
Grandparents Raising Grandchildren in Illinois— Establishing the Right to a Continuing Relationship Through Visitation, Custody, and Guardianship in 2007: Where We’ve Been, Where We Are, and Where We Need to Go

by Rebecca J. O’Neill*

I. INTRODUCTION

In today’s society, many grandparents are very involved in their grandchildren’s lives and play a vital role in meeting their grandchildren’s day-to-day living needs. Often grandparents assume the responsibilities of parenting for their grandchildren. In Illinois, there are 288,827 children living in households headed by persons other than their parents.¹ Of these, approximately 213,465 live with grandparents.² Over one quarter of the grandparents raising grandchildren in Illinois report that they live in households without the children’s parents present.³ As of 2000, approximately forty percent of Illinois households list grandparents as primary caregivers for children.⁴ In meeting these children’s essential living needs, the grandparents often form substantial relationships with the children.

Whether grandparents have a legal right to secure and protect the relationships they form with their grandchildren has become

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1. AARP, ILLINOIS: A STATE FACT SHEET FOR GRANDPARENT AND OTHER RELATIVES RAISING CHILDREN 1 (2005), http://www.giclocalsupport.org/doc/kinship_care_2006_il.pdf.

2. *Id.* This number equals 6.67% of all children in the state. *Id.*

3. *Id.* (These data were collected from the U.S. Census Bureau Table DP-2. Profile Selected Social Characteristics: 2000.) Approximately 104,000 grandparents in Illinois reported they were responsible for their grandchildren living with them. *Id.*

4. Michael K. Goldberg, *Can Court-Imposed Grandparent Visitation Survive Wickham v. Byrne?*, 90 ILL. B.J. 458, 458 (2002).

questionable in the wake of two seminal decisions: *Troxel v. Granville*⁵ and *Wickham v. Byrne*.⁶ These decisions have played an important role in defining the constitutionality of grandparent visitation statutes—the state statutes that set forth when and under what circumstances grandparents may petition for visitation. It is currently unresolved whether the Illinois statutes can be interpreted in a manner that will justify a court’s grant of grandparent visitation without violating the parents’ rights to make decisions concerning their child.

Although the Illinois Supreme Court in *Wickham v. Byrne* declared the Illinois grandparent visitation statute unconstitutional, grandparents have not given up the pursuit to secure and protect their relationships with their grandchildren. Many grandparents have continued to file cases seeking the right to maintain relationships with their grandchildren through guardianship, custody, visitation, and adoption proceedings.⁷ Since *Wickham*, the Illinois Supreme Court has revisited the legal issues involving parental rights, and interference with those rights by grandparents and others. The court has done this in the context of cases involving grandparent visitation,⁸ the Juvenile Court Act,⁹ the Parentage Act,¹⁰ and guardianship under the Probate Act.¹¹ The court’s ruling in *Wickham* has also, in part, prompted a proliferation of challenges in the appellate courts. Although many cases clearly warrant court protection of the grandparent-grandchild relationship, the

5. *Troxel v. Granville*, 530 U.S. 57 (2000). In this case, the United States Supreme Court held that a Washington statute providing that any person may petition the court for visitation at any time was unconstitutional because the statute was too broad. *Id.* at 73. The Court found that the statute violated the parent’s due process right to make decisions concerning the care, custody, and control of her children. *Id.* at 75.

6. *Wickham v. Byrne*, 769 N.E.2d 1 (Ill. 2002). In this case the Supreme Court of Illinois held that a state statute authorizing grandparent visitation was unconstitutional as applied to fit parents. *Id.* at 10.

7. At the time this article was written, approximately thirty Illinois cases that cite *Wickham* have been reported by the Illinois appellate courts. These cases address grandparents and other parties who seek the right to protect some type of relationship with a child.

8. See *In re M.M.D.*, 820 N.E.2d 392 (Ill. 2004) (holding that *agreed* grandparent visitation orders are not unconstitutional).

9. See *In re Austin W.*, 823 N.E.2d 572, 584 (Ill. 2005) (“Even the superior right of a natural parent must yield unless it is in accord with the best interests of the child. Under certain circumstances ‘it is not necessary that the natural parent be found unfit or be found to have legally forfeited his rights to custody, if it is in the best interest of the child that he be placed in the custody of someone other than the natural parent.’”) (quoting *People ex rel. Edwards v. Livingston*, 247 N.E.2d 417 (Ill. 1969)).

10. See *In re the Parentage of John M.*, 817 N.E.2d 500 (Ill. 2004) (holding that the trial court could not find the Parentage Act unconstitutional as applied without holding an evidentiary hearing, and finding that the Parentage Act is not facially unconstitutional).

11. See *In re R.L.S.*, 844 N.E.2d 22, 27–28 (Ill. 2006) (discussing the standing requirements under the Probate Act in a case involving a guardianship petition).

courts have struggled with how to apply the broad *Wickham* ruling. Specifically, a review of appellate court decisions since *Wickham* indicates a conflict among the appellate courts regarding the burden of proof a grandparent must meet to make a claim for court protection of the grandparent-grandchild relationship. Consequently, the law is being applied inconsistently in Illinois.

Specifically, courts have struggled to set applicable legal standards in these cases, and they have not been uniform in analyzing grandparent visitation, custody, and guardianship cases. Courts are now holding that standing requirements are contingent upon whether a petitioner seeks relief under the Illinois Marriage and Dissolution of Marriage Act, the Probate Act, or the Juvenile Court Act.¹² Application of different standing requirements is problematic because under each statute the petitioner seeks to establish a legal right to some form of relationship with a child and to interfere with the parent's right to make decisions concerning the child's care—a right which the courts have deemed fundamental.

The Illinois legislature has responded to the court decisions concerning grandparent visitation rights by revising the visitation statute¹³ three times since *Wickham*. The newest amendment became effective January 1, 2007. In considering these amendments, this article has four principal aims. First, it will explain the amendments to the statute and how the statute should be reviewed when it is challenged constitutionally. Second, this article contends that the legislature must revise both the Illinois Marriage and Dissolution of Marriage Act provisions concerning grandparent visitation and custody and the guardianship provisions of the Probate Act. Third, this article suggests that the Illinois Supreme Court wrongly decided *Wickham* by broadly holding section 607(b)(1) of the grandparent visitation statute unconstitutional, because there are identifiable circumstances in which the statute would have survived constitutional scrutiny. Fourth, this article argues that the state may often have a compelling interest in protecting the relationship between a child and his or her nonparental caregiver when a substantial relationship between the two has formed, and will also discuss other circumstances that would warrant state protection of the grandparent-grandchild relationship.

12. *See id.* (discussing the standing requirements under the Probate Act); *In re Austin W.*, 823 N.E.2d at 580 (discussing the standing requirements under the Juvenile Court Act); *In re Custody of T.W.*, 851 N.E.2d 881, 884–85 (Ill. App. Ct. 2006) (discussing the standing requirements under the Illinois Marriage and Dissolution of Marriage Act). *See also infra* Part III.D (further discussing the standing requirements under these three acts).

13. 750 ILL. COMP. STAT. 5/607 (2006).

Although black letter rules are difficult to establish in family law cases given the nature of the factual variances that are presented before the courts, the state needs a clearer, more uniform standing requirement in cases involving grandparents who seek the right to protect relationships with their grandchildren. All parties involved in grandparent cases, and the attorneys who represent them, need assurance that the law will be applied consistently whether the petitioner seeks visitation, custody, or guardianship of the minor child. By giving the reader a comprehensive review of the recent inconsistent cases involving grandparents who have sought to secure relationships with their grandchildren through the courts, this article argues that the legislature must create uniform laws involving grandparent visitation, custody, and guardianship. These laws can, and should, be written in a manner that will clearly withstand constitutional scrutiny.

II. THRESHOLD ISSUES

Several threshold issues must be addressed before a court can render a decision concerning a child. Does the court have subject matter jurisdiction over the case? Do the statutes require that notice or service of process be made in a particular manner for the court to exercise jurisdiction over the parties? Is the court the appropriate venue for the case? What gives a person who is not the biological parent of the child standing to bring the case to the court? This part addresses these issues and their relevance to grandparent child visitation cases.

A. *Subject Matter Jurisdiction*

“Subject matter jurisdiction refers to the power of the court to hear and determine cases.”¹⁴ The Second District Appellate Court in *Felzak v. Hruby* recently confronted some of the significant subject matter jurisdiction issues that can arise in grandparent visitation cases.¹⁵ In *Felzak*, the parents were held in indirect civil contempt of court for failing to allow grandparent visitation as ordered in 1995. The parents argued that the trial court did not have subject matter jurisdiction over the grandparents’ claim because the visitation statute on which it was based had been declared unconstitutional.¹⁶ As a result, the parents argued, the court order holding them in contempt was invalid.¹⁷

14. *Felzak v. Hruby*, 855 N.E.2d 202, 214 (Ill. App. Ct. 2006) (quoting *Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 770 N.E.2d 177, 188 (Ill. 2002)).

15. *Felzak*, 855 N.E.2d at 202.

16. *Id.* at 210–11.

