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Note*


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I. INTRODUCTION

With the recent widespread enactment of grandparent visitation statutes, grandparents' legal access to their grandchildren changed dramatically. Under the common law, grandparents were generally denied the legal right to bring a separate grandchild visitation suit. Currently, every state in the nation has a statute granting grandparents the legal right to seek court-ordered visitation. These statutes embody a remarkable shift away from the concept of exclusive parental control and toward a right of access for grandparents based upon their status in the family.

Nebraska joined this wave of change when it became the final state in the nation to adopt a grandparent visitation statute. The Nebraska statute allows grandparents separate grandchild visitation rights if they can establish that they share a significant beneficial relationship with their grandchild and that visitation is in the best interests of the child.1 The Nebraska legislature did not provide a definition for the somewhat vague “best interest of the child” standard. As a result, it was left to the judiciary to breathe life into grandparents' newly acquired legal rights.

In Eberspacher v. Hulme,2 the Nebraska Supreme Court reversed an appellate court decision granting separate and reasonable visitation rights to the grandparents of Rex Eberspacher and Tricia Hulme's children. In so doing, the Nebraska Supreme Court failed to follow its own standard of judicial review previously set forth in a similar grandparent visitation case.3 As a result, the Eberspacher decision increases the level of uncertainty that plagues the “best interests of the child” analysis under the Nebraska Grandparent Visitation Rights Statute.4

This Note analyzes the impact that the Eberspacher decision has on grandparent visitation rights and criticizes the failure of the court

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to adhere to a clearly mandated standard of review. The Note begins by examining the history of grandparent visitation rights within the United States, and more specifically, within Nebraska. An examination of the facts and holding of the Eberspacher opinion follows. Part IV analyzes the standard of review set forth by the Nebraska Supreme Court in the first grandparent visitation rights decision and the standard as it was properly applied by the Nebraska Court of Appeals in Eberspacher. This Note then criticizes the supreme court’s failure to follow its own precedent which results in a superfluous review at the appellate level, as well as an uncertain approach for analyzing the “best interests of the child.” The Note concludes that while the Nebraska legislature did not define the phrase “best interests of the child,” the legislature did not intend the judiciary to decide grandparent visitation cases based on vague, illusory factors, centered on whatever criteria a judge feels is important.

II. THE HISTORY OF GRANDPARENT VISITATION RIGHTS

A. The Development of National Grandparent Visitaton Rights

With the dynamics of the American family constantly changing, family law must undergo a concomitant change.5 Under the common law, grandparents generally had no visitation rights; rather visitation was left to the behest of the parents, and grandparents were left to rely on a parent’s moral obligation to allow visitation.6 Courts justified their denial of grandparent visitation rights with a number of reasons.7 Some judges reasoned that granting individual visitation rights to grandparents would undermine parental authority.8 An-

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5. See Ross A. Thompson, et al., Grandparent Visitaton Rights: Legalizing the Ties that Bind, 44 Am. Psychol. 1217, 1217 (1989)(positing that legislators should exercise care not to change the nature of families through laws, but merely create laws to accommodate those changes in family life that have already occurred.).


8. Jackson, supra note 6, at 573-74. See, e.g., Jackson v. Fitzgerald, 185 A.2d 724, 726 (D.C. 1962)(stating that, as a rule of law, grandparents have no legal standing through which visitation may be granted); Odell v. Lutz, 177 P.2d 628, 629 (Cal. Dist. Ct. App. 1947)(explaining that permitting grandparents to intervene in the parental right to raise their children would “injuriously hinder proper parental authority by dividing it.”). See also Ross A. Thompson, et al., Grandparent Visitaton Rights: Emergent Psychological and Psychologial Issues, in HANDBOOK OF PSYCHOLOGY AND LAW, 292, 294 (Dorothy Kagehiro & W. Laufer eds., 1992) (courts’ justifications for denying grandparent visitation rights included concerns
other justification provided by courts rested on the ground that placing a child in the middle of an inter-generational conflict would adversely affect the development of the grandchild. Yet another justification found courts holding that parental autonomy is a fundamental constitutional right that should not be infringed upon by the grant of separate grandparent visitation rights.

Recently, however, in response to the "increasing number of unmarried or divorced parents, the existence of step-families, the estrangement of extended families, the decrease in the number of grandchildren, and the increased longevity of grandparents, all fifty states, but not the District of Columbia, have enacted statutes giving grandparents visitation rights." These statutes are designed, in part, to provide stability and security to children faced with the unpredictable ebb and flow of modern family life.

Recent research supports the premise that there often exists a "special bond" between grandparents and grandchildren that can lend children a level of emotional security in times of uncertainty. Additionally, new studies highlight a number of beneficial roles that giving independent rights to grandparents would undermine parental authority and the parents' ability to raise their children as they considered best.

9. See, e.g., Noll v. Noll, 98 N.Y.S.2d 938, 940 (N.Y. App. Div. 1950)(explaining that the relationship between grandparents and their son is irrelevant; grandparents simply have no legal standing to seek separate visitation rights); Commonwealth ex rel. Flannery v. Sharp, 30 A.2d 810, 812 (Pa. 1943)(explaining that requiring a child to visit with grandparents may lead to both physical and emotional trauma in the child); Cox v. Stayton, 619 S.W.2d 617, 621 (Ark. 1981)(holding that "to create new, enforceable rights in grandparents could lead to results that would burden . . . the welfare of the child.").

