Re-Evaluating Grandparental Visitation in North Carolina in Light of Troxel v. Granville

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RE-EVALUATING GRANDPARENTAL VISITATION IN NORTH CAROLINA IN LIGHT OF TROXEL v. GRANVILLE

BY JOHN M. LEWIS

I. INTRODUCTION

Imagine the following situation: John and Jane meet, fall in love, marry, and have a daughter that they name Donna. John is a paratrooper stationed at Fort Bragg, North Carolina. He and his family live in rural Cumberland County on a three-acre portion of his parents’ farm. John is an only child, and Donna is his parents’ only grandchild. As is often the case, the relationship between Jane and John’s mother is rather strained. Jane feels that John’s mother is too intrusive, and John’s mother does not think that Jane is “good enough” for her “baby boy.” Suddenly an international crisis arises, and John is sent into harms way. Tragically, John is killed in the defense of our country’s national interests. Jane grieves and remains at the marital home for a year, but when Donna is three years old, Jane decides to move closer to her parents in western North Carolina. As the months pass, Jane, for whatever reason, no longer allows John’s parents to have any communication or contact with their only grandchild. As a last resort, John’s parents visit a lawyer to find out what options, if any, they may have in regard to obtaining visitation with their granddaughter.

Although the facts of this hypothetical situation may appear unusual, situations involving the denial of grandparental visitation in cases in which where one parent is deceased, have become increasingly common. Current North Carolina law does not grant legal standing to biological grandparents except in limited circumstances. Under the facts in the above-described hypothetical, the grandparents lack legal standing to petition for court ordered visitation. In an effort

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3. See infra notes 127-139 and accompanying text.
to interpret N.C. Gen. Stat. § 50-13.1(a)\(^4\) in a manner that comports with the constitutional rights of natural parents,\(^5\) the North Carolina appellate courts have reached conclusions such as this by ignoring what appears to be a broad grant of legal standing contained within N.C. Gen. Stat. § 50-13.1(a), and by violating various long standing tenets of statutory construction.\(^6\) In light of the recent United States Supreme Court decision in *Troxel v. Granville*,\(^7\) this conclusion reached by the North Carolina appellate courts\(^8\) is no longer necessary, and may fail to adequately protect the constitutional rights of natural parents.\(^9\) As such, the North Carolina appellate courts should reverse their prior decisions and adopt a new approach to this emotionally charged and constitutionally hazardous area.\(^10\)

II. *Troxel v. Granville*

In the years since the recognition of substantive due process rights, the United States Supreme Court has examined the nature of a parent’s “protected status” concerning the “care, custody, control and supervision” of their minor children.\(^11\) In January 2000, the Supreme Court, for the first time, directly addressed the constitutionality of a statute which grants standing to grandparents to petition for court ordered visitation with their minor grandchildren.\(^12\) In *Troxel v. Gran-"

   
   Any parent, relative, or other person, agency, organization or institution claiming the right to custody of a minor child may institute an action or proceeding for the custody of such child, as hereinafter provided. Unless a contrary intent is clear, the word ‘custody’ shall be deemed to include custody or visitation or both.


   
   This Court’s decisions have by now made plain beyond the need for multiple citation that a parent’s desire for and right to “the companionship, care, custody and management of his or her children” is an important interest that “undeniably warrants deference and, absent a powerful countervailing interest, protection.”

_Id._ at 26 (quoting Stanley v. Illinois, 405 U.S. 645, 51(1972)).

6. See _infra_ notes 111-114 and accompanying text.


8. See _infra_ notes 165-172 and accompanying text.

9. See _infra_ notes 200-203 and accompanying text.

10. See _infra_ notes 204-207 and accompanying text.


ville, an appeal from the Supreme Court of Washington, the Supreme Court examined a visitation statute which grants broad standing to grandparents to petition for court ordered visitation with their minor grandchildren. Jenifer and Gary Troxel (hereinafter referred to collectively as "the Troxels") initiated an action for visitation with their minor granddaughters, Natalie and Isabelle Troxel, against Tommie Granville, the natural mother of the minor children. The two children were born out of a non-marital relationship between Tommie Granville and Brad Troxel. After Brad Troxel and Tommie Granville separated, Brad Troxel moved in with his parents and frequently brought his daughters home to visit with them. Tragically, in May 1993, Brad Troxel committed suicide. After the death of their son, the Troxels continued to visit with their granddaughters until October 1993, when Tommie Granville expressed a desire to limit the Troxels' visitation to one short period per month. The Troxels rejected this proposal and were thereafter not allowed to visit with their granddaughters until April 1994, when a temporary order of visitation was entered. During the trial, the Troxels requested that they be granted two weekend visits per month and two weeks during the summer. Tommie Granville, relying on the advice of an attorney,

13. Id.
14. See In re the Custody of Smith v. Stillwell and Troxel v. Granville, 969 P.2d 21 (1998). The Supreme Court of Washington consolidated two appeals, both of which involved issues of third party visitation. In re the Custody of Smith v. Stillwell involved an action for visitation by a "former companion" non-parent against a natural parent. Since the United States Supreme Court and this article only address the issue of grandparents' rights, a discussion of the facts and result of this particular case is not relevant.
15. Wash. Rev. Code § 26310.160(3) (1999) provides: "Any person may petition the court for visitation rights at any time including, but not limited to, custody proceedings. The court may order visitation rights for any person when visitation may serve the best interests of the child whether or not there has been any change of circumstances."
16. Id. The challenged Washington statute grants standing to "any individuals" who claim a right to custody, and not merely the grandparents of the minor children. Id.
requested that the court order only one day of visitation per month with no overnight stay. The trial court granted the Troxels one weekend visitation per month, one week during the summer, and four hours on each of the minor children’s birthdays. Tommie Granville appealed the trial court’s order, challenging the Troxels’ standing to bring an action for visitation.

The Court of Appeals of Washington, Division 1, conducted a de novo review of the challenged statute. The court attempted to identify a consistent legislative intent, allowing the statute to be read in pari materia, and where the language of the statute was given, the court attempted to give the statutory language its ordinary and plain meaning. The court examined the history of the third party custody act and traced the evolution of that act through various stages of legislative amendment. This analysis led the court to conclude that the legislature “unintentionally” failed to amend the provision of the Act that purportedly allowed the Troxels to initiate an action for visitation.

24. Id.
25. Id.
26. At this juncture, it is significant to note that both the North Carolina Court of Appeals and the North Carolina Supreme Court have conducted de novo reviews of the legislative intent behind the statutory scheme created by N.C. Gen. Stat. §§ 50-13.1-13.5 (2000).
27. Literally meaning “upon the same subject”, this rule of statutory construction involves the interpretation of various legislative enactments, some general and some specific in a manner so as to reveal a consistent legislative intent. Black’s Law Dictionary 791 (6th ed. 1990). See also McIntyre v. McIntyre, 341 N.C. 629, 631, 461 S.E.2d 745, 747 (1995) (“Where there is one statute dealing with a subject in general and comprehensive terms, and another dealing with a part of the same subject in a more minute and definite way, the two shall be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy . . . .”) (quoting National Food Stores v. North Carolina Bd. of Alcoholic Control, 268 N.C. 624, 628-29, 151 S.E.2d 582, 586 (1966)).
28. Troxel v. Granville, 940 P.2d 698, 699-701 (1997). In Troxel, the court stated: Statutory construction is a question of law that we review de novo. The primary objective of statutory construction is to carry out the intent of the Legislature by examining the language of the statute. We give words their plain meaning unless a contrary intent appears. We also must construe statutes “as a whole in order to ascertain legislative purpose, and thus avoid unlikely, strained or absurd consequences which could result from a literal reading.” Id. (quoting Alderwood Water Dist. v. Pope & Talbot, Inc., 382 P.2d 639 (1963)).
30. Troxel, 940 P.2d at 700-01.
31. Id. at 700-01. The court concluded:
the end, the court, having divined the intent of the legislature, concluded that the Troxels could only initiate an action for visitation "contemporaneously with a proceeding for child custody." 32

The Supreme Court of Washington granted the Troxels' petition for review, 33 and like the court of appeals before it, conducted a de novo review as to the meaning of the statutory language. 34 Once again, the history of the various legislative enactments and amendments were examined in great detail; 35 however, the supreme court found that the court of appeals disregarded the "plain and unambiguous" language of the statute, and disagreed with the conclusion of the court of appeals. 36 As a result, the court held that the Troxels possessed the statutory standing to initiate an independent action for visitation. 37 Although this statutory interpretation was momentarily beneficial to the Troxels' position, the supreme court proceeded to examine this interpretation in light of substantive due process protections afforded to natural parents. 38 In an opinion similar to the North Carolina

Therefore, we must assume that the Legislature's failure to similarly amend the later statute was the result of an unintentional oversight. . . . For all the reasons discussed above, whether or not the Legislature overlooked amending RCW 26.10.160(3) when it amended RCW 26.09.240, we believe it did intend that a custody preceding be in effect before third parties could petition for visitation.

Id.


35. Id. at 24-26

36. The supreme court began its review of the opinion of the court of appeals by noting that "[t]his court has emphasized that it will not construe unambiguous language and that it assume[s] that the legislature means exactly what it says." Id. at 25. The supreme court "decline[d] to construe the language of RCW 26.10.160(3) because [they found] that the language of the statute [was] unambiguous." Id. at 26. The Washington Supreme Court's failure to "modify" the language of the statute, or apply judicially created limitations on its applicability, will prove to be key in the analysis of the United States Supreme Court. See infra notes 49-51 and accompanying text.

