



1994

Notes: Grandparent Visitation — The One and Only Standard — Best Interests of the Child. Fairbanks v. Mccarter, 330 Md. 39, 622 a.2d 121 (1993)

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Recommended Citation

Avin, Jacquelyn E. (1994) "Notes: Grandparent Visitation — The One and Only Standard — Best Interests of the Child. Fairbanks v. Mccarter, 330 Md. 39, 622 a.2d 121 (1993)," *University of Baltimore Law Review*: Vol. 24: Iss. 1, Article 7.
Available at: <http://scholarworks.law.ubalt.edu/ubl/vol24/iss1/7>

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GRANDPARENT VISITATION: THE ONE AND ONLY STANDARD—BEST INTERESTS OF THE CHILD. *Fairbanks v. McCarter*, 330 Md. 39, 622 A.2d 121 (1993).

I. INTRODUCTION

A special relationship often develops between children and their grandparents. Despite the unique nature of this bond, it is often hard for such relationships to endure changes in the family unit. Even during the most civil of divorces, for example, the sensitive issue of child visitation may result in bitterness and resentment among the parties involved. These parties include not only the parents and the children, but quite often the grandparents. The issue of whether grandparents are entitled to visitation privileges, and under what circumstances, has recently surfaced in *Fairbanks v. McCarter*,¹ a 1993 Maryland court of appeals decision. In *Fairbanks*, the court interpreted Maryland's grandparent visitation statute² to require only that a trial court determine whether grandparental visitation is in the child's best interest.³ The court also held that the Maryland statutory provision does not require grandparents seeking visitation rights to demonstrate any exceptional circumstances.⁴

In *Fairbanks*, the parents of two minor children divorced in 1988.⁵ The divorce proceedings ended three years later, and a decree was rendered granting joint legal custody to the parents.⁶ The decree

1. 330 Md. 39, 622 A.2d 121 (1993).

2. 1991 Md. Laws ch. 247 (current version at MD. CODE ANN., FAM. LAW § 9-102 (Supp. 1994)).

3. *Fairbanks*, 330 Md. at 49, 622 A.2d at 126.

4. *Id.* at 48, 622 A.2d at 126. Common law required the existence of exceptional circumstances before visitation rights could be granted to grandparents. See *infra* notes 23-29 and accompanying text (discussing exceptional circumstances standard and providing examples of exceptional circumstances).

5. *Fairbanks*, 330 Md. at 43, 622 A.2d at 123.

6. *Id.* The term "joint custody" consists of two distinct concepts: (1) legal custody and (2) physical custody. *Taylor v. Taylor*, 306 Md. 290, 296, 508 A.2d 964, 967 (1986). "Legal custody carries with it the right and obligation to make long range decisions involving education, religious training, discipline, medical care, and other matters of major significance concerning the child's life and welfare." *Id.* With joint legal custody, both parents have an equal voice in making such decisions, and neither parent's rights are superior to the other. *Id.*; see *infra* note 7 (discussing physical custody).

named the father as the custodial parent⁷ while the mother retained the right to visit the children every other weekend, two weeks during the summer, and on certain holidays.⁸

The paternal grandparents saw the children frequently throughout the week while the children were with their father.⁹ The maternal grandparents, on the other hand, usually saw their grandchildren only every other Sunday, while the children were with their mother, for a family dinner.¹⁰ There were no provisions for grandparental visitation in the divorce agreement.¹¹ Unhappy with this arrangement, the maternal grandparents filed a complaint against the father seeking independent visitation rights of the children.¹² They alleged that the father would not voluntarily expand the time that the children might spend with them,¹³ and thus, they were unable to continue establishing a meaningful relationship with their grandchildren.¹⁴ The father answered the complaint by stating that the maternal grandparents had adequate access to the children when the children visited their mother.¹⁵ At the subsequent hearing, however, the mother testified that she no longer wanted to share her limited visitation time with her parents.¹⁶

At that hearing, the judge denied the maternal grandparents' petition for visitation rights.¹⁷ The court determined that there were

7. As the custodial parent, the father was given physical custody of the children. Physical custody involves the "right and obligation to provide a home for the child and to make the day-to-day decisions required during the time the child is actually with the parent having such custody." *Taylor*, 306 Md. at 296-97, 508 A.2d at 967 (1986).

8. *Fairbanks*, 330 Md. at 43, 622 A.2d at 123.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* The complaint was filed in the Circuit Court for Dorchester County, Maryland. The complaint alleged that, since the divorce, the defendant had engaged in a continuous pattern of behavior that prevented the grandparents from having reasonable visitation with the children. Complaint for Visitation Rights at E.2, *Fairbanks* (No. C2241).

13. *Fairbanks*, 330 Md. at 43, 622 A.2d at 123.

14. Complaint for Visitation Rights at E.2, *Fairbanks* (No. C2241).

15. *Fairbanks*, 330 Md. at 43, 622 A.2d at 123.

16. *Id.* It is unclear why the mother took this position. She may have genuinely decided that she did not have enough time with the children to afford sharing any of her time with the maternal grandparents. The decision, on the other hand, may have been the result of ill feelings between the mother and her parents. The court raised a red flag at the end of its opinion concerning this issue. *Id.* at 50, 622 A.2d at 127. The court stated: "[f]inally, without in any way inferring its presence in this case, a petition for grandparental visitation must not foster collusion between grandparents and a non-custodial parent seeking to undo a prior decree and win greater access to the child in question."

Id.

17. *Id.* at 44, 622 A.2d at 123.

no exceptional circumstances¹⁸ to warrant any additional visitation orders.¹⁹ The maternal grandparents appealed and, on its own initiative, the Court of Appeals of Maryland granted certiorari prior to intermediate appellate review.²⁰ The court of appeals held that the absence of exceptional circumstances was irrelevant.²¹ Maryland's highest court determined that the standard for grandparental visitation in Maryland is not predicated on whether exceptional circumstances exist, but rather, solely on the child's best interest.²²

II. BACKGROUND

At common law, prior to the enactment of grandparent visitation statutes, grandparents possessed no independent right to visit their grandchildren unless either the parents of the child consented to such visitation or exceptional circumstances were determined to exist by a court.²³ Grandparents' interests were moral, not legal.²⁴ As a result, the child's parents maintained virtual autonomy in deciding whether the grandparents could visit the grandchildren; judicial oversight was minimal. In the absence of exceptional circumstances, granting visitation privileges to the grandparents over the objection of a parent constituted reversible error.²⁵ Thus, where the parents refused visitation rights to the grandparents, the grandparents were without legal recourse unless exceptional circumstances were present. Exceptional circumstances included situations where a parent had died,²⁶ a parent was declared unfit,²⁷ a father was on duty in the armed forces,²⁸ and where a parent had abandoned the child.²⁹

18. See *infra* notes 23-29 and accompanying text (discussing the exceptional circumstances standard used at common law).