10. See, e.g., Hawk v. Hawk, 855 S.W.2d 573, 577-78 (Tenn. 1993)(holding that the Tennessee grandparent visitation statute was unconstitutional because it granted separate visitation rights over the objection of both parents); Theodore R. v. Loretta J., 476 N.Y.S.2d 720, 721 (N.Y. Fam. Ct. 1984)(court denied grandparent visitation rights, reasoning "[i]there should not be any judicial interference with the fundamental constitutional rights of a parent. . . .") Contra Herndon v. Tugey, 857 S.W.2d 203, 208-09 (Mo. 1993)(holding parents' constitutional right to raise their children is not absolute, as a result, the Missouri grandparent visitation statute, granting separate visitation over the objection of both parents, is not unconstitutional). See also Mark Moody, Constitutional Questions Regarding Grandparent Visitation and Due Process Standards, 60 Mo. L. Rev. 195 (1995) (tracing the development of parents' constitutional right to rear their children); Judith L. Shandling, The Constitutional Constraints on Grandparent's Visitaton Statutes, 86 Colum. L. Rev. 118, 125-26 (1986) (explaining the Supreme Court's recognition of parents' fundamental liberty interests in raising their children as following from a long line of cases in which the Supreme Court struck down state statutes as "unreasonably [interfering] with the liberty of parents and guardians to direct the upbringing and education of children under their control").

11. Jackson, supra note 6, at 563-64.

grandparents can fulfill in children's lives. Social scientists identify at least four “symbolic” roles that explain the various ways in which grandparents influence their families. First, the understated “being there” role requires simply that a grandparent maintain a presence within the family that benefits grandchildren in two ways. The presence of a grandparent “mitigates against the obtrusive events of the outside world and disruptive events of role transitions . . . [and] serves to maintain the identity of the family.” Additionally, in times of transition, such as “the birth of a sibling or during divorce, a grandparent’s presence may exert a calming influence on grandchildren.”

The second role that a grandparent may fulfill is that of the “family watchdog.” This role finds the grandparent maintaining a vigilant watch for signs of abuse or neglect that “might indicate that the children need additional care or attention.” The third role, that of arbitrator, finds the grandparent acting as an impartial, third party mediator between children and their parents. This role requires the grandparents to “actively negotiate between parents and children concerning values and behavior that may be more central, in the long run, to family continuity and individual enhancement than those that the parents’ authority status allow to be expressed.” The fourth important role finds grandparents acting as “interpreters” of the family history. Grandparents may help children construct a greater sense of identity if they can build connections between the family’s past, present, and future. In sum, “[v]isits with a grandparent are often a precious part of a child’s experience and there are benefits which devolve upon the grandchild from the relationship with his grandparents which he cannot derive from any other relationship.”

While it has long been recognized that grandparents play an important role in their grandchildren’s lives, it took a significant level of

13. See, e.g., VERN L. BENGSTON, DIVERSITY AND SYMBOLISM IN GRANDPARENTAL ROLES 21 (Vern L. Bengston & Joan F. Robertson eds., 1985) (explaining the various roles that sociologists recognize in grandparent-grandchild relationships.).
14. Id.
16. BENGSTON, supra note 13, at 22.
17. Id. at 22.
18. Id.
19. Id.
20. Id. at 23.
21. Id. at 24.
22. Id.
23. Mimkon v. Ford, 332 A.2d 199, 204 (N.J. 1975). But see Thompson, supra note 5, 300-07 (arguing that the assumption that the grandparent relationship necessarily benefits children misrepresents the “heterogeneity of grandparenting styles and their effects on children and the diverse influences mediating the impact of the grandparenting relationship on grandchildren”).
pressure from strong, politically active grandparent groups, to provide
the necessary influence to move legislatures towards implementing
visitation statutes.24

While every state has implemented grandparent visitation stat-
utes, a brief survey of state visitation statutes reveals several glaring
differences among the laws.25 As an example, Delaware law provides
that courts may grant grandparents reasonable visitation rights “re-
gardless of marital status of the parents . . . or the relationship of the
grandparents to the person having custody of the child; provided, how-
ever, that when the natural or adoptive parents of the child are cohab-
itng as husband and wife, grandparental visitation may not be
granted over both parents’ objection.”26 By contrast, Kentucky law al-

dows for the following liberal visitation rights: “The circuit court may
grant reasonable visitation rights to . . . grandparents of a child . . . if
it determines that it is in the best interest of the child to do so.”27
Maine law provides that “[t]he court may award reasonable rights of
contact with a minor child to any third persons.”28

Tennessee’s sweeping statute grants grandparents visitation
rights “upon a finding that such visitation rights would be in the best
interests of the minor child.”29 Moreover, the statute “shall not apply
in the case of any child who has been adopted by any person other
than a relative of the child or a stepparent of the child.”30 The Ten-
esssee statute also provides for grandparent visitation “if the child is
placed in a foster home upon an analysis of the grandparents’ past
record for a determination of any criminal wrongdoing.”31 Vermont
law only allows for grandparent visitation if a “parent of a minor child
is deceased, physically or mentally incapable of making a decision or
has abandoned the child . . . .”32 In addition, the Vermont statute
lists eight factors to consider when determining the child’s best inter-

24. Jackson, supra note 6, at 563-65 (citing Grandparents’ Rights: Preserving Gener-

ational Bonds: Hearing Before the Subcomm. on Human Services of the House
Select Comm. on Aging, 102d Cong., 1st Sess. 3 (1991)(claiming that senior citi-
zens are “the most active lobby in this country, and when it comes to grandparents
there is no one group more united in their purpose.”)). See also Andre P.
Derdyn, Grandparent Visitation Rights: Rendering Family Dissension More
Pronounced, 55 Am. J. Orthopsychiatry 277, 282 (1985)(asserting that the in-
creased demand for grandparent visitation rights is attributable to today’s more
active grandparents as well as to receptive legislators who respond to the political
power exerted by senior citizens.).