17. *Id.*

The parents' argument relied on a recent Fifth District opinion, *In Re Dobbs*,¹⁸ which determined that a trial court did not have subject matter jurisdiction to enter an agreed visitation order concerning an adult when the statute on which it was based contained no provisions for adult visitation.¹⁹ The parents further argued that *In Re M.M.D.*, a case upholding a voluntary visitation agreement, did not address the issue of subject matter jurisdiction,²⁰ and even if there was subject matter jurisdiction, the visitation order was void for lack of consideration.²¹

The trial court denied the parents' motion to dismiss, relying upon the Illinois Supreme Court decision, *In re M.M.D.*,²² which held that agreed orders for grandparent visitation were not void as unconstitutional and should be enforced.²³ The Second District Court agreed that *In Re M.M.D.* did not resolve the jurisdictional issues in this case, but the court refused to apply *Dobbs*. The court stated, "In *M.M.D.*, our supreme court did not consider whether the trial court had subject matter jurisdiction over disputes concerning grandparent visitation, but whether a provision of a consent decree allowing grandparent visitation was void as unconstitutional."²⁴ The court noted that in *M.M.D.*, the court had subject matter jurisdiction to enter an agreed order under the Illinois Probate Act and the Illinois Parentage Act, because the cases were brought under these acts.²⁵ Therefore, neither case answered the question of whether a trial court has subject matter jurisdiction over an action for grandparent visitation brought under the Illinois Marriage and Dissolution of Marriage Act.²⁶

In *Felzak*, the only action that had been filed was a petition for grandparent visitation under the grandparent visitation statute. Therefore, the court was forced to consider whether standing still existed since section 607(b) had become inoperative. The court acknowledged that a judgment is void if the court lacks subject matter jurisdiction over the matter before it.²⁷ The court found, however, that the trial court retained subject matter jurisdiction to enforce the

18. *Id.* at 209 (citing *In Re Marriage of Dobbs*, 831 N.E.2d 1154 (Ill. App. Ct. 2005)).

19. *In Re Marriage of Dobbs*, 831 N.E.2d at 1158. In this case, a father brought an action against his former wife to allow visitation with their disabled adult child. *Id.* at 1155.

20. *Felzak*, 855 N.E.2d at 212.

21. *Id.* at 210.

22. *In re M.M.D.*, 820 N.E.2d 392 (Ill. 2004).

23. *Felzak*, 855 N.E.2d at 209 (citing *In re M.M.D.*, 820 N.E.2d 392).

24. *Id.* at 212 (citing *In re M.M.D.*, 820 N.E.2d 392).

25. *Id.* at 213.

26. *See id.*

27. *Id.* (citing *Diaz v. Provena Hosps.*, 817 N.E.2d 206, 213 (Ill. App. Ct. 2004)).

visitation order under common law, noting that the court's equitable powers over grandparent visitation "existed at common law prior to and independent of the enactment of section 607(b)."²⁸ "As a result, grandparent visitation was not a justiciable matter created by the legislature, and therefore it did not disappear when section 607(b) became inoperative."²⁹ The court noted that several post-*Wickham* cases had refused to apply the common law because the special-circumstances test applied the best-interests standard.³⁰ While acknowledging that the *Wickham* decision removed the earlier common law doctrine that grandparent visitation could be granted under special circumstances, the court found that *Wickham* did not eliminate grandparent visitation as a justiciable matter.³¹ Therefore, the court found that the consent decree entered into by the parents was not void for lack of subject matter jurisdiction.³² At the time, the then-newly revised grandparent visitation statute³³ had not yet been ruled unconstitutional. Therefore, standing under this new statute was not addressed by the court in *Felzak*.

In cases involving grandparents or de facto parents seeking visitation, guardianship, or custody, the court's subject matter jurisdiction depends upon whether the grandparents or de facto parents seek relief under a statute. If no statute exists to support the relief sought, then the court must determine whether a justiciable matter exists under common law. The appellate courts in Illinois have issued conflicting opinions concerning the survival of common law since the Illinois Supreme Court's ruling in *Wickham*.³⁴

B. Personal Jurisdiction and Venue

Before addressing the merits of any petition concerning a child's welfare—whether the case involves guardianship, adoption, child custody, or visitation—a court must first address the issue of personal jurisdiction over the child and parties. The court should consider whether the applicable statute has specific jurisdictional requirements

28. *Id.* at 215.

29. *Id.*

30. *Id.* (citing *In re Marriage of Ross*, 824 N.E.2d 1108, 1115–17 (Ill. App. Ct. 2005), *Beurksen v. Graff*, 813 N.E.2d 1018, 1020 (Ill. App. Ct. 2004); *Langman v. Langman*, 757 N.E.2d 505, 510 (Ill. App. Ct. 2001)). When a court applies a best-interests standard, the court considers several factors, such as the mental and physical health of those involved, the wishes of the child, the child's adjustment to home, school, and community.

31. *Felzak*, 855 N.E.2d at 216.

32. *Id.* at 219–20.

33. 750 ILL. COMP. STAT. 5/607(b) (2006).

34. *See infra* Part III.C (fully discussing the conflicting opinions issued after *Wickham*).

and whether any other statute would control the jurisdictional question. In particular, in cases involving children who have been removed from the state, or who have recently moved to the state, the court must consider the application of the Uniform Child-Custody Jurisdiction and Enforcement Act,³⁵ the Parental Kidnapping Prevention Act of 1980,³⁶ the Interstate Compact on the Placement of Children,³⁷ and possibly the Hague Convention on the Civil Aspects of International Child Abduction.³⁸

The jurisdiction and venue requirements for cases involving child custody or grandparent visitation are found within the Marriage and Dissolution of Marriage Act.³⁹ When cases for custody or visitation are filed by someone other than a parent, the petition must be filed in the county where the child is permanently a resident or found, but only if the child is not in the physical custody of one of his parents.⁴⁰ Notice of a child-custody or visitation proceeding must be provided to the child's parents, guardian, and custodian.⁴¹ Notice requires that the child's parent, guardian, and custodian be served written notice and a copy of the petition to modify at least thirty days prior to the hearing on the petition.⁴² The Act is silent about the necessity of service and notice to the child involved in a custody or visitation proceeding.

In contrast, the Probate Act does not specify that personal service of process must be made on a minor child or the child's parents for a court to exercise *in personam* jurisdiction when a petition for guardianship over a minor has been filed. Instead the Act states:

Unless excused by the court for good cause shown, it is the duty of the petitioner to give notice of the time and place of the hearing on the petition, in person or by mail, to the minor, if the minor is 14 years, or older, and to the relatives of the minor whose names and addresses are stated in the petition, not less than 3 days before the hearing, but failure to give notice to any relative is not jurisdictional.⁴³

35. 750 ILL. COMP. STAT. 36/102 (2006).

36. 28 U.S.C.A. § 1738A (West 2006).

37. 45 ILL. COMP. STAT. 15/1 (2006).

38. This was adopted by the Hague Convention in 1980 to attempt to combat the problem of international parental child abduction. Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, 1343 U.N.T.S. 98.

39. 750 ILL. COMP. STAT. 5/607(a-3), (a-5), (4) (2006).

40. 750 ILL. COMP. STAT. 5/601(b)(2) (2004); 750 ILL. COMP. STAT. 5/607(a-3) (2004), amended by 2006 Ill. Legis. Serv. P.A. 94-1026 (H.B. 4357) (West) (stating when persons other than parents may file a petition for custody or visitation).

41. 750 ILL. COMP. STAT. 5/601(c) (2004).

42. 750 ILL. COMP. STAT. 5/601(d) (2004).

43. 755 ILL. COMP. STAT. 5/11-10.1 (2004).

Compare the statutory jurisdictional requirements of guardianship, custody, and visitation to those in the Adoption Statute, which requires that summons be served on a minor child who is the subject of an adoption.⁴⁴ In guardianship, custody, and grandparent visitation cases, a court can exercise jurisdiction over a child even without the personal service of process upon the child's parent. Notice to parents may be made by publication if other means of notice are not effective.⁴⁵ These threshold issues of jurisdiction, venue, and standing must be resolved before proceeding to look more thoroughly at grandparent visitation. If a grandparent can establish subject matter jurisdiction, personal jurisdiction, and proper venue, she may then seek visitation based on the merits of her claim.

III. GRANDPARENT VISITATION

The issue of grandparent visitation in Illinois is largely controlled by the Illinois grandparent visitation statute, which was initially adopted in 1981.⁴⁶ Previously, grandparent visitation rights were controlled by common law, which allowed a grandparent visitation rights upon a showing of special circumstances.⁴⁷ The statute has subsequently been

44. 750 ILL. COMP. STAT. 50/7.A. (2004).

45. 750 ILL. COMP. STAT. 36/108 (2004); 735 ILL. COMP. STAT. 5/2-203, 2-206, 2-208 (2004) (authorizing publication if person outside of the state and no other manner is reasonable).

46. Ill. Rev. Stat. 1981, ch. 40, ¶ 607(b), *amended* by Act of Sept. 2, 1981, Pub. Act. 82-344, 1981 Ill. Laws 1856. This statute provided the "court may grant reasonable visitation privileges to a grandparent or great-grandparent of any minor child upon the grandparents' or great-grandparents' petition to the court . . . if the court determines that it is in the best interest and welfare of the child." *Id.*

The Illinois Probate Act also has provisions allowing visitation rights for grandparents and other relatives when both natural or adoptive parents of a minor are deceased. 755 ILL. COMP. STAT. 5/11-7.1 (2004). The Act allows courts to grant reasonable visitation when found to be in the best interests of the child. The Act states:

Whenever both natural or adoptive parents of a minor are deceased, visitation rights shall be granted to the grandparents of the minor who are the parents of the minor's legal parents unless it is shown that such visitation would be detrimental to the best interests and welfare of the minor. In the discretion of the court, reasonable visitation rights may be granted to any other relative of the minor or other person having an interest in the welfare of the child. However, the court shall not grant visitation privileges to any person who otherwise might have visitation privileges under this Section where the minor has been adopted subsequent to the death of both of his legal parents except where such adoption is by a close relative

Where such adoption is by a close relative, the court shall not grant visitation privileges under this Section unless the petitioner alleges and proves that he or she has been unreasonably denied visitation with the child. The court may grant reasonable visitation privileges upon finding that such visitation would be in the best interest of the child.