37. Id. at 27.

38. Id. at 27-31. Since the Washington Court of Appeals resolved the standing issue by determining that the statute did not grant standing to the Troxels, the Washington Supreme Court did not directly address the constitutional implications of such a broad statute.
Supreme Court opinion in Petersen v. Rogers, 39 the Washington Supreme Court held that the state's power as parens patriae 40 could not justify government intrusion into a natural parent's decision concerning with whom their minor children associate. 41 In further defense of their conclusion, the supreme court noted that the statute, by its own terms, failed to provide any "safeguards" for a parent's protected status. The court also found the statute did not provide guidance to the trial courts as to what factors to consider, and what weight, if any, should be given to those factors. 42

In September 1999, the United States Supreme Court granted certiorari to review the opinion of the Supreme Court of Washington. 43 In a 6-3 decision, 44 the Supreme Court upheld the decision of the

39. 337 N.C. 397, 445 S.E.2d 901 (1994). See infra notes 118-125 and accompanying text. In the respective analyses of the constitutionally protected right of a natural parent to the care, custody and control of their minor children, the North Carolina Supreme Court and the Washington Supreme Court cite to United States Supreme Court opinions of Meyer v. Nebraska, 262 U.S. 390 (1923), Prince v. Massachusetts, 321 U.S. 158 (1944), and Stanley v. Illinois, 405 U.S. 645 (1972). One striking dissimilarity between the two opinions is the failure on the part of the North Carolina Supreme Court to identify and use the applicable standard of review to governmental actions which infringe upon a "fundamental right." In Troxel, the Washington Supreme Court conducted its constitutional analysis by applying the strict scrutiny standard of review, which requires the state to demonstrate a compelling governmental interest coupled with a narrowly tailored means. 969 P.2d at 28. See also Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 235 (1995); City of Richmond v. Croson, 488 U.S. 469, 493 (1989). The North Carolina Supreme Court appears to have identified certain specific factual circumstances which would warrant governmental intervention and invented a bright-line test. The fact that the United States Supreme Court did not conduct its own "strict scrutiny" review nor even mention "strict scrutiny" suggests that a parent's "protected status" does not rise to the level of a "fundamental right" under substantive due process.

40. "'Parens patriae,' literally 'parent of the country,' refers traditionally to the role of state as sovereign and guardian of persons under legal disability, such as juveniles or the insane, and in child custody determinations, when acting on behalf of the state to protect the interests of the child." Black's Law Dictionary 1114 (6th ed. 1990) (citations omitted).

41. Troxel, 969 P.2d at 30. The Washington Supreme Court interpreted United Supreme Court precedent to require proof of harm to the minor child in order for the state to interfere with the parent's "protected status." Id. at 29. Cf. infra notes 77-79 and accompanying text.

42. Id. at 30-31. The fact that the Washington statutory scheme lacked safeguards or guidance for the trial court, whether contained within the language of the statute or mandated by judicial review, became important in the United States Supreme Court's review of the statute. See infra notes 53-63 and accompanying text.


44. Troxel v. Granville, 530 U.S. 57 (2000). The plurality opinion of the Court was authored by Justice O'Connor and joined by Chief Justice Rehnquist and Justices
Supreme Court of Washington. Before conducting a constitutional analysis of the Washington statute, the plurality opinion recognized the increasing trend among the various states to enact statutes that recognize the ever-increasing importance of the extended, non-nuclear family, particularly grandparents. The United States Supreme Court’s constitutional analysis began, as the Supreme Court of Washington’s opinion began, by recognizing that parents have a protected right to the care, custody, and control of their minor children. After comparing the Washington statute as interpreted in light of this protected right, the Court concluded that the statute was “breathtakingly broad”, and therefore unconstitutional as applied in this case.

The plurality opinion concluded that the statute was overly broad in that it granted “any person” standing to petition for visitation and

Ginsburg and Breyer. Justices Souter and Thomas concurred in the judgment, but filed separate concurring opinions. Justices Stevens, Scalia and Kennedy dissented from the judgment of the Court and filed separate dissenting opinions. Although not germane to the subject of this article, arguably the most intriguing aspect of this particular case is the concurring opinion of Justice Thomas, who announced his willingness to overturn all prior Supreme Court decisions which recognize so-called substantive due process rights under the Fifth and Fourteenth Amendments to the United States Constitution. Id. at 78-79 (Thomas, J., dissenting). Justice Thomas, in his dissent, wrote:

I write separately to note that neither party has argued that our substantive due process cases were wrongly decided and that the original understanding of the Due Process Clause precludes judicial enforcement of unenumerated rights under that constitutional provision. As a result, I express no view on the merits of this matter, and I understand the plurality as well to leave the resolution of that issue for another day.

Id.

45. See id. at 64. The Court stated:

The nationwide enactment of non-parental visitation statutes is assuredly due, in some part, to the State’s recognition of these changing realities of the American family. Because grandparents and other relatives undertake duties of a parental nature in many households, States have sought to ensure the welfare of the children therein by protecting the relationships those children form with such third parties.

Id. See also id. at 74 n.1 (plurality opinion) (listing third party visitation statutes from all fifty states).

46. See supra note 39 and accompanying text. As mentioned above, it remains unclear as to the full nature of a parent’s “protected status.” The Washington Supreme Court treated this “protected status” as involving a “fundamental” substantive due process right and applied strict scrutiny review. The United States Supreme Court refers to the “protected status” as involving a “fundamental” liberty interest; however, the Court does not apply, nor refer to “strict scrutiny” review.

47. Troxel, 530 U.S. at 63-64.

48. Id. at 67.
did not provide any indication as to what weight, if any, should be
given to the decision of the natural parent.\textsuperscript{49} The plurality found that
the practical result of the over-reaching nature of the Washington stat-
ute is that whenever a person claiming right to visitation is denied
visitation by the minor children's parents, that person may seek judi-
cial review of that decision.\textsuperscript{50} The plurality concluded that absent stat-
utorily or judicially imposed safeguards protecting the "protected
status" of a natural parent, the statute impermissibly infringed upon
that status.\textsuperscript{51}

Although the plurality opinion could have ended its inquiry by
simply announcing that a natural parent enjoys a "protected status"
concerning the care, custody, control and supervision of their minor
children, it continued by identifying factors which are relevant to a
judicial inquiry into whether to grant visitation with a third party over
the objections of the natural parents.\textsuperscript{52} The plurality opinion identi-
fied three such factors. The first factor involves allegations, by the per-
son petitioning for visitation of parental unfitness.\textsuperscript{53} Despite the fact
that there is a presumption that a fit parent will act so as to further the
best interests of his or her minor child,\textsuperscript{54} the plurality opinion did not
definitively hold that parental unfitness is the one pivotal factor in
determining whether or not a state may permissibly override a paren-

\textsuperscript{49} Id. at 67.

\textsuperscript{50} Id. ("Thus, in practical effect, in the State of Washington a court can disregard
and overturn any decision by a fit custodial parent concerning visitation whenever a
third party affected by the decision files a visitation petition, based solely on the
judge's determination of the child's best interests.").

\textsuperscript{51} The Supreme Court noted that the Supreme Court of Washington had the
opportunity to judicially restrict the applicability of the challenged statute, but chose
to refrain from so doing. Id.

\textsuperscript{52} Id. at 67-71.

\textsuperscript{53} Id. at 68.

\textsuperscript{54} See Parham v. J.R., 442 U.S. 584, 602 (1979):
The law's concept of the family rests on a presumption that parents possess
what a child lacks in maturity, experience, and capacity for judgment
required for making life's difficult decisions. More important, historically it
has recognized that natural bonds of affection lead parents to act in the best
interests of their children.

Id. at 602. See also Price v. Howard, 346 N.C. 68, 79, 484 S.E.2d 528, 534 (1997)
(citing Lehr v. Robertson, 463 U.S. 248, (1983)).

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tual decision. According to the plurality opinion, allegations of unfitness are but one factor to be considered.

A second factor identified by the plurality opinion is the weight to be given to the determination by the natural parent to deny visitation. Due to the presumption that a natural parent will act in the best interests of his or her minor child, a trial court must give special weight to the decision of the natural parent. The plurality found that the trial court's decision in Troxel was problematic because it reversed this presumption and required the natural parent to demonstrate that the requested visitation would "adversely affect" the minor child(ren). By reversing this presumption, the trial court failed to provide the requisite special weight to the decision of the natural parent. As with allegations of unfitness, the decision by the natural parent not to allow visitation was found instructive, but not determinative:

Needless to say, however, our world is far from perfect, and in it the decision whether such an intergenerational relationship would be beneficial in any specific case is for the parent to make in the first instance. And, if a fit parent's decision of the kind at issue here becomes subject to judicial review, the court must accord at least some special weight to the parent's own determination.

The third factor which the Court identified as significant in determining whether to override the decision of a natural parent is whether

55. Troxel, 530 U.S. at 68-69. The Court stated:
Accordingly, so long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's child. Id. (emphasis added). Cf. Price v. Howard, 346 N.C. 68, 484 S.E.2d 528 (1997); Petersen v. Rogers, 337 N.C. 397, 445 S.E.2d 901 (1994).

56. Troxel, 530 U.S. at 68 ("To be sure, this case involves a visitation petition filed by grandparents soon after the death of their son—the father of Isabelle and Natalie—but the combination of several factors here compel our conclusion that § 26.10.160(3), as applied, exceeded the bounds of the Due Process Clause.") (emphasis added).