25. Jackson, supra note 6, at 568-69.
27. KY. REV. STAT. ANN. § 405.021 (Baldwin 1991).
30. Id.
31. Id.
32. VT. STAT. ANN. tit. 15 § 1012 (1989).
est, and visitation rights are automatically terminated upon the adoption of the child by someone other than a relative of the child.\textsuperscript{33} Arguably, this lack of cohesiveness among statutes "prevents parents and grandparents from fully understanding their custody and visitation rights"\textsuperscript{34} and increases the litigation involving grandparent visitation statutes.\textsuperscript{35}

\section*{B. Nebraska Law}

Before 1986, Nebraska law afforded no legal avenue through which grandparents could seek visitation of their grandchildren. While there is a paucity of cases in this area, at least one case sets forth the traditional common law approach to grandparent visitation rights.

In the case of \textit{In Re Ditter},\textsuperscript{36} the Nebraska Supreme Court denied the request of paternal grandparents for visitation with their grandchildren while the children were involved in an adoption proceeding.\textsuperscript{37} After noting that the common law did not recognize visitation rights for grandparents, the court held that "once the natural parents' rights to a child have been terminated, ... the parents of the parent whose rights have been terminated likewise lose any legal right to visitation."\textsuperscript{38} Thus, since the parental rights of the father were terminated, any derivative rights that the grandparents might have been entitled to were likewise terminated. Consequently, under Nebraska law, there existed no legal right for a grandparent to seek visitation of his or her grandchild.

In 1986, the Nebraska legislature made Nebraska the final state in the union to enact a grandparent visitation rights statute that reversed the traditional common law approach.\textsuperscript{39} The statute contains three distinct provisions that govern a grandparent's standing to petition for visitation. The first section grants courts jurisdiction to hear a petition from a grandparent when the child's parent or parents are deceased.\textsuperscript{40} A dissolution provision affords the parents of either party

\begin{footnotesize}
\begin{enumerate}
  \item Id. §§ 1013, 1016 (1989).
  \item Jackson, supra note 6, at 569.
  \item See Thompson, supra note 5, at 1221 (arguing that explicit standards regarding grandparent visitation might allow families to "bargain in the shadow of the law" because clear standards allow potential litigants to predict probable results of litigation, thereby diminishing grandparent visitation cases and encouraging intra-family negotiations to resolve the dispute).
  \item 212 Neb. 855, 326 N.W.2d 675 (1982).
  \item The grandparents sought visitation rights after the rights of their son, the children's natural father, were terminated. In \textit{Ditter} the children's natural mother was deceased, having been murdered by the natural father who was sentenced to life in prison. \textit{Id.} at 856-57, 326 N.W.2d at 676.
  \item \textit{Id.} at 857, 326 N.W.2d at 676.
  \item See, e.g., \textit{Law Eases Visits to Children}, \textit{N.Y. Times}, April 16, 1986 at C16 (noting the passage of the Nebraska grandparent visitation rights statute).
\end{enumerate}
\end{footnotesize}
in a dissolution or divorce proceeding the opportunity to petition a court for visitation.\textsuperscript{41} Lastly, the statute allows grandparents to petition for visitation when the parents of the child have never married, but paternity has been legally established.\textsuperscript{42}

Regardless of the standing provision under which grandparents petition for visitation rights, the statute directs a court to ascertain whether separate grandparent visitation is “in the best interest of the child.”\textsuperscript{43} Moreover, the statute requires a petitioner to demonstrate that a “significant beneficial relationship” exists between the grandparent and the children.\textsuperscript{44} The statute fails, however, to provide a definition for either phrase as \textit{Eberspacher v. Hulme} made clear.

III. \textit{Eberspacher v. Hulme}

Tricia Hulme and Rex Eberspacher were married in Nebraska in 1983.\textsuperscript{45} Prior to divorcing in 1989, the couple had two sons.\textsuperscript{46} As a result of the divorce, Tricia was awarded custody of the boys while Rex received visitation rights.\textsuperscript{47} At the time of the divorce, Tricia and Rex both lived in Omaha.\textsuperscript{48} Rex subsequently moved to Parkville, Missouri, and Tricia moved to Grand Island, Nebraska.\textsuperscript{49} Throughout the divorce proceedings, Rex’s parents, Carroll and Margaret, lived in Friend, Nebraska. In 1989, Rex’s visitation rights were modified to conform to the distance between residences.\textsuperscript{50} Soon thereafter, Tricia Hulme moved to Lincoln, Nebraska.\textsuperscript{51} Rex then pursued greater visitation rights with his sons. In June 1991, Rex again petitioned the court for expanded visitation. However, the terms of visitation were not modified.\textsuperscript{52}