19. *Fairbanks*, 330 Md. at 44, 622 A.2d at 124.

20. *Id.*

21. *Id.* at 48, 622 A.2d at 126.

22. *Id.* at 49, 622 A.2d at 126.

23. See Succession of Reiss, 15 So. 151, 152 (La. 1894); Phyllis C. Borzi, Note, *Statutory Visitation Rights of Grandparents: One Step Closer to the Best Interests of the Child*, 26 CATH. U. L. REV. 387-89 (1977) (stating that the parents' decision controlled unless the grandparent could prove that the custodial parent was unfit); Patricia S. Fernandez, *Grandparent Access: A Model Statute*, 6 YALE L. & POL'Y REV. 109, 114 (1988) (stating that grandparents had no judicially enforceable right of access to the grandchildren when they were in the custody of their parents unless exceptional circumstances existed).

24. Fernandez, *supra* note 23, at 114.

25. *Lingwall v. Hoener*, 464 N.E.2d 1248, 1249 (Ill. App. Ct. 1984) (citing *Chodzko v. Chodzko*, 360 N.E.2d 60 (1976)); see also *supra* note 23 and accompanying text.

26. *Boyles v. Boyles*, 302 N.E.2d 199, 201 (Ill. App. Ct. 1973).

27. Succession of Reiss, 15 So. 151, 152 (La. 1894).

28. *Solomon v. Solomon*, 49 N.E.2d 807, 808 (Ill. App. Ct. 1943).

29. *Benner v. Benner*, 248 P.2d 425, 426 (Cal. Dist. Ct. App. 1952).

Policy reasons for the common-law rule included the notion that judicial enforcement of grandparental visitation would further divide the family unit as well as hinder parental authority.³⁰ Thus, the child's best interest could not be served by forcing the child into the "midst of a conflict of authority and ill feelings between parent and grandparent."³¹

Furthermore, under the common law, grandparents' rights were considered derivative.³² In other words, the grandparents' rights stemmed from a corresponding right enjoyed by the parent.³³ Therefore, the paternal grandparents could visit the child during the father's visitation time and the maternal grandparents could visit the child during the mother's visitation time. If a parent did not have visitation privileges, then neither did his or her parents.

Over time, state legislatures began to reject the common-law rule. Today, all fifty states have enacted statutes authorizing courts to grant visitation rights to grandparents under certain circumstances.³⁴

30. Annotation, *Grandparent Visitation Rights*, 90 A.L.R.3d 222, 225-26 (1979).

31. *Id.* at 226.

32. See *In re Adoption of a Child*, 355 A.2d 211, 212 (N.J. Super. Ct. Ch. Div. 1976) (stating that grandparents' rights are derivative through the natural parent unless there is legislation to the contrary).

33. *Fairbanks v. McCarter*, 330 Md. 39, 48-49, 622 A.2d 121, 126 (1993).

34. See ALASKA STAT. § 30-3-4 (1994); ARIZ. REV. STAT. ANN. § 25-337.01 (1994); ARK. CODE ANN. § 9-13-103 (Michie 1994); CAL. FAM. CODE § 3103 (West 1993); COLO. REV. STAT. § 19-1-117 (1994); CONN. GEN. STAT. ANN. § 466-59 (West 1993); DEL. CODE ANN. tit. 10, § 1031 (1994); FLA. STAT. ANN. § 752.01 (West 1994); GA. CODE ANN. § 19-7-3 (1994); HAW. REV. STAT. § 571-46 (1993); IDAHO CODE § 32-719 (1994); ILL. ANN. STAT. ch. 755, para. 11-7.1 (Smith-Hurd 1994); IND. CODE ANN. § 31-1-11.7.2 (West 1994); IOWA CODE ANN. § 598.35 (West 1993); KAN. STAT. ANN. § 38-129 (1993); KY. REV. STAT. ANN. § 405.021 (Baldwin 1994); LA. REV. STAT. ANN. § 344 (West 1993); ME. REV. STAT. ANN. tit. 19, §§ 1001-05 (West 1994); MD. CODE ANN., FAM. LAW § 9-102 (Supp. 1994); MASS. GEN. L. ch. 119, § 39D (1994); MICH. COMP. LAWS ANN. § 722.27b (West 1994); MINN. STAT. ANN. § 257.022 (West 1994); MISS. CODE ANN. § 93-16-1 (1993); MO. ANN. STAT. § 452.402 (Vernon 1993); MONT. CODE ANN. § 40-9-102 (1993); NEB. REV. STAT. § 43-1802 (1993); NEV. REV. STAT. § 432B.560 (1993); N.H. REV. STAT. ANN. § 458:17-a (1993); N.J. STAT. ANN. § 9:2-7.1 (West 1994); N.M. STAT. ANN. § 40-9-2 (Michie 1994); N.Y. DOM. REL. LAW § 72 (McKinney 1994); N.C. GEN. STAT. § 50-13.2, 50-13.2A (1994); N.D. CENT. CODE § 14-09-05.1 (1993); OHIO REV. CODE ANN. § 3109.051 (Baldwin 1992); OKLA. STAT. ANN. tit. 10, § 5 (West 1994); OR. REV. STAT. § 109.121 (1993); 23 PA. CONS. STAT. ANN. §§ 5311-14 (1994); R.I. GEN. LAWS § 15-5-24.3 (1994); S.C. CODE ANN. § 20-7-420 (Law. Co-op 1993); S.D. CODIFIED LAWS ANN. § 25-4-52 (1994); TENN. CODE ANN. § 36-6-301 (1994); TEX. FAM. CODE ANN. § 14.03 (West 1993); UTAH CODE ANN. § 30-5-2 (1994); VT. STAT. ANN. tit. 15, § 1011 (1993); VA. CODE ANN. § 20-107.2 (Michie 1994); WASH. REV. CODE ANN. § 09.240 (West 1994); W. VA. CODE § 48-26-1 (1994); WIS. STAT. ANN. § 767.245 (West 1993); WYO. STAT.

