and birthdays.[368]

The grandparents never challenged the fitness of the parents who were divorced, and the Family Court rejected the mother's argument that DRL § 72, as applied, violated her substantive due process rights as a fit parent because DRL § 72 has been interpreted to require substantial deference to the authority of parents. The court in *Smolen* emphasized that although the Court of Appeals could have addressed the constitutional question in *Emanuel S. v. Joseph E.,*[369] it chose to dodge it, opting instead to limit its ruling to whether the grandparents had established standing in the face of an intact nuclear family.[370]

In *Smolen,* the court further observed that *Sibley* "is one of very few cases in which visitation has been mandated over the objection of parents;"[371] and this decision arose from the unique circumstances of the case because there was evidence that the termination of visitation

365 Sibley o/b/o Sheppard v. Sheppard, 445 N.Y.S.2d 420 (1981).

366 *Frances E.,* 479 N.Y.S.2d at 323 (quoting Sibley o/b/o Sheppard v. Sheppard, 445 N.Y.S.2d 420, 424 (1981)).

367 713 N.Y.S.2d 903 (Fam. Ct. 2000).

368 *Id*. at 904.

369 Emanuel S. v. Joseph E., 573 N.Y.S.2d 36 (1991).

370 "We are not addressing an award of visitation, but only whether petitioner has standing to seek it." *Id.* at 39.

371 *Smolen*, 713 N.Y.S.2d at 833.

would have harmed the child, thereby, leading the appeals court to dub the visitation as "a moderate intrusion into the family's autonomy."[372]

> Although it is couched in the language of "best interest" in accordance with the statutory mandate of Domestic Relations Law §72, it is also consistent with the ruling in Troxel in that this moderate intrusion into the family's autonomy was found to be necessary to prevent actual harm to the child.[373]

The court in *Smolen*, however, quickly added that harm arising from a denial of visitation does not *per se* warrant an award of visitation:[374]

> The Supreme Court [in Troxel], however, declined to establish a per se rule that petitioning grandparents must show potential harm to the child by denial of visitation in order to prevail. Instead, the Court noted that the precise scope of parental rights in the context of visitation must be carefully considered on a case by case basis. Potential harm to the child is one factor to be considered.[375]

One court[376] opined its resentment of DRL §72 by stating that the statute is "repugnant to the Privacy Rights of Citizens under the Constitution."[377]

> As the state interest is not "compelling", this Court verily believes that Section 72 DRL is repugnant to the Privacy Rights of Citizens as assured under the U.S. Constitution's 14th Amendment (and 9th Amendment). On a much less technical basis but more traditional one—it simply violates the citizen—Government contract. The State was not established to tell us who we and our children must associate with. The downside of the presumption of constitutionality, and reluctance of Courts of original jurisdiction to strike statutes on such grounds is that the rules involved govern the affairs of men and women often without review.[378]

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372 *Id*. at 833.

373 *Id.*

374 *Id*. at 834.

375 *Id*. at 834.

376 Smith v. Jones, 587 N.Y.S.2d 506 (Fam. Ct. 1992)

377 *Id*. at 507

378 *Id.* (internal citations omitted).

Accordingly, it may be safely said that New York governing law will shield DRL §72 to withstand any constitutional attacks.

V. Post Adoption Visitation

Adoption cases decided either before or just after the enactment of DRL §72 treated prior families rather harshly by not permitting any contact with the child's prior family, the personal conscience of the judiciary to the contrary notwithstanding.[379]

In *People ex rel. Levine v. Rado*[380] the petitioner-maternal grandmother, with whom the child lived for five years after his birth, filed for grandparental visitation. The child's father was in prison, and his mother, who was drug addicted, had died. In 1963 a dispute arose between the maternal grandmother and the paternal grandmother concerning custody of the child. The Supreme Court awarded custody of the child to his paternal aunt, Mary Rado, and granted both the maternal and paternal grandparents limited visitation rights. Eventually Mr. and Mrs. Rado became the child's adoptive parents.

The issues before the court were: (1) did the order of adoption supersede the prior order setting forth visitation rights to the maternal grandmother, and (2) did DRL §72 entitle the maternal grandmother any rights of visitation.[381]

Levine held that "the order of adoption superseded the prior order of the Supreme Court because it was the culmination of a proceeding initiated by either writ of habeas corpus or order to show cause for the sole purpose of establishing custodial and visitation rights – a proceeding in which the Supreme Court acts as *parens patriae* makes a decision which is at best temporary in nature and always subject to review or modification."[382] *Levine* elaborated regarding the temporariness of the prior order:

> At the time when that proceeding was argued, it must be remembered that the natural mother had died and that the natural father was incarcerated. It could not seriously be argued that the determination of custody would, for example, be of such a permanent nature as to preclude the natural father upon release from jail from seeking to obtain custody of his natural born son. The order granting custody to Mary

379 *See* People *ex rel.* Hacker v. Strongson, 141 N.Y.S.2d 859 (Sup. Ct. 1955).
380 283 N.Y.S.2d 483 (Sup. Ct. 1967).
381 *Id.* at 484.
382 *Id.* at 485.

