

GRANDFATHERED IN: GRANDPARENT INTERVENTION IN MISSISSIPPI ADOPTION PROCEEDINGS

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INTRODUCTION

It has been almost a full year since Helen, a 37-year old grandmother, has seen or heard from her four grandchildren. After Helen's daughter terminated her parental rights, the children were adopted out of Helen's family to a nonbiological, adoptive family who requested a closed adoption. Helen was denied the right to intervene in her grandchildren's adoption proceeding and now has no right to see them, talk with them, or even know where they live. Helen turned to an online blog intended to provide support to grandparents who have lost their grandchildren in adoption proceedings and wrote, "It just breaks my heart into pieces. I need help to cope with this because even though I might not show it on the outside, I am dying on the inside."¹

The role that grandparents play in the lives of their grandchildren has dramatically changed over the last sixty years. Grandparents are now playing larger roles in the lives of their grandchildren, and many grandparents are the sole caregivers responsible for their grandchildren. Courts seem to agree that the changing family dynamic has resulted in grandparents becoming much more than babysitters, gift givers, or the occasional visitors for holidays and special events.² Today, grandparents are often playing large roles in the childrearing process by "providing love, guidance, discipline, protection, and financial support."³

Every state has, at some point in time, adopted statutes allowing grandparents to petition courts for visitation with their grandchildren in certain situations. These statutes are often

¹ This hypothetical was inspired by a forum post on an adoption website. See *Grandparents Coping With Losing Grandchildren thru The State*, ADOPTION.COM (Jan. 15, 2009), <https://adoption.com/forums/thread/332445/grandparents-coping-with-losing-grandchildren-thru-the-state/> [<https://perma.cc/PWT6-TQ9D>].

² THOMAS J. DOWNEY, GRANDPARENTS RIGHTS: A RESOURCE MANUAL: A REPORT BY THE CHAIRMAN OF THE SUBCOMM. ON HUMAN SERVS. OF THE SELECT COMM. ON AGING, H.R. DOC. NO. 102-898, at 2 (1992).

³ *Id.*

referred to as “Grandparent Visitation Statutes”⁴ or “Third-Party Visitation Statutes.”⁵ While Mississippi courts have recognized the rights of grandparents through enacting a grandparent visitation statute, there is currently no statute allowing grandparents to intervene in the adoption proceedings of their grandchildren. This gap in legal protection leaves grandparents at risk of losing their grandchildren to nonbiological, adoptive families without even having the chance to be heard in court. Failing to hear the grandparent’s petition for adoption negatively affects the court’s ability to determine that is truly in the best interest of the child.

Unfortunately, due to the lack of statutory protection, many grandparents, like Helen, are denied the opportunity to intervene in the adoption proceedings of their grandchildren.⁶ A court’s denial of a grandparent’s request to intervene serves as a permanent termination of the grandparent-grandchild relationship.⁷ In Mississippi, a large number of children are being raised by their grandparents, along with a growing number of children being placed in out-of-home foster care. These rising numbers are linked to the drug crisis being faced by the state. The time is ripe for the Mississippi legislature to define the rights that Mississippi grandparents hold in regard to their grandchildren. Specifically, the Mississippi legislature should consider adopting a statute that authorizes grandparents to intervene in the adoption proceedings of their grandchildren.

Part I of this article will give an overview of the history and development of grandparents’ rights in the United States, including an extensive discussion of the Supreme Court’s plurality decision in *Troxel v. Granville*.⁸ It will also reveal statistics on the number of grandparents who serve as the sole caregiver for their grandchildren, along with statistics on the opioid and drug crisis,

⁴ See, e.g., ARK. CODE ANN. § 9-13-103 (2019); COLO. REV. STAT. ANN. § 19-1-117 (2014); IND. CODE ANN. § 31-17-5-1 (2019); MISS. CODE ANN. § 93-16-3 (2019); NEB. REV. STAT. ANN. § 43-1802 (2019); TENN. CODE ANN. § 36-6-307 (2011).

⁵ See, e.g., ARIZ. REV. STAT. ANN. § 25-409 (2013); DEL. CODE ANN. tit. 13, § 2410 (2010).

⁶ Kristen Jones Indermark, Note, *Permissive Intervention—Grandparents’ Key to Entering Adoption Proceedings*, 26 GA. L. REV. 787, 787 (1992).

⁷ *Id.* at 788.

⁸ See generally *Troxel v. Granville*, 530 U.S. 57 (2000).

which is a contributing factor to the growing number of children being raised by their grandparents. Further, this part will include statistics on the number of children in foster care and specifically discuss the increase in the number of children in foster care in the State of Mississippi. Part II will define the two procedural vehicles of intervention: intervention of right and permissive intervention. This section will discuss the differences in the two vehicles and the requirements for intervening in an action. Part III will discuss the current version of Mississippi's Grandparents' Visitation Statute and how Mississippi courts have historically treated grandparents in adoption proceedings. Part IV will propose a statute to the Mississippi legislature stating that grandparents should always be allowed to intervene as a matter of right in adoption proceedings involving their grandchildren. Part V will outline the policy reasons in favor of adopting this statute, which include the following: the allowance of courts to truly reach a finding in the best interest of the child; the alignment with the Supreme Court's opinion in *Troxel* and the Mississippi Grandparents' Visitation Statute; the alignment with the goals of the recently passed Family First Prevention Services Act; the alignment with the federal and state "reasonable efforts" requirements; the psychological and social benefits of the grandparent-grandchild relationship; and courts' historical recognition of the importance of familial, biological relationships.

I. HISTORY OF GRANDPARENTS' RIGHTS IN THE UNITED STATES

A. *Development of Grandparents' Rights*

In the 1960s, state legislatures first took notice of the American families' changing demographics.⁹ With divorce rates increasing, many states recognized that intergenerational conflicts were affecting contact and, in turn, relationships between grandparents and their grandchildren.¹⁰ Thus, states enacted legislation that provided grandparents with a statutory right to

⁹ Michael K. Goldberg, *A Survey of the Fifty States' Grandparent Visitation Statutes*, 10 MARQ. ELDER'S ADVISOR 245, 246 (2009).

¹⁰ Susan Tomaine, Comment, *Troxel v. Granville: Protecting Fundamental Parental Rights While Recognizing Changes in the American Family*, 50 CATH. U. L. REV. 731, 741 (2001).

petition courts for intervention in these situations—referred to as grandparent, or third-party, visitation statutes.

Although states have sole control over domestic relations, grandparents' rights eventually gained the attention of the federal government, due largely to the size, wealth, and political activism of the senior population.¹¹ In 1995, Congress even declared it the "Year of the Grandparent."¹² The congressional proclamation also called for the president to issue his own proclamation to encourage Americans to celebrate grandparents with "programs, ceremonies, and activities."¹³

By the mid-1980s, all states, excluding the District of Columbia, had enacted third-party visitation statutes that addressed grandparents' visitation rights.¹⁴ Today, all fifty states have enacted grandparent visitation statutes, but not all of the statutes are currently in effect.¹⁵ Additionally, the visitation statutes remaining in effect vary greatly from state to state.¹⁶ The statutes differ in the language employed by the legislatures, the standard that grandparents must show in order to gain visitation, and in the manner that state courts interpret the statutes.¹⁷ Many states' third-party visitation statutes limit visitation petitions to grandparents only.¹⁸ Others require petitioners to show a substantial relationship with a child, and some require that the

¹¹ See GRANDPARENTS: NEW ROLES AND RESPONSIBILITIES, A BRIEFING BY THE CHAIRMAN OF THE SUBCOMM. ON HUMAN SERVS. OF THE SELECT COMM. ON AGING, H.R. DOC. NO. 102-876, at 1 (opening statement of Chairman Thomas J. Downey) ("While Congress has no general legislative authority over family law matters such as grandparent visitation . . . we have tried [in] many ways to influence the States to adopt uniform grandparent visitation laws.").

¹² Year of the Grandparent—Proclamation, Pub. L. No. 103-368, 108 Stat. 3475 (1994) ("Whereas grandparents often serve as the primary caregivers for their grandchildren, providing a stable and supportive home environment; Whereas grandparents should be acknowledged for the important role they play within families, and for the many and varied contributions they make to enhance and further the value of the family and family traditions.").

¹³ *Id.*

¹⁴ DOWNEY, *supra* note 2, at 2.

¹⁵ See Goldberg, *supra* note 9, at 246.

¹⁶ *Id.* at 249-50.

¹⁷ *Id.*

¹⁸ Troxel v. Granville, 530 U.S. 57, 99-100 (2000) (Kennedy, J., dissenting).

petitioner be the grandparent and show a substantial relationship.¹⁹

While there is no uniform visitation statute, grandparents must always meet the standing requirement of a grandparent visitation statute if one is required.²⁰ According to Michael Goldberg's survey of these statutes, "[a]lmost half of the states permit grandparents to petition the court for grandparent visitation, if one of the parents is deceased, or if the parents are divorced, legally separated, or a divorce is pending."²¹ However, other states require a variety of other standing requirements.²² Additionally, New Hampshire and New York have much broader standing requirements.²³ In New Hampshire, a grandparent has standing whenever a "cause" creating an "absence of a nuclear family" exists.²⁴ In New York, a grandparent has standing when "conditions exist [in] which equity would see fit to intervene."²⁵

Once grandparents meet the standing requirement, they must then show the court that visitation should be granted by meeting the required standard.²⁶ Many states require that visitation be granted if the grandparents can show that visitation is in the best interest of the grandchild.²⁷ A majority of states require grandparents to show this along with some additional factor, such as parental unfitness.²⁸ Other states require that the grandparents show that the grandchild will be harmed if

¹⁹ *Id.*

²⁰ *See* Goldberg, *supra* note 9, at 250.