In May 1992, Carroll and Margaret Eberspacher filed a petition in the district court for Lancaster County seeking separate grandparent visitation rights pursuant to Nebraska law.\textsuperscript{53} After a trial at which

\begin{itemize}
\item \textsuperscript{41} \textit{Nebraska Revised Statutes} § 43-1802(1)(b) (Reissue 1993).
\item \textsuperscript{42} \textit{Nebraska Revised Statutes} § 43-1802(1)(c) (Reissue 1993).
\item \textsuperscript{43} \textit{Nebraska Revised Statutes} § 43-1802(2) (Reissue 1993).
\item \textsuperscript{44} \textit{Nebraska Revised Statutes} § 43-1802(2) (Reissue 1993).
\item \textsuperscript{46} \textit{Id.}
\item \textsuperscript{47} \textit{Id.} at 203-04, 533 N.W.2d at 104. The visitation rights were comprised of every other weekend, overnight stays each Wednesday, certain alternating holiday visitations, and three weeks of summer visitation, “to be exercised [one] week at a time during the months of June, July, and August.”
\item \textsuperscript{48} \textit{Id.}
\item \textsuperscript{49} \textit{Id.}
\item \textsuperscript{50} Rex’s visitation rights were modified allowing for one weekend visit per month, alternating holiday weekends, and thirty-five consecutive days during the children’s summer vacation. \textit{Id.}
\item \textsuperscript{51} \textit{Id.}
\item \textsuperscript{52} \textit{Id.}
\item \textsuperscript{53} \textit{Nebraska Revised Statutes} § 43-1801 (Reissue 1993).
\end{itemize}
each of the parents and grandparents testified, the district court de-
nied Carroll and Margaret’s petition for separate grandparent visita-
tion rights. "The district court determined that there was not clear
and convincing evidence that there is or has been a significant benefi-
cial relationship between the grandparents and the children..."54
Moreover, the district court concluded that there was not clear and
convincing evidence establishing that it was in the best interests of
the children that a separate relationship between the boys and their
grandparents continue;55 and finally, the grandparents failed to es-

tablish that such visitation would not adversely interfere with the
parent-child relationship.56

The Nebraska Court of Appeals, "after a thorough review of the
record,"57 reversed the decision.58 The court of appeals reasoned that
"separate and reasonable visitation rights... would serve the best
interest of... [the children] and would not adversely interfere with
the parent-child relationship of either Tricia or Rex with the chil-
dren."59 The court of appeals found that the district court’s denial of
grandparent visitation rights was an abuse of discretion.60

The Nebraska Supreme Court reversed the appellate court deci-
sion. The court held that the trial court did not abuse its discretion in
denying the petition for grandparent visitation rights.61 After a curs-
sory review of the facts, the court found that “the undisputed evidence
of record is that the grandparent-grandchild relationship here is an
unremarkable, typical, healthy relationship.”62 The court concluded
that “in light of the litigious relationship between the grandparents
and Tricia, we cannot say that the district court abused its discre-

As a result, Carroll and Margaret Eberspacher were denied
the right bestowed on them by Nebraska’s grandparent visitation
statute.

55. Id.
56. Id.
57. Id.
202, 533 N.W.2d 103 (1995)).
60. Id. at *17.
61. Id. at 207, 533 N.W.2d at 106.
62. Id. at 208-09, 533 N.W.2d at 106-07.
63. Id. at 209, 533 N.W.2d at 107.
IV. ANALYSIS

A. Nebraska's Judicial Interpretation

Given the inherent ambiguities that exist in the Nebraska grandparent visitation statute, it was left to the judiciary to give meaning to the rights bestowed on grandparents.

1. Rosse v. Rosse: A Case of First Impression

In Rosse v. Rosse, the Nebraska Supreme Court was asked to interpret the grandparent visitation statute. In Rosse, the court affirmed a district court order granting separate visitation rights to the children's paternal grandparents after a divorce of the children's parents.

In an attempt to provide substance to the phrase "significant beneficial interest," the court explained "it is obvious that such a relationship is fact-dependent, . . . we proceed to examine this requirement based on the facts . . . ." An analysis of the facts led the court to conclude that there existed clear and convincing evidence that the grandparents enjoyed the requisite significant beneficial relationship with their grandchild.

The facts the court relied on included the grandmother's testimony that her granddaughter trusted her and had slept in her arms, the granddaughter hugged and kissed her grandmother, and told her "I love you, Nana." Moreover, the facts revealed that the grandfather took the child places such as the park and the zoo; the grandfather was able to care for the child's needs "such as feeding and toileting [sic]," and the child gave the grandfather kisses.

Turning to the issue of whether visitation would adversely interfere with the parent-child relationship, the state supreme court concluded that, although the relationship between the grandparents and the child's mother was "strained", there existed no evidence sug-

64. See Brown, supra note 12, at 146-47 (asserting that one of the primary problems with grandparent visitation statutes is the failure by legislatures to define the phrase "best interests." Thus, courts are left to their own discretion in determining the child's best interest); Fernandez, supra note 15, at 123 (stating that "in states without enumerated criteria [that define the "best interests" standard] . . . the decisions are generally based on whatever criteria the judge feels is important."); Jackson, supra note 6, at 570 (stating that the "commonly used, but ill-defined best interests of the child standard" helps contribute to the uncertainty that exists in grandparent visitation statutes).