Id.

47. *See Chodzko v. Chodzko*, 360 N.E.2d 60, 63 (Ill. 1976) ("[T]he giving of the visitation

amended several times.⁴⁸ When adopting the grandparent visitation statute, the Illinois legislature codified the common law decisions to form the statute's substantive provisions.

A. Wickham v. Byrne

In 2002, in *Wickham v. Byrne*,⁴⁹ the Illinois Supreme Court ruled the grandparent visitation statute unconstitutional.⁵⁰ The court consolidated

rights to the grandfather over the objections of the mother in the absence of any special circumstances justifying the interference with the superior custodial right of the natural parent [is error.]). See also *infra* Part III.C (discussing common law standards).

48. See *Lulay v. Lulay*, 739 N.E.2d 521, 526–29 (Ill. 2000) (discussing the history of the grandparent visitation statute).

In September of 1985 the General Assembly amended the statute adding that the court “may grant reasonable visitation privileges to a grandparent or great-grandparent whose child has died where the court determines that it is in the best interests and welfare of the child.” Ill. Rev. Stat. 1983, ch. 40, ¶ 607(b) (as amended by Public Act 82-1002, eff. September 17, 1982). Also in 1985, the General Assembly added to the language of Section 607 to permit grandparent visitation following adoption of the minor by the spouse of the custodial parent after either death or termination of parental rights of the other parent. Ill. Rev. Stat. 1985, ch. 40, ¶ 607(b) (as amended by Public Act 84-667, eff. September 20, 1985).

The grandparent visitation statute was next amended in 1989, this time allowing grandparents the right to seek visitation regardless of whether the nuclear family was still intact. Ill. Rev. Stat. 1989, ch. 40, ¶ 607(b)(1)(A) (as amended by Public Act 86-855, eff. September 8, 1989). Finally, in 1991, the grandparent visitation statute was amended again, putting it in the form that was ultimately interpreted in the *Lulay* decision. Ill. Rev. Stat. 1991, ch. 40, ¶ 607(b)(1) (as amended by Public Act 86-1452, eff. July 1, 1991).

49. *Wickham v. Byrne*, 769 N.E.2d 1 (Ill. 2002).

50. *Id.* at 7–8. The visitation statute provided:

(b)(1) The court may grant reasonable visitation privileges to a grandparent, great-grandparent, or sibling of any minor child upon petition to the court by the grandparents or great-grandparents or on behalf of a sibling, with notice to the parties required to be notified under Section 601 of this Act, if the court determines that it is in the best interests and welfare of the child, and may issue any necessary orders to enforce such visitation privileges. Except as provided in paragraph (2) of this subsection (b), a petition for visitation privileges may be filed under this paragraph (1) whether or not a petition pursuant to this Act has been previously filed or is currently pending if one or more of the following circumstances exist:

- (A) the parents are not currently cohabiting on a permanent or an indefinite basis;
- (B) one of the parents has been absent from the marital abode for more than one month without the spouse knowing his or her whereabouts;
- (C) one of the parents is deceased;
- (D) one of the parents joins in the petition with the grandparents, great-grandparents, or sibling; or
- (E) a sibling is in State custody.

....

(3) When one parent is deceased, the surviving parent shall not interfere with the visitation rights of the grandparents.

750 ILL. COMP. STAT. ANN. 5/607(b)(1) and (3) (West 2002) *invalidated by Wickham*, 769 N.E.2d 1.

two cases when considering whether certain provisions of the grandparent visitation statute violated a parent's due process rights.⁵¹ In the first case, the mother of the minor child had died. In her last will and testament the mother had expressed her wish for frequent visitation between her mother (the child's grandmother) and the child.⁵² After the child's mother's death, the father honored the mother's request and allowed the grandmother to visit with the grandchild.⁵³ However, the father refused to allow the grandmother unsupervised and overnight visitation. The grandmother filed a petition for grandparent visitation.⁵⁴ The father filed a motion to dismiss the petition, claiming that the grandparent visitation statute violated his due process rights. He based his argument on the decisions of the United State Supreme Court in *Troxel v. Granville*⁵⁵ and the Illinois Supreme Court in *Lulay v. Lulay*.⁵⁶

In the second consolidated case, the grandparents of the minor children involved had maintained a close relationship with their grandchildren, seeing them two to three times a month.⁵⁷ The grandparents' son, the father of the children, died.⁵⁸ Following their son's death, the grandparents continued their relationship with the grandchildren, seeing the grandchildren once a week.⁵⁹ The grandparents requested more time with the grandchildren, but the mother refused.⁶⁰ After the grandparents filed their petition for visitation, the mother moved the children six hours away from the grandparents to make a fresh start.⁶¹

In both cases, the trial courts granted some form of visitation to the grandparents.⁶² In the first case, the trial court found that the state may

51. *Wickham*, 769 N.E.2d at 2.

52. *Id.*

53. *Id.*

54. *Id.*

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

56. *Lulay v. Lulay*, 739 N.E.2d 521 (Ill. 2000). In this case both parents objected to the grandparent's petition for visitation with her grandchildren. The Illinois Supreme Court found that the state did not have a compelling state interest to maintain a relationship between the grandparent and grandchildren where the children's parents were divorced yet stood united in their parental decision that children should not visit with the grandparent, and, therefore, Section 607(b)(1) of the Marriage and Dissolution of Marriage Act could not pass the strict-scrutiny test. The court held that Section 607(b)(1), as applied to this case, was an unconstitutional infringement on the parents' fundamental liberty interest in raising their children.

57. *Wickham*, 769 N.E.2d at 3.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 2-3.

have had a compelling interest in ordering visitation between the child and grandchild over the parent's objection.⁶³ The parent applied for an interlocutory appeal from this decision under Illinois Supreme Court Rule 308.⁶⁴ The appellate court denied the appeal, but the Illinois Supreme Court granted it. In the second case, the trial court said:

It has been the law of Illinois for over 30 years that when considering the best interest of the children the Court must look at "all matters that have a bearing upon the welfare of the child . . ." [T]here is a strong indication that unsupervised grandparental visitation would be of great benefit to the children. Their father is deceased, his surviving family is the only connection the children can have with those who had an intimate and close family relationship.⁶⁵

The appellate court reversed the trial court's decision, finding that section 607(b)(1), as applied in this case, unconstitutionally infringed on the mother's fundamental right to make decisions concerning the care, custody, and control of her children.⁶⁶

The Illinois Supreme Court concluded that section 607(b)(1) contained a flaw similar to the statute at issue in *Troxel*.⁶⁷ The Court concluded that it "could conceive of no set of circumstances under which section 607(b)(1) [and section 607(b)(3)] of the Act would be valid," and held these sections facially unconstitutional.⁶⁸

Following this opinion, several cases challenged prior orders that had granted grandparent visitation rights. These cases, which are discussed in the next section, address whether prior consent decrees are still enforceable, and whether the common law survives, in light of *Wickham*'s ruling finding the grandparent visitation statute unconstitutional.⁶⁹

63. *Id.*

64. This rule permits immediate appeal of an order where doing so may materially advance the ultimate termination of the litigation. ILL. SUP. CT. R. 308.

65. *Wickham*, 769 N.E.2d at 4.

66. *Id.*

67.

Like the statute in *Troxel*, section 607(b)(1), in every case, places the parent on equal footing with the party seeking visitation rights. Further, like the statute in *Troxel*, section 607(b)(1) directly contravenes the traditional presumption that parents are fit and act in the best interests of their children. The statute allows the "State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made."

Id. at 7–8 (quoting *Troxel v. Granville*, 530 U.S. 57 (2000)).

68. *Id.* at 8.

69. See *infra* Part III.C (discussing the appellate split over whether the statute being declared unconstitutional made the common law rule unconstitutional as well).

B. Consent Decrees

Wickham did not resolve the issue of enforcing prior grandparent visitation orders. The legal challenge to prior orders was based upon the premise that visitation orders were void as a result of the decision in *Wickham*. One could argue that because the agreement was entered with knowledge of the grandparent visitation statute, the agreement was invalid because it would not have been made absent the statute. The Illinois Supreme Court addressed the issue of enforcement of consent orders in *In re M.M.D.*⁷⁰

In re M.M.D. dealt with an agreement between the father of a minor child and the child's grandparents setting forth the grandparents' visitation right. Following *Wickham*, the father argued that the visitation agreement should be terminated. Both the trial court and appellate court found that *Wickham* did not nullify the parties' visitation agreement.⁷¹ The Illinois Supreme Court reasoned that while the *Wickham* decision rejected the trial court's judgment being substituted for the judgment of the parents, here, the trial court had not substituted its judgment for the father's.⁷² The order entered by the court granting visitation rights was considered a consent decree because it was based upon the parties' agreement.⁷³ Here, the order was not imposed by the court against the father's wishes; rather, it was entered pursuant to an agreement between the parties.⁷⁴

One other recent challenge to a consent decree argued that there was no consideration for the visitation agreement. In *Felzak v. Hruby*, the parents challenged the enforcement of a consent decree after the grandparent visitation statute was ruled unconstitutional.⁷⁵ The parents claimed that the grandmother provided consideration for the visitation agreement by forbearing her claim to petition for custody under 607(b) of the Act. Because section 607(b) was invalid, she had no legal claim to forbear and thus provided no consideration for the agreement.⁷⁶ The court disagreed with this argument, finding that "any act or promise that benefits one party or disadvantages another is sufficient consideration to support the formation of a contract."⁷⁷

70. *In Re M.M.D.*, 820 N.E.2d 392 (Ill. 2004).