²¹ *Id.* (footnotes omitted).

²² *Id.* at 250-51 ("Other examples of standing requirements include the following: a parent has been established as missing for a specified amount of time; a parent has abandoned or deserted the grandchild; the grandchild was born out-of-wedlock; a parent is incarcerated; a parent has been determined to be incompetent as a matter of law; the child is being raised outside of either parent's care; a parent's parental rights have been terminated; there has been a denial or restriction of grandparent visitation; the grandchild resided with the grandparent for a specified period of time; or the grandparent has established that there is a sufficient grandparent-grandchild relationship, or at least an attempt to establish such a relationship has been made.") (footnotes omitted).

²³ *Id.* at 251 (citation omitted).

²⁴ *Id.* at 251-52 (citation omitted); N.H. REV. STAT. ANN. § 461-A:13(I) (2019).

²⁵ Goldberg, *supra* note 9, at 252; N.Y. DOM. REL. LAW § 72(1) (McKinney 2019).

²⁶ *See* Goldberg, *supra* note 9, at 252.

²⁷ *Id.*; *see, e.g.*, ALASKA STAT. ANN. § 25.20.065 (West 2019); MICH. COMP. LAWS ANN. § 722.27 (West 2019); WIS. STAT. ANN. § 767.43(3) (West 2019).

²⁸ *See* Goldberg, *supra* note 9, at 252.

grandparent visitation is denied.²⁹ Finally, at least one state currently requires the grandparents to show that the grandparent-grandchild relationship is of benefit to the grandchild.³⁰

B. Troxel v. Granville: The Peak of the Grandparents' Rights Movement

While every state has a grandparent visitation statute on the books, not all of the statutes are currently in effect.³¹ The movement toward grandparents' rights culminated when the Supreme Court of the United States decided *Troxel v. Granville*. Washington's grandparent visitation statute allowed for *any* person at *any* time to request visitation rights from a state judge.³² The grandparents, Jenifer and Gary Troxel, sought better visitation rights from Tommie Granville, the mother of their two granddaughters.³³ Brad Troxel, Jenifer and Gary's son, had lived with Tommie for two years.³⁴ Brad and Tommie had two daughters together, Natalie and Isabelle.³⁵ The couple eventually split, and Tommie later married another man, Kelly Wynn.³⁶ In 1993, Brad committed suicide.³⁷ Following his death, the Troxels asked Tommie for frequent visitation with their granddaughters, but Tommie wanted to limit visitation to one weekend a month.³⁸ Refusing to accept Tommie's limitation, the Troxels sought better visitation rights in state court, asking for an entire weekend every other weekend with their grandchildren.³⁹ However, a judge granted them visitation consisting of one weekend per month, one week during the summer, and several hours on each of the grandparents' birthdays.⁴⁰

²⁹ *Id.*; see OKLA. STAT. ANN. tit. 43, § 109.4 (A)(1)(b) (West 2019).

³⁰ See Goldberg, *supra* note 9, at 252; see also NEB. REV. STAT. ANN. § 43-1802(2) (West 2019).

³¹ See Goldberg, *supra* note 9, at 246.

³² *Troxel v. Granville*, 530 U.S. 57, 60 (2000).

³³ *Id.* at 60-61.

³⁴ *Id.* at 60.

³⁵ *Id.*

³⁶ *Id.* at 61.

³⁷ *Id.* at 60.

³⁸ *Id.* at 60-61.

³⁹ *Id.* at 61.

⁴⁰ *Id.*

Tommie appealed this ruling to the Washington Supreme Court, which found the statute unconstitutional because it encroached on the constitutional privacy interests of parents.⁴¹ The court ruled that visitation should only be imposed when it is necessary to prevent harm to the child, since parents have a right to rear their children without state interference.⁴²

The case reached the Supreme Court in 2000, and the Court issued a plurality opinion. The Justices authored six opinions, three of which were dissenting opinions. Justice O'Connor authored the judgment of the Court, joined by Chief Justice Rehnquist, Justice Ginsburg, and Justice Breyer, holding that the Washington statute was unconstitutional by virtue of being "breathtakingly broad."⁴³ The Court was particularly concerned that the State of Washington could "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."⁴⁴ The Court also held that it "[did] not, and need not, define . . . the precise scope of the parental due process right in the visitation context."⁴⁵

Justice Souter, in his concurrence, discussed the Court's ruling in *Meyer v. Nebraska*, which recognized the right of upbringing.⁴⁶ Further, Justice Thomas, in his concurrence, noted

⁴¹ *In re Custody of Smith*, 969 P.2d 21 (Wash. 1998), *aff'd sub nom.* *Troxel v. Granville*, 530 U.S. 57 (2000); *see also* HOWARD BALL, *THE SUPREME COURT IN THE INTIMATE LIVES OF AMERICANS: BIRTH, SEX, MARRIAGE, CHILDRearing, AND DEATH* 162 (2002) (quoting Joan Biskupic, *Challenging Legal Notion of 'Family,'* WASH. POST (Jan. 9, 2000), at A1, <http://www.washingtonpost.com/wp-srv/WPcap/2000-01/09/040r-010900-idx.html> [<https://perma.cc/H4CU-HXA6>] ("Parents have a right to rear their children without state interference and said visitation could be imposed only if necessary to prevent harm to the child.")).

⁴² *Troxel*, 530 U.S. at 63; *see* BALL, *supra* note 41, at 162 ("[T]he [Supreme Court of Washington] found that the challenged statute does not require a threshold showing of harm and sweeps too broadly by permitting any person to petition at any time with the only requirement being that the visitation serve the best interest of the child.").

⁴³ *Troxel*, 530 U.S. at 67 ("That language effectively permits any third party seeking visitation to subject any decision by a parent concerning visitation of the parent's children to state-court review. . . . [A] parent's decision that visitation would not be in the child's best interest is accorded no deference.").

⁴⁴ *Id.*

⁴⁵ *Id.* at 73.

⁴⁶ *Id.* at 78 (Souter, J., concurring) (citing *Chicago v. Morales*, 527 U.S. 41, 71, 144 L. Ed. 2d 67, 199 S. Ct. 1849 (1999) (Breyer, J., concurring in part and concurring in

that he would apply strict scrutiny to infringement of fundamental rights, and that “the State of Washington lack[ed] even a legitimate governmental interest—to say nothing of a compelling one—in second-guessing a fit parent’s decision regarding visitation with third parties.”⁴⁷

In dissent, Justice Stevens stated that the Due Process Clause of the Fourteenth Amendment “leaves room for States to consider the impact on a child of possibly arbitrary parental decisions that neither serve nor are motivated by the best interests of the child.”⁴⁸ Justice Scalia expressed concern that any decisions by the Court would create a “new regime of judicially prescribed, and federally prescribed family law.”⁴⁹ He argued that this role is better suited for state legislatures since they are in a better place than federal judges to correct their mistakes quickly.⁵⁰

Finally, Justice Kennedy dissented, writing that the Washington Supreme Court’s holding seemed to proceed from the assumption that parents who resist grandparent, or third-party, visitation have “always been the child’s primary caregivers and that the third parties who seek visitation have no legitimate and established relationship with the child.”⁵¹ This idea, Justice Kennedy believed, was influenced by “the concept that the conventional nuclear family ought to establish the visitation standard for every domestic relations case.”⁵² But, as Justice Kennedy noted, this is simply not the image of many American households today.⁵³ For many children, “a traditional family with two or even one permanent and caring parent is simply not the reality of their childhood.”⁵⁴

judgment)) (“*Meyer*’s repeatedly recognized right of upbringing would be a sham if it failed to encompass the right to be free of judicially compelled visitation by ‘any party’ at ‘any time’ a judge believed he ‘could make a “better” decision’ than the objecting parent had done.”).

⁴⁷ *Id.* at 80 (Thomas, J., concurring).

⁴⁸ *Id.* at 91 (Stevens, J., dissenting).

⁴⁹ *Id.* at 93 (Scalia, J., dissenting).

⁵⁰ *Id.*

⁵¹ *Id.* at 98 (Kennedy, J., dissenting).

⁵² *Id.*

⁵³ *Id.* (citing *Moore v. East Cleveland*, 431 U.S. 494 (1977)).

⁵⁴ *Id.* at 98.