65. 244 Neb. 967, 510 N.W.2d 73 (1994).
66. Id. at 975, 510 N.W.2d at 79.
67. Id. at 973, 510 N.W.2d at 78.
68. Id. at 974, 510 N.W.2d at 78.
69. Id. at 973, 510 N.W.2d at 78.
70. Id. at 974, 510 N.W.2d at 78.
71. Id.
gesting that visitation interfered with the relationship between the children and either parent. The court looked at the following testimony in reaching its conclusion: The mother testified that the grandmother "was a liar and could not be trusted to care for Isabella in the way [the mother] preferred." Also, the mother claimed that the grandmother gave the child candy, in direct contravention to the mother's wishes. The court concluded that while this testimony supported the conclusion that some acrimony existed between the grandparents and the mother of the child, there existed no evidence that visitation by the grandparents would interfere with the maternal relationship.

The supreme court next explained that the record did not support a holding that the trial court abused its discretion in finding clear and convincing evidence that it was in the best interests of the grandchild for her relationship with her grandparents to continue. The court based this conclusion on the age of the child and the fact that the child's father also exercised separate visitation rights with his daughter.

While the Rosse decision lent some guidance to the interpretation of the phrase "best interests of the child," the more important aspect of the decision can be found in the standard of review enumerated by the court. The appropriate standard of review established by the decision was explicitly set forth as follows:

This case is one of first impression for this court regarding grandparent visitation rights. However, we have consistently held that, in a dissolution of marriage action, determinations concerning visitation with a minor are initially entrusted to the discretion of the trial judge, whose determinations, on appeal will be reviewed de novo on the record and affirmed in the absence of abuse of the trial judge's discretion. . . . We hold that the same standard of review is to be applied to a judicial determination of grandparent visitation rights.

Plainly stated, the court held that while grandparent visitation rights are initially entrusted to the discretion of the trial judge, that initial determination is subject to meaningful review by the Nebraska appellate courts. This standard of review is the same as that applied to determinations concerning visitation with a minor in a dissolution of marriage action.

72. Id. at 974, 510 N.W.2d at 78-79.
73. Id. at 974.
74. Id. at 974, 510 N.W.2d at 78.
75. Id. at 974, 510 N.W.2d at 78-79.
76. Id. at 974-75, 510 N.W.2d at 79.
77. Id.
78. Id. at 969, 510 N.W.2d at 76 (citing Hickenbottom v. Hickenbottom, 239 Neb. 579, 477 N.W.2d 8 (1991)).
2. Appellate Level Review

In order to more fully appreciate the standard of review set forth by the Nebraska Supreme Court, it is necessary to examine the role of the appellate court as previously established by the court. The rule of law governing the appropriate standard of appellate review was first set forth in *Guggenmos v. Guggenmos*. In *Guggenmos*, the court explained:

In a review de novo on the record, we reappraise the evidence as presented by the record and reach our own independent conclusions with respect to the matters at issue. A review to determine whether an abuse of discretion has taken place is much narrower. Although an abuse of discretion does not imply an improper motive, willful purpose, or intentional wrong, it does require the reasons or rulings of the trial judge to be clearly untenable and to deprive a party of a substantial right such as to amount to a denial of justice.

Thus, according to the Nebraska Supreme Court, if grandparents are denied separate visitation rights, on appeal the appellate court is directed to review the record de novo and affirm the decision in the absence of an abuse of the trial court's discretion. An abuse of discretion exists if the trial judge's opinion is "untenable" or, in other words, indefensible. Thus, while determinations concerning grandparent visitation rights are initially entrusted to the discretion of the trial judge, that initial determination is subject to plenary review by the appellate court.

Additionally, when the trial court fails to make an essential finding, the Nebraska supreme court, and a fortiori the Nebraska Court of Appeals, in its de novo review has the power to make the necessary essential finding. The Nebraska Supreme Court set forth this unequivocal rule of law in *Parker v. Parker*:

We hold that the party seeking modification of a decree of dissolution bears the burden of showing a material change of circumstances affecting the best interests of a child, and, if a finding on that issue is not made in the trial court, the Supreme Court, in its de novo review, may make such finding if the evidence supports it.

Thus, while grandparents overcame the common law obstacles depriving them of separate visitation rights by the enactment of the Nebraska grandparent visitation rights statute, grandparents still

81. Id. at 748, 359 N.W.2d at 90 (citing Pettegrew v. Pettegrew, 128 Neb. 783, 260 N.W. 287 (1935)). The court looked to the standard of review as first established in marriage dissolution cases dealing with the division of property to arrive at the appropriate standard of review in child visitation cases.
82. Id.
84. Id. at 168, 449 N.W.2d at 554.
85. See Thompson, supra note 5, at 1293-1295 (discussing the common law burdens grandparents faced when seeking separate visitation rights.).
face a tremendous legal challenge as set forth by the statute itself, as well as by the strict standard of review that must be satisfied at the trial level and on appeal.