> Rado and visitation rights to the petitioner would stand until modified by a subsequent order of the Supreme Court or until another court of competent jurisdiction would make a permanent change in status.[383]

The court then turned to the permanence of adoptions observing that "[A]s soon as the order of adoption became final, Mr. and Mrs. Rado became the parents of the infant, and the infant, whose name was then changed to Joseph Rado, became the son of those parents. All prior temporary orders with respect to custody and visitation were necessarily extinguished by the adoption."[384]

Levine further reasoned that the grandmother did not have standing to seek visitation under the newly enacted grandparental visitation statute notwithstanding its provision of standing to a grandparent in the event of the death of either or both parents because as of the date of the order of adoption the child had parents even though his biological mother had died, expressing a concern that to rule otherwise could serve to discourage adoptions:

> . . .in legal contemplation the child's parents were not deceased even though the child's natural mother had died. His natural father had consented to the adoption and the adoptive parents became in fullest legal effect his true parents having all the rights and being subject to all the duties which that relationship requires. If Section 72 were construed so as to authorize paternal or maternal grandparents to seek custodial or visitation privileges from adoptive parents. . .such a construction would work as a strong deterrent from adoption. No such construction is indicated.[385]

The heart being mightily more persuasive, the court did, however, precatorily divulge its own feelings of encouragement that the newly adoptive parents "may feel that it might be in the best interests of the child to maintain some contact with his maternal grandmother through periods of visitation, and this court would urge that they give serious consideration to such a course" noting, however, that "it is exclusively within their own good judgment."[386]

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383 *Id.* at 485.

384 *Id.* at 485.

385 *Id.* at 486.

386 *Id.* at 486.

State ex rel. Herman v. Lebovits[387] followed the lead set forth in *Levine*. Respondents, the child's father and his paternal grandparents, sought reargument of their prior motion to vacate the judgment awarding the maternal grandfather visitation with the child.

After the death of the child's natural mother (petitioner's daughter), the petitioner filed for custody of the child which the petitioner later withdrew based on a consent order that the child's maternal grandparents be permitted bi-monthly visitation at the respondent's home in Maryland. The respondents challenged the validity of that judgment on two grounds: (a) that it was jurisdictionally defective, and (b) on the grounds that the subsequent order of adoption by respondent-father's present wife superseded the judgment and extinguished petitioner's rights thereunder.

The court rejected the jurisdictional challenge because "the father had voluntarily submitted himself to the jurisdiction of this Court and consented to the entry of judgment granting visitation privileges to petitioner. Having done so, he waived objection to the jurisdiction of the Court, and he may not collaterally attack the judgment."[388]

The second challenge, however, drew a different conclusion. Citing *Levine* the court held that "the judgment, though valid when entered, did not vest the petitioner with permanent rights to visitation with the child. Provisions in a judgment regarding visitation are 'at best temporary in nature and always subject to review or modification' based upon a significant change of circumstances."[389] Pointing to the father's remarriage and the new wife's adoption of the child the court tracked the thinking of the *Levine:*

> [the] adoption unquestionably effectuated a permanent change in the child's status because "[A]s of the date of the order of adoption, the adoptive mother became, in the fullest legal sense, the mother of the child, having all the rights and obligations of a natural parent."[390]

Although contemporary thinking, with the assistance of interpretations of parallel statutes in other jurisdictions, has refined our comprehension of the intent behind DRL § 117 so that it is understood for what it is, i.e., a statute dealing with fiscal related issues consequent to

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387 State *ex rel.* Herman v. Lebovits, 322 N.Y.S.2d 123 (Sup. Ct. 1971).
388 *Id.* at 124.
389 *Id.* at 124.
390 *Id.* at 125.

an adoption,[391] earlier decisional authority, as reflected in the Court of Appeals interpreted it ". . . to make the adopted child the natural child of the adoptive parent . . . to give the 'adopted child the same legal relation to the foster parent as a child of his body' . . . and . . . the adoption divests the natural parents of the relation which they had heretofore sustained toward the infant'."[392]