C. Current Status of Grandparents' Rights

Through grandparent and third-party visitation statutes, courts and legislators have begun to recognize the increased roles of grandparents in the lives of their grandchildren in the form of grandparental rights. However, it is imperative that these rights be explicitly and further defined in order to afford grandparents legal protection regarding the children they have either solely raised or played a significant role in their upbringing. In 2017, for instance, 7.2 million grandparents reported that their grandchildren lived in their household.⁵⁵ Oftentimes, this is the result of a parent's addiction to opioids and other drugs.⁵⁶ Other causes may be linked to poverty, or the death, incarceration, or mental illness of a parent.⁵⁷ In 2017, the Centers for Disease Control and Prevention reported that an estimated 47,730,000 persons over the age of twelve in the United States either used illicit drugs, or misused prescription drugs in the year 2015.⁵⁸ The CDC converted this number to an estimated rate of 17.8 per 100 persons.⁵⁹ In late 2017, President Trump's administration declared the opioid crisis a national Public Health Emergency under federal law, effective immediately.⁶⁰

In turn, the number of children living with their grandparents has increased by approximately one million over the last decade.⁶¹ Notably, this number has almost doubled since the

⁵⁵ U.S. CENSUS BUREAU, 2017 AMERICAN COMMUNITY SURVEY, Table B10050, *Grandparents Living with Own Grandchildren Under 18 Years by Responsibility for Own Grandchildren by Length of Time Responsible for Own Grandchildren for the Population 30 Years and Over*.

⁵⁶ See CHILDREN'S SERV. SOC'Y OF UTAH, *Grandfamilies & Kinship Care*, <http://cssutah.org/services/kinship-care/> [<https://perma.cc/68R2-2V3K>] (last visited Dec. 29, 2019).

⁵⁷ *Id.*

⁵⁸ CTRS FOR DISEASE CONTROL AND PREVENTION, ANNUAL SURVEILLANCE REPORT OF DRUG-RELATED RISKS AND OUTCOMES: UNITED STATES 12 (2017), <https://www.cdc.gov/drugoverdose/pdf/pubs/2017-cdc-drug-surveillance-report.pdf> [<https://perma.cc/DNU2-UD29>].

⁵⁹ *Id.*

⁶⁰ THE PRESIDENT'S COMM'N ON COMBATING DRUG ADDICTION AND THE OPIOID CRISIS, FINAL REPORT, at 5 (2017), https://www.whitehouse.gov/sites/whitehouse.gov/files/images/Final_Report_Draft_11-1-2017.pdf [<https://perma.cc/4D92-PNV2>] (last visited Oct. 24, 2019).

⁶¹ Compare U.S. CENSUS BUREAU, 2017 AMERICAN COMMUNITY SURVEY, Table B10050, *supra* note 55 (estimating that 7,245,403 grandparents were living with their

census data relied on by the Court in *Troxel* was published.⁶² In the year 2015, for example, there were approximately 50,918 grandparents in Mississippi who had the primary responsibility of caring for their grandchildren.⁶³ While critics have expressed concerns that grandparents are not financially capable of raising their grandchildren, 86.8 percent of grandparents raising their grandchildren reported incomes at or above the poverty level.⁶⁴ Only 13.2 percent of grandparents reported incomes below the poverty level.⁶⁵

In addition to financial assistance, grandparents also contribute to the day-to-day life of their grandchildren. In a quantitative study done by the American Association of Retired Persons (“AARP”), the majority of grandparents reported that they play a very (59%) or somewhat (30%) important role in their grandchildren’s lives.⁶⁶ The grandparents who were interviewed described themselves as “shapers of another generation.”⁶⁷ Many of those involved in the study also mentioned the importance of passing on values to their grandchildren, and in turn helping them develop morally and spiritually.⁶⁸

grandchildren under 18 years of age), with U.S. CENSUS BUREAU, 2007 AMERICAN COMMUNITY SURVEY, Table B10050, *Grandparents Living With Own Grandchildren Under 18 Years by Responsibility for Own Grandchildren by Length of Time Responsible for Own Grandchildren for the Population 30 Years and Over* (estimating that 6,210,076 grandparents were living with their grandchildren under 18 years of age).

⁶² *Troxel v. Granville*, 530 U.S. 57, 64 (2000); Terry A. Lugaila, *Current Population Reports, Marital Status and Living Arrangements: March 1998 (Update)*, U.S. CENSUS BUREAU (Dec. 1998) (finding that approximately 4 million children—or 5.6 percent of children under 18—lived in the household of their grandparents).

⁶³ U.S. CENSUS BUREAU, 2015: AMERICAN COMMUNITY SURVEY 5-YEAR ESTIMATES DATA PROFILE, Table DP02, *Selected Social Characteristic in the United States* (Mississippi data).

⁶⁴ U.S. CENSUS BUREAU, 2014: AMERICAN COMMUNITY SURVEY 1-YEAR ESTIMATES COMPARISON PROFILES, Table CP03, *Comparative Economic Characteristics*.

⁶⁵ *Id.*

⁶⁶ CHERYL L. LAMPKIN, PH.D., *INSIGHTS AND SPENDING HABITS OF MODERN GRANDPARENTS 1, 4* (AARP Research & Strategic Analysis 2012), https://www.aarp.org/content/dam/aarp/research/surveys_statistics/general/2012/Insights-and-Spending-Habits-of-Modern-Grandparents-AARP.pdf [<https://perma.cc/4C9H-WDYH>].

⁶⁷ *Id.* at 1.

⁶⁸ *Id.* at 1, 4, 9.

While the overall number of children placed in foster care has actually decreased over the last decade,⁶⁹ the number of children living apart from their families in out-of-home care in Mississippi has increased significantly from 2011 to 2015.⁷⁰ Specifically, this number has increased by 32.7 percent.⁷¹ These alarming statistics demonstrate the need for statutory change in the State of Mississippi's adoption laws. By enacting legislation to combat issues being faced by the state's foster care system, the state can hopefully see an overall decrease in the number of children entering the foster care system.

II. THE PROCEDURAL VEHICLE OF INTERVENTION

Rule 24 of the Mississippi Rules of Civil Procedure provides for two forms of intervention relevant to adoption proceedings.⁷² The first category, intervention as a matter of right, is recognized in Rule 24(a).⁷³ The second category, permissive intervention, is recognized in the Rule 24(b).⁷⁴ Intervention as a matter of right allows a party with a legal or statutory right to enter the proceeding.⁷⁵ On the other hand, courts are given the discretion to determine if a party should be allowed to permissively intervene.

Rule 24(a)(1) of the Mississippi Rules of Civil Procedure states that anyone shall be permitted to intervene in an action "when a statute confers an unconditional right to intervene."⁷⁶ For example, a lien holder has a statutorily recognized right to

⁶⁹ CHILD WELFARE INFORMATION GATEWAY, CHILDREN'S BUREAU, U.S. DEP'T HEALTH & HUMAN SERVS., FOSTER CARE STATISTICS 2017 (2019), <https://www.childwelfare.gov/pubPDFs/foster.pdf#page=2&view=Children%20in,%20entering,%20and%20exiting%20care> [<https://perma.cc/99H4-U9X7>].

⁷⁰ See CHILD WELFARE LEAGUE OF AMERICA, MISSISSIPPI'S CHILDREN 2017, <https://www.cwla.org/wp-content/uploads/2017/03/MISSISSIPPI.pdf> [<https://perma.cc/8VV9-DGVA>].

⁷¹ *Id.*

⁷² JEFFREY JACKSON ET AL., 1 MISS. CIV. PROC. § 9:29, 625 (2019).

⁷³ MISS. R. CIV. P. 24(a).

⁷⁴ MISS. R. CIV. P. 24(b).

⁷⁵ JACKSON, *supra* note 72, § 9.29, at 626.

⁷⁶ MISS. R. CIV. P. 24(a); *see also* JACKSON, *supra* note 72, § 9:30, at 629 (Examples of rights that are conferred by statute include: "in an attachment action, other creditors may intervene against the debtor; in an action on the payment bond of a public works contractor, other claimants may intervene; [. . .] where an injured employee receives worker's compensation and files suit against a third party, the employer or insurer may intervene.") (footnotes omitted).

intervene in an execution of property upon which there is a lien.⁷⁷ If no statutory right of intervention is available, Rule 24(a) provides that a party may intervene as a matter of right if they can show “interest, impairment, and inadequate representation.”⁷⁸

Rule 24(a) lists four requirements a party must satisfy before intervening as a matter of right if there is no statutory right available.⁷⁹ First, the party wishing to intervene must make a timely application. Second, “he or she must have an interest in the subject matter of the action.” Third, “he or she must be so situated that the disposition of the action may ‘as a practical matter’ impair or impede his ability to protect his interest.” Finally, the party wishing to intervene cannot already be represented by an existing party. The Mississippi Supreme Court has held that Rule 24 “calls for an interpretation based in common sense and practicality” and that a party seeking to intervene, especially parties seeking intervention of right, should be given the benefit of the doubt.⁸⁰ Discretion regarding rulings on motions to intervene is vested in the trial courts, and these motions are reviewed under an abuse of discretion standard.⁸¹

The Mississippi Supreme Court has recognized that “intervention may be sought in a wide variety of situations involving unique facts and procedural postures.”⁸² Thus, the factors laid out in Rule 24(a)(2) must be applied to the facts of each particular case and “should be considered together and balanced against each other.”⁸³ In the leading Mississippi intervention of right case, the court approved of the language of the United States Court of Appeals for the First Circuit when it stated that the “[a]pplication of the rule requires that its components be read not discreetly, but together.”⁸⁴ Thus, the First

⁷⁷ MISS. CODE ANN. § 11-23-7 (West 2019).