71. *Id.* at 397-98.

72. *Id.* at 400.

73. *See id.* at 398-99.

74. *Id.*

75. *Felzak v. Hruby*, 855 N.E.2d 202 (Ill. App. Ct. 2006).

76. *Id.* at 220.

77. *Id.* at 221 (citing *De Fontaine v. Passalino*, 584 N.E.2d 933, 939 (Ill. 1991)).

C. Common Law

After *Wickham*, several courts issued conflicting opinions regarding whether grandparents' visitation rights continued to exist at common law.⁷⁸ In *Felzak*, the court determined that grandparent visitation cases still present a justiciable issue under common law.⁷⁹ In *In re Marriage of Sullivan*, the court found that the trial court erred in dismissing the father's petition on subject matter jurisdiction grounds.⁸⁰ The father had petitioned to allow his parents to visit with his children during his absence while serving in the military.⁸¹ The court held that the effect of a finding that sections 607(b)(1) and (b)(3) were unconstitutional was to return the law to its form before the enactment of the statute.⁸²

In *Beurksen v. Graff*,⁸³ the trial court granted a mother's petition to vacate a prior order granting visitation to the child's grandmother on the basis that the grandparent visitation statute had been declared unconstitutional.⁸⁴ The grandmother argued that the court should apply common law principles to uphold the prior order. The First District Appellate Court noted that despite the Third District's ruling in *In Re M.M.D.*,⁸⁵ (finding a common law right to petition for grandparent visitation following *Wickham*) "the parties' visitation order is invalid as it is based on an unconstitutional statute."⁸⁶

In *In re Marriage of Ross*,⁸⁷ a mother filed a petition asking the court to grant her parents visitation with her children. The Fifth District Appellate Court refused to follow the ruling in *Sullivan*.⁸⁸ The court

78. *In re Marriage of Sullivan*, 795 N.E.2d 392 (Ill. App. Ct. 2d Dist. 2003); *Beurksen v. Graff*, 813 N.E.2d 1018 (Ill. App. Ct. 1st Dist. 2004); *Felzak v. Hruby*, 855 N.E.2d 202 (Ill. App. Ct. 2d Dist. 2006); *In re Marriage of Ross*, 824 N.E. 2d 1108 (Ill. App. Ct. 5th Dist. 2005).

79. *Felzak*, 855 N.E.2d at 215.

80. *Sullivan*, 795 N.E.2d at 394.

81. *Id.*

82. *Id.* at 396 (citing *Geneva Construction Co. v. Martin Transfer & Storage Co.*, 122 N.E.2d 540, 543 (Ill. 1954)) ("The legal effect of declaring a statute unconstitutional is to relegate the parties to such rights as obtained prior to the enactment of the unconstitutional statute."). In this case, returning to the common law rights that existed prior to the enactment of the unconstitutional statute would have allowed the father to petition for visitation between his children and his parents. *Id.*

83. *Beurksen v. Graff*, 813 N.E. 2d 1018 (Ill. App. Ct. 1st Dist. 2004).

84. *Id.* at 1019 (vacating a previous visitation order between grandmother and grandson following *Wickham*).

85. *In re M.M.D.*, 800 N.E.2d 831 (Ill. App. Ct. 1st Dist. 2003).

86. See *Beurksen*, 813 N.E.2d at 1021 (agreeing with dissent of Justice Slater in *In re M.M.D.*, and holding the visitation agreement void).

87. *In re Marriage of Ross*, 824 N.E.2d 1108 (Ill. App. Ct. 5th Dist. 2003).

88. See *id.* at 1116 (citing *Wickham v. Byrne* 769 N.E.2d 1, 8 (Ill. 2002) ("We . . . fail to reconcile the court's distinction in *In re Marriage of Sullivan* with the Illinois Supreme Court's declaration in *Wickham* that no set of circumstances existed under which the statute could validly

instead ruled, "The statute authorizing the court to order grandparent visitation privileges, against a parent's wishes, was declared unconstitutional, and the prior common law that authorized the same is equally unconstitutional."⁸⁹

Notably, the majority of these courts did not analyze whether the state would have a compelling interest in ordering visitation rights over a parent's objection given the particular facts presented in the case, but instead concluded that because visitation agreements infringe on the parent's fundamental right to raise his child, visitation rights cannot be legitimized by reliance on common law principles. These courts did not consider situations where the state may have a compelling state interest in granting visitation to nonparents over the objection of a parent who had not been determined unfit. Even recognizing that parents have the fundamental right to make child-rearing decisions, there may be times that such an order would pass constitutional scrutiny.

Because the courts disagree about the survival and application of the common law, and are not adequately analyzing whether a compelling state interest exists under the facts of each case, there is a need for statutes which establish the right to petition for custody, visitation, or guardianship. These statutes should identify what must be shown to establish whether the state has a compelling interest in protecting a relationship between a child and a third party.

D. Amendments to the Grandparent Visitation Statute

After *Wickham*, the state adopted a new grandparent visitation statute, which became effective in January of 2005.⁹⁰ The statute creates "a rebuttable presumption that a fit parent's actions and

authorize a court to order grandparent visitation against a parent's wishes because that court-ordered visitation would violate a parent's constitutionally protected liberty interest to direct the care, custody, and control of his children without unwarranted state intrusion."). The Court also noted:

The special circumstances for which the common law authorized the courts to order grandparent visitation were similar to those circumstances delineated in the statute that *Wickham* declared to be unconstitutional. We are inclined to agree with the First District Appellate Court in *Beurksen*. In *Beurksen*, the court cited with approval Justice Slater's appellate court dissent in *In re M.M.D.*, which stated that court-ordered grandparent visitation infringed upon the parent's fundamental right to raise his child and could not be retroactively legitimized by reliance on resurrected common law principles.

Id. (citations omitted) (discussing *Beurksen*, 813 N.E.2d 1018).

89. *Id.* (citations omitted).

90. 750 ILL. COMP. STAT. 5/607 (2004 & West Supp. 2005), amended by Act of July 14, 2006, Ill. Pub. Act 94-1026, sec. 5, 2006 Ill. Legis. Serv. 2645 (West) (for the amendments effective Jan. 1, 2005, see Act of Aug. 12, 2004, Ill. Pub. Act 93-911, sec. 5, 2004 Ill. Laws 3212).

decisions regarding grandparent . . . visitation are not harmful to the child's mental, physical, or emotional health."⁹¹ It places the burden on the party filing the petition to prove that the parent's actions and decisions regarding visitation times are harmful to the child's mental, physical, or emotional health.⁹² Minor amendments were made to the statute again in 2005, changing the term "illegitimate" to a child "born out of wedlock."⁹³ More substantive changes were made to the grandparent visitation statute in 2006; the amendments take effect in January of 2007.⁹⁴

91. 750 ILL. COMP. STAT. 5/607(a-5)(3) (2004 & West Supp. 2005), *amended by* Act of July 14, 2006, Ill. Pub. Act 94-1026, sec. 5, 2006 Ill. Legis. Serv. 2645 (West).

92. *Id.*

93. 750 ILL. COMP. STAT. 5/607(a-5)(3) (2004 & West Supp. 2005), *amended by* Act of July 14, 2006, Ill. Pub. Act 94-1026, sec. 5, 2006 Ill. Legis. Serv. 2645 (West) (for the amendments effective Jan. 1, 2006, see Act of July 14, 2005, Ill. Pub. Act 94-229, sec. 15, 2005 Ill. Laws 2047).

94. Act of July 14, 2006, Ill. Pub. Act 94-1026, sec. 5, 2006 Ill. Legis. Serv. 2645, 2645-49 (West) (effective Jan. 1, 2007) (to be codified at 750 ILL. COMP. STAT. 5/607).

The substantive changes are as follows:

5/607(a-3) was amended to provide Grandparent, great-grandparents, and siblings of a minor child, who is one year old or older, have standing to bring an action in circuit court by petition, requesting visitation in accordance with this Section. The term "sibling" in this Section means a brother, sister, stepbrother, or stepsister of the minor child. Grandparents, great-grandparents, and siblings also have standing to file a petition for visitation rights in a pending dissolution proceeding or any other proceeding that involves custody or visitation issues, requesting visitation in accordance with this Section. A petition for visitation with a child by a person other than a parent must be filed in the county in which the child resides. Nothing in this subsection (a-3) and subsection (a-5) of the this Section shall apply to a child whose interests in a petition is pending under Section 2-13 of the Juvenile Court Act of 1987 or a petition to adopt an unrelated child is pending under the Adoption Act.