Legislative history surrounding the passage of these statutes is virtually nonexistent.³⁵ These statutes, however, are likely a result of increasing divorce rates³⁶ and the strong lobbying efforts of grandparents.³⁷ As divorce often results in both the physical and emotional division of a family, a custodial parent may very well deny the ex-spouse's parents any opportunity to visit the grandchildren, even where a strong relationship had previously existed between that grandparent and grandchild.³⁸ Grandparent visitation statutes protect the ties between grandchildren and their grandparents and recognize the nurturing relationship that often exists between them.³⁹ The grandparent-grandchild relationship may be especially important to a child when divorce divides the nuclear family.⁴⁰

Maryland's first statute specifically addressing grandparental visitation rights was enacted in 1981.⁴¹ Under section 3-602(a)(4) of the Courts and Judicial Proceedings Article of the Maryland Annotated Code, a court of equity could:

[d]etermine who shall have visitation rights to a child. At any time following the termination of a marriage, the court may consider a petition for reasonable visitation by one or more of the grandparents of a natural or adopted child of the parties whose marriage has been terminated, and may

§ 20-7-101 (1994); see also Fernandez, *supra* note 23, at 117; Kristen Jones Indermark, Note, *Permissive Intervention—Grandparents' Key to Entering Adoption Proceedings*, 26 GA. L. REV. 787, 829 n.165 (1992).

35. Borzi, *supra* note 23, at 393.

36. Fernandez, *supra* note 23, at 115.

37. See Megan Rosenfeld, *Grandparents' Rights: Activists Turn to Court to Protect Their Ties to Grandchildren*, WASH. POST, Oct. 16, 1991, at Z12. The number of grandparents is growing. It is estimated that as of 1991 there were 58 million grandparents, and in the year 2001 there will be 98 million. *Id.* For a further discussion of possible factors influencing the creation of grandparent visitation statutes, see Fernandez, *supra* note 23, at 115-17.

38. See Fernandez, *supra* note 23, at 115.

39. Cf. Anne Marie Jackson, Comment, *The Coming of Age of Grandparent Visitation Rights*, 43 AM. U. L. REV. 563, 591 (1994) (stating that guidelines for grandparental visitation should consider the nature of the relationship between the grandparent and the child, including whether the relationship was "a nurturing, caring, relationship").

40. Grandparents can comprise a secondary support system or a "safety net" for grandchildren when the child's nuclear family divides. Indermark, *supra* note 34, at 806-07. During such transitional times, grandparents may offer a calming influence on the grandchildren and provide needed stability. Fernandez, *supra* note 23, at 110.

41. 1981 Md. Laws ch. 276 (repealed and reenacted by 1984 Md. Laws ch. 296, § 9-101; renumbered at 1984 Md. Laws ch. 529 § 9-102; current version at Md. CODE ANN., FAM. LAW § 9-102 (Supp. 1994)).

grant such visitation if the court believes it to be in the best interests of the child⁴²

Prior to 1981, this section did not specifically include the language regarding grandparents. Rather, section 3-602(a)(4) simply stated that a court of equity could "determine who shall have visitation rights to a child."⁴³ "[S]ection 3-602(a)(4), prior to the 1981 amendment, constituted the broadest possible grant of authority to courts to determine who shall be awarded visitation rights."⁴⁴ Inherent in this broad language was the right of a court to grant visitation rights to grandparents.⁴⁵ Nevertheless, in 1981, the legislature added language to the statute specifying grandparents as possible candidates for such visitation rights.⁴⁶

The evolution of this statute, as well as its legislative history, was examined in *Skeens v. Paterno*,⁴⁷ a 1984 Maryland court of special appeals decision. In *Skeens*, an unmarried minor, Debra Skeens, gave birth to the child of Jeffrey Paterno.⁴⁸ After learning of the pregnancy, Paterno proposed to Skeens, but she declined Paterno's offer of marriage.⁴⁹ Skeens subsequently decided to place the child up for adoption.⁵⁰ Three days after the child was born, Paterno brought suit to enjoin Skeens from proceeding with any action relative to the child's adoption and also requested custody of the child.⁵¹ During the course of the ensuing litigation, the adoption issue was withdrawn, leaving only the custody issue.⁵²

The trial court awarded custody to Skeens with liberal visitation rights to Paterno.⁵³ Because Paterno was an enlisted member of the

42. *Id.*

43. 1975 Md. Laws ch. 317 § 3-602(a)(4) (current version at MD. CODE ANN., FAM. LAW § 9-102 (Supp. 1994)).

44. *Evans v. Evans*, 302 Md. 334, 339, 488 A.2d 157, 159 (1985).

45. *See id.* at 339-43, 488 A.2d at 159-61; *Skeens v. Paterno*, 60 Md. App. 48, 60, 480 A.2d 820, 826 (1984), *overruled by* *Fairbanks v. McCarter*, 330 Md. 39, 622 A.2d 121 (1993).

46. 1981 Md. Laws ch. 276 (repealed and reenacted by 1984 Md. Laws ch. 296, § 9-101; renumbered by 1984 Md. Laws ch. 529 § 9-102; current version at MD. CODE ANN., FAM. LAW § 9-102 (Supp. 1994)) (clarifying that a court may grant visitation rights to grandparents of a child). Senate Bill 333 was a "culmination of a four-year effort to enact legislation to afford visitation rights to grandparents." *Evans*, 302 Md. at 339, 488 A.2d at 159 (referring to S.B. 333, 1981 Sess. (Md. 1981)).

47. 60 Md. App. 48, 480 A.2d 820 (1984), *overruled by* *Fairbanks v. McCarter*, 330 Md. 39, 622 A.2d 121 (1993).