57. Id. at 69-70.

58. See supra note 54.

59. Troxel, 530 U.S. at 69.

60. In essence, the reversal of the presumption by the trial court forced Granville to prove that visitation with the grandparents was not in the best interests of the minor child. Id. at 69.

61. See id. at 69-70 ("In that respect, the trial court's presumption failed to provide any protection for Granville's fundamental constitutional right to make decisions concerning the rearing of her own daughters.").

62. Id. at 70. This statement presupposes the fact that a third party, namely a grandparent, can maintain an action for visitation despite the decision of the natural parent to deny such visitation.
that parent has denied complete contact between the third party and
the minor child(ren). In *Troxel*, Granville did not seek to terminate
all contact between the minor children and her paternal grandpar-
ents. To the contrary, Granville only sought to reduce the amount of
contact. In support of the relevancy of this factor, the plurality opinion
cited, apparently with approval, several state statutes that grant grand-
parents standing to petition for visitation when the natural parents
have denied complete contact. Specifically, the plurality opinion
cited Mississippi, Oregon, and Rhode Island statutes, all of which

63. *Id.* at 71 ("Finally, we note that there is not allegation that Granville ever
sought to cut off visitation entirely.")

64. *Id.* See also *supra* note 21 and accompanying text.

65. Although the opinion does not definitively hold that these statutes comport
with constitutional mandates, it would be illogical for the Justices to cite these statutes
in support of their analysis if the author and the supporting Justices did not perceive
these statutes constitutional. See 530 U.S. at 71-72.

(2) Any grandparent who is not authorized to petition for visitation rights
pursuant to subsection (1) of this section may petition the chancery court
and seek visitation rights with his or her grandchild, and the court may grant
visitation rights to the grandparent, provided the court finds:
(a) That the grandparent of the child had established a viable relationship
with the child and the parent or custodian of the child unreasonably denied
the grandparent visitation rights with the child; and
(b) That visitation rights of the grandparent with the child would be in the
best interests of the child.

(1)(a) A child's grandparent may, upon petition to the circuit court, be
granted an order establishing reasonable rights of visitation between the
grandparent and the child if:
(A) The grandparent has established or has attempted to establish ongoing
personal contact with the minor child; and
(B) The custodian of the minor child has denied the grandparent reasonable
opportunity to visit the child.

(a)(1) The family court upon miscellaneous petition of a grandparent for
visitation rights with the petitioner's grandchild and upon notice to both
parents of the child and notice to the child, and after hearing thereon, may
grant reasonable rights of visitation of the grandchild to the petitioner.
(2) The court, in order to grant petitioner reasonable rights of visitation,
must find and set forth in writing the following findings of fact:
(i) That it is in the best interest of the grandchild that petitioner be granted
visitation rights with the grandchild;
(ii) That the petitioner is a fit and proper person to have visitation rights with
the grandchild;
(iii) That the petitioner has repeatedly attempted to visit his or her
grandchild during the ninety (90) days immediately preceding the date the
provide for grandparental visitation when the natural parent(s) completely denies contact between the grandparent and the minor children.

Although presented with the opportunity to define the exact scope of third parties' rights to court ordered visitation contrary to the wishes of the children's natural parents, the Court was unwilling to do so.\(^{69}\) Instead, the Court chose to limit its examination to the sweeping breadth of the Washington statute. In addition, instead of outlining a "bright-line" test in determining when a third party visitation statute adequately safe-guarded the protected status of a natural parent, the plurality opinion suggests that this is a judgment best left to a case-by-case determination, guided by the factors outlined by the opinion.\(^{70}\) In the end, it was the combination of the three factors, or the lack thereof, that led the plurality opinion to the conclusion that the Washington statute was unconstitutional.\(^{71}\)

petition was filed and was not allowed to visit the grandchild during the ninety (90) day period as a direct result of the actions of either, or both parents of the grandchild;

(iv) That there is no other way the petitioner is able to visit his or her grandchild without court intervention; and

(v) That petitioner, by clear and convincing evidence, has successfully rebutted the presumption that the parent's decision to refuse the grandparent visitation with the grandchild was reasonable.

\(^{69}\) Troxel, 530 U.S. at 73. The Court stated:

Because we rest our decision on the sweeping breadth of § 26.10.160(3) and the application of that broad, unlimited power in this case, we do not consider the primary constitutional question passed on by the Washington Supreme Court—whether the Due Process Clause requires all non-parental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation.

\(^{70}\) Id. Cf. United States v. Virginia, 518 U.S. 515 (1996) (Scalia, J., dissenting) ("The Supreme Court of the United States does not sit to announce 'unique' dispositions. Its principle function is to establish precedent—that is, to set forth principles of law that every court in America must follow.").

\(^{71}\) Id. at 72 ("Considered together with the Superior Court's reason's for awarding visitation to the Troxels, the combination of these factors demonstrates that the
Although instructive, the *Troxel* plurality opinion falls far short of providing clear guidance to state appellate courts as to the way in which they must determine constitutional challenges to their respective non-parental visitation statutes.\(^{72}\) Are the three factors examined by the plurality opinion the only factors lower courts must or may consider? What weight should be given to each factor? What is the burden of proof required of the petitioning non-parent? These are all valid questions which remain unanswered. Despite the unanswered questions, the greatest impact of the *Troxel* decision is that the United States Supreme Court has implicitly recognized that it is constitutionally feasible for a grandparent to obtain visitation rights despite the protestations of the minor children's natural parents.\(^{73}\)

Compounding the lack of clarity in the plurality opinion is the fact that it is simply a plurality opinion, not a majority opinion, and, therefore, is of little or no benefit as precedent. Despite these various shortcomings, when the plurality opinion is read in conjunction with the dissents of Justices Stevens and Scalia, one can see that it is possible for a state to enact legislation granting grandparents standing to petition for visitation, which will possibly command a 6-3 *majority*.\(^{74}\) The dissent of Justice Stevens clearly argues that a parent's "protected status" as a parent is not absolute,\(^{75}\) and that the constitution does not require a showing of "harm" in order for the state to infringe upon that

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\(^{72}\) The plurality opinion also fails to provide clear guidance to state legislatures as to how to draft third party visitation statutes, which adequately protect parents' constitutionally "protected status." The opinion did note, in a footnote, that all fifty states have some type of non-parental visitation statute. See id. at 74 n.1 (plurality opinion).

\(^{73}\) See *supra* note 62 and accompanying text.

\(^{74}\) The Justice Kennedy's dissent primarily focused upon the issue of whether a demonstration of "harm" is required in order to grant visitation to a third party, over the objections of the minor child's parents. Justice Kennedy, recognizing that all fifty states have statutes that grant third-party visitation, would not require proof of harm in order to grant visitation to third parties. Justice Kennedy also noted the importance of providing protection to natural parents in the form of restrictions on who can petition for visitation, and in the form of preferences in favor of a parent's decision. Although this dissent does not explicitly agree with the plurality opinion, it recognizes that a parent's protected status is not absolute, and can be overridden based upon factors that do not rise to the level of "harm" to the minor child.

\(^{75}\) *Troxel*, 530 U.S. at 89 (Stevens, J., dissenting) ("The constitutional protection against arbitrary state interference with parental rights should not be extended to prevent the States from protecting children against the arbitrary exercise of parental authority that is not motivated by an interest in the welfare of the child.").
status. Justice Stevens' dissent goes as far to suggest that the courts should balance the constitutional rights of minor children in addition to the rights of parents. Justice Scalia would limit the recognition of a parent's "protected status," and would not recognize the ability of the federal courts to overrule the will of the people as expressed through laws duly enacted by their representative legislatures. Based upon the plurality opinion and the dissents of Justices Stevens and Scalia, it seems possible for state legislatures to enact logical grandparental visitation statutes which adequately protect the rights of natural parents, but which are not restrictive to the point that the statute becomes a legal nullity.

76. Id. at 85-86 (Stevens, J., dissenting) ("The second key aspect of the Washington Supreme Court's holding—that the Federal Constitution requires a showing of actual or potential "harm" to the child before a court may order visitation continued over a parent's objections—finds no support in this Court's case law.").

77. Id. at 88.

While this Court has not yet had occasion to elucidate the nature of a child's liberty interests in preserving established familial or family-like bonds, it seems to me extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests, and so, too, must their interests be balanced in the equation.

Id. (Stevens, J., dissenting) (citations omitted).

78. Id. at 92.

A legal principle [the parent's protected status] that can be thought to produce such diverse outcomes in the relatively simple case before us here is not a legal principle that has induced substantial reliance. While I would not now overrule those earlier cases (that has not been urged), neither would I extend the theory upon which they rested to this new context.

Id. (Scalia, J., dissenting). Cf. supra note 44 (concerning Justice Thomas's willingness to overrule prior decisions establishing substantive due process rights under the Fifth and Fourteenth Amendments to the United States Constitution).

79. Traxel, 530 U.S. at 91-91.

While I would think it entirely compatible with the commitment to representative democracy set forth in the founding documents to argue, in legislative chambers or in electoral campaigns, that the state has no power to interfere with parents' authority over the rearing of their children, I do not believe that the power which the Constitution confers upon me as a judge entitles me to deny legal effect to laws that (in my view) infringe upon what is (in my view) that unenumerated right [parent's protected status].

Id. (Scalia, J., dissenting).