⁷⁸ JACKSON, *supra* note 72, § 9:31, at 629.

⁷⁹ *Id.* at 629-30.

⁸⁰ Kinney v. S. Miss. Planning & Dev. Dist., Inc., 202 So. 3d 187, 196-97 (Miss. 2016) (quoting Guar. Nat. Ins. Co. v. Pittman, 501 So. 2d 377, 384-85 (Miss. 1987)).

⁸¹ Hayes v. Leflore Cty. Bd. of Supervisors, 935 So.2d 1015, 1017 (Miss. 2006).

⁸² Perry Cty. v. Ferguson, 618 So. 2d 1270, 1272 (Miss. 1993) (quoting United States v. Tex. E. Transmission Corp., 923 F.2d 410, 412 (5th Cir. 1991)).

⁸³ *Id.*

⁸⁴ *Id.* (quoting Int'l Paper Co. v. Inhabitants of Jay, Me., 887 F.2d 338, 344 (1st Cir. 1989)).

Circuit reasoned that a party's showing of a strong interest could be sufficient for intervention, even in light of "a lesser showing of impairment or inadequacy of representation."⁸⁵

Even when a statute confers an unconditional right to intervene, a party wishing to intervene must do so "[u]pon timely application."⁸⁶ The Fifth Circuit held that a court must review all of the circumstances when determining whether an intervention satisfies the timeliness requirement.⁸⁷ The Mississippi Supreme Court subsequently adopted the Fifth Circuit's test and analyzes the same factors when determining if a motion to intervene was timely.⁸⁸ The *Perry* Court endorsed the First Circuit's view that "[t]he various components of [Rule 24] are not bright lines, . . . and there is no litmus paper test for timeliness."⁸⁹

Rule 24(b) of the Mississippi Rules of Civil Procedure defines permissive intervention and outlines the requirements one must meet in order to permissively intervene in a proceeding.⁹⁰ Permissive intervention allows a party to intervene in an adoption proceeding only if the party's claim or defense has common questions of law or fact with the main action.⁹¹ This procedural

⁸⁵ *Id.*

⁸⁶ MISS. R. CIV. P. 24(a).

⁸⁷ JACKSON, *supra* note 72, § 9:29, at 625 (discussing *Trans Chem. Ltd. v. China Nat'l Mach. Imp. and Exp. Corp.*, 332 F.3d 815, 822 (5th Cir. 2003)) ("The Fifth Circuit has held that the 'timeliness of intervention' depends on a review of all the circumstances, including: (1) the length of time the intervener knew or should have known of his interest in the case; (2) prejudice to the existing parties resulting from the intervener's failure to apply for intervention sooner; (3) prejudice to the intervener if his application is denied; and (4) the existence of unusual circumstances.").

⁸⁸ *Hood ex rel. State Tobacco Litig.*, 958 So. 2d 790, 806 (Miss. 2007).

⁸⁹ *Perry Cty. v. Ferguson*, 618 So. 2d 1270, 1272 (Miss. 1993) (quoting *Int'l Paper Co. v. Town of Jay, Me.*, 887 F.2d 338, 344 (1st Cir. 1989)).

⁹⁰ MISS. R. CIV. P. 24(b) ("Upon timely application anyone may be permitted to intervene in an action: (1) when a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency, or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.").

⁹¹ JEFFREY JACKSON ET AL., 2 ENCYCLOPEDIA OF MISS. LAW § 13:35, 149 (2d ed. 2015) [hereinafter JACKSON, ENCYCLOPEDIA].

rule also allows a party to intervene if a statute has conferred a conditional right to intervene. It is not required that an intervenor by permission be a person who would have been a proper party at the beginning of the suit.⁹²

In order to permissively intervene, a party must meet four requirements. First, the party must make a timely application.⁹³ Second, the party must have an interest in the subject matter of the answer.⁹⁴ Third, the situation must be one in which the disposition of the action would impair or impede the intervening party's ability to protect their interest in the matter.⁹⁵ Finally, there cannot be an existing party that already adequately represents the interests of the party wishing to intervene.⁹⁶

Grandparents are always able to attempt to permissively intervene in the adoption proceedings of their grandchildren. However, the grandparent-grandchild relationship would be afforded greater legal protection through the use of intervention of right. Grandparents are often confused and overwhelmed by the legal and child welfare systems and are unsure of the steps to take in order to adopt their grandchildren. If grandparents were statutorily granted the right to be heard in their grandchildren's adoption proceeding, there would be a clearly defined process for how grandparents can attempt to protect the grandparent-grandchild relationship.

III. THE CURRENT STATUS OF GRANDPARENTS' RIGHTS IN MISSISSIPPI

A. *Mississippi's Grandparents' Visitation Rights Statute*

Mississippi's grandparent visitation statute gives chancery courts the authority to grant visitation rights to grandparents if the court makes two findings.⁹⁷ First, the court must find that the grandparent has established a viable relationship with the child and that the parent or custodian of the child unreasonably denied

⁹² JACKSON, *supra* note 72, § 9:32, at 635.

⁹³ JACKSON, ENCYCLOPEDIA, *supra* note 91, § 13:35, at 149.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ MISS. CODE ANN. § 93-16-3 (West 2019).

the grandparent visitation with the child.⁹⁸ Second, the court must find that granting visitation rights of the grandparent with the child would be in the best interests of the child.⁹⁹

While limited legislative history is available to provide insight behind the enactment of this statute, Mississippi did amend the statute in 2009 to accommodate grandparent visitation when a grandparent has been a child's primary caregiver or has significantly cared for the child while the child's parent was in jail or on military duty, as well as for "related purposes."¹⁰⁰ In January 2018, a proposed amendment to Mississippi's Grandparents' Visitation Rights statute was introduced to the House of Representatives.¹⁰¹ While the bill ultimately failed to pass, it proposed to add a subsection authorizing grandparents to petition for visitation rights and directing courts to grant visitation rights if they make two findings.¹⁰² First, the court would have to find "that the parent or custodian of the child had previously given the grandparent of the child express visitation rights at the child's school or extracurricular activities and the parent or custodian of the child unreasonably denied the grandparent visitation rights with the child." Second, the court would have to find that "visitation rights of the grandparent with the child would be in the best interests of the child."¹⁰³ Once the court was satisfied that the grandparent had made a showing of both of these requirements, the court could grant visitation to the grandparent.

⁹⁸ *Id.* § 93-16-3(2)(a).

⁹⁹ *Id.* § 93-16-3(2)(b). The Mississippi Legislature amended subsection 4 of this statute, effective as of July 1, 2019, to provide that in a petition under subsection 2 of this statute, "[u]pon a showing of financial hardship for the parents, the court shall on motion of the parent or parents direct the grandparents to pay reasonable attorney's fees to the parent or parents at any time, including before a hearing, without regard to the outcome of the petition." 2019 Miss. Laws ch. 404 (amending Miss. Code Ann. § 93-16-3).

¹⁰⁰ See S.B. 2136, 2009 Leg., Reg. Sess. (Miss. 2009).

¹⁰¹ H.B. 930, 2018 Leg., Reg. Sess. (Miss. 2018).

¹⁰² *Id.*

¹⁰³ *Id.*

B. Grandparents and Intervention of Right in Mississippi

In 2009, the Supreme Court of Mississippi held, in *S.G. v. D.C.*, that a grandmother had the right to intervene in a custody dispute involving her grandchildren.¹⁰⁴ The children's father and mother had previously divorced.¹⁰⁵ Four years later, the mother became aware of the possibility that her daughter was being sexually assaulted by her father.¹⁰⁶ The mother relocated the family to Texas, and the child began to receive counseling where she recounted disturbing situations where her father had entered her room at night and sexually assaulted her.¹⁰⁷ Back in Mississippi, the father later filed a petition to modify the divorce decree and a motion for contempt, in an effort to enforce his visitation rights.¹⁰⁸ The mother filed a counterclaim asking the court to hold visitation in abeyance until sexual-abuse allegations against the father could be fully investigated.¹⁰⁹ Fearing that the trial court would not properly consider the evidence of abuse, the children's maternal grandmother filed a motion to intervene.¹¹⁰ The trial court denied the motion, but offered no explanation as to why it did so.¹¹¹

The Supreme Court of Mississippi analyzed whether the grandmother did, in fact, have a right to intervene under Rule 24(a)(2) of the Mississippi Rules of Civil Procedure, as opposed to permissive intervention.¹¹² After noting that "the longstanding rule in child-custody litigation [is] that the paramount consideration is the best interest of the child," the court held that the trial judge abused her discretion when she did not allow the grandmother to intervene.¹¹³ Further, the court stated that "grandparents in Mississippi have a naturally strong interest in the safety and well-being of their grandchildren," the factor alone is not enough to allow intervention in child-custody battles

¹⁰⁴ *S.G. v. D.C.*, 13 So. 3d 269, 272 (Miss. 2009).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 272-73.