48. *Id.* at 53, 480 A.2d at 822.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* The trial court stated in its order that the father was entitled to visitation

United States Navy, however, his parents were granted visitation rights with the child while their son was away on duty.⁵⁴ The court of special appeals affirmed the lower court's decision to award the paternal grandparents such visitation privileges due to the exceptional circumstances.⁵⁵

The *Skeens* court applied the grandparent visitation statute, section 3-602(a)(4).⁵⁶ The court of special appeals recognized that, under the statute, the "ultimate test for custody and visitation is the best interests of the child."⁵⁷ The court stated further that custody should be granted to a grandparent, as against a parent, only in the presence of exceptional circumstances.⁵⁸ The same requirement "may also be true as to grandparental visitation."⁵⁹ The court held that

with the child at least "two consecutive days and nights per week, alternating major holidays of New Years, Easter, Memorial Day, Thanksgiving and Christmas and six consecutive weeks during the summer months of June, July and August of each year." *Id.* at 55, 480 A.2d at 823.

54. *Id.*

55. *Id.* at 61-62, 480 A.2d at 826-27. The court of appeals denied the Skeens' petition for writ of certiorari. *Skeens v. Paterno*, 301 Md. 639, 484 A.2d 274 (1984).

56. 1981 Md. Laws ch. 276 (repealed and reenacted by 1984 Md. Laws ch. 296, § 9-101; renumbered by 1984 Md. Laws ch. 529 § 9-102; current version at MD. CODE ANN., FAM. LAW § 9-102 (Supp. 1994)). The Skeens contended that § 3-602(a)(4) of the Maryland Code was not applicable in this case since Debra Skeens and Paterno had never married. *Skeens*, 60 Md. App. at 58-60, 480 A.2d at 825-26. They argued that the 1981 amendment to § 3-602(a)(4) limited a court's authority to grant grandparental visitation in only those situations where a marriage had terminated. *Id.* at 58, 480 A.2d at 825. The court, however, rejected the Skeens contention. *Id.* at 59-61, 480 A.2d at 825-26. Although the court conceded that the statute could be subject to such an interpretation, the court ultimately held that § 3-602(a)(4) "does no more than restate existing law as to grandparental visitation rights in a termination of marriage context." *Id.* at 59-61, 480 A.2d at 825-26. Thus, the statute does not limit the power of a court in considering requests by grandparents for custody and visitation under other circumstances. *Id.* at 61, 480 A.2d at 826.

57. *Id.*

58. *Id.*

59. *Id.* (citations omitted). The court's proposal that grandparental visitation should be based upon exceptional circumstances is dictum. *Fairbanks v. McCarter*, 330 Md. 39, 48, 622 A.2d 121, 126 (1993). The court did not explore this proposition further because it determined that the father's absence on naval duty constituted an exceptional circumstance. *Skeens*, 60 Md. App. at 61, 480 A.2d at 826. Therefore, because this exceptional circumstance existed, the court automatically awarded the paternal grandparents visitation privileges. *Id.* at 61-62, 480 A.2d at 826-27.

In support of this dictum, the court made an analogy between visitation and custody—since exceptional circumstances are required to grant custody to a grandparent over a parent, such circumstances are also required to grant visitation rights to grandparents. *Id.* at 61, 480 A.2d at 826; *see also infra* notes 64-65 and accompanying text (discussion of exceptional circumstance

the father's absence on naval duty constituted such an exceptional circumstance.⁶⁰ The only way the child could maintain contact with the paternal side of the family was through Paterno's parents.⁶¹

Skeens is significant to Maryland law because the court pronounced an exceptional circumstances requirement in the context of grandparental visitation despite the absence of such a requirement in the plain language of section 3-602(a)(4).⁶² It appears that the court adopted the exceptional circumstances requirement from custody law and incorporated that principle into the realm of grandparental visitation.⁶³ At the time *Skeens* was decided, it had been well established by the Maryland courts that exceptional circumstances were required to grant custody of a child to a third party over the biological parent.⁶⁴ That requirement still exists today based upon the same presumption that as between a biological parent and a third party, the child's best interests are best served by granting custody to the parent unless exceptional circumstances are present.⁶⁵

requirement in custody law). The court also relied on *Chodzko v. Chodzko*, 360 N.E.2d 60 (Ill. 1976), and *In re Adoption of a Child*, 355 A.2d 211 (N.J. Super. Ct. Ch. Div. 1976). *Skeens*, 60 Md. App. at 61, 480 A.2d at 826. Since *Skeens* was decided, however, *Chodzko* has been effectively overruled by the Illinois Marriage and Dissolution of Marriage Act. ILL. REV. STAT. ch. 40, para. 607(b) (1983) (The statute provides that "the court may grant reasonable visitation privileges to a grandparent . . . if the court determines that it is in the best interests and welfare of the child."). Special circumstances are no longer a necessary prerequisite in awarding grandparents visitation rights in Illinois. The statute "enlarges the power to grant grandparent visitation beyond that which existed at common law." *Lingwall v. Hoener*, 464 N.E.2d 1248, 1249 (Ill. App. Ct. 1984). Likewise, one year after *In re Adoption of a Child* was decided, the Superior Court of New Jersey, Appellate Division, held that grandparents' rights are not derivative. *Bennett v. Bennett*, 376 A.2d 191, 193 (N.J. Super. Ct. App. Div. 1977). The granting of such rights depends solely upon whether it is in the best interest of the child. *Id.*

60. *Skeens*, 60 Md. App. at 61, 480 A.2d at 826.

61. *Id.* at 61, 480 A.2d 826-27.

62. *Compare Skeens*, 60 Md. App. at 61-62, 480 A.2d at 826-27 (determining that the father's absence on naval duty was an exceptional circumstance and awarding visitation rights to the grandparents) *with* 1981 Md. Laws ch. 276 (repealed and reenacted by 1984 Md. Laws ch. 296, § 9-101; renumbered by 1984 Md. Laws ch. 529 § 9-102; current version at MD. CODE ANN., FAM. LAW § 9-102 (Supp. 1994)) (setting forth as the only requirement for grandparental visitation "the best interest of the child").

63. *See supra* notes 58-59 and accompanying text.