Section 5/607(a-5)(1)(A) was deleted. This provision had provided the following condition: "one parent of the child is incompetent as a matter of law or deceased or has been sentenced to a period of imprisonment for more than 1 year;"

Section 5/607(a-5)(1)(A-5) was added. "**(A-5) the child's other parent is deceased or has been missing for at least 3 months. For the purposes of this Section a parent is considered to be missing if the parent's location has not been determined and the parent has been reported as missing to a law enforcement agency;**"

Section 5/607(a-5)(1)(A-10) was added. "**(A-10) a parent of the child is incompetent as a matter of law;**"

Section 5/607(a-5)(1)(A-15) was added. "**(A-15) a parent has been incarcerated in jail or prison during the 3 month period preceding the filing of the petition;**"

Section 5/607(a-5)(1)(B) was amended as follows: "the child's mother and father are divorced or have been legally separated from each other **or there is pending a dissolution proceeding involving a parent of the child or another court proceeding involving custody or visitation of the child (other than any adoption proceeding of an unrelated child) during the 3 month period prior to the filing of the petition** and at least one parent does not object to the grandparent, great-grandparent, or sibling having visitation with the child. The visitation of the grandparent, great-grandparent, or sibling must not diminish the visitation of the parent who is not related to the grandparent, great-grandparent, or sibling seeking visitation;"

Most significantly, subsection (a-3) provides that:

Grandparents, great-grandparents, and siblings of a minor child, who is *one year old or older*, have standing to bring an action in circuit court by petition, requesting visitation in accordance with this Section. . . . Grandparents, great-grandparents, and siblings also have standing to file a petition for visitation rights in a pending dissolution proceeding or any other proceeding that involves custody or visitation issues, requesting visitation *in accordance with this Section*.⁹⁵

It remains unclear whether grandparents have standing to bring a petition for visitation when a child is less than one year old. When looking at the other language in subsection (a-3), the language specifies “this subsection (a-3)” when referencing the contents of this paragraph (a-3). Therefore, the provision stating that grandparents may *also* have standing to file a petition in accordance with *this Section* may mean that grandparents would have standing to petition for visitation of a child

Section 5/607(a-5)(1)(C) was deleted.

Section 5/607(a-5)(2)(2) was amended as follows: “**Any visitation rights granted pursuant to this Section before the filing of a petition for adoption of a child shall automatically terminate by operation of law upon the entry of an order terminating parental rights or granting the adoption of the child, whichever is earlier. If the person or persons who adopted the child are related to the child, as defined by Section 1 of the Adoption Act, any person who was related to the child as grandparent, great-grandparent, or sibling prior to the adoption shall have standing to bring an action pursuant to this Section requesting visitation with the child. The grandparent, great-grandparent, or sibling of a parent whose parental rights have been terminated through an adoption proceeding may not petition for visitation rights.**”

Section 5/607(a-5)(4)(I) was amended as follows: “whether the petitioner had frequent or regular contact **or visitation** with the child for at least 12 consecutive months; ~~and~~”

Section 5/607(a-5)(4)(J) was amended, adding the word “and” at the end of the section.

Section 5/607(a-5)(4)(K) as added providing: “**whether the grandparent, great-grandparent, or sibling was a primary caretaker of the child for a period of not less than 6 consecutive months.**”

Section 5/607(a-7)(2) was amended as follows: “The court shall not modify ~~an a-prior grandparent, great-grandparent, or sibling visitation~~ order **that grants visitation to a grandparent, great-grandparent, or sibling** unless it finds by clear and convincing evidence, upon the basis of facts that have arisen since the prior visitation order or that were unknown to the court at the time of the entry of the prior visitation, that a change has occurred in the circumstances of the child or his or her custodian, and that the modification is necessary to protect the mental, physical, or emotional health of the child. The court shall state in its decision specific findings of fact in support of its modification or termination of the grandparent, great-grandparent or sibling visitation. **A child’s parent may always petition to modify visitation upon changed circumstances when necessary to promote the child’s best interest.**”

Section 5/607(c) was amended as follows: “The court may modify an order granting or denying visitation rights of a parent whenever modification would serve the best interest of the child; but the court shall not restrict a parent’s visitation rights unless it finds that the visitation would endanger seriously the child’s physical, mental, moral or emotional health.”

95. Act of July 14, 2006, Ill. Pub. Act 94-1026, sec. 5, 2006 Ill. Legis. Serv. 2645, 2646 (West) (effective Jan. 1, 2007) (to be codified at 750 ILL. COMP. STAT. 5/607) (emphasis added).

less than one year if any of the other provisions in Section (a) are applicable and there are other pending proceedings involving visitation or custody of the child. Thus, a reasonable interpretation of the amendment is that a grandparent is prohibited from bringing a grandparent visitation proceeding for a child less than one year old unless there is a separate proceeding already pending concerning the child's visitation or custody. The amendment could also be interpreted to mean that grandparents cannot petition for visitation of any child who is less than one year old.

IV. GUARDIANSHIP

In Illinois, under the Probate Act, there are three ways a nonparent can obtain guardianship over a minor child: (1) through the traditional guardianship process,⁹⁶ (2) through appointment as a short-term guardian,⁹⁷ or (3) through a standby guardianship.⁹⁸ A guardian over the person "shall have the custody, nurture and tuition and shall provide for the education of the ward."⁹⁹ The guardian of a minor's estate "shall have the care, management and investment of the estate, shall manage the estate frugally and shall apply the income and principal of the estate so far as necessary for the comfort and suitable support and education of the ward."¹⁰⁰

In a traditional guardianship case, "[t]he court lacks jurisdiction to proceed on a petition for the appointment of a guardian of a minor if (i) the minor has a living parent, adoptive parent or adjudicated parent, whose parental rights have not been terminated, whose whereabouts are known, and who is willing and able to make and carry out day-to-day child care decisions concerning the minor."¹⁰¹ The court may exercise jurisdiction over a petition for guardianship if a parent consents to the appointment of the guardian, or the parent fails to object to the appointment of the guardian after receiving notice of the hearing.¹⁰² Finally, if guardianship over a child has already been established by a court of competent jurisdiction, the court may also exercise jurisdiction

96. 755 ILL. COMP. STAT. 5/11-5 (2004). *See also infra* notes 101–105 and accompanying text (discussing traditional guardianship under the Probate Act).

97. 755 ILL. COMP. STAT. 5/11-5.4 (2004). *See also infra* Part IV.B (discussing the short-term guardianship provisions under the Probate Act).

98. 755 ILL. COMP. STAT. 5/11-5.3 (2004). *See also infra* Part IV.A (discussing the standby guardianship provisions under the Probate Act).

99. 755 ILL. COMP. STAT. 5/11-13(a) (2004).

100. 755 ILL. COMP. STAT. 5/11-13(b) (2004).

101. 755 ILL. COMP. STAT. 5/11-5(b)(i) (2004).

102. 755 ILL. COMP. STAT. 5/11-5(b)(i) (2004).

on a new petition for guardianship.¹⁰³ In guardianship cases, there is a “rebuttable presumption that a parent of a minor is willing and able to make and carry out day-to-day child care decisions concerning the minor, but the presumption may be rebutted by a preponderance of the evidence.”¹⁰⁴ When determining whether guardianship is appropriate, the court must consider the best interests of the child.¹⁰⁵

The Probate Act contains a specific pronouncement concerning parental right to custody. It provides:

If both parents of a minor are living and are competent to transact their own business and are fit persons, they are entitled to the custody of the person of the minor and the direction of his education. If one parent is dead and the surviving parent is competent to transact his own business and is a fit person, he is similarly entitled. The parents have equal powers, rights and duties concerning the minor. If the parents live apart, the court for good reason may award the custody and education of the minor to either parent or some other person.¹⁰⁶

Presumably, the matter would not proceed to a best-interests hearing on a guardianship petition unless there is no fit parent available and willing to make the day-to-day child-care decisions for the child. Also, it seems clear that under current case law, before the court grants the custody and education of the minor to a person other than the parent, over a parent’s objection, the court must determine that the state has a compelling interest justifying this type of intervention into the family.¹⁰⁷

A. *Standby Guardians*

In 1994, the state added provisions to the Probate Act relating to standby guardians.¹⁰⁸ The provisions for standby guardians allow parents or current guardians to designate someone to be appointed as the standby guardian. That person will act as a guardian for the child when the child’s parents or guardian dies or is no longer willing or able to make day-to-day child-care decisions.¹⁰⁹ The same presumptions concerning the parents that apply in the traditional guardianship cases

103. 755 ILL. COMP. STAT. 5/11-5(b)(ii) (2004).

104. 755 ILL. COMP. STAT. 5/11-5(b)(ii) (2004).

105. 755 ILL. COMP. STAT. 5/11-5(a) (2004).

106. 755 ILL. COMP. STAT. 5/11-7 (2004).

107. *In Re M.M.D.*, 820 N.E.2d 392, 399–401 (Ill. 2004); *Wickham v. Byrne*, 769 N.E.2d 1, 6–8 (Ill. 2002) (“State interference with fundamental parental childrearing rights is justified in limited instances to protect the health, safety, and welfare of children.”).

108. Act of July 14, 1994, Ill. Pub. Act 88-529, sec. 5, 1993 Ill. Laws 4685, 4687 (codified as amended 755 ILL. COMP. STAT. 5/11-5.3).