B. The Appropriate Application of Appellate Review

In light of the clearly stated standard of review, in order to receive separate grandparent visitation rights, Carroll and Margaret Eberspacher had to meet a heavy burden. To overcome the district court order, the grandparents were required to show, by clear and convincing evidence, that they enjoyed a significant beneficial relationship with the children, that the best interests of the children would be served if the relationship were to continue at an elevated level, and that an award of separate visitation rights would not interfere with either parent’s relationship with the children. Moreover, the appellate court was precluded from reversing the trial court decision unless it concluded that the decision was an abuse of discretion.

1. A Significant Beneficial Relationship

The appellate court began its review with an exhaustive finding of fact with respect to each element of the grandparent visitation statute. The court first found that the evidence offered at trial was clear and convincing in support of the conclusion that the Eberspachers maintained a significant beneficial relationship with their grandsons. The court explained that the significant relationship began “at the respective births of each of these children ... the grandparents visited in the parents’ home once or twice a month, despite its being a 130-mile trip, one way.” The evidence also indicated that the grandparents took advantage of every opportunity available to visit the children. In addition, the Eberspachers engaged in the following activities with their grandchildren:

- planting gardens, riding tractors, feeding cows, swimming, grilling hamburgers, going to Carroll’s barbershop, riding bikes, watching the ducks at the grandparents’ duck pond, renting movies, eating popcorn, playing baseball,

86. Neb. Rev. Stat. § 43-1802(2)(Reissue 1993) allows a court to grant reasonable rights of visitation only after a grandparent establishes that a significant beneficial relationship exists, or has existed, by clear and convincing evidence. This “strict” standard of proof means “that amount of evidence which procures in the trier of fact a firm belief or conviction about the existence of the fact to be proved.” In other words, it must be evidence that is “more than a preponderance, but less than evidence beyond a reasonable doubt.” In re Interest of L.V., 240 Neb. 404, 407, 482 N.W.2d 250, 253 (1992).


88. Id.

89. Id. at *8.
Moreover, the appellate court found that "despite several relocations of Rex and Tricia and the geographical impediments attendant with such moves, ample evidence was presented to produce the firm conviction that a significant beneficial relationship existed between the Eberspachers and their grandsons..."91

2. The Best Interests of the Children

Moving to the "best interests of the children" element, the court, again after an exhaustive review of the record and relevant case law, found that separate visitation rights coincided with the best interests of the boys.92 The court observed that the nature and extent of visitation rights must be considered on a case-by-case basis with attention to the following factors and circumstances:

- [the] age and health of the child; character of the noncustodial parent; the place where visitation rights will be exercised; frequency and duration of visits; the emotional relationship between the visiting parent and the child; the likely effect of visitation on the child; availability of the child for visitation; likelihood of disrupting an established lifestyle otherwise beneficial to the child; and, when appropriate, the wishes of the child.93

The appellate court explained that these factors were initially developed in the context of parent visitation rights following a divorce.94 However, the court noted that the factors "are appropriate reference points in evaluating the best interests of a minor child in grandparent visitation determinations as well."95 The court found, upon application of the factors to the facts at bar, that the evidence established that the boys were "ecstatic' and 'electrified' over visits with their grandparents and that such visits are attended with hugs, kisses, and 'I love yous'."96 The court also determined that "it is obvious that the Eberspachers have an abiding dedication to the extended family and want [the boys] to know their father's family..."97 The testimony further showed the importance of "the children's developing a sense of trust with [their grandparents]... so that the children would know the extent of how much they were loved and cared for."98

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90. Id.
91. Id.
92. Id. at *15.
93. Id. at *9 (citing Gerber v. Gerber, 225 Neb. 611, 619, 407 N.W.2d 497, 503 (1987)).
94. Id.
95. Id. at *10.
96. Id.
97. Id.
98. Id.
grandparent visitation rights coincided with the best interests of the children.

3. Interference With the Parent-Child Relationship

Looking to the third prong of the statute, whether reasonable rights of grandparent visitation would adversely interfere with the parent-child relationship, the court concluded that awarding Carroll and Margaret separate visitation rights would not interfere with either parent's relationship with the children.99 The boys' mother argued that Rex should share his visitation time with his parents. As the appellate court pointed out, however, the statute calls for an award of separate visitation rights to the grandparent.100 Moreover, requiring the grandparents to "share" visitation time with the children's father would likely interfere with the relationship that the boys and their father shared.101

With respect to the relationship between the mother and the boys, the court explained that while "[t]he record reflects that both the Eberspachers and Tricia exhibited rudeness and insensitivity . . . ," the animosity and stress between the parties was not evidence that an award of separate visitation rights to Carroll and Margaret would "adversely oppose" the relationship between Tricia and the boys.102 Thus, in light of the conclusion that an award of separate visitation to Carroll and Margaret served the best interests of the boys, it followed naturally that separate visitation would not "interfere" with the relationship between the children and their mother.

The appellate court's exhaustive review of the record served two purposes. First, the review properly fulfilled the court's judicial obligation as set forth in the Rosse decision. Additionally, the review led to an accurate application of the plain meaning of the grandparent visitation statute.