Herman summed up: (1) upon adoption, an infant becomes completely assimilated into a new family unit, which a grandparent has not part of,[393] (2) "the legal relationship formerly existing between grandparent and child is terminated by the order of adoption, and the grandparent has no legal right to insist upon continued visitation with the child against the wishes of the child's adoptive mother and natural father,"[394] (3) "it would be against the public policy of this state to hold otherwise,"[395] (4) that "the right of visitation afforded a grandparent under DRL §72 does not survive the subsequent adoption of the child because 'if §72 were construed so as to authorize paternal or maternal grandparents to seek custodial or visitation privileges from adoptive parents . . . such a construction would work as a strong deterrent from adoption. No such construction is indicated."[396]

Herman highlighted that an adoption is an adoption for all time and for all purposes, irrespective of the prior relationship between the child and the grandparent because the adoption reconfigures the permanence within the child's life[397] and "[A]ll prior temporary orders with respect to custody and visitation were necessarily extinguished by the adoption."[398]

> "[N]o valid distinction can be made between an adoption by strangers, as was the case in Levine, and an adoption by the spouse of a natural parent, [as is the situation in the case at bar] "[T]he order of adoption is controlling in both instances."[399]

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391 *See* Sibley v. Sheppard, 445 N.Y.S.2d 420 (1981); Simmons v. Sheridan, 414 N.Y.S.2d 83, 84, *aff'd* , 79 A.D.2d 896, 435 N.Y.S.2d 871, *aff'd,* 445 N.Y.S.2d 420 (1981); Scarnton v. Hutter, 339 N.Y.S.2d 708, 710 (App. Div. 1973).

392 *Herman,* 322 N.Y.S.2d at 125.

393 *Id.*.

394 *Id*.

395 *Id.*

396 *Id.*

397 *Id.*

398 *Id.*

399 *Id.* at 126.

Ten years and the 1975 amendment to DRL § 72 later the Court of Appeals took a bold progressive step which dramatically distanced itself from the old school of thinking characterized by *Levine* and *Herman.* Although *Sibley v. Sheppard*[400] stated that "it has been suggested that adoptive parents stand in the same legal position as natural parents,[401] the case simultaneously highlighted the principle that "what the legislature giveth, the legislature may taketh away." The high court held that since "the adoptive relationship is solely the creature of statute unknown to the common law"[402] arising out of its concern for the best interest of the child, the State may, thus, further shape the parameters and "determine to what extent the child's contacts with its natural family will be ended . . . [C]ompletion of the adoption process does not oust the State of all power to continue its supervision of the child's best interest, at least insofar as the question of the natural grandparents' access to the child is concerned."[403]

Sibley confronted a challenge grounded on DRL § 117's perceived impact on DRL § 72. The parents argued that DRL § 117 severs the adoptive child's ties to the natural family and that DRL § 72 only applies to a non-adoptive setting. The Court of Appeals considered such a reading overboard and an "interfere[nce] with the court's ability to protect the best interest of the child"[404] holding that both statutory schemes, DRL § 117 and § 72, do not evidence any legislative intent to restrict DRL § 72 to non-adoptive situations only:

> Section 117 itself does not pretend to discourage all contacts between an adoptive child and its natural relatives. Rather, the statute recognizes that such contacts may exist and that the natural relatives may desire to perpetuate the sense of family, for example, by bequeathing property to the adopted child (see DRL § 117, subd. 2). The bulk of the statute refers to intestacy and succession. Nothing in the statute purports to abrogate the interests of the grandparents, and the child, in continued contacts.
>
> Had the Legislature intended section 117 to limit section §72 either or both sections could have expressly reflected that intention. The

400 Sibley v. Sheppard, 445 N.Y.S.2d 420 (1981).

401 *Sibley*, 445 N.Y.S.2d 420 (citing Smith v. Organization of Foster Families, 431 U.S. 816 (1977)).

402 *Id.* at 423; Matter of Best, 477 N.Y.S.2d 431, 431 (1984); Betz v. Horr, 276 N.Y. 83, 86 (1937).

403 *Id.* at 423.

404 *Id.* at 422.