109. 755 ILL. COMP. STAT. 5/11-5.3 (2004).

apply in standby guardianships.¹¹⁰ The standby guardian does not have authority to act until he or she receives knowledge of the death or inability of the minor's parent, parents, or guardian to make and carry out the day-to-day child-care decisions for the child, or until he or she receives the consent of the parent(s) or guardian.¹¹¹ Within sixty days after receiving this knowledge, the standby guardian must petition for the traditional guardianship of minors under the Probate Act.¹¹²

B. Short-Term Guardianship

The short-term guardianship provisions were added to the Probate Act in 1994.¹¹³ This section allows parents or guardians to appoint, in writing and without court approval, a short-term guardian to act as guardian of the person of a minor child for up to sixty days.¹¹⁴ The short-term guardian does not have estate guardianship powers, except that a short-term guardian may apply for public benefits on behalf of the minor child.¹¹⁵ A parent may not appoint a short-term guardian if the minor has another living parent "whose parental rights have not been terminated, whose whereabouts are known, and who is willing and able to make and carry out day-to-day child-care decisions concerning the minor, unless the [other] parent consents to the appointment by signing the written instrument" appointing the short-term guardian.¹¹⁶

C. In re R.L.S.

In February 2006, the Illinois Supreme Court, in *In re R.L.S.*,¹¹⁷ compared the standing requirements for guardianship under the Probate Act to those for custody under the Illinois Marriage and Dissolution of Marriage Act. In this case, the trial court had dismissed a petition for guardianship filed by a child's grandparents based upon the child's father's claim that the grandparents lacked standing because the child's father had not voluntarily and indefinitely relinquished custody of the child.¹¹⁸ The minor child had resided with her grandmother at the time

110. See *supra* note 104 and accompanying text (discussing the rebuttable presumption that parent is willing and able to make day-to-day decisions).

111. 755 ILL. COMP. STAT. 5/11-13.1(b) (2004).

112. 755 ILL. COMP. STAT. 5/11-13.1(c) (2004).

113. Act of Jan. 14, 1994, Ill. Pub. Act 88-529, sec. 5, 1993 Ill. Laws 4685, 4687 (codified as amended 755 ILL. COMP. STAT. 5/11-5.4).

114. 755 ILL. COMP. STAT. 5/11-13.2(a) (2004).

115. 755 ILL. COMP. STAT. 5/11-13.2(b) (2004).

116. 755 ILL. COMP. STAT. 5/11-5.4(b) (2004).

117. 844 N.E.2d 22 (Ill. 2006).

118. *In re R.L.S.*, 844 N.E.2d 22, 25-26 (Ill. 2006).

the child's mother died in an automobile accident.¹¹⁹ Following the child's mother's death the grandparents petitioned for guardianship over the child.¹²⁰ The appellate court reversed the trial court's decision, holding that section 11-5(b) provides the only requirement for standing for guardianship petitioners.¹²¹ It does not include a requirement that a parent voluntarily and indefinitely relinquish custody of a child before someone can petition for guardianship. The appellate court found that the state can carry out the superior-rights doctrine in different ways when effectuated in different acts.¹²² The Illinois Supreme Court agreed that each statute has its own standing requirements, stating that, "to have standing to seek custody under the Marriage Act, the nonparent must first show that the child is not in the physical custody of one of his parents."¹²³

In contrast, "to have standing to proceed on a petition for guardianship under the Probate Act, when the minor has a parent whose whereabouts are known, the petitioner must rebut the statutory presumption that the parent is 'willing and able to make and carry out day-to-day child care decisions concerning the minor.'"¹²⁴ In *R.L.S.*, the child's father urged that "unless guardianship petitioners under the Probate Act are required to show that the child is not in the physical custody of one of his parents, the Probate Act violates the parents' due process rights."¹²⁵ Moreover, he argued, similar to the Washington statute invalidated in *Troxel* allowing "any person" to petition for visitation at "any time," "the Probate Act allows any qualified nonfelon adult to commence a guardianship proceeding simply by filing a petition."¹²⁶ Although the Supreme Court agreed that the Probate Act establishes minimum limits on those who may file a petition for guardianship, the court disagreed that the Act contained the same infirmity identified by the Supreme Court in *Troxel*.¹²⁷ The court distinguished the Probate Act from the statute struck down in *Troxel*, stating:

119. *Id.* at 25.

120. *Id.*

121. *Id.* at 26.

122. *In re R.L.S.*, 820 N.E.2d 1201, 1204 (Ill. App. Ct. 2004). The appellate court held that "how the superior rights doctrine is effectuated in one act is irrelevant to application of the same doctrine in another." *Id.*

123. *In re R.L.S.*, 844 N.E.2d at 27.

124. *Id.* at 28 (quoting 755 ILL. COMP. STAT. ANN. 5/11-5(b) (West 2004)).

125. *Id.* at 28.

126. *Id.* at 30 (citations omitted).

127. *Id.*

A person who petitioned for visitation under the Washington statute would be given a hearing on merits, and the determination of the child's best interests would be made without any deference to the parents' decision. By contrast, a person who files a petition for guardianship under the Probate Act will have the petition dismissed if the child has a parent who is willing and able to carry out day-to-day child-care decisions."¹²⁸

The court acknowledged that a petitioner can proceed on the merits of a petition over the objection of a parent when the parent has been found to be unwilling or unable to carry out day-to-day child-care decisions, thus insuring both the protection of children's health, safety and welfare as well as the superior rights of parents.¹²⁹

The Illinois Supreme Court discusses section 11-7 of the Probate Act in great detail in *In re R.L.S.* The last sentence of that section provides, "If the parents live apart, the court for good reason may award the custody and education of the minor to either parent or to some other person."¹³⁰ The court interpreted this sentence, when taken in context with the other sentences in the section, to mean that fit parents are entitled to custody of their children.¹³¹ If the parents live apart, "the court may award the child to either parent if both are fit."¹³² The court noted that prior Illinois Supreme Court decisions had historically refused to apply section 11-7 in this manner.¹³³ "Instead, this court has repeatedly held that, despite the statute's pronouncement, a fit parent's custody rights are subservient to the best interests of the child."¹³⁴ The Supreme Court concluded that its prior decisions that did not apply section 11-7 as written were wrong and should no longer be followed.¹³⁵ The court held that the petitioners lacked standing to proceed with their petition, "unless the court determines that they have rebutted the presumption that respondent is willing and able to make day-to-day child-care decisions. Moreover, if respondent is a fit person

128. *Id.* at 30.

129. *In re R.L.S.*, 844 N.E.2d at 31.

130. 755 ILL. COMP. STAT. 5/11-7 (2004).

131. *In re R.L.S.*, 844 N.E.2d at 32 ("If the child does not have a fit parent, good reason exists to award the child to a third party.").

132. *Id.*

133. *Id.*

134. *Id.* (citing *In re Kirchner*, 649 N.E.2d 324, 331-32 (Ill. 1995); *In re Estate of Whittington*, 483 N.E.2d 210, 215 (Ill. 1985); *In re Custody of Townsend*, 427 N.E.2d 1231, 1234 (Ill. 1981); *People ex rel. Edwards v. Livingston*, 247 N.E.2d 417, 421-22 (Ill. 1969)).

135. *In re R.L.S.*, 844 N.E.2d at 34.

who is competent to transact his own business, he is entitled to custody of R.L.S.”¹³⁶

The Illinois Supreme Court did not address the qualifications of a “fit person,” nor does the Probate Act define a “fit person.” “A fit person who is competent to transact his own business” may not be someone who has previously demonstrated a willingness and ability to make day-to-day child-care decisions, nor must the “person who is competent to transact his own business” necessarily be competent to care for his child. Hopefully, courts will allow petitioners to rebut the presumption that the respondent is willing and able to make day-to-day child-care decisions by showing that the parent has never, or rarely, demonstrated a willingness or ability to make day-to-day child-care decisions for the child. A parent’s claim of willingness and ability to make these decisions will hopefully also be insufficient to deny a guardianship petitioner standing when the parent has been absent from the child’s life for a significant period of time or when the parent has not fulfilled the responsibilities of parenting. The person who has fulfilled the responsibilities of parenting for a significant period of time should have standing to bring a guardianship petition.

D. Custody

The Illinois Marriage and Dissolution of Marriage Act authorizes a grandparent or others to petition for custody of a child.¹³⁷ The custody provision provides that a child-custody petition can be filed by a person other than a parent, but only if the child is not in the physical custody of one of his parents.¹³⁸ This statute also allows grandparents to petition for custody of a child when one of the parents is deceased, provided that certain circumstances concerning the surviving parent exist.¹³⁹

136. *Id.*

137. 750 ILL. COMP. STAT. 5/601(b) (2004).

138. *Id.* at 5/601(b)(2).

139. *Id.* at 5/601(b)(4)(A)–(C). Grandparents may petition for custody of a child when one or more of the following circumstances exists at the time of the parent’s death:

(A) the surviving parent had been absent from the marital abode for more than one month without the deceased spouse knowing his or her whereabouts;

(B) the surviving parent was in State or federal custody; or

(C) the surviving parent had: (i) received supervision for or been convicted of any violation of Article 12 of the Criminal Code of 1961 directed towards the deceased parent or the child; or (ii) received supervision or been convicted of violating an order of protection entered under Section 217, 218, or 219 of the Illinois Domestic Violence Act of 1986 for the protection of the deceased parent or child.

Id.

Shortly after *In re R.L.S.* was decided by the Illinois Supreme Court, the Fifth District Appellate Court confronted the question whether the decision in *R.L.S.* “expressly abrogated all previous cases that adhered to the rule that the superior rights of fit natural parents were necessarily subservient to the best interests of the child.”¹⁴⁰ The appellant also asked the court to find that unless a parent is unfit, the court should not make decisions concerning the best interest of the child when a petition for custody has been filed by someone other than the parent. In *In re Custody of T.W.*, the grandparents of a minor child filed a petition for custody under the Illinois Marriage and Dissolution of Marriage Act.¹⁴¹ The mother of the child had voluntarily surrendered physical custody of the child to her parents, the child’s grandparents, and the minor child had not been in the physical custody of either of her parents for more than two years.¹⁴² The child had lived in her grandparents’ home during the first year and half of her life.¹⁴³ When the child was two, she moved to another residence with her mother for about one year, but then returned to live with her grandparents. She resided with them until the time of the grandparents’ custody petition, when the minor was almost six years old.¹⁴⁴ The father had not acknowledged paternity until the Illinois Attorney General instituted an action to obtain child support.¹⁴⁵ The father had visited with the child regularly for part of one day on alternate weekends for a period of two years.¹⁴⁶ The father had recently married and purchased a new home with three bedrooms.¹⁴⁷ The trial court found that the grandparents had met their burden of showing good cause to overcome the superior rights of the respondent.¹⁴⁸ The father appealed the trial court’s decision, relying on *In re R.L.S.*¹⁴⁹

The Fifth District appellate court rejected the father’s argument, determining that in *In re R.L.S.* the Illinois Supreme Court had only criticized the precedent regarding the operation of the Probate Act and that this interpretation did not apply in cases under the Marriage Act.¹⁵⁰

140. *In re Custody of T.W., A Minor*, 851 N.E.2d 881, 888 (Ill. App. Ct. 5th Dist. 2006).

