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## Grandparenting: legal rights for visitation of grandchildren

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### Quick Facts

In recent years it has become increasingly recognized that a child's best interest can include the continuation of a relationship that has developed between the child and a grandparent.

In most cases, visitation arrangements between a grandchild and grandparents continues to be made informally.

If a court deems that such animosity is not in the best interest of the child, then the grandparents are unlikely to gain visitation rights.

It is not until a court order is issued and finalized that the actual right to visitation becomes effective.

Courts rarely grant grandparent visitation rights over the objection of the grandchild's parents as long as the parents' marriage is intact.

Under the laws of every state, an adoption completely terminates the parent-child relationship between the child and his or her birth parents. Most courts generally view the grandparent bond dissolved as well.



they saw fit. If the parents dissolved their marriage, or if one of the parents died, the right to grant or prohibit grandparent visitation passed to the custodial or sole living parent. A grandparent acquired no legal right at all to visit the grandchild unless and until the grandparent was named the grandchild's legal guardian or custodian.

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### Background

Both under common law and, until recently, under the laws of almost every state, grandparents had no greater legal right to their grandchildren than a non-relative. This right of access was controlled by the grandchild's parents, who could issue and/or withdraw invitations for visitation as

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## The Child's Best Interest

The legal precedent for this policy was that remaining with a parent was in the best interest of the child. However, in recent years it has become increasingly recognized that a child's best interest can include the continuation of a relationship that has developed between the child and a grandparent. This is particularly the case when the child's parents divorce or if one parent dies.

It is important to note that while most states apply the best-interest-of-the-child test to determine visitation rights, only three states (Nevada, Vermont and Virginia) actually specify the factors that should be involved in this determination. Vermont's law is the most detailed: In determining the best interest of the child, the following shall be considered...

- the love, affection and other emotional ties existing between the grandparents involved and the child;
- the capacity and disposition of the parties involved to give the child love, affection and guidance;
- the nature of the relationship between the petitioner and the grandchild, and the desirability of maintaining that relationship;
- the moral fitness of the parties;
- the mental and physical health of the parties;
- the reasonable preference of the child, if the court deems the child to be of sufficient age to express a preference;
- the willingness of the petitioner to facilitate and encourage a close and continuing relationship between the child and the other parties; and
- any other factor that the court considers relevant to a just determination of visitation or access.

When no specific criteria are specified (as is the case with Colorado), courts generally rely on prior case law or other factors that highlight the best interest of the child.



*When Tom fled his marriage and returned to his parents' home, he brought his 18-month-old son, Nathan. Tom and Nathan remained with Tom's parents for nearly three years. Blond-haired and brown-eyed Nathan grew from infancy to a little boy and his grandparents became very attached to him.*

*Since Tom's work required he travel out-of-state much of the time, his retired parents assumed the majority of responsibility of caring for Nathan. The grandfather remembers how Nathan would jump out of the car and into his arms and the grandmother recalls his cuddling up to her as she read him bedtime stories.*

*Two years ago, Tom decided to go back to his abusive wife. Shortly after his return, his wife smashed the windshield of their car with a tire iron. Scared for the safety of the child, Tom carried Nathan to a nearby gas station to call his parents for help. Tragically, Tom committed suicide shortly after leaving his wife for the second time. In the ensuing months, Tom's parents tried to gain legal custody of Nathan, lost him to the mother in the legal battle and were ultimately denied even phone conversations with him. They expended a considerable amount of their retirement savings in hiring lawyers and a psychologist, but to no avail. They found there was nothing they could really do.*

## Federal vs. State Law

At the federal level, Congress has no general authority to pass legislation on family law questions, including grandparent visitation rights. Under Article 1, section 8 of the Constitution, and the 10th Amendment, such action generally is reserved for the states.

In most cases, visitation arrangements between a grandchild and grandparents continues to be made informally. However, every state (excluding the District of Columbia) now has laws authorizing grandparents' visitation rights under certain circumstances. The most frequent of these circumstances is the dissolution of the parents' marriage through death or divorce. The specific conditions of visitation vary considerably from state to state.

## Animosity Between Grandparents and the Grandchild's Parents

In cases where grandparents use legal avenues to gain visiting rights to a grandchild, it is almost a given that some degree of animosity exists among the parties involved. How does this affect grandparents' attempt to gain visitation rights?

Courts generally recognize that some animosity exists among the parties involved and will not ordinarily defeat a grandparent's petition on the basis that such animosity would be aggravated if visiting rights were granted, a condition that might not be in the best interest of the child. But in such instances, grandparents are at a disadvantage. If a



court deems that such animosity is not in the best interest of the child, then the grandparents are unlikely to gain visitation rights. In such a case in Ohio, the court wrote the following decision:

We note in passing that it will be a rare case where damage to children done by the acrimony present between the parties where a court must order visitation will be outweighed by the benefits of visitation, the artificial nature of which must be evident even to children, and therefore not in the children's best interest.