64. *See Ross v. Hoffman*, 280 Md. 172, 177-78, 372 A.2d 582, 586-87 (1977).

65. "When the dispute is between a biological parent and a third party, it is presumed that the child's best interest is subserved by custody to the parent. That presumption is overcome and such custody will be denied if (a) the parent is unfit to have custody, or (b) if there are such exceptional circumstances as [to] make such custody detrimental to the best interest of the child." *Id.* at 178-79, 372 A.2d at 587. The burden of proof is on the third party. *Id.* at 178, 372 A.2d at 587.

Skeens was the first Maryland appellate case to suggest that such a presumption also exists with grandparental visitation.⁶⁶ In other words, *Skeens* suggested that without exceptional circumstances, the child's interests were presumably best served by granting visitation only to the child's parents, not the grandparents.⁶⁷ Since the *Skeens* decision in 1984, neither the legislature nor the courts had affirmed or disputed the requirement of exceptional circumstances in the context of grandparental visitation until *Fairbanks v. McCarter*⁶⁸ in 1993. Before *Fairbanks* was decided, though, Maryland's grandparent visitation statute underwent two non-substantive changes, neither of which affected the *Skeens* exceptional circumstances requirement.

The Maryland General Assembly first moved the visitation statute, in 1984, from section 3-602 of the Courts and Judicial Proceedings Article⁶⁹ to section 9-102 of the Family Law Article.⁷⁰ While in the Courts and Judicial Proceedings Article, the grandparent visitation statute was part of a broad section entitled "Custody, Guardianship, Maintenance, and Support of a Child."⁷¹ As a result of the move to the Family Law Article, however, the visitation statute stood alone and was entitled "Petition by Grandparents for Visitation."⁷²

A second change, made by the Maryland legislature in 1991, was clarifying in nature. The previous statute authorized an equity court to grant visitation rights to a grandparent after "termination of a [parents'] marriage."⁷³ The 1991 amendment added language to the statute to clarify the court's power to consider a petition for visitation by a grandparent "after the termination of a marriage by divorce, annulment, or death."⁷⁴ *Fairbanks v. McCarter*,⁷⁵ decided two years later, examined Maryland's grandparent visitation statute in light of the 1991 amendment.⁷⁶ The 1991 amended version of section 9-102 read as follows:

66. See *Fairbanks v. McCarter*, 330 Md. 39, 48, 622 A.2d 121, 126 (1993).

67. See *Skeens v. Paterno*, 60 Md. App. 48, 61, 480 A.2d 820, 826 (1984).

68. 330 Md. 39, 622 A.2d 121 (1993).

69. 1981 Md. Laws ch. 276 § 3-602(a)(4).

70. Chapter 296 of the 1984 Maryland Laws recodified § 3-602(a)(4) of the Courts and Judicial Proceedings Article as § 9-101 of the Family Law Article. 1984 Md. Laws ch. 296. Later that same year, the legislature renumbered that section as 9-102. 1984 Md. Laws ch. 529.

71. 1981 Md. Laws ch. 276 § 3-602(a)(4).

72. 1984 Md. Laws ch. 529 § 9-102 (current version at MD. CODE ANN., FAM. LAW § 9-102 (Supp. 1994)).

73. 1984 Md. Laws ch. 529 § 9-102.

74. 1991 Md. Laws ch. 247 (current version at MD. CODE ANN., FAM. LAW § 9-102 (Supp. 1994)).

75. 330 Md. 39, 622 A.2d 121 (1993).

76. *Id.* at 46-48, 622 A.2d at 125-27.

At any time after the termination of a marriage by divorce, annulment, or death, an equity court may:

(1) consider a petition for reasonable visitation by a grandparent of a natural or adopted child of the parties whose marriage has been terminated; and

(2) if the court finds it to be in the best interests of the child, grant visitation rights to the grandparent.⁷⁷

After the decision in *Fairbanks v. McCarter*, section 9-102 underwent yet another change—grandparents may now petition a court for visitation rights even though the nuclear family is intact.⁷⁸

“An equity court may: (1) consider a petition for reasonable visitation of a grandchild by a grandparent; and (2) if the court finds it to be in the best interests of the child, grant visitation rights to the grandparent.”⁷⁹ The marital status of the parents is now irrelevant in determining visitation rights of grandparents.⁸⁰

III. INSTANT CASE

In *Fairbanks v. McCarter*,⁸¹ the trial court did not rely on Maryland's grandparent visitation statute. Rather, the trial court's opinion relied primarily on the teachings in *Skeens v. Paterno*.⁸² The *Fairbanks* trial court asserted three principles in its opinion:

[T]he first, and probably the most important [principle] to make note of, is that the ultimate test in any of these cases is what is in the best interest of the children.

The second of these principles . . . is that [when] you are talking about custody of children, custody awarded to grandparents as against a parent is only to be granted when there are exceptional circumstances.

In [*Skeens v.*] Paterno the Court further notes that that may also be true with respect to grandparental visitation

.....

.....

. . . [T]here is at least a [third] principle that absent other exceptional factors, the visitation or custody with the

77. 1991 Md. Laws ch. 247 (current version at MD. CODE ANN., FAM. LAW § 9-102 (Supp. 1994)).

78. MD. CODE ANN., FAM. LAW § 9-102 (Supp. 1994); see also *Beckman v. Boggs*, No. 78, 1995 WL 119124 (Md. Mar. 22, 1995) (applying 1993 version of Maryland's grandparent visitation statute).

79. MD. CODE ANN., FAM. LAW § 9-102 (Supp. 1994).

80. *Id.*

81. 330 Md. 39, 622 A.2d 121 (1993).