141. *Id.* at 882.

142. *Id.* at 883.

143. *Id.*

144. *Id.*

145. *Id.* at 888.

146. *Id.* at 883.

147. *Id.*

148. *Id.* at 890.

149. *Id.* at 888.

150. The court found the limitation in *R.L.S.* “exceptionally clear when viewed in light of other recent statement regarding the operation of the superior-rights doctrine.” It stated, “the precedents criticized in *R.L.S.* have recently been used to address the Juvenile Court Act of

Shortly before *In Re R.L.S.* was decided, the Illinois Supreme Court cited *People ex rel. Edwards v. Livingston* for the proposition that “[u]nder certain circumstances ‘it is not necessary that the natural parent be found unfit or be found to have legally forfeited his rights to custody, if it is in the best interest of the child that he be placed in the custody of someone other than the natural parent.’”¹⁵¹ The Fifth District concluded, “*In re R.L.S.*’s limitation to the Probate Act explains why the court saw no need to address this recent Juvenile Court Act precedent.” The Fifth District also noted that “[s]ubsequent to *In re R.L.S.*, the Fourth District Appellate Court stated that under the Juvenile Court Act a court need not find a natural parent unfit before awarding custody to another person, but the court must follow the procedural requirements of the Juvenile Court Act.”¹⁵²

Pre- and post-*Wickham*, many cases have presented issues in the appellate courts regarding the application of the standing requirements in custody cases filed under the Illinois Marriage and Dissolution of Marriage Act.¹⁵³ Recently, the Fifth District found that whether a nonparent has the custody of the minor child, so as to have standing to seek the custody of a minor child, is determined by examining the nonparent’s status on the date relief is sought.¹⁵⁴ The court stated:

[I]n concluding that a nonparent has the physical custody of a minor child, the circuit court must consider factors such as who was responsible for the child’s care and welfare prior to the initiation of custody proceedings, how the physical possession of the child was obtained, and the nature and duration of the possession of the child.¹⁵⁵

V. THE CONSTITUTIONAL ANALYSIS—SETTING THE STANDARD OF REVIEW

Following *Troxel*, many cases have been decided throughout the United States concerning the constitutionality of grandparent visitation statutes.¹⁵⁶ The debate over grandparents’ rights to visitation, custody,

1987.” *Id.* at 889 (citations omitted).

151. *Id.* (citing *In re Austin W.*, 823 N.E.2d 572, 584 (2005)).

152. *In re Custody of T.W., A Minor*, 851 N.E.2d at 889 (citing *In re S.J.*, 846 N.E.2d 633, 641 (Ill. App. Ct. 4th Dist. 2006) and 705 ILL. COMP. STAT. ANN. 405/2-28 (West 2004)).

153. 750 ILL. COMP. STAT. 5/601 (2004).

154. *In re Marriage of Archibald*, 843 N.E. 2d 446 (Ill. App. Ct. 5th Dist. 2006).

155. *Id.*

156. For a comprehensive review of these cases, see Kristine L. Roberts, *State Supreme Court Applications of Troxel v. Granville and the Courts’ Reluctance to Declare Grandparent Visitation Statutes Unconstitutional*, 41 FAM. CT. REV. 14, 22–29 (2003); Karl A. Menniger, *Grandparent Visitation and Custody Awards*, 69 AM. JUR. PROOF OF FACTS 3D § 281 (2004); Michael K. Goldberg, *Over the River and Through the Woods—Again: The New Illinois*

or guardianship over grandchildren has centered on whether establishing this type of legal relationship between the grandparent and grandchild infringes on the parent's fundamental right to parent his own child. The struggle to determine whether and to what degree the state should be involved in cases involving parties seeking the right to parent or to preserve some form of relationship with a child is reflected in the volume of cases that have been litigated. Some courts, like the Supreme Court of Illinois, have declared their state's statutes unconstitutional,¹⁵⁷ while other state supreme courts have upheld the constitutionality of grandparent visitation statutes.¹⁵⁸ Visitation statutes that have withstood constitutional scrutiny do not contain special language; instead, courts recognized that the statutes could be applied in a constitutional manner.

The Supreme Court of Connecticut recognized that to invalidate Connecticut's statute on its face "would leave adrift the significant interests of the children harmed by the loss of visitation with a loved one."¹⁵⁹ Other courts, like the Kansas Supreme Court, the Mississippi Supreme Court, and the Maine Supreme Court, found that their statutes could be applied in a constitutional manner if proper consideration is given to the parent's liberty interest.¹⁶⁰

After ruling Illinois' grandparent visitation statute unconstitutional in *Wickham*, the Illinois Supreme Court was again confronted with a constitutional challenge to an Illinois statute involving parental rights. In the 2004 case of *In re Parentage of John M., a Minor*,¹⁶¹ a trial court ruled that the Illinois Parentage Act of 1984¹⁶² was unconstitutional.¹⁶³ However, the trial court's reasoning was unclear. In reviewing the trial court's decision, the Supreme Court discussed the factors involved in a traditional analysis associated with due process and equal protection claims.¹⁶⁴

Grandparent Visitation Act, 29 S. ILL. U. L.J. 403, 422–32 (2005).

157. Roberts, *supra* note 156, at 23–29; Goldberg, *supra* note 156, at 422–32.

158. Goldberg, *supra* note 156, at 422–32.

159. Roth v. Weston, 789 A.2d 431, 449 (Conn. 2002) (emphasis omitted).

160. *Id.*; Rideout v. Riendea, 761 A.2d 291, 298 (Me. 2000); Skov v. Wicker, 32 P.3d 1122, 1123 (Kan. 2001); Stacy v. Ross, 798 So. 2d 1275, 1279 (Miss. 2001); Zeman v. Stanford, 789 So. 2d 798, 803 (Miss. 2001).

161. *In re Parentage of John M., a Minor*, 817 N.E.2d 500 (Ill. 2004).

162. 750 ILL. COMP. STAT. ANN. 45/1 *et seq.* (West 2004 & Supp. 2005).

163. *In re John M.*, 817 N.E.2d at 503–04.

164. *Id.* at 507–08. Specifically, the court said:

This court noted in *In re R.C.* that there are general procedures that courts follow when addressing due process challenges: "The analysis courts use when confronted with a claim that a statute violates the due process guarantees of the United States and Illinois

The Supreme Court noted at the outset that:

A facial challenge of the constitutionality of a statute is the most difficult challenge to mount successfully. This is because a statute is facially invalid only if no set of circumstances exist under which the Act would be valid. The fact that the statute could be found unconstitutional under some set of circumstances does not establish the facial invalidity of the statute.¹⁶⁵

The question that follows this decision is whether the Illinois Supreme Court followed this standard when it ruled the grandparent visitation statute unconstitutional in *Wickham*. Did the court contemplate other sets of circumstances where the statute could have been applied in a constitutional manner? Could the state have granted grandparents or others visitation rights under the statute without violating the protections provided by the United States and Illinois Constitutions? *Wickham* did not discuss this type of analysis.

There are several examples of how former section 607(b)(1) of the visitation statute could be applied in a constitutional manner. First, when the parents of a child disagree on grandparent visitation, the court could exercise jurisdiction under the prior version of 607(b)(1) to determine a grandparent's petition for visitation without violating the parent's fundamental right to make decisions concerning the child. The fundamental right to make decisions regarding a child does not preclude the court from deciding matters concerning a child in cases where the parents disagree. Some court mechanism must be available for these decisions when the parents do not agree. One parent simply cannot claim the shield of "the fundamental right" to make decisions

Constitutions depends on the nature of the right upon which the statute supposedly infringes. Ordinarily courts will employ a relaxed scrutiny of statutes, looking only to see whether the statute bears a rational relationship to a legitimate state interest. However, in cases where the right infringed upon is among those considered a 'fundamental' constitutional right, courts subject the statute to 'strict' scrutiny. To survive strict scrutiny, the means employed by the legislature must be 'necessary' to a 'compelling' state interest, and the statute must be narrowly tailored thereto, i.e., the legislature must use the least restrictive means consistent with the attainment of its goal." Similarly, there are analytical procedures which are typically followed when an equal protection challenge is made. In *City of Urbana v. Andrew N. B.* we explained: "Equal protection guarantees that similarly situated individuals will be treated similarly, unless the government demonstrates an appropriate reason for doing otherwise. The shorthand we have developed for the degree of deference we give in evaluating the appropriateness of such a reason is the term 'scrutiny.' In cases like the one before us, where the statutory classification at issue does not involve fundamental rights, we employ so-called rational basis scrutiny and ask only whether the challenged classification bears a rational relation to a legitimate purpose." *Id.* (citations omitted).