### Colorado Law

In Colorado, visitation rights of grandparents are as follows:

*"Any grandparent of a child may seek a court order granting reasonable grandchild visitation rights when there is or has been a child custody case. For purposes of this statute, 'child custody case' includes the following, whether or not child custody was specifically an issue: (1) that the marriage of the child's parents has been declared invalid or has been dissolved by divorce or legal separation; (2) that legal custody of the child has been given to a party other than the child's parent or the child has been placed outside of and does not reside in the home of the parent, excluding adoptive placements; or (3) that the child's parent, who is the child of the grandparent, has died. (Colo. Rev. Stat. 19-1-117(1))."*

### Special Condition for Granting Visitation Rights

A few states have provisions for visitation when the grandparent is the parent of an incarcerated parent (e.g. Texas), if the child's parent is physically or mentally incapable of making a decision (e.g. Vermont), where the child has been placed in a foster home (e.g. Illinois), or where the child has resided with the grandparents for a specified length of time (e.g. Minnesota, Pennsylvania, Texas).

Some states allow grandparents' visitation rights to children born out of wedlock, if the parentage of the child is verified (e.g. Illinois, Nebraska, Ohio, Oklahoma), and after adoption, if the person adopting the child is a stepparent or a blood relative (e.g. Alabama, California, Connecticut, Florida).

### Visitation and Visitation Orders

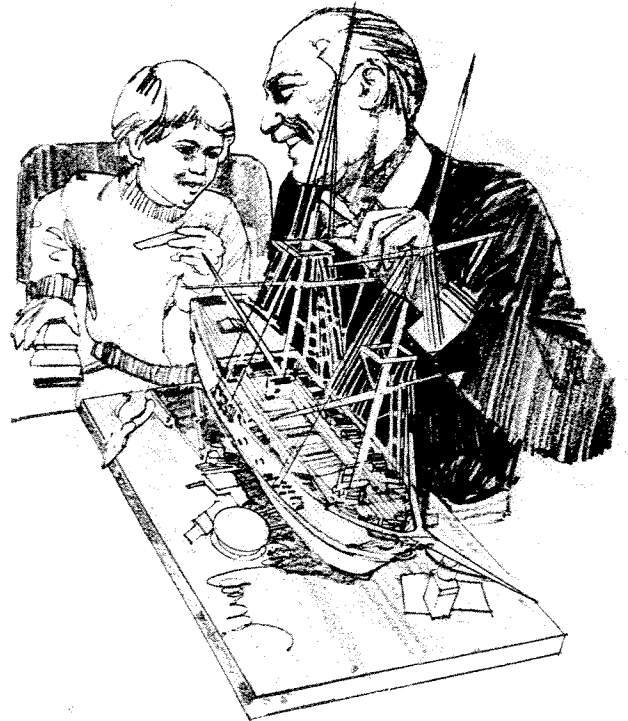
In all these instances, obtaining visitation rights is not automatic. These state laws only give grandparents the right to petition for visitation rights. The courts decide on a case-by-case basis whether such visitation rights are in the best interest of the child. It is not until a court order is issued and finalized that the actual right to visitation becomes effective.

In some states, and most frequently when the grandchild's parent is deceased, grandparents can initiate their own court action to establish visitation rights. In most instances, when a marriage of adult children is dissolved, grandparents must assert these rights as part of the divorce proceedings; they cannot bring such an action into the legal fray prior to that time.

A court-issued visitation order, including a grandparent visitation order, is ordinarily modifiable at any time by any of the parties involved if a change in circumstances is demonstrated (e.g. a remarriage). In the case of grandparent visitation rights, a few states (of which Colorado is one) have enacted laws limiting modification efforts to set intervals, or setting some other limitation regarding when such petitions can be filed.

### Denial of Visitation Rights

Courts rarely grant grandparent visitation rights over the objection of the grandchild's parents as long as the parents' marriage is intact. The parents and their family unit, which is ordinarily defined in such a way as to exclude grandparents,



have privacy rights (under the Constitution) that will ordinarily not be questioned by the court unless there is evidence of child abuse and neglect.

### **Effect of Adoption on Grandparents Visitation Rights**

Awarding grandparent visitation rights under circumstances involving adoption represents a much different legal situation, even when the adoption is by a stepparent who marries the surviving or custodial parent. Under the laws of every state, an adoption completely terminates the parent-child relationship between the child and his or her birth parents. Although adoption laws are silent regarding what happens to the grandparent-grandchild bond, most courts generally view this bond dissolved as well. Importantly, a growing number of states (Colorado is not one of them) now provide that stepparent or close relative adoption does not automatically terminate grandparent visitation rights.

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