> Legislature, presumed to know what statutes are in effect when it enacts new laws (Easly v. New York State Thruway Authority., 1 N.Y.2d 374, 379, 153 N.Y.S.2d 28, 135 N.E.2d 572), must have been aware of section 117 when it enacted section 72 and intended each to have full effect. The language of neither section supports a contrary conclusion.
>
> As noted, section 72 permits a proceeding against any person who has custody; nothing in that section excludes custody obtained through adoption. The purpose of the section, as manifested by its own terms, is to facilitate maintenance of family ties between grandparents and grandchildren where one or both of the natural parents have died. This court declines to ascribe to the Legislature an intention to proscribe maintenance of such ties simply because the grandchild has been placed for adoption, particularly where the placement is with the family of one of the deceased parents. Indeed, the statute expressly accords the right to seek visitation in the event of the death of both parents, a circumstance frequently found in the adoption setting.[405]

The Court of Appeals refused to infuse a negative public policy inference where the legislature did not:

> An adopted child may not in all respects be isolated from his or her natural family. Some may perceive an inconsistency in the termination of some rights, but not others, between the adoptive child and the natural family. If such exists, the desire for consistency in the law should not of itself sever the bonds between the child and the natural relatives.[406]

Sibley did, however, stress that opening the doors to post-adoptive visitation must be tempered by restraint: (1) "visitation rights may not be awarded when doing so will hinder the adoptive relationship,"[407] and (2) "the [judicial] power to interfere is severely limited in other respects as well"[408] because a court may only act in accordance with the legislature's bidding:

> Furthermore, the power to interfere is severely limited in other respects as well. It does not include any power to decide for the adoptive parents, for example, how and where the child shall be educated, what

405 *Id.*
406 *Id.* at 423.
407 *Id.*
408 *Id.*.

> religious training shall be imposed, what hours the child may keep, or with what friends the child may associate. Nor may the court break up the family unit merely because the court disapproves of the way the adoptive parents have elected to raise the child (cf. Quilloin v. Walcott, 434 U.S. 246, 255, 98 S.Ct. 549, 554, 54 L.Ed.2d 511). These aspects of family integrity remain inviolate. The court may do nothing more than execute the Legislature's determination that, under appropriate circumstances, an adoptive child's best interest will be served by continued visits with its natural grandparents.[409]

In *Layton v. Foster*[410] the Court of Appeals, citing *LoPresti,* held that "DRL §72 evidences a legislative intent to continue the familial relationship between the grandparents of an adopted child and the child provided that doing so is not contrary to the best interests of the child because "completion of the adoption process does not oust the State of all power to continue its supervision of the child's best interest."[411]

In *Simmons v. Sheridan*[412] the maternal grandmother sought visitation with her grandchild who had been adopted by the paternal grandparents. The adoptive parents, like those in *Sibley,* urged a denial of the application on the ground that the grandmother's statutory right to visitation was extinguished because she ceased to be a grandparent within the meaning of DRL §72 upon the adoption. *Simmons* read §72 in conjunction with DRL §117[413] and reasoned as follows:

> Section 72 is silent with regard to the rights of grandparents to visit with a grandchild who has been adopted. The statute must be read in conjunction with DRL §117 . . . . It can be argued that if, under DRL §117, the natural parents "shall have no rights" over the adoptive child, then a fortiori, adoption extinguishes the rights of a grandparent. On the other hand, as the 4th Department pointed out in Scranton v. Hutter, 40 A.D.2d 296, 299, 339 N.Y.S.2d 708, 711, DRL § 72 provides for the relief sought after notice to "any parent" and the legislature did not see fit to exclude adoptive parents . . . . In

409 *Id.*

410 472 N.Y.S.2d 916 (1984).

411 *Layton*, 472 N.Y.S.2d at 917 (citing LoPresti v. LoPresti, 387 N.Y.S.2d 412 (1976)); *Sibley*, 445 N.Y.S.2d at 424.

412 414 N.Y.S.2d 83, 84, *aff'd,* 435 N.Y.S.2d 871, *aff'd* 445 N.Y.S.2d 420 (1981).

413 Effect of adoption. §117(1): "After the making of an order of adoption the natural parents of the adoptive child shall be relieved of all parental duties toward and of all responsibilities for and shall have no rights over such adoptive child or to his property by descent or succession . . ." N.Y. DOM. REL. LAW § 117(1) (McKinney 2002).