C. Criticism of Eberspacher v. Hulme

With an outline of the appropriate standard of review, as well as with the appellate court's extraordinarily thorough findings of fact and law in mind, a close analysis of the supreme court's Eberspacher opinion reveals several remarkable inconsistencies committed by Nebraska's highest court. As a result, the requisite appellate court re-

99. Id. at *15. The court properly noted that "any specified grandparent visitation, particularly when resisted, will interfere . . . with the parents' life, schedule, and routine. The issue is not whether it will inconvenience the parent, but whether the visitation will adversely or unfavorably oppose the parent-child relationship so as to hamper, hinder, or obstruct it." Id. at *14 (emphasis added).
100. Id. at *15.
101. Id.
102. Id. at *13-14.
view now stands as a vacuous formality. The district court judge who initially handles a claim for separate grandparent visitation rights is left to impose personal moral values, as well as his or her own subjective opinions about child-rearing, when deciding the "best interests of the child."

1. The District Court Order Failed to Provide a Finding of Fact or Any Reasoning in Support of Its Decision.

After a trial in which the children's parents and grandparents both testified, the district court issued the following order:

There is not sufficient evidence to support a determination by clear and convincing evidence... either (A) that there is, or has been a significant beneficial relationship between the petitioners and the children... and that it is in the best interests of the children that such relationship continue; or (2) [sic] that such visitation will not adversely interfere with the parent-child relationship. Grandparent visitation is, therefore, denied.104

Significantly, there was no finding of fact in the trial judge's order that supports his determination regarding the absence of a substantial beneficial relationship between Margaret and Carroll and their grandchildren. Moreover, as the appellate court pointed out, "[t]he reasoning of the trial judge does not appear in his order, and therefore, we are not advised of what factors he relied upon in reaching such decision."105 Without a description of those factors relied on by the trial judge, on de novo review, in light of all of the facts, the appellate court could not reach the same conclusion as that of the trial judge.

Remarkably, the Nebraska Supreme Court eschewed the findings of fact and conclusions of law issued by the appellate court. In so doing, the court implicitly reversed a number of former decisions that lay the foundation upon which the appellate level of review was constructed. Plainly stated, the appellate court, acting in consistency with the Parker decision and faced with the absence of appropriate findings by the trial court, made its own findings of fact in its de novo review regarding the significant beneficial relationship between the grandparents and grandchildren, the best interests of the children, and whether visitation would adversely interfere with the parental relationships.106 The unavoidable conclusion under Rosse was that the district court abused its discretion, thereby depriving the Eberspachers of a substantial right—their right of separate visitation with their grandchildren.

105. Id. at *8.
As a result of the *Eberspacher* opinion, the appellate court's role became to simply "rubber stamp" the decision of the trial judge. In effect, the *Eberspacher* court held that the trial court judge did not abuse his discretion when he concluded that separate grandparent visitation would not serve the best interests of the children. The district court order contained no findings of fact or reasons in support of its decision. As such, the supreme court could only speculate as to the factors the trial judge considered in making his decision. Consequently, the court promulgated a standardless rule of law that will allow a trial judge to capriciously grant or deny visitation rights according to any subjective standards the judge deems appropriate. Moreover, an appellate court, faced with a skeletal district court order, simply has no incentive to thoroughly develop the facts of the case in order to ascertain whether the trial judge abused his discretion.

By failing to follow the supreme court's own established precedent, the *Eberspacher* decision allows judges to impose their own morals and views regarding child-rearing on the litigants. This form of subjective judicial decision making becomes clear upon a close examination of the glaring inconsistencies between the *Eberspacher* and *Rosse* decisions.

2. The *Eberspacher* and *Rosse* Decisions Are Factually Indistinguishable.

The inconsistencies between the *Eberspacher* and *Rosse* decisions begin with the fact that the court found a "significant beneficial relationship" in the *Rosse* case, and refused to do so in the *Eberspacher* decision.\(^{107}\) Concededly, whether a "significant beneficial relationship" exists is a fact dependent question;\(^{108}\) however, when the facts of two cases are relatively indistinguishable, the first case generally controls.\(^{109}\)

In *Rosse*, the grandparents enjoyed a relationship with their granddaughter that included hugs, kisses, and "I love yous." The identical displays of affection existed in the Eberspachers' relationship with their grandsons. Additionally, the Rosse grandparents took their granddaughter to the zoo and to the park and cared for her physically. The Eberspachers not only took their grandsons to the park, they also fed cows and raised ducks with the children on the Eberspachers' farm. Consequently, drawing the conclusion that on one hand, the Rosse grandparents maintained a "significant beneficial relationship"

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108. Rosse v. Rosse, 244 Neb. 967, 973, 510 N.W.2d 73, 78 (1994).
109. Anthony v. Pre-Fab Transit Co., 239 Neb. 404, 409, 476 N.W.2d 559, 563 (1991) (explaining that when the facts of two cases are indistinguishable, the former case generally controls the outcome of the latter case).
with their granddaughter and, on the other hand, the Eberspachers' relationship with their grandsons was not a "significant beneficial relationship" is clearly inconsistent.

In attempting to distinguish the results of the cases, the Eberspacher court explained "[t]he undisputed evidence of record is that the grandparent-grandchild relationship here is unremarkable, typical, healthy relationship." Thus, the court concluded that the relationship between the Eberspachers and their grandsons did not fall within the scope of the grandparent visitation statute. The fallacy in the court's reasoning is found in the fact that the Nebraska grandparent visitation statute was designed to protect "unremarkable, typical, healthy relationships" between children and their grandparents. The plain language of the statute requires clear and convincing evidence of a significant beneficial relationship, or in other words, a typical, healthy relationship between children and grandparents.¹¹¹ Requiring grandparents to prove anything beyond a typical, healthy relationship results in a clear disregard of the plain, unambiguous language of the visitation statute.