¹⁰⁸ *Id.* at 273.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 275.

¹¹¹ *Id.*

¹¹² *Id.* at 277.

¹¹³ *Id.* at 279.

between parents.¹¹⁴ However, the court felt that, under the unusual facts and circumstances of this case, the grandmother's interest in the safety and well-being of her grandchildren would not be adequately represented by the existing parties.¹¹⁵ While the facts of this case are particularly upsetting and disturbing, the holding demonstrates the Mississippi Supreme Court's recognition that there are times when it is fit to grant a grandparent the right to intervene in a dispute regarding their grandchildren.

IV. GRANDPARENT INTERVENTION STATUTE PROPOSAL

The Mississippi Legislature should consider enacting a statute recognizing that grandparents have a right to intervene in the adoption proceedings of their grandchildren. This statutory right will satisfy the requirements for an intervention of right under Rule 24(a) of the Mississippi Rules of Civil Procedure. Through this legislation, Mississippi can finally define the rights of grandparents, provide appropriate legal protection to the grandparent-grandchild relationship, and combat issues being faced by the state's foster care system.

V. ARGUMENTS IN FAVOR OF PROPOSED GRANDPARENT INTERVENTION STATUTE

A. *Supports a Finding in the Best Interest of the Child*

Courts in all fifty states evaluate the best interest of the child before making a custody decision.¹¹⁶ In an adoption proceeding, Mississippi courts consider the factors set forth in *Albright v. Albright*, commonly referred to as the "*Albright* factors," in determining the child's best interest.¹¹⁷ The Mississippi Supreme

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ DEBORAH H. BELL, *BELL ON MISSISSIPPI FAMILY LAW* 339 (2d ed. 2011).

¹¹⁷ *Albright v. Albright*, 437 So. 2d 1003, 1005 (Miss. 1983). These factors include: "[1] health, and sex of the child; [2] a determination of the parent [who] has had the continuity of care prior to the separation; [3] which has the best parenting skills and which has the willingness and capacity to provide primary child care; [4] the employment of the parent and responsibilities of that employment; [5] physical and mental health and age of the parents; [6] emotional ties of parent and child; [7] moral fitness of parents; [8] the home, school and community record of the child; [9] the preference of the child at the age sufficient to express a preference by law; [10] stability

Court has stated repeatedly “the polestar consideration in child custody cases is the best interest and welfare of the child.”¹¹⁸

While Mississippi courts have not explicitly stated that the factor of continuity of care prior to the separation weighs more heavily than other factors, a parent serving as the child’s primary caretaker is often the “determining factor” in awarding custody.¹¹⁹ In light of the statistics regarding the number of children being raised by their grandparents in Mississippi, it seems even more unclear why grandparents are often left out of their grandchildren’s adoption proceedings. While Mississippi’s grandparent visitation statute has been held constitutional, courts have held that this right to visitation does not grant natural grandparents the right to object to an adoption to which the child’s natural parents have consented.¹²⁰ In *Muse v. Hutchins*, the Mississippi Supreme Court concluded that “[w]hatever rights to visitation [appellant maternal grandmother] may have acquired under the Grandparents Visitation Rights Act were terminated by the decree of [the] adoption.”¹²¹

Under Mississippi’s current statutory scheme, a grandparent that loses their grandchild in an adoption proceeding is left with absolutely no recourse for gaining custody, even visitation, with their grandchild. The Proposed Grandparent Intervention Statute would close this gap in legal protection afforded to the grandparent-grandchild relationship by allowing grandparents the opportunity to intervene in adoption proceedings and, at the least, be heard by the courts.

Once a grandparent is allowed to intervene in the adoption proceeding under the Proposed Grandparent Intervention Statute, the court must still conduct the traditional “best interest of the child” analysis. Thus, grandparents are not being granted an elevated legal status or receiving a presumption in their favor. Once grandparents enter the courthouse doors, they are standing on equal ground with potential adoptive parents and must show

of home environment and employment of each parent, and other factors relevant to the parent-child relationship.” *Id.*

¹¹⁸ *Id.*

¹¹⁹ BELL, *supra* note 116, at 344.

¹²⁰ *In re Adoption of J.J.G.*, 736 So. 2d 1037, 1039-40 (Miss. 1999).

¹²¹ 559 So. 2d 1031, 1034 (Miss. 1990).

the court that it is in the best interest of the grandchild for them to be adopted by their grandparents. After discussing the *Albright* factors, the court has the discretion to find that it is in the child's best interest to be adopted by the non-grandparental adoptive family.

Even if the court makes a finding in favor of the non-grandparental adoptive family, the child's grandparents have still presented useful information to the court.¹²² Thus, allowing grandparents to intervene in the adoption proceedings of their grandchildren, at a minimum, provides the court with additional information to consider when making their findings.¹²³ The intervention of natural grandparents also increases the possibility of the court reaching a decision in the best interest of the child, the court's "polestar consideration." If the court's top priority is truly the best interest of the child, allowing more information regarding the child's wellbeing will enhance the court's analysis of the *Albright* factors and support a finding that is best for the child. More importantly, the Proposed Grandparent Intervention Statute ensures that grandparents receive the opportunity to be heard in court and that the child receives one final chance at remaining within their biological family.

One valid concern regarding statutorily granting a third party—a child's grandparents—the right to intervene in an adoption proceeding is the possibility that any additional parties might elongate the adoption process. However, the policy of reaching a finding that is truly in the best interest of the child outweighs the inconvenience of any additional time spent in court regarding the adoption. While data on the average amount of time it takes to render an adoption final varies, there is concern that it already takes much too long for these matters to make their way through the court system. Allowing grandparents to intervene in the proceedings and be heard by the court could potentially delay this process further.

¹²² See Indermark, *supra* note 6, at 803 ("Grandparents bring a fresh perspective to most adoption proceedings, which in turn helps the state dispose of the case. Grandparents' ability to contribute to the proceedings often stems from their access to additional factual evidence concerning the best interests of the child.")

¹²⁴ *Id.*

During any adoption proceeding, the child involved is likely facing instability regarding his or her place of residence, along with confusion about who will be their long-term, primary caretaker. Further, depending on the child's age, he or she could be experiencing anxiety and distress regarding the status of the adoption and the unknown future. A recent study on the negative impacts of instability on child development found that family instability is linked to children displaying problem behaviors and even academic difficulties.¹²⁴ Further, the number of family transitions that a child experiences can be related to behavioral problems.¹²⁵ While even one family transition can be disruptive to a child's well-being, additional family transitions resulting in instability increase the possibility of worse outcomes.¹²⁶

While concern for the child's stability during the adoption proceeding should be considered and protected by the court, any additional time added to the adoption proceeding by the intervention of grandparents would be in furtherance of the best interest of the child. Mississippi courts are already statutorily required to "schedule all hearings concerning [a] contested adoption as expeditiously as possible for prompt conclusion of the matter."¹²⁷ The positive impact the grandparents' presence and information would have on the court's determination, as well as the opportunity for the child to remain within their biological family, outweighs any concerns about the length of the adoption proceeding.

¹²⁴ HEATHER SANDSTROM & SANDRA HUERTA, URBAN INST., THE NEGATIVE EFFECTS OF INSTABILITY ON CHILD DEVELOPMENT: A RESEARCH SYNTHESIS 10 (Sept. 2013), <https://www.urban.org/sites/default/files/publication/32706/412899-The-Negative-Effects-of-Instability-on-Child-Development-A-Research-Synthesis.PDF> [<https://perma.cc/8XAQ-KRX2>]. See also *id.* ("For the purposes of this synthesis, *instability* is best conceptualized as the experience of abrupt, involuntary, and/or negative change in individual or family circumstances, which is likely to have adverse implications for child development.").

¹²⁵ *Id.* at 25.

¹²⁶ *Id.* at 26.

¹²⁷ MISS. CODE ANN. § 93-17-8(1)(d) (West 2019).

B. Aligns with Troxel and the Mississippi Grandparents' Visitation Statute

The Mississippi Supreme Court addressed and upheld the constitutionality of the Mississippi Grandparents' Visitation Rights statute¹²⁸ in *Stacy v. Ross*.¹²⁹ In *Stacy*, the court determined that the Grandparents' Visitation Rights statute was indeed constitutional in light of the United States Supreme Court's holding in *Troxel*.¹³⁰ In doing so, the court reasoned that the Mississippi statute, unlike the overly-broad Washington statute, enumerates certain requirements that must be met in order for the court to find that the grandparents' visitation petition should be granted.¹³¹ Thus, the Mississippi Supreme Court considered Mississippi's statute to include constitutionally sufficient limitations.¹³²

Granting a statutory right to intervene to grandparents would not put the court at risk of infringing upon a parent's constitutionally protected right to raise their child. The Mississippi Supreme Court has ruled that Mississippi's grandparent visitation act "does not deprive the parents of their right to raise their children by determining the care, custody and management of the child."¹³³ Thus, the statute was deemed constitutional because it did not intrude upon parental liberty.¹³⁴ While this statement of the constitutionality standard was specifically addressing the visitation statute, the same standard is applicable to the proposed Grandparent Intervention Statute. The standard for determining the statute's constitutionality would

¹²⁸ *Id.* § 93-16-3.