> 1973, the Appellate Division, 4th Department, specifically held that "an adoption does not preclude the natural grandparents from applying for a writ of habeas corpus to obtain visitation rights under Section 72 of the Domestic Relations Law.". . . The 4th Department reasoned that the purpose and effect of DRL's §72 would be vitiated if it were read to exclude from its ambit the grandparents of a child adopted by his step-parent. It quoted with approval a passage from Matter of Zook, 62 Cal.2d 492, 494-496, 42 Cal.Rptr. 597, 600, 399 P.2d 53, 56, which stated:
>
> 'Unquestionably the substitution of adoptive for natural parents serves a great number of social objectives. On the other hand the law should not and cannot ignore the fact that an adopted person may not in many respects be cut off from his natural family. If affection and regard remains between members of a natural family, the law should not in the name of consistency undertake to thwart the expression of those feelings when the encouragement thereof does not hinder the adoptive relationships.'
>
> The reasoning of the Scranton decision should apply to the facts herein. If the child's adoption by his grandparents were to cut off petitioner's right to seek visitation, then the purpose of DRL's §72 would be frustrated. It would appear that where the child has been adopted by grandparents, instead of by a step-parent, there is even less reason to sever contact with the natural family. A child adopted by his or her step-parent often must adapt to a new set of grandparents and it is possible that a continued relationship with the deceased parent's family might inhibit the formation of new ties.[414]

Simmons concluded in public policy fashion:

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414 *Id.* at 84. In *Scranton,* not only did the Fourth Department conduct a similar analysis between DRL § 72 and DRL § 117, but also between the California probate statute (California Probate Code Section 257) and the California grandparental visitation statute (section 197.5 of the California Civil Code). *Scranton* compared DRL § 117 with the California Probate Code § 257:

> Section 257 of the Probate Code is a succession statute, and it provides that an adopted child shall be a descendant of one who has adopted him 'for all purposes of succession'. There is no statutory requirement, in section 257 of the Probate Code or otherwise, that an adoption precludes natural grandparents of the adopted child from maintaining an action to obtain visitation rights under section 197.5 of the Civil Code.

Id. (quoting Roquemore v. Roquemore, 275 Cal.App.2d 912, 916 (1969); Geri v. Fanto, 361 N.Y.S.2d 984 (Fam. Ct. 1974) (highlighting that "the 'consistency' [in *Matter of Zook*] to which reference is made, is consistency between the probate law and the tax law of the State of California and not between adoptive and natural relationships").

> The expansion of grandparent visitation rights after adoption is consistent with a growing awareness of the need for an adoptive child to know his "roots". So-called "open adoption". . .[415]

The facts were not in dispute in *People ex rel. Wilder v. Director, Spence-Chapin Services to Families and Children.*[416] The grandchild was born with narcotic withdrawal symptoms resulting in the transfer of custody to the Commissioner of Social Services of the City of New York, who thereafter, transferred physical custody to the respondent Spence-Chapin to whom custody was ultimately awarded.

The grandmother, who had never seen the child, learned of the child's existence by happenstance much after its birth. Nevertheless, she was caring for a six month old sister of the child and there are apparently three other siblings who reside with the petitioner's mother. There had never been any contact between the child and these other children.[417]

The court lamented the unfortunate separation of siblings but, nevertheless, denied visitation under the facts before it. The grandmother's providing care for the child's sister did not sway the court towards granting visitation. The hook on which the appellate court hung its hat was: "the grandmother could not possibly have had any relationship with the child because she had never even seen the child."[418]

Wilder proffered a rather peculiar dichotomy by suggesting that grandparental visitation may be available if the child is adopted by the spouse of a natural parent as opposed to being adopted by third parties.[419] Such a conclusion would be untenable under current decisional authority.

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415 *Id.* at 85.

416 403 N.Y.S.2d 454 (Sup. Ct. 1978).

417 *Id.* at 455.

418 *Id.*

419 *Id.* at 455.

> In both Scranton and Geri, however, the adoption involved was by the new spouse of a natural parent of the child. Research has not disclosed any authority dealing with the question of whether the adoption of the child by unrelated third parties would bar the assertion of visitation rights by grandparents. The statute offers no guidance and a reading of Lo Presti, supra, indicates that each case must turn on its own facts.

Id.

Finally, once a child has been placed for adoption with an authorized agency the grandparent may not sue for custody; the only recourse is to sue for adoption.[420]

> "Members of the extended family of a child who has been surrendered to an authorized agency for the purpose of adoption have no special nonconstitutional right to custody of the child which permits them to override a decision by the agency to place the child for adoption with adoptive parents to be selected by the agency". . . Since the parental rights of the biological parents here were terminated and the children's custody was transferred to respondent, petitioner's recourse was to seek adoption, and not custody. . .At that point, "adoption became the sole and exclusive means to gain care and custody of the child[ren]."[421]

A. *The surrendering of or termination of parental rights and subsequent efforts to gain visitation with the child of the child*

In *Clarabelle K. v. Christman*[422] the rights of the grandmother to her own child had been terminated due to abuse and neglect. She, nevertheless, continued to maintain contact with the child and, eventually, with the child's children. The court's findings regarding her failure to have "tak[en] any steps in the intervening 11 years to improve her parenting skills"[423] resulted in a denial of standing. The conclusion is the same but the path by which it arrived is different: *Clarabelle K.* could simply have denied standing by virtue of the termination of relationship – it did not need to reach the issue of the merits of the grandmother's parenting skills.