80. If one considers the concurring opinion of Justice Thomas, who would eliminate substantive due process rights all together, a properly drafted, or properly interpreted statute, could possibly command a 6-3 majority opinion.
III. CURRENT NORTH CAROLINA LAW

Like the State of Washington, North Carolina has enacted a statute that grants broad standing to individuals to initiate actions for custody and/or visitation with minor children. In addition to one broad statute, North Carolina has enacted several other statutes that govern certain limited circumstances. In light of indications that the broad statute may fail to adequately safeguard the "protected status" of natural parents, the North Carolina appellate courts have attempted to limit its scope. Despite these attempts to interpret the North Carolina statute constitutionally, the various opinions in the Troxel case demonstrate its continued invalidity.

In order to fully understand the present illogical status of North Carolina law regarding the issue of grandparental visitation, one must begin by examining the various legislative enactments and conclude by examining the relevant appellate court decisions. Within Chapter 50 of the North Carolina General Statutes, four sections, either directly or indirectly, address the issue of grandparental visitation: N.C. Gen. Stat. §§ 50-13.1(a), 50-13.2(b1), 50-13.2A, 50-81.

82. See infra notes 93-95.
83. "We note that this subject may involve constitutional issues relating to the substantive due process interests in the care and custody of one's children. As neither party has brought the issue before this Court, we do not address it." Ray v. Ray, 103 N.C. App. 790, 407 S.E.2d 592, 593-94 (1991), overruled by Petersen v. Rogers, 337 N.C. 397, 445 S.E.2d 901 (1994). In addition to the general statute being unconstitutional absent judicial interpretation, the other "special" statutes designed to apply to limited circumstances are, more likely than not, unconstitutional as well. See infra note 198 and accompanying text.
84. See infra notes 115-164 and accompanying text. Cf. supra notes 33-37 and accompanying text (the State of Washington, which refused to interpret their general statute); notes 49-51 and accompanying text (Supreme Court opinion in Troxel focused upon protecting decisions of the natural parent).
85. See infra notes 194-208 and accompanying text.
86. See infra notes 92-95.
87. See infra notes 105-172 and accompanying text.
88. Chapter 50 of the North Carolina General Statutes contains legislative enactments concerning issues of domestic relations (e.g., absolute divorce, divorce from bed and board, alimony, post separation support, child custody and child support).
89. See supra note 4.
90. N.C. Gen. Stat. § 50-13.2(b1) reads:
An order for custody of a minor child may provide visitation rights for any grandparent of the child as the court, in its discretion, deems appropriate. As used in this subsection, 'grandparent' includes biological grandparents of a


92. "In any action in which custody of a minor child has been determined, upon a motion in the cause and showing of changed circumstances pursuant to G.S. 50-13.7, the grandparents of the child are entitled to such custody or visitation rights as the court, in its discretion, deems appropriate." N.C. Gen. Stat. § 50-13.5(j) (2000).

93. See In re Holt, 1 N.C. App. 108, 111, 160 S.E.2d 90 (1968) ("By the enactment of this Chapter the Legislature has sought to eliminate the conflicting and inconsistent statutes, which have caused pitfalls for litigants, and to bring all of the statutes relating to child custody and support together into one act.").


Had the Legislature intended G.S. 50-13.1 to apply to only those custody disputes involved in a divorce or separation, it would have expressly so provided, as it did in the prior statutes G.S. 50-13 and G.S. 50-16. The mere fact that G.S. 50-13.1 is found in the Chapter of the General Statutes governing Divorce and Alimony is not sufficient to cause its application to be restricted to custody disputes involved in separation or divorce.

Id.

95. See infra notes 105 - 172 and accompanying text. See also McIntyre v. McIntyre, 341 N.C. 629, 635, 461 S.E.2d 745, 749-50 (1995) ("The three special statutes provide grandparents with the right to seek 'visitation' only in certain clearly specified situations. Those situations do not include that of initiating suit against parents whose family is intact and where no custody proceeding is ongoing. A legislative intent contrary to that for which plaintiffs argue therefore seems clear."); Peterson v. Rogers, 337 N.C. 397, 445 S.E.2d 901, 906 (1994). The court in Peterson reasoned:

We agree with the reasoning of the trial court in Ray that N.C.G.S. § 50-13.1 was not intended to confer upon strangers the right to bring custody or visitation actions against parents of children unrelated to such strangers. Such a right would conflict with the constitutionally-protected paramount right of parents to custody, care, and control of their children.


We agree that in Moore and Acker the North Carolina Court of Appeals stated that parents have such a prerogative to determine with whom their children associate. However, we hold that in 1989 when the legislature changed
his or her discretion, to grant specific visitation to the minor child's grandparents\(^96\) when entering an order of child custody in an ongoing custody action.\(^97\) When a minor child has been adopted, and the minor child's grandparents\(^98\) can demonstrate a "substantial relationship" with the minor child, N.C. Gen. Stat. § 50-13.2A grants grandparents standing to petition for visitation.\(^99\) Once the custody of a minor child has been determined, N.C. Gen. Stat. § 50-13.5(j) enables the minor child's grandparents\(^100\) to file a Motion in the Cause and petition for visitation.\(^101\) A cursory examination of these statutes would lead one to the conclusion that grandparents have several procedural options when petitioning for visitation with their minor grandchildren. Unfortunately, this cursory examination of the meaning and application of these statutes is far from accurate.

Since the adoption of these legislative provisions, the North Carolina Supreme Court and the North Carolina Court of Appeals have examined, interpreted, re-examined and re-interpreted the "meaning" of these statutes. In particular, the courts have focused upon interpreting the broad statute in accord with the three specific statutes in an effort to identify a consistent legislative intent.\(^102\) When N.C. Gen.

\(^96\) Not all grandparents are allowed to petition for visitation pursuant to this statute. \textit{See generally} N.C. Gen. Stat. § 50-13.2(b1) for the definition of the class "grandparent."

\(^97\) \textit{See} Moore v. Moore, 89 N.C.App. 351, 365 S.E.2d 662, at 663 (1988) ("While this provision authorizes the court to provide for the visitation rights to grandparents when the custody of minor children is being litigated, it does not authorize the court to enter such an order when the custody of the children is not even in issue."). \textit{See also} Fisher v. Gaydon, 124 N.C.App. 442, 445-46, 477 S.E.2d 251, 253 (1996).


\(^101\) In order to exercise the rights granted by this statute, petitioning grandparents must demonstrate "changed circumstances" pursuant to N.C. Gen. Stat. § 50-13.7.

\(^102\) \textit{See} McIntyre v. McIntyre, 341 N.C. 629, 631, 461 S.E.2d 745, 747 (1995), in which the court stated:

"Where there is one statute dealing with a subject in general and comprehensive terms, and another dealing with a part of the same subject in a more minute and definite way, the two shall be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy . . . ."
RE-EVALUATING GRANDPARENTAL VISITATION

Stat. § 50-13.1(a) was amended in 1989 by the inclusion of a second sentence,\(^\text{103}\) the North Carolina Court of Appeals in *Ray v. Ray*\(^\text{104}\) held that the amendment permitted grandparents to initiate a separate, independent action for visitation. In so concluding, the court of appeals determined that the specific statutes were “merely supplemental” to the general provisions of N.C. Gen. Stat. § 50-13.1(a).\(^\text{105}\) Although the decision in *Ray* would appear to determine the issue of “consistent legislative intent,” the final paragraph of the court’s opinion questioned the constitutional validity of the statute as interpreted.\(^\text{106}\)

The causes behind the need for the examination and re-examination of the meaning of N.C. Gen. Stat. § 50-13.1(a) are multi-faceted. As noted above, the courts must read various legislative enactments, addressing the same issue, *in pari materia*.\(^\text{107}\) In addition to this requirement, however, is a presumption that legislative enactments comport with constitutional mandates,\(^\text{108}\) and a requirement that the courts interpret statutes, if possible, so as to comport with these mandates.\(^\text{109}\) These three tenets of statutory construction are then coupled

\(\text{id.}(\text{quoting Nat'l Food Stores v. North Carolina Bd. of Alcoholic Control, 268 N.C. 624, 628-29, 151 S.E.2d 582, 586 (1966)).}\)

\(\text{103. "Unless a contrary intent is clear, the word 'custody' shall be deemed to include custody or visitation or both." N.C. Gen. Stat. § 50-13.1(a) (2000).}\)


\(\text{[W]e hold that in 1989 when the legislature changed N.C.G.S. § 50-13.1(a) so that it includes the right to bring an action for visitation, that law changed . . . . Other statutes which allow for visitation (i.e., N.C.G.S. §§ 50-13.2A, 50-13.2(b1), and 50-13.5(j)) are merely supplemental. These statutes do not in any way contradict N.C.G.S. § 50-13.1(a) nor do they create an exception to the step-grandparent's right to bring an action for visitation in this case.}\)

\(\text{id.}\)

\(\text{106. The court stated: "We note that this subject may involve constitutional issues relating to the substantive due process interests in the care and custody of one's children. As neither party has brought the issue before this Court, we do not address it." Id. at 793, 407 S.E.2d at 593-94.}\)

\(\text{107. See supra note 26.}\)

\(\text{108. See Ramsey v. Veterans Comm'n, 261 N.C. 645, 647, 135 S.E.2d 659, 661 (1964) ("The presumption is that any act passed by the legislature is constitutional, and the court will not strike it down if such legislation can be upheld on any reasonable ground.").}\)

\(\text{109. See In re Dairy Farms, 289 N.C. 456, 465-66, 223 S.E.2d 323, 328-29 (1976) ("If a statute is reasonably susceptible of two constructions, one of which will raise a serious question as to its constitutionality and the other will avoid such question, it is}\)
with the mandate that the language of the statute be given its usual and ordinary meaning, and that all irreconcilable conflicts be decided in favor of the most recently enacted statute.