¹²⁹ *Stacy v. Ross*, 798 So. 2d 1275 (Miss. 2001).

¹³⁰ *Id.* at 1279 (discussing the Mississippi statute together with the United States Supreme Court's holding in *Troxel v. Granville*, 530 U.S. 57 (2000)).

¹³¹ *Stacy*, 798 So. 2d at 1279. "[T]he court must find that (1) the grandparent has established a viable relationship with the grandchild, (2) that the custodial parents have unreasonably denied grandparent visitation, and (3) visitation between the grandparent and the grandchild would be in the best interest of the child." *Id.* (citing MISS. CODE ANN. § 93-16-3(2)).

¹³² See *Zeman v. Stanford*, 789 So. 2d 798, 803 (Miss. 2001) (finding that "[t]he limitations imposed by this Court in its interpretation of § 93-16-3 clearly result in the 'narrower reading' that was lacking in *Troxel*").

¹³³ *Martin v. Coop*, 693 So. 2d 912, 915 (Miss. 1997).

¹³⁴ *Id.*

simply be whether the statute deprives the parents of their right to raise their children.

In a situation where the proposed Grandparent Intervention Statute would be applicable, the statute passes the test of constitutionality. Since the natural parents' rights have already been terminated by the point of intervention¹³⁵ or are, at a minimum, in the process of being severed, statutorily granting grandparents a right to intervene would not be infringing on the parent's liberties.¹³⁶ Thus, the statute does not conflict with the Supreme Court's plurality opinion in *Troxel*.

Once a parent's rights have been terminated, the court's focus shifts from protecting the parental rights of the natural parents to making a determination in the best interest of the child.¹³⁷ Thus, any concern that the natural parents are being disadvantaged is misplaced because their parental rights have been terminated, and granting grandparents a right to intervene advances the best interest of the child.¹³⁸ Further, grandparent intervention does not affect the rights of adoptive parents as they have no rights until the adoption is finalized.¹³⁹ Since the proposed statute passes the Mississippi Supreme Court's test for constitutionality by not infringing on the rights of natural or prospective adoptive parents, the statute is in line with the Supreme Court's decision in *Troxel* and the current Mississippi Grandparents' Visitation Statute.

¹³⁵ BELL, *supra* note 116, at 335 (noting that a third-party adoption results in the termination of the natural parent's rights.); *see also In re N.B.*, 135 So. 3d 220, 224 (Miss. Ct. App. 2014) ("It is undisputed by all parties that the biological parents have no interest in the adoption since they unequivocally surrendered their parental rights and chose not to participate in the proceedings.").

¹³⁶ JACKSON, ENCYCLOPEDIA *supra* note 91, § 3:25.25 ("A natural parent may affect a termination of his or her parental rights by voluntarily surrendering the child to the Child Protection Services or to a home, executing an affidavit which names the child and vests exclusive custody of the child in CPS or the home, and executing a written release of parental rights.").

¹³⁷ *See* Indermark, *supra* note 6, at 802-03.

¹³⁸ *See* Michelle Ognibene, Comment, *A Constitutional Analysis of Grandparents' Custody Rights*, 72 U. CHI. L. REV. 1473, 1497 (2005) ("Rather, the best interests of the child analysis would continue to serve as a restriction on grandparents' rights, just as the best interests of the child can now override parents' rights in cases of neglect or abuse.").

¹³⁹ *See* Indermark, *supra* note 6, at 817.

The proposed statute is most applicable in situations where a child is being removed from the family home due to problems stemming from parental drug use or concern about the child's overall welfare. However, one can imagine other situations where grandparent intervention may not seem like the right solution. For example, a young girl becomes pregnant and wishes to give the child up for adoption in hopes of continuing her young life free of the burdens of motherhood. Imagine her parents, the child's grandparents, wish to adopt the child even though the young mother would rather the child go to a nonbiological, adoptive family. The proposed statute is simply a starting point for Mississippi courts to begin tackling the effects of the opioid and drug crisis and the growing number of children in the state's foster care system. There are situations, such as the one previously described, where grandparental intervention might be the wrong answer. Courts will have the discretion to make findings based on each specific scenario, and the best interest of each child involved.

C. Aligns with the goals of the recently passed Family First Prevention Services Act

Hidden in the recently passed Bipartisan Budget Act is the biggest overhaul of the federal child welfare program since the Title IV-E entitlement was established in 1980.¹⁴⁰ On February 9, 2018, the Family First Prevention Services Act ("FFPSA") was signed into law.¹⁴¹ The main purpose of these historic reforms to the FFPSA is to have children remain within their natural families, and keep them from entering the foster care system.¹⁴²

¹⁴⁰ John Kelly, *A Complete Guide to the Family First Prevention Services Act*, THE CHRONICLE OF SOCIAL CHANGE (Feb. 25, 2018), <https://chronicleofsocialchange.org/finance-reform/chronicles-complete-guide-family-first-prevention-services-act> [https://perma.cc/LX7L-KJU2].

¹⁴¹ *Family First Prevention Services Act: Bill Summary*, FIRST FOCUS CAMPAIGN FOR CHILDREN (March 2018), <https://campaignforchildren.org/wp-content/uploads/sites/2/2016/06/FFCC-Short-Summary-FFPSA.pdf> [https://perma.cc/GDM2-HRMB].

¹⁴² *The Family First Prevention Services Act: Historic Reforms to the Child Welfare System will Improve Outcomes for Vulnerable Children*, CHILDREN'S DEFENSE FUND (Feb. 2018) (providing detailed summary of the Family First Prevention Services Act), <https://www.childrensdefense.org/wp-content/uploads/2018/08/family-first-detailed-summary.pdf> [https://perma.cc/STX6-KRFZ].

While the number of children in foster care had previously begun to decline, this number has started to rise steadily since 2012.¹⁴³ In 2016, the Children’s Defense Fund found that there were more than 437,000 children in foster care.¹⁴⁴ Experts, along with anecdotal evidence, revealed that the growing number of children in foster care is linked to the rise in opioid addiction and overdoses in the country.¹⁴⁵ Thus, partly in response to the opioid epidemic, the FFPSA provides prevention services to families with children at risk of entering the child welfare system.¹⁴⁶ One overall goal of the legislation is to decrease the number of children entering the foster care system.¹⁴⁷ It does so by providing more federal resources meant to help families stay together in times of crisis.¹⁴⁸ States are also incentivized to reduce the number of children being placed in congregate care.¹⁴⁹

Part I of the FFPSA requires that states maintain a prevention plan to have the child remain safely at home or to live with a kin caregiver.¹⁵⁰ The bill allows states to receive federal reimbursement for mental health services, substance use treatment, and in-home parenting skill training for twelve months

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ Bipartisan Budget Act of 2018, Pub. L. No. 115-123, § 50702, 132 Stat. 232 (2018) (“The purpose of this subtitle is to enable States to use Federal funds available under parts B and E of title IV of the Social Security Act to provide enhanced support to children and families and prevent foster care placements through the provision of mental health and substance abuse prevention and treatment services, in-home parent skill-based programs, and kinship navigator services.”)

¹⁴⁷ *Id.* at § 50711.

¹⁴⁸ Kelly, *supra* note 140.

¹⁴⁹ FIRST FOCUS CAMPAIGN FOR CHILDREN, *supra* note 141. See also *Congregate Care, Residential Treatment and Group Home State Legislative Enactments 2009–2013*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Feb. 10, 2017), <http://www.ncsl.org/research/human-services/congregate-care-and-group-home-state-legislative-enactments.aspx> [<https://perma.cc/G3HZ-8RPZ>]. Congregate care consists of “group homes, residential treatment facilities, psychiatric institutions, and emergency shelters.” *Id.*

¹⁵⁰ ANN M. HARALAMBIE, 2 HANDLING CHILD CUSTODY, ABUSE AND ADOPTION CASES § 12:31, Westlaw (database updated Dec. 2018). Kinship care is defined by the Child Welfare League of America as “the full time care, nurturing and protection of children by relatives, members of their tribes or clans, godparents, stepparents, or any adult who has a kinship bond with a child.” *Id.*

after a prevention strategy is first identified.¹⁵¹ The funds under Title IV-E can be used for a period of only twelve months for children who are “candidates for foster care” or for foster youth who are pregnant or parenting.¹⁵² Funding for preventive services will also be available for any child and youth under the guardianship of a kin caregiver.¹⁵³ In order to be considered an eligible service under Title IV-E, several requirements must be met.¹⁵⁴ However, Jerry Milner, the associate commissioner of the Children’s Bureau, has publicly stated that the federal government will be taking a flexible approach to defining eligible prevention programs under Title IV-E.¹⁵⁵

Further, the FFPSA invests in keeping children safely with their families in several other ways.¹⁵⁶ Relative caregivers, or kin caregivers, are supported through the federal funds that the act provides for Kinship Navigator programs.¹⁵⁷ The act also specifically addresses the opioid epidemic and other substance abuse problems by reauthorizing and updating the Regional Partnership Grant program.¹⁵⁸ This program provides funding for “evidence-based services to prevent child maltreatment related to

¹⁵¹ FIRST FOCUS CAMPAIGN FOR CHILDREN, *supra* note 141.