The concurring opinion in *Clarabelle K*. read the United States Supreme Courts's ruling that "[t]ermination [of parental rights] denies the natural parents physical custody, as well as the rights ever to visit, communicate with, or regain custody of the child"[424] in tandem with the requirement that DRL § 72's legislative origin mandates a strict statutory construction regarding who may petition for visitation, and opined that once the grandmother had lost parental rights to her own

420 Herbert PP. v. Chenango County Dept. of Social Services, 751 N.Y.S.2d 96 (App. Div. 2002).

421 *Id.* at 98 (quoting Matter of Peter L., 466 N.Y.S.2d. 251 (1983)).

422 Clarabelle K. v. Christman, 639 N.Y.S.2d 578 (App. Div. 1996).

423 *Id.* at 579. Parenthetically, *Clarabelle*, also, telegraphed a message to the trial court not to reach the issue of best interests because any order of visitation would not be sustained on appeal. *Id.*

424 *Id.* at 579 (Peters, J. concurring) (quoting Santosky v. Kramer, 455 U.S. 745, 749 (1982)).

child, and could have, thus, never again petitioned for visitation with that child, also lost was her status of "grandmother" and the concomitant eligibility to seek visitation with the child's children.[425]

In *Catherine JJ. v. Charlotte II*[426] the maternal biological grandmother sought visitation with two infant children, both of whose parents had surrendered their parental rights to them. The record noted that the grandmother had also lost her rights to her own daughter, the children's mother. The Appellate Division affirmed the dismissal of the petition, based on public policy pursuant to Social Services 384-b, because "when petitioner's parental rights to her own daughter were severed, any familial connection to her daughter or the daughter's progeny was also severed."[427]

Ann M.C. v. Orange County Dept. of Social Services[428] represented an issue of first impression[429] in the Second Department which had already been twice decided in the Third Department:

> The issue to be decided . . . must the termination of the petitioner's parental rights as to her daughter result in an absolute bar to the petitioner's standing to seek grandparental visitation with her daughter's child? Contrary to the conclusion of the Family Court, we answer that question in the negative.[430]

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425 The concurring justice highlighted the amendment to Social Services Law § 383-c which focuses on the method by which parental rights were terminated as a possible means of subsequently regaining visitation rights with that child: parents forever lose their right to seek visitation if the termination of their rights occurs via an adversarial proceeding as opposed to a voluntary surrender of their rights to the child in which case they may thereafter apply for visitation:

> As of January 1, 1991, with the amendment of Social Services Law § 383-c, the method by which parental rights are terminated (compare Social Services Law § 384-b with Social Services Law § 383-c) affects the power of the court to permit contact between a parent and child (Matter of Rita VV., supra). If termination occurs as a result of an adversarial proceeding, the court is without authority to provide for contact in the order of disposition (id.). Thus, notwithstanding the fact that Social Services Law § 383-c was not enacted at the time of the termination of petitioner's parental rights, had it been in existence, the adversarial nature of her proceeding would now preclude her from having standing to petition for visitation with her biological grandchildren pursuant to Domestic Relations Law §72.

Id.

426 628 N.Y.S.2d 826 (App. Div. 1995).

427 *Id.* at 827.

428 682 N.Y.S.2d 62 (App. Div. 1998), *lv to appeal dismissed*, 694 N.Y.S.2d 634 (1999).

429 *Id* at 65.

430 *Id.* at 63.

The Second Department emphasized that the case dealt "only with the right to assert a claim for grandparental visitation; the issue of simple standing—-nothing more."[431]

The petitioner grandmother, Ann, had lost her rights to her daughter when the child, Elizabeth, was nine years old. The termination notwithstanding, DSS permitted Ann to visit Elizabeth regularly. At age sixteen Elizabeth had a child who was taken into the care of DSS following a neglect proceeding. The record showed that the petitioner had made "remarkable progress" "towards turning her life around."[432] The record further demonstrated that the mother-daughter relationship continued uninterruptedly under the aegis of DSS even after the termination of parental rights. The appellate court's choice of terminology regarding the grandmother, "remarkable progress"[433] and "turning her life around",[434] augurs the final decision.[435]

Family Court dismissed the petition because the grandmother "failed to establish that she is a grandparent for purposes of standing."