The desired result of the process of statutory interpretation is to arrive at a constitutional and logical statutory scheme that reflects the intentions of the elected legislature.

In 1994, the North Carolina Supreme Court, in Petersen v. Rogers, overruled the court of appeals' determination of the “consistent legislative intent” as announced in Ray. At issue in this puzzling opinion was an action commenced by unrelated third parties petitioning for custody of and visitation with a minor child. In concluding that the unrelated third party plaintiffs lacked standing to initiate

well settled that the courts should construe the statute so as to avoid the constitutional question.

110. See In re Arthur, 291 N.C. 640, 642, 231 S.E.2d 614, 615 (1977) ("Words in a statute are to be given their natural, ordinary meaning, unless the context requires a different construction.") (quoting In re Watson, 273 N.C. 629, 635, 161 S.E.2d 1, 7 (1968)).

111. See Martin v. Sanatorium, 200 N.C. 221, 223, 156 S.E. 849, 850 (1930) ("[T]he rule is that if two statutes, or two sections or parts of the same statute, relating to the same subject, shall not be reconciled by any fair and reasonable method of construction, the last in point of time will control."). See also Highway Comm'n v. Hemphill, 269 N.C. 535, 153 S.E.2d 22 (1967).

We apply the well recognized rules of statutory construction that the intent of the legislature controls the interpretation of a statute, and that when there are two acts of the legislature applicable to the same subject, their provisions are to be reconciled if this can be done by fair and reasonable intentment, but, to the extent that they are necessarily repugnant, the later shall prevail.

Id. at 538-39, 153 S.E.2d at 26 (citations omitted).


113. In Petersen, the North Carolina Supreme Court stated:

We agree with the reasoning of the trial court in Ray that N.C.G.S. § 50-13.1 was not intended to confer upon strangers the right to bring custody or visitation actions against parents of children unrelated to such strangers. Such a right would conflict with the constitutionally protected paramount right of parents to custody, care, and control of their children. For these reasons, we expressly disavow language in Ray indicating that the statute changed the paramount right of parents.

Id. at 406, 445 S.E.2d at 906.

114. See Thomas L. Fowler & Ilene B. Nelson, Navigating Custody Waters Without A Polar Star: Third-Party Custody Proceedings After Petersen v. Rogers and Price v. Howard, 76 N.C. L. Rev. 2145, 2171 (1998) ("It is arguable, however, that Supreme Court cases after 1972 do not compel the Petersen decision and that the decision is in conflict with North Carolina case law prior to and after 1972.").

115. The facts surrounding the Petersen opinion are extremely complex, involving issues of policies against “purchasing” babies, and freedom of religion. Before all issues had been resolved by the various appeals, nearly six years elapsed. For a more
an action for custody and/or visitation and thereby overruling Ray, the
supreme court examined various United States Supreme Court116 and
North Carolina Supreme Court opinions117 which identify a "para-
mount right" of a parent to the care, custody, control and supervision
of their minor child. In light of this "paramount right", the court deter-
mined that N.C. Gen. Stat. § 50-13.1(a) was not intended to "confer
upon strangers the right to bring custody or visitation actions against
the parents of children unrelated to [those strangers]."118 Although
the Petersen opinion noted119 that the legislature carved out exceptions
for "biological" and "adoptive" grandparents,120 the court did not
formally reject a biological grandparent's right, pursuant to N.C. Gen.
Stat. § 50-13.1(a), to seek court ordered visitation. However, the court
did outline a "bright-line" test to be utilized in custody disputes
between parents and non-parents.121 The reasoning of the North Caro-

The rights to conceive and to raise one's children have been deemed 'essential', 'basic civil rights of man', and 'rights far more precious . . . than property rights'. 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.' The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment . . . .

117. See Peterson, 337 N.C. at 401-02, 445 S.E.2d at 904 ("North Carolina's recognition of the paramount right of parents to custody, care, and nurture of their children antedates the constitutional protections set forth in Stanley.") (citing Jolly v. Queen, 264 N.C. 711, 142 S.E.2d 592 (1965) and Browning v. Humphrey, 241 N.C. 285, 84 S.E.2d 917 (1955)).

118. Peterson, 337 N.C. at 405, 445 S.E.2d at 906.

119. The court included a lengthy excerpt from the trial court's order in Ray, see supra note 98, which dismissed Plaintiffs' complaint. The substance of the excerpt was the same as that of the Petersen opinion, namely, that N.C. Gen. Stat. § 50-13.1(a) was not intended to grant legal standing to unrelated third parties.

120. Peterson, 337 N.C. at 405, 445 S.E.2d 906.

121. Id. at 403-404, 445 S.E.2d at 905. ("We hold that absent a finding that (i) parents are unfit or (ii) have neglected the welfare of their children, the constitutionally-protected paramount right of parents to custody, care, and control of their children must prevail.") Although this "bright-line" test was developed in the context of a custody dispute between natural parents and unrelated third parties, one must assume that the court intended for this test to apply to all disputes involving parents and non-parents. As noted by Justice Scalia in his dissent in United States v.
lina Supreme Court plainly ignores the plain and unambiguous language of the statute,\textsuperscript{122} and thus ignores a long-standing tenet of statutory construction.

The issue of grandparents' standing to institute an independent action for visitation, not directly addressed by the court in \textit{Petersen},\textsuperscript{123} was directly addressed by the North Carolina Supreme Court in \textit{McIntyre v. McIntyre}.\textsuperscript{124} In particular, the court examined, in light of the \textit{Petersen} opinion, the effect of the 1989 amendment to N.C. Gen. Stat. § 50-13.1(a).\textsuperscript{125} Although the end result of the two opinions was similar (dismissal of the plaintiffs' complaint), the court arrived at this result utilizing different approaches. Where the court in \textit{Petersen} concluded that the unrelated third parties could not maintain their action primarily based upon constitutional concerns, the court in \textit{McIntyre} concluded, based upon apparently pure statutory construction, that N.C. Gen. Stat. § 50-13.1(a) did not grant grandparents standing to petition for court ordered visitation except in a few limited circumstances. The court concluded that the specific statutes\textsuperscript{126} restricted the applicability of the broad statute\textsuperscript{127} so as to create a consistent legislative intent.\textsuperscript{128} Although the \textit{McIntyre} opinion is interesting in the way in which it arrived at a result diametrically opposed to the one reached in \textit{Ray}, it is more interesting to note the language used to support this conclusion. The opinion does not definitively determine the legislative intent of N.C. Gen. Stat. § 50-13.1 \textit{et seq.} Instead, the opinion repeat-
edly utilizes words of uncertainty, such as “suggests,” “appears,” “probably,” “seems,” and “strongly suggests” when concluding that the specific statutes limit the breadth of the broad statute. Despite this language of uncertainty, the court held that “[t]he three special statutes provide grandparents with the right to seek ‘visitation’ only in certain clearly specified situations . . . .”, and that “[t]hese situations do not include that of initiating suit against parents whose family is intact and where no custody proceeding is ongoing.” As with the Petersen decision, the McIntyre opinion ignores the plain and unambiguous language of the statute. In addition, the opinion ignores the tenet of statutory construction which dictates that the most recently enacted statute is controlling. In this particular case, the second sentence of N.C. Gen. Stat. § 50-13.1(a) is the most recently enacted legislation.

In the wake of McIntyre, one last question need be addressed: What constitutes a McIntyre “intact family”? In Fisher v. Gaydon, the court of appeals examined the issue of what constitutes a McIntyre “intact family.” Relying upon the language and facts of McIntyre, the plaintiffs argued that the defendant was not living in an “intact

129. See supra note 131.
130. “Rather, it appears that the legislature intended to grant grandparents a right to visitation only in those situations specified in these three statutes.” McIntyre, 341 N.C. at 634, 461 S.E.2d at 749 (emphasis added).
131. “The amendment probably was added to provide that in certain contexts ‘custody’ and ‘visitation’ are synonymous . . . .” Id. (emphasis added).
132. “A legislative intent contrary to that for which plaintiffs argue therefore seems clear.” Id. at 635, 461 S.E.2d at 750 (emphasis added).
133. “Reading N.C.G.S. § 50-13.1(a) in conjunction with N.C.G.S. §§ 50-13.2(b1), 50-13.5(j), and -13.2A strongly suggests that the legislature did not intend ‘custody’ and ‘visitation’ to be interpreted as synonymous in the context of grandparents’ rights.” Id. at 634-35, 461 S.E.2d at 749 (emphasis added).
134. Id. at 635, 461 S.E.2d at 749-50.
135. See supra notes 113 and 125 and accompanying text.
136. See supra note 114 and accompanying text.
138. Fisher involved an action commenced by the maternal grandparents against their daughter seeking visitation with their two minor grandchildren. Defendant Gaydon was a single mother of two children born from relationships between her and two different men. At the time the grandparents filed their action for visitation, the defendant mother was the plaintiff in an action seeking child custody and child support against the father of one of the children. Several months after the grandparents filed their complaint, the defendant mother dismissed, without prejudice, her action against the child’s father. Id.
139. Specifically, the plaintiffs relied upon the fact that the defendants in McIntyre were living together and that there was no ongoing custody dispute. It should be noted
nuclear family”, and that therefore the plaintiffs had standing to petition for visitation. In addition, the plaintiffs claimed standing due to the existence of an “ongoing” custody dispute between the defendant mother and the father of one of the minor children. The court of appeals, in an unanimous opinion, held that a single parent living with his or her child(ren) does constitute a McIntyre “intact family.” In an attempt to further justify this holding, the opinion focused upon the specific facts of Fisher: “In this case the record reveals that Ms. Gaydon was living with her two children at the time the complaint was filed, had lived with them for at least two years prior to the filing of the action and this qualifies as an ‘intact family’. Unfortunately, the court of appeals failed to provide any guidance as to which of these facts, if any, were controlling in determining what constitutes an “intact family.” Nor did the court of appeals provide any indication as to what weight should be given to these various factors.