¹⁵² NATIONAL CONFERENCE OF STATE LEGISLATURES, *supra* note 149.

¹⁵³ *Id.*

¹⁵⁴ *Id.* To be an eligible service under Title IV-E, the service must be described in the state’s plan. Second, the state must maintain a manual that outlines the components of the service. Third, the service must show a clear benefit. Finally, the service must be a promising practice, supported practice, or well-supported treatment. *Id.*

¹⁵⁵ John Kelly, *Family First Prevention Services Act Update: Federal Rules, Delay Deadlines, State Flexibility and More*, THE CHRONICLE OF SOCIAL CHANGE (July 26, 2018), <https://chronicleofsocialchange.org/youth-services-insider/family-first-update-federal-regs-delay-deadlines-definitions-and-more/31730> [<https://perma.cc/V6RA-8MPZ>]. At a meeting of the House Ways and Means Subcommittee on Human Resources, Jerry Milner stated, “We do not intend to regulate definitions of key concepts beyond what’s in [the] statute . . . We will also strive to provide maximum flexibility in claiming for prevention services.” *Id.*

¹⁵⁶ *See generally* CHILDREN’S DEFENSE FUND, *supra* note 142.

¹⁵⁷ GRANDFAMILIES.ORG, *Kinship Navigator Programs*, <http://www.grandfamilies.org/Topics/Kinship-Navigator-Programs/Kinship-Navigator-Programs-Summary-Analysis> [<https://perma.cc/39HF-U5BS>] (last visited Nov. 12, 2019). Grandfamilies.org, a national legal resource available for grandparents involved in the child welfare system, defines kinship navigator programs as “initiatives that provide information, referral, and follow-up services to grandparents and other relatives raising children to link them to the benefits and services that they or the children need.” *Id.*

¹⁵⁸ CHILDREN’S DEFENSE FUND, *supra* note 142.

substance abuse as an important step in addressing the recent spike in requests to child welfare systems due to opioids and other drugs.”¹⁵⁹

While it is still unclear exactly what effects the changes laid out in the FFPSA will have on the American foster care system, the passing of this recent legislation demonstrates where Congress stands policy-wise on the foster care system.¹⁶⁰ Congress has, once again, reiterated the importance of keeping children with their families. By funding mental health services, substance use treatment, and in-home parenting skill training, Congress hopes to provide guidance to parents who are potentially in danger of losing their child to the child welfare system. Federal funding of these programs aims to support recovering parents on their journey to overcome whatever hardship they are facing. After taking advantage of the opportunity to seek mental health services, substance abuse treatment, or parenting classes, these parents will hopefully be able to regain and maintain custody of their children and the likelihood of losing their children in the future will be decreased.

While the FFPSA is ultimately aimed at keeping children with their natural parents, the underlying goals of the law support the policies behind the Proposed Grandparent Intervention Statute. One of the main goals of allowing grandparents to intervene in their grandchildren’s adoption proceedings would be to increase the chances that a child would remain within their biological family. By increasing these chances, the proposed statute would theoretically lead to a decrease in the number of children in foster care. This goal is directly in line with the goals that Congress recently expressed in the passage of the FFPSA.

If the Mississippi Legislature were to pass the Proposed Grandparent Intervention Statute, the state would be following in the federal government’s footsteps of making positive changes to the American foster care system in light of the opioid epidemic. In enacting the FFPSA, Congress recognized the impact that the opioid epidemic and the increase in overdoses have had on the

¹⁵⁹ *Id.*

¹⁶⁰ As of November 19, 2018, no federal regulations have been issued to provide guidance for enforcing the Family First Prevention Services Act.

foster care system. In fact, the impact on the foster care system was so significant that it led Congress to essentially overhaul the entire system for the first time in 38 years. Like Congress, Mississippi should recognize the impact that the drug crisis is having on the state foster care system and make positive changes that will combat the crisis and further assist Mississippi families.

In a situation where a child's parent, faced with an opioid or other drug addiction, has terminated their parental rights, the Proposed Grandparent Intervention Statute would allow a grandparent to intervene in their grandchildren's adoption proceeding. Critics of a statutory right to intervene may be concerned that a grandparent who raised a child that ultimately ended up battling a drug addiction may not be fit to raise their grandchildren. However, just because the grandparent's child is currently facing addiction or some other hardship does not necessarily mean that adoption by the grandparent could not possibly be in the best interest of the child. While it is true that there may be situations in which the way a grandparent raised their child led directly or indirectly to their child's current struggle with drug addiction, this is often simply not the case. While an individual's home environment, especially during childhood, is an important environmental factor that may increase the risk of addiction, there is no single factor that can predict or determine whether someone will battle drug addiction in their lifetime.¹⁶¹ Additional risk factors include: aggressive behavior in childhood, lack of parental supervision, poor social skills, drug experimentation, availability of drugs at school, and community poverty.¹⁶² These risk factors can be combated with protective factors, those that reduce a person's risk of becoming addicted to drugs.¹⁶³ Protective risk factors include: good self-control, parental monitoring and support, positive relationships, good grades, school anti-drug policies, and neighborhood resources.¹⁶⁴

¹⁶¹ NAT'L INST. ON DRUG ABUSE, *Drugs, Brains, and Behavior: The Science of Addiction*, <https://www.drugabuse.gov/publications/drugs-brains-behavior-science-addiction/drug-misuse-addiction> [https://perma.cc/962X-356M] (last visited Nov. 12, 2019).

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

Further, any concern that the grandparents may not be the best choice for the legal guardians of their grandchild can be alleviated by remembering that grandparents will not be receiving a presumption in their favor or any advantage over potential adoptive parents. Once grandparents exercise their statutory right to intervene in the adoption proceedings, the court must still evaluate the best interests of the child by using the *Albright* factors. The court will evaluate the grandparents' parenting skills, physical and mental health, age, moral fitness, and other factors against those of the adoptive parents.¹⁶⁵ The court may still make a finding in favor of adoption by the nonbiological family if they determine that it is in the best interest of the child or children.

D. Aligns with the federal and state “reasonable efforts” requirements

Before its recent overhaul, the American foster care system was governed by the Adoption Assistance and Child Welfare Act of 1980 (“AACWA”).¹⁶⁶ The foster care system gained the attention of Congress after it found that state and local child welfare agencies were removing children from their parents without first making an attempt to keep the family intact.¹⁶⁷ The agencies were also failing to provide adequate services to assist parents in being reunited with their children.¹⁶⁸ Further, the congressional hearings revealed that child welfare agencies were not creating case plans for foster children; thus, children were spending long amounts of time in out-of-home care and were experiencing “foster care drift.”¹⁶⁹ Based on these alarming findings, Congress enacted the AACWA with the purpose of preserving a greater number of families and reuniting children with their biological parents.

Under Title IV-B and IV-E of the Social Security Act, the federal government grants money to the states to financially

¹⁶⁵ *Irle v. Foster*, 176 So. 3d 25, 30 (Miss. Ct. App. 2013), *aff'd*, 175 So. 3d 1232 (Miss. 2015).

¹⁶⁶ LEONARD EDWARDS, REASONABLE EFFORTS: A JUDICIAL PERSPECTIVE 16 (2014), <https://www.ncjfcj.org/resource-library/publications/reasonable-efforts-judicial-perspective> [<https://perma.cc/PN48-GYWT>] (last visited Nov. 4, 2019).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* “Foster care drift” is “the movement from one foster home to another” and has been shown to cause damage to the children who experience it. *Id.*

support the foster care system.¹⁷⁰ In turn, each state creates a state plan that outlines how the state will use the federal funding “to provide services to prevent removal, to reunify families that are separated, and to finalize a permanency plan for children under state control.”¹⁷¹ The state plan functions similarly to a contract—the federal government provides money to the state as long as the state promises to use the money as defined in the state plan.¹⁷² In order to ensure a state’s compliance with its state plan, the federal government takes a case-by-case approach and looks at judicial findings for standards such as “contrary to the best interests” and “reasonable efforts.”¹⁷³

To comply with federal law and to continue to receive federal foster care funds, a judicial finding that “continuation in the home would be contrary to the child’s welfare” and that the child welfare agency made “reasonable efforts” to have the child remain in their home is required.¹⁷⁴ This finding must be made in at least three different stages of a juvenile dependency case.¹⁷⁵ The financial effects of failing to comply with the “reasonable efforts” requirement are detrimental.¹⁷⁶ If a court finds, on the record, that “no reasonable efforts” were taken, the agency will receive no federal funding to support the child in foster care.¹⁷⁷ Instead, the local government will bear the burden of those costs.¹⁷⁸

Mississippi law is in line with the federal “reasonable efforts” requirement. The law, in its current form, states that if a youth court orders that custody or supervision of a child be placed with the Department of Human Services or any other person or agency besides the child’s parent, guardian, or custodian, the youth court

¹⁷⁰ *Id.* at 20.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.* The Supreme Court held that private parties are unable to bring claims to enforce the federal reasonable efforts requirement in Titles IV-B and IV-E, partly due to the statute’s silence on the precise meaning of “reasonable efforts.” *See Suter v. Artist M.*, 503 U.S. 347, 364 (1992) (“[W]e think that Congress did not intend to create a private remedy for enforcement of the ‘reasonable efforts’ clause.”).