> The court concluded that as a matter of law the termination of the petitioner's parental rights vis-a-vis [her own child] also severed the petitioner's grandparental rights as to [the child], as "[t]o hold otherwise would controvert the policy of finality of termination proceedings and it would render meaningless the word termination in the phrase 'termination of parental rights.[436]

In sharp contrast to the Third Department's contrary conclusions in such cases, the Second Department charted a different course holding that the Family Court had committed a double error in its application of the law to the facts of the case. First:

> The Family Court erred as a matter of law in holding that termination of the petitioner's rights to her child ipso facto terminated her rights to seek visitation with her grandchild. There is simply no statutory mandate or controlling case law, under facts similar to those at bar,

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431 *Id* at 67 ("We are by no means suggesting that the petitioner herein must be granted visitation rights").

432 *Id.* at 63

433 *Id.*

434 *Id.* at 63.

435 Rulings in family law matters are typically fact sensitive. If the collective heart and soul of the appellate panel can be touched the court will do its utmost to achieve the emotionally desired result, by massaging the facts into the confines of governing law.

436 *Id.* at 64.

> that unequivocally holds that the termination of a grandparent's parental rights over a child irrevocably precludes that grandparent from seeking grandparental visitation.[437]

Second, when the Family Court speculated as to what may happen to the child:

> The court erred in its conclusion that to grant standing to the petitioner would controvert the policy and finality of termination proceedings. To begin with, the subject child, the child], is not presently a subject for termination of parental rights, and he may never be.[438]

The Appellate Division, citing decisional authority from the both the Second and Third Departments, emphasized that "[a] grandparent may seek visitation with a grandchild even after parental rights have been terminated or the child has been freed for adoption."[439] *Ann M.C.* reviewed the requirements regarding grandparental visitation and the requisite showing of either an ongoing relationship with the grandchild or an effort to establish a relationship with the grandchild. The court noted the requirement that "what is required of grandparents must always be measured against what they could reasonably have done under the circumstances. . .Clearly, under the unusual circumstances at bar, the petitioner could have done nothing more."[440]

The Second Department, apparently seeking judicial uniformity with respect to this issue, successfully struggled to reach a decision in *Ann* which would distinguish it from the undesired conclusions in the Third Department while, still, reining it into conformity with its sister Department. The Second Department, thus, rejected the view of "a blanket prohibition against grandparental visitation where the parental rights of the grandparent over their own offspring have been terminated."[441] With that in mind, the Second Department distinguished *Matter of Catherine JJ,*[442] a Third Department case, from *Ann M.C.*, based on the finality in the former case where the child had been surren-

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437 *Id.* at 64.

438 *Id.*

439 *Id.* at 64.

440 *Id.* at 65 (citing Matter of Rita VV., 619 N.Y.S.2d 218, *lv. denied*, 631 N.Y.S.2d 287 (1995); Matter of Loretta D. v. Commr. of Social Servs. of City of N.Y., 576 N.Y.S.2d 164 (App. Div. 1991)).

441 *Id.* at 66.

442 628 N.Y.S.2d 826, 827 (App. Div.1995)

dered for adoption while in the latter case Elizabeth's rights to the child had been only temporarily suspended, with a yet undetermined outcome, during which time the grandmother could develop into "a valuable familial resource."[443] The court in *Ann M.C.* further stated:

> Thus, the petitioner is not seeking to foist herself on unwilling adoptive parents, but rather is merely attempting to establish a relationship with a grandchild whose eventual permanent care and custody are presently undetermined, and who may well be returned to his mother; a mother who has voluntarily reestablished a relationship with the petitioner notwithstanding the termination of the legal parent/child relationship.[444]

Based on the facts of that case, the court in *Ann M.C.* agreed with the Third Department's resolution in *Matter of Clarabelle K. v. Christman,*[445] where the totality of the circumstances evidenced that equity should not intervene. The Second Department bent backwards to show that the Third Department had conducted the appropriate analysis within the parameters of the Second Department's guidelines (required to establish standing) before ruling as it did in *Clarabelle K.* and, thus, retreated from the "implied legal theory" in *Catherine JJ. v. Charlotte II.*[446]

Although *Ann* cautioned that its ruling be limited to the question of standing,[447] the Appellate Division was practically jumping off the bench to telegraph the intendedly desirable resolution of the case based on the grandmother's personal progress:

> The petitioner is not merely a concerned third party. She is a biological grandmother of a child clearly in need of positive family influences. If the petitioner's claims of self-improvement are genuine, she most certainly should be afforded an opportunity to establish that visitation with [the child] is in his best interests.[448]

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443 *Id.* at 66.