Had the Eberspacher court examined the facts as developed by the appellate court, it would have realized that the facts of the case are indistinguishable from those in Rosse. The Eberspacher opinion, however, wholly fails to distinguish the Rosse case. As a result, the "best interests of the child" standard becomes a malleable concept, through which judges at the trial level may incorporate any subjective criteria that they consider appropriate to the case at bar.

3. The Eberspacher Court Erroneously Relied on the Fact that the District Court Judge Observed the Witnesses.

The Eberspacher opinion relies, in part, on the fact that the district court "observed the witnesses."¹¹² As a general rule, "when the evidence is in conflict, [an appellate court] considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another...."¹¹³ There exists, however, an exception to this general rule, carved out by the Nebraska Supreme Court. In State ex. rel. Reitz v. Ringer,¹¹⁴ the court explained that because the rule uses permissive

¹¹¹. NEB. REV. STAT. § 43-1802(2) (Reissue 1993). See, e.g., Rosse v. Rosse, 244 Neb. 967, 971, 510 N.W.2d 73, 77 (1994) (holding "[i]n the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning; when the words of a statute are plain, direct, and unambiguous, no interpretation is necessary or will be indulged to ascertain their meaning").
¹¹⁴. 244 Neb. 976, 510 N.W.2d 294 (1994).
language, "an appellate court is not required to give any weight to the trial court's findings, much less great weight." 115

Clearly, the appellate court had discretion regarding the consideration it should give to the fact that the trial court judge observed the witnesses. More importantly, the appellate court was not required to give any weight to this consideration. The supreme court's reference to the fact that the trial court judge "observed the witnesses" is not grounds for reversal. The appellate court was given the discretion to accept or dismiss the fact that the trial judge observed the witnesses. For the Nebraska Supreme Court to rely, in part, on this fact in making its decision is indefensible.

4. The Court's Reference to the "Litigious Relationship" Between the Parties Was Significantly out of Context.

The Eberspacher opinion denied Carroll and Margaret separate visitation rights, in part, because of the "litigious relationship in this case." 116 The extent of the "litigious relationship" between the Eberspachers and the children's mother consisted of the grandparents filing an action seeking a declaration of visitation pursuant to their statutory right. Moreover, the animosity that existed between the Eberspachers and Tricia Hulme was virtually identical to that which existed between the Rosse grandparents and the grandchild's mother.

In Rosse, the mother of the child called the grandmother a "liar" and accused the grandmother of giving the child candy despite the mother's explicit instructions to the contrary. 117 Additionally, the mother testified that both grandparents "are two-faced to her." 118

In Eberspacher, Tricia Hulme testified to the fact that "animosity exists between [Tricia] and the Eberspachers." 119 Tricia also testified that "Carroll Eberspacher called her after he filed the petition for grandparent visitation and said, 'I see you got my little birthday card, huh?'" 120

Based on the facts of both cases, it is clear that animosity existed between the grandparents and a parent. What is unclear, however, is why the supreme court labeled the relationship between the Eberspachers and Tricia Hulme as "litigious," while the relationship between the parties in Rosse was merely "strained." 121 Arguably, the inconsistent holdings are a result of the judges imposing their own subjective standards on the litigants, and as a result, making moral

115. Id. at 988, 510 N.W.2d at 303 (emphasis added).
117. Rosse v. Rosse, 244 Neb. 967, 974, 510 N.W.2d 73, 78 (1994).
118. Id.
120. Id.
judgments with respect to the “best interests” of the children, who are “the primary and paramount considerations”\(^{122}\) in visitation cases. As one commentator has pointed out, “[a]llowing a judge to impose personal values arguably is worse than directing him or her to impose values that a legislature has chosen, because a judge is less personally accountable to the public than is the representative legislature.”\(^{123}\)

V. CONCLUSION

In recent years, dramatic social changes and a strong “senior lobby” have focused increasing national attention on the rights of grandparents to visit their grandchildren. The Nebraska legislature responded by adopting the Nebraska grandparent visitation statute. While the legislative response created some inherent ambiguities concerning the rights of grandparents to seek separate visitation rights with their grandchildren, the Nebraska Supreme Court exacerbated these ambiguities when it decided *Eberspacher v. Hulme*.

The *Eberspacher* opinion is striking because the court not only ignored established precedents regarding the proper standard of review in child visitation cases, but the court refused to distinguish a case that was factually on all fours with the *Eberspacher* decision. The court’s careless application of a clear statutory directive allows trial judges to decide grandparent visitation cases capriciously. Moreover, appellate courts will provide little solace to grandparents attempting to reverse an arbitrary decision. The *Eberspacher* opinion delegates to a trial court judge the right to issue an order unsupported by facts or reasoning, with little fear of being reversed for an “abuse of discretion.”

The most unfortunate result, however, is that children, like the boys in *Eberspacher*, will become lost in the shuffle because when the courts make subjective value judgments with respect to the litigating parties, the children’s welfare is likely being ignored.

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\(^{123}\) Fernandez, *supra* note 15, at 129.