165. *Id.* at 509 (citations omitted).

concerning the child to prevent court intervention when the parents are in disagreement concerning the child's upbringing.

Second, section 607(b)(1) of the former grandparent visitation statute could have been applied in a constitutional manner where the grandparent had been the primary caregiver for the grandchild for a substantial period of time. Even though the parents may not have been ruled unfit, the state has a compelling interest in protecting the relationship between the child and grandparent because harm may have come to the child absent the state's intervention. As indicated, the state is not precluded from intervening in that parent's fundamental right to parent when the state has a compelling state interest to do so.¹⁶⁶

Finally, section 607(b)(1) could be applied in a constitutional manner when the biological parent of the child has not fulfilled his or her parental responsibilities. When a parent fails to demonstrate a full commitment to the responsibilities of parenthood by participating in the rearing of a child, his or her interest in personal contact with the child may not require substantial protection under the Due Process Clause.¹⁶⁷

A. *Compelling State Interest*

When does the state have a compelling interest in allowing a person who is not the child's biological parent to petition the court for visitation, custody, or guardianship? Is the biological relationship between a parent and child sufficient to warrant protection when the parent has not established any other type of relationship with the child, i.e., when the parent has not been involved in parenting?

The United States Supreme Court has found that the state has a compelling interest in protecting both biological and nonbiological family relationships. In *Michael H. v. Gerald D.*,¹⁶⁸ the Court determined that a mere biological relationship is not enough to establish the fundamental right to parent a child. Further, the Court found that even a biological relationship coupled with an established relationship with the child might be insufficient to establish the fundamental right to parent a child.¹⁶⁹ In *Michael H.*, the biological father of a child sought to overturn a California statute that created the presumption of paternity for the husband when a child was born during the marriage.¹⁷⁰ As one commentator has summarized the court's finding:

166. See *infra* Part V.A (discussing compelling state interests).

167. See *supra* notes 151–53 and accompanying text (discussing parental responsibilities).

168. *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

169. *Id.* at 126–27.

170. *Id.* at 113.

That the liberty interest, or due process protection of the family, trumped the interests of the biological father in maintaining a relationship with his child. Specifically, the right of the family to avoid rupture in these circumstances is a constitutionally protected right pursuant to the Fourteenth Amendment to the United States Constitution.¹⁷¹

When a biological parent has not been involved in rearing a child, the biological parent is not part of a family unit that warrants the right to avoid rupture. The United States Supreme Court unambiguously stated in *Lehr v. Robertson*¹⁷² that a mere biological relationship is not enough to warrant substantial protection under the Due Process Clause when a biological parent has not demonstrated a full commitment to the responsibilities of parenthood. The Court noted that if the natural father fails to grasp the opportunity to develop a relationship with his child, “the Federal Constitution will not automatically compel a State to listen to his opinion of where the child’s best interest lie.”¹⁷³ In *Lehr*, the Court emphasized the familial relationship that results from the emotional attachments established by the intimacy of daily association, and the manner in which the familial relationship plays an important role in promoting a constructive way of life through the instruction of the child. The Court recognized that parents obtain rights as a counterpart to the responsibilities they have assumed.¹⁷⁴

These cases leave little doubt that when grandparents have fulfilled the responsibilities of parenting, and the parent has not demonstrated a full commitment to the responsibilities of parenting, the biological parent’s opinion concerning the child’s best interests is unpersuasive. Instead, the state must protect the substantial relationships that have formed, and the family unit that has developed, while a grandparent has been fulfilling the role of parent. Illinois statutes do not clearly state this principle.

VI. ADOPTING A UNIFORM STANDING REQUIREMENT

The current child custody standing provisions of the Illinois Marriage and Dissolution of Marriage Act and the Probate Act should be revised to enumerate factors to be considered when determining whether a parent has acquiesced to another person’s custody of a child. The

171. See Steven N. Peskind, *Who’s Your Daddy? An Analysis of Illinois’ Law of Parentage and the Meaning of Parenthood*, 35 LOY. U. CHI. L.J. 811, 825–26 (2004) (discussing the arguments against linking parentage and parentage rights with biology).

172. *Lehr v. Robertson*, 463 U.S. 248 (1983).

173. *Id.* at 248.

174. *Id.* at 257.

current language in the Illinois Marriage and Dissolution of Marriage Act which states that a petition may be filed by someone other than a parent “only if [the child] is not in the physical custody of one of his parents”¹⁷⁵ is insufficient. The state should consider adding factors similar to those in the visitation provisions of the Illinois Marriage and Dissolution of Marriage Act. Specifically, courts should consider the period of time that the grandparent has fulfilled parenting responsibilities; whether the parent has provided consistent care for the child; whether the parent has absented himself from the child’s home, making care from another child care provider necessary; and whether the parent, impaired by substance abuse, has been unavailable to care for the child in an appropriate manner. If the court finds that a parent has not fulfilled the responsibilities of parentage, a grandparent should have standing to petition for custody. The court could then determine the best interests of the child when making the custody determination.

As currently interpreted, the Probate Act arguably requires that the parent(s) must be found unfit (if the parents object to the guardianship) before a grandparent can petition for guardianship.¹⁷⁶ “A fit person who is competent to transact his own business” may not be someone who has previously demonstrated a willingness and ability to make day-to-day child-care decisions, nor may the “person who is competent to transact his own business” necessarily be competent to care for his child. The Supreme Court’s interpretation of the Probate Act demonstrates that the statute must be amended to create clearer rules regarding the petitioner’s standing. The state should acknowledge that there are factual situations that would warrant a court’s determination of a guardianship petition even when the parent has not been found unfit. The person who has fulfilled the responsibilities of parenting for a significant period of time should have standing to bring a guardianship petition.

When reviewing changes to the Probate Act, the legislature should also consider that the term “unfit” has traditionally been used in cases involving termination of parental rights.¹⁷⁷ There are often times when termination of parenting authority may not be at issue in determining another party’s right to involvement with the child. Often grandparents provide care for their grandchildren with the hope that the parent will someday assume their parental responsibilities.¹⁷⁸ Because “unfitness”

175. 750 ILL. COMP. STAT. ANN. 5/601 (West 2006).

176. *See supra* Part IV.C (discussing parental rights to custody).

177. Juvenile Court Act, 705 ILL. COMP. STAT. ANN. 405/1 et. seq. (West 2006).

178. Most of the grandparents that the author has represented have expressed this desire.

is a term associated with the termination of parental rights, the possibility of a finding of unfitness may cause a parent to object to a guardianship petition when the parent might otherwise acknowledge that he or she is presently not able to care for the child. Standing requirements to petition for guardianship under the Probate Act should be similar to those proposed within the Illinois Marriage and Dissolution of Marriage Act.¹⁷⁹

The grandparent visitation statute that took effect in January 2007 is tailored too narrowly. There are circumstances where the state has a compelling interest in protecting a grandparent-grandchild relationship that would be excluded under this statute. Under the present statute, there is a rebuttable presumption that a fit parent's actions and decisions regarding grandparent, great-grandparent, or sibling visitation are not harmful to the child's mental, physical, or emotional health. The burden is on the party filing a petition under this section to prove that the parent's actions and decisions regarding visitation times are harmful to the child's mental, physical, or emotional health. Apparently, the current statute presumes that the state would only have a compelling interest in allowing grandparent visitation over a parent's objection when the objection causes harm to the child. The state might have a compelling interest in allowing grandparents visitation rights even without a showing of harm to the child. If one parent consents to the grandparent visitation, the petitioner should not be compelled to show harm to the child before the court can award grandparent visitation rights. It should not be necessary for a petitioner for grandparent visitation to show harm to the child when no fundamental parental right is at stake. If the parent has not demonstrated a commitment to parenting the child, grandparent visitation rights could be granted without concern for the fundamental right to make parenting decisions, because the parent has not developed a relationship that merits fundamental protection.

Finally, the grandparent visitation provisions that took effect in 2007 may prohibit a grandparent from petitioning for visitation simply because the child is less than one year old. If the grandparent has provided significant care of the child during the first twelve months of the child's life, the grandparent should be allowed to petition for visitation. If one parent consents to grandparent visitation, the grandparent should be allowed to petition for visitation. It is not

179. See *supra* Part II.A (explaining the standing requirements under the Illinois Marriage and Dissolution of Marriage Act).

presently clear whether that grandparent would have standing to petition under the January 2007 grandparent visitation statute.

VII. CONCLUSION

The confusion over whether and when it is appropriate for grandparents to have standing to petition for guardianship, custody, or visitation is evidenced by the numerous cases that have been brought before the courts concerning these issues and the conflicting opinions that have been issued by the courts. In addition to considering factual circumstances, courts must balance whether the state has a duty to intervene in the parent-child relationship for the protection of the child or to promote a compelling state interest against the claim that a parent's fundamental right to make decisions for his child is at stake. Presently, Illinois statutes are ambiguous or, at a minimum, unclearly interpreted. These issues merit the attention of the Illinois legislature.

Finally, the legislature should also focus on the significant problem caused by grandparents' lack of financial resources for obtaining legal representation. Without financial means, many grandparents are unable to obtain the legal authority to provide the care that they already provide. Grandparents are often unaware that they need to affirmatively seek legal authority from the court to secure their right to make decisions for their grandchildren. Some grandparents have raised their grandchildren until adulthood without ever having obtained legal authority to make decisions. Clearly the state has a strong interest in promoting the continuity of care for children and in granting providers of continued care a right to protect the relationships that have developed between the caregiver and child.