As to the claim of standing pursuant to N.C. Gen. Stat. § 50-13.2(b1), the court of appeals held that since the issues of custody and support were not actually “contested,” the grandparents lacked standing to petition for visitation. The obvious impact of this holding is that it further restricts the scope of N.C. Gen. Stat. § 50-13.1(a) by requiring a “contested” ongoing action for custody in order for a grandparent to possess the requisite standing to petition for visitation. The less obvious impact is what ramification, if any, this holding may have upon the standing granted to grandparents by N.C. Gen. Stat. § 50-13.2(b1) and N.C. Gen. Stat. § 50-13.5(j).

In future disputes, will the Fisher opinion require that the action in which a trial court has exercised its discretion and granted visitation to the minor

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142. The court stated: “We believe a proper construction of that opinion is that a single parent living with his or her child is an ‘intact family’ within the meaning of McIntyre.” Fisher, 124 N.C. App. at 445, 477 S.E.2d at 251 (citing Lambert v. Riddick, 120 N.C. App. 480, 484 n.2, 462 S.E.2d 835, 837 n.2 (1995)).
144. “There is nothing in this record showing that the alleged biological father was contesting Ms. Gaydon’s claim of custody.” Id. at 446, 477 S.E.2d at 251.
145. The court stated: “It is only when the custody of a child is ‘in issue’ or ‘being litigated’ that the grandparents are entitled to relief pursuant to N.C. Gen. Stat. § 50-13.2(b1). We therefore reject this argument.” Id.
146. See supra note 93.
147. See supra note 95.
children's grandparents have actually been contested? In addition, when a minor child's grandparents file a motion in the cause alleging "changed circumstances" and a "substantial relationship," will they also need to allege that the prior action was actually "contested?"

Although the Fisher opinion does not anticipate these possibilities, it neither explicitly nor implicitly prohibits them.

The Fisher opinion, authored by Judge K. Edward Greene, refers to his dissenting opinion in Lambert v. Riddick. Although the opinion in Lambert does not directly revolve around grandparents' rights to petition for visitation, it is instructive to examine this dissent because it begins to lay the foundation for the North Carolina Supreme Court's decision in Price v. Howard. In his dissent, Judge Greene argued that in situations like the one in Lambert, where a parent is attempting to get custody of their child and the child is in the custody of a third party, that the "best interest test" should be employed. In essence, Judge Greene would have the court focus upon the conduct of the parties, which need not rise to the level of unfitness, in order to determine the appropriate test to be employed. As such, natural parents' conduct can decrease the level of protection afforded to their paramount right.


150. 120 N.C. App. 480, 462 S.E.2d 835 (1995). See supra note 145. In Lambert, the father of a minor child, born out of wedlock, brought an action for visitation against the defendant mother and a third party (Utley) who had physical possession of the child. Due to the defendant mother not being in a position to raise the child, Ms. Utley, a friend of the defendant mother, had possession of the minor child since the child's birth. The plaintiff alleged that he had been denied visitation. The mother and Ms. Utley, filing a joint answer, denied this allegation and asserted a counterclaim for custody. The trial court, employing the "best interests" test from N.C. Gen. Stat. § 50-13.2 placed custody of the child with Ms. Utley and granted visitation to plaintiff and defendant mother. Plaintiff appealed, and the court of appeals reversed. Id.


152. The dissent did note, however, that the term custody, in this sense, meant actual physical possession. See Lambert, 120 N.C.App. at 484, 462 S.E.2d at 837 (Greene, J., dissenting).

153. Cf. infra notes 162-164 and accompanying text.

154. Id. at 484-85, 462 S.E.2d at 837-38. Justice Greene, in the Lambert dissent, stated:
The court of appeals decision in *Price v. Howard*,155 which affirmed the order of the trial court, is nothing more than an application of the prior decisions of the supreme court. The basic issue in *Price* was a custody battle between a parent (defendant mother) and an unrelated third party (putative father, plaintiff).156 Applying the logic and holding of *Petersen*,157 the court of appeals affirmed the trial court’s decision to place custody of the child with the biological mother. In his dissent in *Price*, as in his dissent in *Lambert*, Judge Greene broadened the scope of examined parental conduct beyond acts of “unfitness”,158 and would have reversed the order of the trial court.

There is no evidence that the father was living together with the child in an intact family unit at the time of this custody trial or that the child had been removed from him unlawfully. Indeed the father had consented to the placement of the child with Utley and the child had lived in that home for approximately two years at the time the complaint for custody was filed. Thus the custody dispute between the father and Utley was properly resolved by the trial court using the best interest test of section 50-13.2(a).

*Id.* at 484-85, 462 S.E.2d at 837-38 (Greene, J., dissenting).

155. 122 N.C. App. 674, 471 S.E.2d 673 (1996). In *Price*, the plaintiff filed an action seeking custody of a child, allegedly born of a relationship between the plaintiff and the defendant mother. Prior to the filing of the action, the defendant mother had allowed the plaintiff to be an “equal caretaker,” and, for an extended period of time, the primary caretaker of the minor child. In response to the plaintiff’s complaint, the defendant mother denied that the plaintiff was the father of the minor child. A paternity test was ordered, and the plaintiff was excluded as the minor child’s father. The trial court found that the “best interests” of the minor child would be served by being in the custody of the plaintiff; however, since there were no allegations of “unfitness,” the court determined that it was compelled to award custody of the minor child to the defendant mother. *Id.*


Thus, it is arguable that the courts lacked subject matter jurisdiction to consider *Price*’s claim for custody because he lacked standing to raise the issue. But none of the courts that heard the matter dismissed *Price*’s action. The question remains whether *Price* overruled *Petersen* on the standing issue or whether *Price* was subject to dismissal upon remand to the trial court.

*Id.* at 2195.


In this case, although the plaintiff has no biological relationship with the child, ‘biological relationships are not [the] exclusive determination of the existence of a family.’ . . . Therefore, this plaintiff, although not the biological parent of the minor child, must not be treated like a third party non-parent within the meaning of *Petersen*. Within the meaning of *Petersen*, the plaintiff is more like a parent and thus the best interest test should be applied.
court. Since the defendant mother and the child were not living as an intact family, and since the plaintiff putative father had possession of the minor child, not as a result of any wrongful act of the plaintiff, Judge Greene would have limited the Petersen holding, and would have only required the application of the “best interests test.”

As with the opinion in Petersen, the supreme court’s opinion in Price focused heavily upon issues of substantive due process and a parent’s paramount right/interest in the care, custody, control and supervision of their minor children. After alleged consideration of various United States Supreme Court precedents, the North Carolina Supreme Court adopted a new “bright-line” test for custody disputes between parents and non-parents:

If a natural parent’s conduct has not been inconsistent with his or her constitutionally protected status, application of the ‘best interest of the child’ standard in a custody dispute with a non-parent would offend the Due Process Clause. However, conduct inconsistent with the parent’s protected status, which need not rise to the statutory level warranting termination of parental rights, would result in application of the ‘best interests of the child’ test without offending the Due Process Clause.

This new “bright-line” test enables the trial court to consider a much broader range of conduct that may justify overriding a parent’s “protected status.” In the end, the supreme court’s decision in Price lowered the requisite burden for a non-parent seeking custody against a natural parent. As with the Petersen opinion, the supreme court in

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Id. (Greene, J., dissenting) (quoting Smith v. Org. of Foster Families, 431 U.S. 816, 843 (1977) (alteration in original) (citations omitted)). Cf. supra note 157 and accompanying text.

159. In the Petersen opinion, the supreme court referred to the interest of a parent to the care, custody and control of their minor children as a “paramount right.” In the Price decision, the supreme court refers to this interest as a “paramount interest.” Due to the change in the test required to overcome this “right”/”interest,” it can be argued that with the lessening of the necessary burden of proof, the court has recognized a lesser protected interest. Although this change in semantics may, upon first glance, appear to be nothing more than a simple change in semantics, examining the opinion further reveals additional changes. Quoting Stanley v. Illinois, the court noted that the right of a parent is an “important interest” which undeniably warrants deference and, absent a powerful countervailing interest, protection. Price, 346 N.C. 68, 74, 484 S.E.2d 528, 531 (1997) (quoting Stanley v. Illinois, 405 U.S. at 651). See also Troxel, 969 P.2d at 28. (In Troxel, the United States Supreme Court did not employ strict scrutiny review, despite recognizing a parent’s fundamental right.).

160. See supra note 117.

161. Price, 346 N.C. at 79, 484 S.E.2d at 534 (citations omitted).
Price modified the manner in which it interpreted North Carolina's custody statutes so that the desired equitable result could be reached.