82. *Skeens v. Paterno*, 60 Md. App. 48, 480 A.2d 820 (1984), *overruled by* *Fairbanks v. McCarter*, 330 Md. 39, 48, 622 A.2d 121, 126 (1993).

grandparents is in substitution of or in lieu of custody or visitation with the parent⁸³

As discussed above,⁸⁴ the Court of Special Appeals of Maryland proposed in *Skeens* that exceptional circumstances were required in order to grant visitation rights to grandparents.⁸⁵ In applying the principles set forth in *Skeens*, the trial court in *Fairbanks* determined that the issuance of additional visitation orders was not in the children's best interest⁸⁶ because exceptional circumstances did not exist.⁸⁷ The court maintained that visitation with the maternal grandparents was not necessary.⁸⁸ The children's mother had visitation rights and, therefore, the maternal grandparents could visit the children while they were in their mother's care.⁸⁹

The court of appeals disagreed with the trial court's rationale.⁹⁰ Maryland's highest court held that, under section 9-102 of the Family Law Article, grandparents have an independent right to petition the court for visitation of their grandchildren.⁹¹ According to the court, grandparents no longer have to prove the existence of exceptional circumstances when petitioning the court for visitation privileges.⁹² A trial court should be guided exclusively by the best interests of the grandchildren.⁹³

In its analysis, the court of appeals first examined the traditional rules of statutory construction.⁹⁴ The court stated that the words of a statute must be given their ordinary meaning⁹⁵ and that a court

83. *Fairbanks*, 330 Md. at 44, 622 A.2d at 124 (citing *Skeens*, 60 Md. App. at 61, 480 A.2d at 826).

84. See *supra* text accompanying notes 56-67.

85. *Skeens*, 60 Md. App. at 61, 480 A.2d at 826.

86. Trial Transcript at 66-67, *Fairbanks v. McCarter* (No. C4171) (Cir. Ct. Dorchester County, Md.).

87. The trial judge also noted that these children had more contact with their grandparents, maternal and paternal, than most other children have with their grandparents. Trial Transcript at 67, *Fairbanks* (No. C4171).

88. Trial Transcript at 65-66, *Fairbanks* (No. C4171).

89. Trial Transcript at 66, *Fairbanks* (No. C4171).

90. *Fairbanks v. McCarter*, 330 Md. 39, 48-49, 622 A.2d 121, 126 (1993).

91. *Id.*; see also *Beckman v. Boggs*, No. 78, 1995 WL 119124 at *6 (Md. Mar. 22, 1995) (holding that adoption of a child by maternal grandparents in no way impairs paternal grandparents' independent right to petition for visitation under § 9-102).

92. *Fairbanks*, 330 Md. at 49, 622 A.2d at 126.

93. *Id.* The court of appeals also held that it was necessary to join the mother as a party to the action even though the trial court did not rule on this issue. *Id.* at 46, 622 A.2d at 125.

94. *Id.* at 46-48, 622 A.2d at 125-26.

95. *Id.* at 46, 622 A.2d at 125; *NCR Corp. v. Comptroller*, 313 Md. 118, 124, 544 A.2d 764, 767 (1988); *Comptroller v. Fairchild Indus.*, 303 Md. 230, 284, 493 A.2d 341, 343 (1985).

cannot append additional components to a statute that are not already expressed in the statute itself.⁹⁶

With the guidance of these traditional rules, the court of appeals held that the language of section 9-102 was clear and unambiguous.⁹⁷ The court read the language as granting a court of equity the power "to consider and award reasonable grandparental visitation in furtherance of the child's best interest."⁹⁸ According to the court, "nothing in the words of [section] 9-102 suggests that only exceptional circumstances, present as conditions precedent, may justify an award of visitation to grandparents."⁹⁹

The lower court, according to the court of appeals, confused visitation with custody.¹⁰⁰ The trial court's reliance upon *Skeens v. Paterno* was misplaced.¹⁰¹ In *Skeens*, the court of special appeals proposed in dictum that grandparental visitation should be based upon exceptional circumstances, as is the case with grandparental custody.¹⁰² The court of appeals in *Fairbanks* stated, however, that "[v]isitation is a considerably less weighty matter than outright custody of a child, and does not demand the enhanced protections, embodied in the exceptional circumstances test, that attend custody awards."¹⁰³ The court therefore ruled that "[t]o the extent that *Skeens v. Paterno* indicates a requirement of special circumstances for grandparental visitation, it is disapproved."¹⁰⁴

The court also stated that because, under section 9-102, grandparents enjoy an independent right to visitation, these rights are not derivative.¹⁰⁵ In other words, a grandparent's right to visit a child is not dependent upon his or her own child's legal rights.¹⁰⁶

96. *Fairbanks*, 330 Md. at 47-48, 622 A.2d at 125; *Harris v. City of Baltimore*, 306 Md. 669, 673, 511 A.2d 52, 54 (1986); *In re Arnold M.*, 298 Md. 515, 521, 471 A.2d 313, 315-16 (1984).

97. *Fairbanks*, 330 Md. at 46, 622 A.2d at 125.

98. *Id.*

99. *Id.* at 47-48, 622 A.2d at 125. The court noted that other jurisdictions have imposed the requirement of exceptional circumstances in cases dealing with grandparental visitation. *Id.* at 48, 622 A.2d at 125 (citing *Brown v. Earnhardt*, 396 S.E.2d 358 (S.C. 1990); *Chodzko v. Chodzko*, 360 N.E.2d 60 (Ill. 1976)). *But see* discussion *supra* note 59 (noting that *Chodzko* has been effectively overruled).

100. *Fairbanks*, 330 Md. at 48-49, 622 A.2d at 126.

101. *See id.* at 48, 622 A.2d at 126.

102. *Id.*; *see supra* notes 58-65 and accompanying text (reviewing the *Skeens* decision regarding the requirement of exceptional circumstances in grandparent visitation statutes).

103. *Fairbanks*, 330 Md. at 48, 622 A.2d at 126.

104. *Id.*

105. *Id.*

106. *Id.* at 48-49, 622 A.2d at 126.