444 *Id.* at 66.

445 *Id.* at 65-66 (citing Matter of Clarabelle K. v. Christman, 639 N.Y.S.2d 578 (App. Div. 1996)).

446 *Id.* at 66 (quoting Catherine JJ. v. Charlotte II, 628 N.Y.S.2d 826, 827 (App. Div. 1995)).

447 *Id.* at 67 ("We are by no means suggesting that the petitioner herein must be granted visitation rights").

448 *Id.* at 66.

Ultimately, *Ann M.C.* linked the facts of the case with the appellate court's view of the real world, couched in public policy rhetoric regarding the termination of parental rights cases:

> Most significant to our determination in this case is the potential detrimental effect to children . . . were we to summarily cut off at the pass the standing of grandparents such as this petitioner without considering all of the circumstances bearing upon a child's ultimate best interest. All termination proceedings are not identical. They result from many different types of parental misconduct. Children who are the subject of proceedings to terminate parental rights resulting from horrendous physical or sexual abuse are in a markedly different posture from those like Elizabeth, whose mother was apparently incapable of caring for her due to alcohol or drug addiction problems, and who may indeed be rehabilitated, and capable of being a valued grandparent. It would be highly unlikely for a Family Court to grant standing to a grandparent to seek visitation with a grandchild where that parent had perpetrated vicious abuse toward her child. However, where parental rights have been terminated due to neglect, as is apparently the case before us, and that parent has demonstrably been rehabilitated, the court may well look differently upon the application of such a parent for visitation with her grandchild in considering that child's best interest.
>
> Furthermore, the reality is that many children never become candidates for adoption, that they often spend the most formative years of their lives shuttled from one foster home to another, with horrendous consequences reported daily by the media. Such facts we dare not ignore. For such children the potential benefit of the care and company of a concerned grandparent may be not only in that child's best interests but the key to the child's survival.[449]

B. *No geographic limitations upon visitation*

In *Matter of Pierson*[450] the Second Department reversed the lower court's geographical restrictions on where the grandparental visitation could occur:

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[449] *Id.* at 67. Note that this is unlike the court in *Clarabelle K.,* where the Appellate Division tipped its hand with respect to a certain reversal in the event that Family Court granted visitation. *See Clarabelle K.,* 639 N.Y.S.2d 578 (App. Div. 1996).

[450] 511 N.Y.S.2d 131 (App. Div. 1987).

> Once the Supreme Court or Family Court has properly acquired jurisdiction over the parties based on sufficient contacts with this State, it is empowered to make any appropriate order with regard to custody or visitation which is not restricted by State boundaries, and the courts' exercise of this power has so long been firmly settled that citation of authority is rarely considered necessary.[451]

CONCLUSION: COURTS MUST STRIKE A BALANCE

Grandparental visitation has made dramatic headway in the past two decades into all phases of life affecting grandchildren. *Toney v. Randace-Toney*[452] captured the essence of grandparental visitation cases: "[T]he court must strike a balance between the benefits which might be accorded to a child to continue or resume relationship with grandparent and the determination by the child's parent that visitation is not in child's best interests."[453]

In sum, DRL § 72 and its judicial progeny are a composite of interlocking probes working in tandem to produce a just result with the child as the first and foremost consideration at every stage – they do not function as a blind rubber stamp. The seemingly liberal and supportive language enunciated by the statute's sponsors and the judiciary in support of the role of grandparents in the lives of their grandchildren to the contrary notwithstanding, the actual application is arduous and not easily won, as evidenced by reported caselaw. It is necessary to bear in mind that all child custody and visitation cases, irrespective of the identity of the petitioner, are fact driven and always examined against the backdrop of the unique equities of the case in question. Although the stereotypical wholesome image of grandparents is not deemed a universal rather each must earn such an entitlement based on the respective merits of his or her case, in the final analysis, however, as a matter of morality and as a matter of children's rights to know their heritage, a showing that a child had enjoyed a prior ongoing relationship with his or her grandparent(s)[454] should result in an award of grandparental visitation—- grandparents should not be made to jump through fiery hoops.

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451 *Id.* at 132.

452 Toney v. Randace-Toney, N.Y.L.J., Sept. 30, 2002, at 36 (N.Y. Sup. Ct., Nassau Co. Sept. 29, 2002).

453 *Id.*

454 Emanuel S. v. Joseph E., 573 N.Y.S.2d 36 (1991); Cole v. Goodrich, 707 N.Y.S.2d 553 (App. Div. 2000), *lv. to appeal denied*, 714 N.Y.S.2d 706 (N.Y. 2000).