Although the foregoing discussion of the supreme court's rulings in Petersen\(^{162}\) and Price,\(^{163}\) as well as the court of appeals' rulings in Lambert\(^{164}\) and Price,\(^{165}\) would appear to have little impact upon the rights of grandparents in seeking court ordered visitation, the facts and the outcome of the supreme court's decision in Price effectively overruled the logic of Petersen, which formed the basis of the supreme court's ruling in McIntyre.\(^{166}\) In its most basic terms, the dispute in Price involved a natural parent and an unrelated, non-parent third party. The plaintiff in Price was an "other person" under N.C. Gen. Stat. § 50-13.1(a). In Petersen, the supreme court held that N.C. Gen. Stat. § 50-13.1(a) did not "confer upon strangers the right to bring custody actions against parents of children unrelated to such strangers."\(^{167}\) Despite this, the court in Price allowed a person "unrelated" to the minor child to gain custody of said minor child. Due to this logical inconsistency, Price, which clearly overrules and/or modifies Petersen by changing the applicable standard, apparently overrules the logic and holding of McIntyre and its progeny.\(^{168}\) Despite this appearance, McIntyre remains good law.

As a result of the various previously discussed appellate decisions, "any other person" does not really mean any other person, except when the appellate courts deem it appropriate. The notion of custody does not include visitation in the context of grandparental standing, despite the clear language of the second sentence of N.C. Gen. Stat. § 50-13.1(a). An "ongoing custody action" requires more than a complaint having been filed and served. An unrelated third party can get custody of a minor child, but a related grandparent generally lacks standing altogether to petition for visitation. Although North Carolina appellate courts have attempted to adopt "bright-line" tests to determine when an individual possesses standing to seek custody or visitation, the reality is that the appellate courts have reviewed this issue on a case-by-case basis. The logical inconsistencies of prior decisions and the strained interpretation of the various visitation statutes reveal the

162. See supra note 115.
163. See supra note 154.
164. See supra note 153.
165. See supra note 158.
166. See supra note 127.
167. 337 N.C. at 406, 445 S.E.2d at 906.
168. McIntyre, 341 N.C. at 629, 461 S.E.2d at 745.
unworkable nature of the scheme currently employed by the North Carolina appellate courts.

IV. A New Beginning

This article has gone to great lengths to reveal the illogical and contradictory status of grandparental visitation under North Carolina's present statutory scheme as interpreted by the North Carolina Court of Appeals and the North Carolina Supreme Court. Although the North Carolina General Assembly could adopt additional statutes or modify existing statutes to clarify their intent, the direct involvement of the legislature is not necessary to correct these blatant deficiencies. It is possible for North Carolina's current statutory scheme to be judicially interpreted in such a manner so as to create a "consistent legislative intent," and adequately protect a natural parent's protected status.

Traditionally, the term "custody" encompasses notions of both physical custody and visitation.169 Despite this traditional interpretation, the General Assembly inserted a second sentence into N.C. Gen. Stat. § 50-13.1(a) which explicitly made the words "custody" and "visitation" synonymous, unless a contrary intent is clear. N.C. Gen. Stat. § 50-13.1(a) does not contain any language which would "clearly" indicate that the legislature did not intend for the word "custody" to include notions of both custody and visitation.170 Therefore, by the plain language of the statute itself, the first sentence of N.C. Gen. Stat. § 50-13.1(a) is to be read as:

Any parent, relative, or other person, agency, organization or institution claiming the right to custody of or visitation with a minor child may institute an action or proceeding for the custody of or visitation with such child, as hereinafter provided.171

169. See generally Clark v. Clark, 294 N.C. 554, 243 S.E.2d 129, 142 (1978): G.S. § 50-13.7(a) (Replacement 1976) provides that 'an order of a court of this State for custody . . . of a minor child may be modified at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested.' Visitation privileges are but a lesser degree of custody. Thus, we hold that the word 'custody' as used in G.S. 50-13.7 was intended to encompass visitation rights as well as general custody. Id. at 575-76, 243 S.E.2d at 142 (1978) (alteration in original).

170. To the contrary, N.C. Gen. Stat. § 50-13.1(a) is the first statute within Chapter 50 of the General Statutes which addresses the issue of child custody and child support and serves as a quasi-definitional provision for the remaining statutes within that subsection.

Giving the words of the statute their ordinary meaning, this is the one logical contextual reading of N.C. Gen. Stat. § 50-13.1(a). Any other interpretation, such as that grandparents lack standing to institute an action for visitation, would negate the plain language of the second sentence.\textsuperscript{172}

With this wording of the broad statute identified, the next step is to determine whether this interpretation of N.C. Gen. Stat. § 50-13.1(a) can be read in pari materia\textsuperscript{173} with the more specific statutes.\textsuperscript{174} In post-Ray decisions, the appellate courts have determined that the specific statutes must be read so as to limit the applicability of the general statute.\textsuperscript{175} This conclusion was reached after consideration of the constitutional implications of a broad interpretation of N.C. Gen. Stat. § 50-13.1(a).\textsuperscript{176}

In order to read these various legislative enactments in a fashion so as to reveal a consistent legislative intent, the specific statutes must be read so as to expand upon, and not restrict, the rights granted by N.C. Gen. Stat. § 50-13.1(a).\textsuperscript{177} If there is an on-going custody action between the minor child’s natural parents, N.C. Gen. Stat. § 50-13.2(b1) empowers the trial court, exercising its broad discretion, to grant visitation with the minor child to “any grandparent of the child.” Should a “grandparent”\textsuperscript{178} choose not to initiate a separate court proceeding, a grandparent is granted the authority to file a Motion in the

\textsuperscript{173.} See supra note 26.
\textsuperscript{174.} See supra notes 93-95.
\textsuperscript{176.} For the present analysis, constitutional concerns will be ignored until after the completion of the interpretation of the statutes and determination of the legislative intent.
\textsuperscript{177.} The analysis of the court of appeals in Ray v. Ray, which did not include a constitutional review of the identified statutory interpretation, was correct in its analysis when it concluded that the other specific statutes were “merely supplemental” to and not contradictory to the general statute. See generally Ray v. Ray 103 N.C. App. at 790, 407 S.E.2d. at 593. See also Thomas L. Fowler & Ilene B. Nelson, Navigating Custody Waters Without a Polar Star: Third-Party Custody Proceedings After Petersen v. Rogers and Price v. Howard, 76 N.C. L. Rev. 2145, 2177 (1998) (“[I]t is reasonable to conclude, as the North Carolina Court of Appeals did in Ray, that the ‘[o]ther statutes which allow actions for visitation (i.e., N.C.G.S. §§ 50-13.2A, 50-13.2(b1) and 50-13.5(j)) are merely supplemental . . . [and] do not in any way contradict N.C.G.S. § 50-13.1(a).’ Both § 50-13.2(b1) and § 50-13.2A concern only visitation for grandparents in certain limited situations.”) (quoting Ray, 103 N.C. App. at 793, 407 S.E.2d at 593).
\textsuperscript{178.} As that term is defined by N.C. Gen. Stat. § 50-15.5(j) (2000).
Cause in a prior custody proceeding. If there is an attempt by a
non-natural parent to adopt the minor child, and if the grandparent
can demonstrate a "substantial relationship" with the minor child,
N.C. Gen. Stat. § 50-13.2A grants standing to the grandparent to com-
mence an action for visitation.

If none of the above specific situations, such as one where a prior
custody action has terminated due to the death of one of the parties,
or one where a custody action involving the minor child is not "con-
tested", N.C. Gen. Stat. § 50-13.1(a) grants standing to a grandparent
to initiate a separate action for visitation. Although the grant of stand-
ing to commence an action for visitation contained within N.C. Gen.
Stat. § 50-13.1(a) may appear superfluous in light of the standing
granted by the various specific statutes, the broad statute is necessary
in order for a grandparent to enjoy the rights granted by the specific
statutes. In order for a grandparent to petition for visitation pursuant
grandparent must demonstrate, among other things, that the grandpar-
ent has a "substantial relationship" with the minor child. If the
grandparent has been denied contact with the minor child, it would be
impossible for the grandparent to demonstrate a "substantial relation-
ship." It is also illogical to reconcile the fact that a grandparent can be
denied standing to petition for visitation after the death of one of the
natural parents, but then be granted standing if and when the surviv-
ing natural parents re-marries, and the new spouse attempts to adopt
the minor child.

The apparent intent of these specific statutes is to preserve the
familial link between a minor child and his/her extended family.

180. The trial court will only retain jurisdiction over issues of child custody until
the earlier of the minor child's emancipation, or the death of one or both of the child's
natural parents. See generally Morris v. Morris, 42 N.C. App. 222, 256 S.E.2d 302
(1979) (citing Johnson v. Johnson, 14 N.C. App. 378, 188 S.E.2d 711 (1972)).
181. See supra notes 93 and 94.
182. See Moore v. City of East Cleveland, 431 U.S. 494 (1977) (plurality opinion).

Our decisions establish that the Constitution protects the sanctity of the
family precisely because the institution of the family is deeply rooted in this
Nation's history and tradition. It is through the family that we inculcate and
pass down many of our most cherished values, moral and cultural. . . . Ours
is by no means a tradition limited to respect for the bonds uniting the
members of the nuclear family. The tradition of uncles, aunts, cousins, and
especially grandparents sharing a household along with parents and children
has roots equally venerable and equally deserving of constitutional
recognition. . . . Even if conditions of modern society have brought about a
decline in extended family households, they have not erased the accumulated
Although the other specific statutes provide avenues to grandparents seeking visitation with their minor grandchildren,183 these statutes do not provide relief to grandparents who have previously enjoyed visitation184 and then have been completely denied contact. The grant of standing by N.C. Gen. Stat. § 50-13.1(a) is a "close gap" measure which applies in a possible situations not envisioned by the specific statutes.185

The above outlined interpretation of N.C. Gen. Stat. § 50-13.1(a) and the way in which it demonstrates a consistent legislative intent is further supported by the fact that the broad statute was amended after the passage of the various specific statutes.186 The trial court and the supreme court in Petersen reasoned that N.C. Gen. Stat. § 50-13.1(a) was not a broad grant, because if the legislature had so intended it would have repealed several of the specific statutes.187 The problem with this logic is that it presupposes that the broad statute and the specific statutes are inconsistent and contradictory. The fact that the supreme court began from this premise is a further indication that the opinion published by that court was driven by result rather than by law.188 The appropriate beginning inquiry should have addressed why the legislature did not repeal the various specific statutes when they (the legislature) amended the broad statute. If the analysis begins with the assumption that the legislature intended what it did when it amended the broad statute and did not repeal the various specific stat-

— wisdom of civilization, gained over the centuries and honored throughout our history, that supports a larger concept of the family.