Section 9-102 calls for only a consideration of the child's best interest, according to the *Fairbanks* court.¹⁰⁷ A trial court, therefore, must only concern itself with the welfare of the child. In determining the best interests of the child under section 9-102, the court of appeals stated that the trial court

should assess in their totality all relevant factors and circumstances pertaining to the grandchild's best interests. These would include, but not be limited to: the nature and stability of the child's relationships with its parents; the nature and substantiality of the relationship between the child and the grandparent, taking into account frequency of contact, regularity of contact, and amount of time spent together; the potential benefits and detriments to the child in granting the visitation order; the effect, if any, grandparental visitation would have on the child's attachment to its nuclear family; the physical and emotional health of the adults involved; and the stability of the child's living and schooling arrangements.¹⁰⁸

The court of appeals remanded the *Fairbanks* case to the trial court, with neither an affirmance nor a reversal, for proceedings in accordance with its opinion.¹⁰⁹

Judge McAuliffe's concurring opinion agreed with the lower court on the issue of exceptional circumstances.¹¹⁰ He believed that "[u]nder ordinary circumstances and in the usual case, each parent should be willing and able to include visits with grandparents when the children are with that parent."¹¹¹ Ordinarily, therefore, it would be neither necessary nor appropriate to award separate visitation rights to the grandparents in order to accommodate the child's best interests.¹¹² Judge McAuliffe also stated, "[t]here is more than enough acrimony, heartbreak, expense, and suffering involved in child custody cases now; I am confident the legislature did not intend to exacerbate this situation by suggesting that grandparental involvement in custody and visitation disputes should become the norm."¹¹³

107. *Id.* at 49, 622 A.2d at 126; see also 1991 Md. Laws ch. 247 (current version at MD. CODE ANN., FAM. LAW § 9-102 (Supp. 1994)).

108. *Fairbanks*, 330 Md. at 50, 622 A.2d at 126-27.

109. *Id.* at 50, 622 A.2d at 127.

110. *Id.* at 50-51, 622 A.2d at 127 (McAuliffe, J., concurring). Judge McAuliffe agreed with the majority that the mother should have been joined as a party to the action but disagreed with the rest of the majority's opinion. See *supra* note 93 (noting that the majority held that it was necessary to join the mother as a party to the action).

111. *Fairbanks*, 330 Md. at 51, 622 A.2d at 127.

112. *Id.* at 50-51, 622 A.2d at 127.

113. *Id.* at 51, 622 A.2d at 127.

Accordingly, Judge McAuliffe agreed with the trial court that no exceptional circumstances existed in *Fairbanks*.¹¹⁴ Judge McAuliffe noted that the mother had visitation privileges on alternate weekends, two weeks during the summer, and on certain holidays.¹¹⁵ The concurrence also pointed out that the mother and her parents lived in close proximity and were not estranged.¹¹⁶ Judge McAuliffe stated that these circumstances provided the grandparents with adequate time for visitation.¹¹⁷ He concluded, therefore, that it would not be in the children's best interest to award additional visitation privileges to the grandparents.¹¹⁸

IV. ALTERNATIVE APPROACHES

In *Fairbanks v. McCarter*,¹¹⁹ the Maryland court of appeals properly decided that under section 9-102 a trial court may grant grandparental visitation when it is in the child's best interest, despite a lack of exceptional circumstances.¹²⁰ Under the plain language of section 9-102, the court of appeals had no alternative but to decide the case as it did. Even a liberal interpretation of the statute would not reveal an exceptional circumstance requirement for granting visitation rights to grandparents.¹²¹ The existence of exceptional circumstances, however, may be an influencing factor when a judge is determining a child's best interest. A court is to consider the totality of the circumstances.¹²² If there is an exceptional circumstance, a court may be more inclined to grant the grandparents visitation rights.¹²³ By the same token, simply because there is not an exceptional circumstance, a court's inquiry is not necessarily complete. As exemplified in *Fairbanks*, a court may not automatically conclude

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. 330 Md. 39, 622 A.2d 121 (1993).

120. *Id.* at 49, 622 A.2d at 126.

121. See 1991 Md. Laws ch. 247 (current version at MD. CODE ANN., FAM. LAW § 9-102 (Supp. 1994)).

122. *Fairbanks*, 330 Md. at 50, 622 A.2d at 126.

123. See *id.* (stating that "[t]he trial court must concern itself solely with the welfare and prospects of the child"). If exceptional circumstances exist, the child may have a greater need for stability and emotional support. See *supra* notes 23-29 and accompanying text (discussing exceptional circumstances). A court may determine that such needs would be best served by awarding the grandparents of the child visitation rights. Thus, even though the *Fairbanks* court held that exceptional circumstances were not required to award visitation rights to grandparents, the court did not preclude the consideration of such circumstances. See *Fairbanks*, 330 Md. at 48, 622 A.2d at 126.

that since no exceptional circumstances exist, an award of grandparental visitation rights is not in the child's best interest.¹²⁴ Rather, the court must consider all of the facts and circumstances to discern the child's best interest.¹²⁵

Not only did the *Fairbanks* court properly interpret section 9-102, but the approach contained in that section represents the best method for resolving grandparental visitation disputes.

Each case concerning grandparents and grandchildren involves distinct differences and intricacies. Just as no two people are created alike, no two relationships develop alike. Furthermore, each case will unavoidably involve many intangible factors, such as the unique needs of the child and the strength of the familial relationships. It is for these reasons that a court, in determining whether to make an award of grandparental visitation, needs the liberty to use its own discretion. A judge should not decide whether to award visitation based solely on one fact or circumstance. The best interest of the child standard affords a court this flexibility.

Concededly, the best interest of the child standard is not perfect. "Present methods for determining a child's best interest are time-consuming [and] involve a multitude of intangible factors that oft-times are ambiguous."¹²⁶ It is true that the child's best interest standard is broad and vague,¹²⁷ but the very nature of these disputes requires such a flexible standard.

The sole alternative to the child's best interest approach is a more mechanical, objective approach. Such an approach would attempt to limit judicial discretion, and thus make the outcome of such proceedings more predictable and uniform. The exceptional circumstances approach and the derivative rights approach discussed above¹²⁸ are both examples of a more mechanical approach. Although

124. The court of appeals in *Fairbanks v. McCarter* listed several factors to guide a trial court in ascertaining the child's best interest. *Fairbanks*, 330 Md. at 50, 622 A.2d at 126-27; see *supra* text accompanying note 108. The court stated that the list is not comprehensive, and also that trial courts should "assess in their totality all relevant factors and circumstances. . . ." *Fairbanks*, 330 Md. at 50, 622 A.2d at 126. Thus, it appears that no one factor is determinative of the child's best interests.

125. *Fairbanks*, 330 Md. at 50, 622 A.2d at 126.

126. *Montgomery County Dep't of Social Servs. v. Sanders*, 38 Md. App. 406, 419, 381 A.2d 1154, 1163 (1978).

127. Other criticisms of the child's best interest standard include: the notion that the standard is actually more focused on the parents' interests rather than the child's interests; the meaning of the phrase, the "child's best interest," is itself unclear and undefined; the standard is subject to judicial abuse because of its vagueness; and litigation is encouraged because of the uncertainty in such proceedings. Andrea Charlow, *Awarding Custody: The Best Interests of the Child and Other Fictions*, 5 YALE L. & POL'Y REV. 267, 267-73 (1987).

128. See *supra* notes 23-29 and accompanying text (discussing exceptional circum-

both standards may seek to fulfill the best interests of the child, they impose additional threshold requirements.¹²⁹

The exceptional circumstances standard is too restrictive. It appears to presume that if exceptional circumstances do not exist, there is no reason to grant a grandparent visitation rights. A presumption of this sort is not always in a child's best interest. Consider, for example, the parents of two minor children who divorce. The mother gains custody of the children and the father visits the children once a month. The paternal grandparents, who had been very close with their grandchildren, live two blocks from the mother's house. After the divorce, the mother decides that she no longer wants her children visiting the paternal grandparents because of the bitter feelings that have developed between the mother and the paternal grandparents. Although the feelings between the mother and the grandparents have deteriorated, the grandchildren and grandparents still love each other. In this example, there are no exceptional circumstances. The father has visitation privileges once a month, so therefore, the children are able to maintain contact with the paternal side of the family. Additionally, both parents are alive, both parents are fit and healthy, and the grandparents live in close proximity to the mother.¹³⁰ If the paternal grandparents petition the court for visitation in a jurisdiction requiring the presence of exceptional circumstances, their petition would almost certainly be denied.¹³¹ A judge would automatically deny visitation to the grandparents simply because of the lack of exceptional circumstances. Under the non-mechanical best interest of the child approach, however, a judge would explore all of the factors. Only after such a liberal examination

stances standard); *supra* notes 32-33 and accompanying text (discussing derivative rights approach).

129. Although the exceptional circumstance approach seeks to fulfill a child's best interest, exceptional circumstances must first exist before the court may consider awarding visitation rights to a grandparent. *See Borzi, supra* note 23. Likewise, under the derivative rights approach, the grandparent's derivative right becomes effective only upon the legal absence of the related parent. Fernandez, *supra* note 23, at 118. "The grandparent may then petition for visitation with the child, since the related parent is no longer able to ensure contact between grandparent and child." *Id.*
130. *See supra* text accompanying notes 26-29 (providing examples of exceptional circumstances).
131. *See generally* Brown v. Earnhardt, 396 S.E.2d 358 (S.C. 1990). In *Brown*, the Supreme Court of South Carolina denied the paternal grandparents visitation rights. *Id.* at 360. The court noted that the father of the children had liberal visitation rights, and therefore, the paternal grandparents could visit the children during that time. *Id.* at 359-60. The court held that the grandparents were not "entitled to contend for autonomous visitation privileges absent a showing of exceptional circumstances." *Id.* at 360.

could a judge determine that grandparental visitation would or would not be in the child's best interest.¹³² The latter approach is more workable and less likely to lead to harsh and unjust results.

Similarly, while simple to apply, the derivative rights alternative is too restrictive.¹³³ Under this approach, a grandparent's rights are not independent of the related parent's legal status.¹³⁴ Like the exceptional circumstances approach, this standard may also fail to fulfill a child's best interests. The fact that a child's father is not entitled to visitation, for example, should not automatically bar the paternal grandparents from visiting the child.¹³⁵ Such an automatic bar may be contrary to a child's best interest, especially where the child and grandparents share a special relationship.

The exceptional circumstances approach and the derivative rights theory fail, therefore, because they do not allow a court to determine what is truly in a child's best interest.¹³⁶ Both approaches are too simplistic given the complexities of the relationships involved. Only the best interest standard furnishes a judge the freedom to adjudicate these personal matters with an unrestricted sense of fairness.

V. CONCLUSION

The Court of Appeals of Maryland correctly interpreted section 9-102 of the Family Law Article in *Fairbanks v. McCarter*.¹³⁷ The court made clear that grandparents have an independent right to petition a court for visitation rights with their grandchildren.¹³⁸ *Fairbanks* held that "[t]he outcome of the grandparents' petition lies within the sound discretion of the trial court, guided solely by the

132. *Fairbanks*, 330 Md. at 50, 622 A.2d at 126 (stating that the "court should assess in their totality all relevant factors and circumstances pertaining to the grandchild's best interests").

133. See Fernandez, *supra* note 23, at 118-19.

134. *Id.*

135. *Id.*

136. The hypothetical example that follows illustrates how a mechanical approach may fail to serve a child's best interests, but fulfill a parent's best interests. The father gains custody of his children. The mother is denied visitation privileges, and the father refuses to allow the maternal grandparents visitation time with the children because of the father's ill feelings towards the maternal grandparents. If a court applied the derivative rights approach, the maternal grandparents would have no right to visitation simply because the mother of the children had no right to visitation. Such a result may not be in the children's best interest if the grandchildren and the maternal grandparents had enjoyed a substantial and nurturing relationship prior to the divorce. It is, however, in the father's best interest, because he does not want the children to have contact with the maternal grandparents.

137. 330 Md. 39, 622 A.2d 121 (1993).

138. *Id.* at 49, 622 A.2d at 126.

best interests of the grandchild."¹³⁹ The child's best interest is now the exclusive consideration for Maryland's courts. Therefore, there is no longer a requirement that exceptional circumstances exist before a grandparent can be awarded visitation rights. Now, a court may award grandparental visitation absent exceptional circumstances as long as the visitation is determined to be in the child's best interests.

The child's best interest standard is the best approach to the grandparental visitation issue. The very nature of these disputes requires an in-depth inquiry into the specific facts and circumstances of each family. Mechanical approaches, such as the exceptional circumstances and derivative rights approaches, are too simplistic and undermine the legislature's overall objective of fulfilling a child's best interest.

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139: *Id.*