Id. at 503-505 (1977).

183. See supra notes 93-95.

184. Therefore, there was no need for the grandparent to seek court-ordered visitation.

185. In Ennis v. Fish (COA99-1382) (unpublished), see supra note 2, the Order of the trial Judge, the Honorable Robert M. Brady, found that "the danger of enacting statutes of such a specific nature is that they may not have considered all possible scenarios that may arise, and, perhaps, this exact issue was not contemplated by the legislature when it enacted the legislation."

186. See supra 106, and accompanying text.

187. See supra text accompanying note 98.


It is arguable, however, that Supreme Court cases after 1972 do not compel the Petersen decision and that the decision is in conflict with North Carolina case law prior to and after 1972. The Petersen court's failure to explore Supreme Court cases other than Stanley and Reno and the North Carolina polar star cases . . . is perplexing.

Id.
utens, the courts should have attempted to discern how the statutes are consistent.

As discussed above, 189 N.C. Gen. Stat. § 50-13.1(a), as it should be interpreted according to the tenets of statutory construction, is as broad as the Washington statute that was found to be unconstitutional in Troxel. As such, the North Carolina appellate courts must judicially modify the statute in order to apply the statute in accordance with constitutional mandates, if possible, and so as to further the consistent legislative intent. 190 In an effort to do so, the North Carolina appellate courts have interpreted N.C. Gen. Stat. § 50-13.1(a) so as to deny grandparents standing to petition for visitation absent an ongoing “contested” custody action or when the minor child’s parents are living together as an “intact family.” 191 Since a single parent household can qualify as an “intact family”, and since specific statutes address when a grandparent may obtain relief in an ongoing custody action, the actual result of this interpretation is to render the second sentence of N.C. Gen. Stat. § 50-13.1(a), in the context of grandparental visitation, a legal nullity. 192 Although the North Carolina appellate courts have limited the number of persons who may petition, they have not provided guidance as to what factors to consider once a petition has been properly filed. In light of the Troxel plurality, 193 concurring, and dissenting opinions, the interpretive scheme employed by the North Caro-

189. See supra notes 173-181 and accompanying text.

190. This is something that the Supreme Court of Washington was unwilling to do.

191. See McIntyre v. McIntyre, 341 N.C. 629, 635, 461 S.E.2d 745, 749 (1995). Although the McIntyre opinion does not address a situation where grandparents demonstrate “conduct inconsistent with the parent’s paramount protected status,” it seems only logical that in such a situation a grandparent could petition for visitation. If the grandparent could petition for custody based upon that standard, they should be able to petition for visitation, which is a lesser form of custody. See supra note 173.

192. Since grandparents already possessed standing, pursuant to N.C. Gen. Stat. § 50-13.2(b1), to obtain court ordered visitation, this interpretation of N.C. Gen. Stat. § 50-13.1(a) is redundant. In addition, the North Carolina Court of Appeals in Fisher v. Gaydon held that since custody was not being contested by the child’s father, and that since the defendant mother dismissed her an action for custody, the petitioning grandparents lacked the required standing. 124 N.C. App. 442, 445-46, 477 S.E.2d 251, 253 (1996). Since a single parent can qualify as an “intact family”, what situation will not qualify as an “intact family”? See id. at 445-46, 477 S.E.2d at 252-53.

193. As previously noted, the plurality opinion in Troxel cited to several state statutes which allowed grandparents standing to petition for visitation when denied contact with their minor grandchildren. By their own terms, these statutes limit their applicability, and provide guidance as to what factors the court must consider.
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Assume for a moment that a grandparent has filed a petition for visitation, and pursuant to McIntyre and Fisher possesses the requisite standing. In determining whether to grant visitation, the trial court must simply determine, utilizing its discretion, whether the requested visitation is in the "best interests" of the minor child. Although in this situation the grandparents were forced to jump through several procedural hoops, this procedure, like the one created by the Washington statute challenged in Troxel, fails to adequately safeguard the "protected interests" of the natural parents. The trial court may, but is not required to, consider the decision of the natural parents. If the trial court does consider the decision of the natural parents, what weight should be given to that decision? Absent additional protections, the mere application of the "best interests test" when determining issues of grandparental visitation is unconstitutional.

Although the Troxel plurality opinion ultimately held that the Washington grandparental visitation statute was unconstitutional as applied, it provides an outline of factors that should be considered so as to adequately safeguard natural parents' "protected status." Using these factors as a guide, North Carolina appellate courts can give full effect to the "consistent legislative intent" created by the broad statute and the various specific statutes, and in so doing safeguard the "protected status" of natural parents. First, the trial courts should be required to consider allegations of "conduct inconsistent" with the

194. Troxel, 530 U.S. at 67.
195. See In re Jones, 62 N.C. App. 103, 105, 302 S.E.2d 259, 260 (1980) ("To support an award of visitation rights, the trial court judgment 'should contain findings of fact which sustain the conclusions of law that a party is a fit person to visit the child and that such visitation rights are in the best interest of the child.'") (quoting Montgomery v. Montgomery, 32 N.C. App. 154, 157, 231 S.E.2d 26, 29 (1977). See also Hedrick v. Hedrick, 90 N.C. App. 151, 368 S.E.2d 14 (1988).
196. The only protection afforded by the current scheme is the minimal protection of reducing the number of persons eligible to "drag" natural parents into court.
197. Cf. supra notes 57-62 and accompanying text.
198. Cf. supra notes 57-62 and accompanying text.
199. See supra notes 52-68 and accompanying text.
200. See supra notes 52-68 and accompanying text.
201. See supra note 130 and accompanying text.
202. See supra note 129 and accompanying text.
203. Although the appellate courts will be performing a "quasi"-legislative function by requiring any safeguards, by doing so, the appellate courts would be adhering to the various tenets of statutory interpretation previously outlined (see supra notes 111-114), and would be giving full effect to the intent of the legislature.
parent’s “protected status.” Although the Troxel opinion refers to allegations of unfitness, it may be more informative to allow the trial court to consider a broader spectrum of possible conduct.\textsuperscript{204} Also, if under current North Carolina law “conduct inconsistent” with a parent’s protected status can form a basis to award custody to a third party, this same standard should also form a basis to award visitation to a related grandparent, despite objections of a natural parent. Next, there should be a rebuttable presumption that a natural parent’s decision not to allow visitation is in the best interests of the minor child. In addition, in the context of grandparental visitation, the court should consider whether the grandparents have been denied complete contact. Finally, there should be a “catch-all” requirement that the court consider “any other factor” relevant to its inquiry. This will allow the trial court to consider the entire factual situation surrounding the dispute. Based upon the evidence of these factors, or the lack thereof, the court should exercise its discretion in deciding whether or not to grant visitation. Admittedly, these factors are extremely vague and will require case-by-case examination. Determining issues of child custody and visitation is far from an exact science.

The Troxel plurality opinion provided a possible alternative to wholesale creation of new standards. The opinion cited several state statutes that grant visitation to grandparents when they have been denied complete contact with their minor grandchildren.\textsuperscript{205} The appellate courts could simply adopt the requirements of the Mississippi, Oregon, or Rhode Island statutes. These requirements are quite similar to those outlined above. The least demanding of the three statutes is the Mississippi statute, which only requires proof of a prior “viable” relationship, unreasonable denial of visitation, and that the requested visitation would serve the best interests of the minor child.\textsuperscript{206} The most demanding statute is the Rhode Island statute, which would require repeated attempts to visit with the minor children, proof of no other option other than judicial intervention, and clear and convincing evidence proving that the decision of the natural parent was unreasonable.\textsuperscript{207}

V. Conclusion

When courts examine issues of child custody and visitation, the inquiry should be guided by the “polar star”: the child’s best inter-

\textsuperscript{204} See generally Price v. Howard, 346 N.C. 68, 484 S.E.2d 528 (1997).
\textsuperscript{205} See supra notes 66 – 68 and accompanying text.
\textsuperscript{207} See supra note 68.

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Towards this end, the North Carolina General Assembly enacted statutes that grant grandparents standing to petition for visitation with their minor grandchildren. During the previous several years, the North Carolina appellate courts, in an effort to protect the rights of natural parents, have eviscerated the application of these statutes. In light of the United States Supreme Court decision in Troxel v. Granville, the North Carolina appellate courts can give effect to these grandparental visitation statutes and continue to protect the rights of natural parents. The current illogical interpretation of these statutes is no longer required and should be re-examined and reversed, thereby once again allowing grandparents to possess the legal standing to petition for court ordered visitation.

208. See Thomas L. Fowler & Ilene B. Nelson, Navigating Custody Waters Without a Polar Star: Third-Party Custody Proceedings After Petersen v. Rogers and Price v. Howard, 76 N.C. L. Rev. 2145 (1998) ("For over 100 years, the best interest of the child was the 'polar star' that guided North Carolina courts in third-party custody proceedings.").