¹⁷⁴ *See EDWARDS*, *supra* note 166, at 23.

¹⁷⁵ *Id.* A finding that reasonable efforts to have the child remain in their home is required “at the time of removal, reunification, and timely permanency.” *Id.* at 17.

¹⁷⁶ *Id.* at 17.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

must have made a finding that “[r]easonable efforts have been made to maintain the child within his own home, but that the circumstances warrant his removal and there is no reasonable alternative to custody.”¹⁷⁹ Further, Mississippi takes a Family-Centered Practice approach to child welfare services and child protective services through its Division of Family and Children’s Services (“DFCS”) Policy Manual.¹⁸⁰ The purpose of a Family-Centered Practice is to ensure that children safely grow up within their own families.¹⁸¹ Family-Centered Practice focuses on family strengths and encourages the development of skills that parents need to safely care for their children and avoid future instances of maltreatment.¹⁸²

The Mississippi DFCS expressly recognizes that removing a child from their home creates a state of impermanency for the child.¹⁸³ It also states that the “reasonable efforts” requirements demand that social workers and DFCS “work diligently and concertedly with the family first of all to prevent removal of the child or children if possible.”¹⁸⁴ Social workers are also instructed to be mindful that, although removal is sometimes necessary, taking a child away from their parents “creates a situation of impermanency for the child, and traumatizes the child and family permanently.”¹⁸⁵ For removal to be deemed in the child’s best interests and adverse to the child’s welfare, the social worker is required to provide extensive safety and risk-related justifications.¹⁸⁶ The only ways to bypass the “reasonable efforts” requirements are if an emergency situation prevented the social worker from making reasonable efforts or if the court determined that reasonable efforts were not required in the particular situation.¹⁸⁷

¹⁷⁹ MISS. CODE ANN. § 43-21-603(7)(a)(i) (West 2019).

¹⁸⁰ MISS. DEP’T HUMAN SERVS., DIV. OF FAMILY AND CHILDREN’S SERVS., POLICY MANUAL, TIT. 18, PART 6, CH. 1, SEC. B, at 190 (rev. 2016), <https://www.sos.ms.gov/ACCcode/00000323c.pdf> [<https://perma.cc/N4FU-ZCEZ>].

¹⁸¹ *Id.*

¹⁸² *Id.* at 191.

¹⁸³ *Id.* at 222.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 220.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 219-20.

Since the passing of the AAWCA, Congress has demonstrated a focus on dedicating resources to structuring a foster care system that will keep families intact. While the federal definition of “reasonable efforts” is left undefined, Mississippi statutes, youth court rules, and DFCS outline what it means for a case worker and DFCS to satisfy the “reasonable efforts” requirement. Congress’s goal of keeping families together and keeping children out of the foster care system is, in turn, woven into the State of Mississippi’s laws through the “reasonable efforts” requirement. The policy of keeping families together has been deemed so important that, if states fail to make reasonable efforts to do so, they can receive no federal funding toward the cost of placing the child in foster care. Further, the only times that reasonable efforts are not required are in the case of an emergency or if the court determines that it was not required.

The Proposed Grandparent Intervention Statute supports all of the policies that informed Congress’s structuring of the foster care system. For almost forty years, Congress has continued to promote the stability of the family unit by making it a top priority that children remain within their families as opposed to entering the foster care system, even for a brief period of time. The proposed statute would promote these policies by increasing the possibility that a child will be adopted by members of their biological family, specifically their grandparents, so as to encourage stability and continuity. Oftentimes, children in these adoption proceedings have been raised completely by their grandparents or have spent substantial amounts of time in their grandparents’ care. By allowing grandparents to intervene in adoption proceedings, the State of Mississippi will come even closer to satisfying the “reasonable efforts” required by both federal and state law. Statutorily granting grandparents the right to intervene is a step toward making reasonable efforts to maintain the child within his or her home, or more specifically here, within his or her biological family.

E. Psychological and social benefits of the grandparent-grandchild relationship

The parent-child relationship and the grandparent-grandchild relationship share many similar benefits.¹⁸⁸ When a child is born, it not only possesses genetic qualities of each of its own parents, but of each of its grandparents as well.¹⁸⁹ The grandparent-grandchild relationship is one of significant importance and is often said to be second in importance only to the parent-child relationship.¹⁹⁰ Alex Haley, the author of "Roots,"¹⁹¹ when questioned about his own roots, said the following:

Nobody can do for children what grandparents can. Grandparents sprinkle stardust on the lives of children. Without contact with grandparents, a child loses a vital and natural way to see and understand that he is part of a continuum, that he has roots, that he is the future and the hope of all those who preceded him.¹⁹²

While the grandparent-grandchild relationship is an important one, this relationship changes when a grandparent must become the primary caregiver of their grandchild. However, studies show that, while acting as a caregiver comes with many demands, it can be a highly rewarding experience for grandparents and have a positive impact on the grandchild.¹⁹³ By serving as their grandchild's caregiver, grandparents often develop an even closer relationship with their grandchild, which

¹⁸⁸ See Ognibene, *supra* note 138, at 1480 ("Grandparents and parents generally share similar feelings of love and responsibility for the child, and grandparents often assist parents in caring for the child.").

¹⁸⁹ See Ellen Marrus, *Over the Hills and Through the Woods to Grandparents' House We Go: Or Do We, Post-Troxel?*, 43 ARIZ. L. REV. 751, 756 (2001) ("Genetically, every child is the sum of two parents and four grandparents. The child in the womb already possesses instincts, temperament, and emotions that are not his or hers alone.").

¹⁹⁰ See generally Vira R. Kivett, *The Grandparent-Grandchild Connection*, in FAMILIES: INTERGENERATIONAL AND GENERATIONAL CONNECTIONS 267 (Susan K. Pfeifer & Marvin B. Sussman eds., 1991).

¹⁹¹ See ALEX HALEY, *ROOTS: THE SAGA OF AN AMERICAN FAMILY* (1976) (a bestselling novel based on the author's ancestry).

¹⁹² DOWNEY, *supra* note 2, at 1.

¹⁹³ Bert Hayslip, Jr. & Patricia L. Kaminski, *Grandparents Raising Their Grandchildren: A Review of the Literature and Suggestions for Practice*, 45 THE GERONTOLOGIST 262, 263 (2005).

often

“enhance[s] a grandparent’s sense of purpose in life.”¹⁹⁴ The caregiving role also leads to grandparents feeling that they are playing an active role in “maintaining the family’s continuing identity and well-being.”¹⁹⁵ Custodial grandparents often feel as though they have been granted a “second chance” at parenting and welcome the possibility of using their previous experiences to improve their parenting style and skills.¹⁹⁶ A study revealed that 90 percent of custodial grandparents, when surveyed, reported that they would take on the responsibility of raising their grandchildren if faced with making the decision again.¹⁹⁷

Additionally, grandchildren raised by their grandparents also gain several benefits from the relationship.¹⁹⁸ Grandparents often serve as positive role models for children whose parents are absent, either physically or emotionally.¹⁹⁹ Studies have also revealed that grandchildren raised by their grandmothers demonstrate “improved school performance, less reliance on welfare, more autonomy in decision making, and fewer deviant behaviors.”²⁰⁰ In a 1995 study, Solomon and Marx found that, while children in traditional nuclear families²⁰¹ were most likely to excel academically, children raised by their grandparents were equally as likely as children raised in single-parent homes to perform well in school.²⁰² Further, children raised by their grandparents, as well as children from traditional nuclear families, were less likely to exhibit behavioral problems at school than children raised in one-parent-only families.²⁰³ Finally, children raised in one-parent homes were more susceptible to

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* Objective data on the benefits that grandchildren receive from being raised by their grandparents is scarce, but scholars have identified several likely benefits through surveys and studies. *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ For the purposes of this study, a “traditional nuclear family” was defined as one where both parents were present. *Id.*

²⁰² *Id.*

²⁰³ *Id.*

illness than those children raised in traditional nuclear families and grandparent-headed families.²⁰⁴

Unfortunately, studies reveal that choosing to become a custodial grandparent can have negative effects on grandparents. Custodial grandparents can experience “poorer physical and mental health, role overload and role confusion, and more isolation from age peers and noncustodial grandchildren.”²⁰⁵ Many grandparents also must deal with the grief over the losses that have led to them serving as caregivers.²⁰⁶ For example, they may be dealing with the death or incarceration of their child while taking on the tremendous responsibility of raising their grandchildren.²⁰⁷

Despite the hardships and challenges faced by custodial grandparents, children often fare well in the care of relatives.²⁰⁸ Children in the care of relatives “have more stability, are less likely to run away and are more likely to report feeling loved” than children in non-relative care.²⁰⁹ Research has shown that placing children with grandparents or other relatives when they are unable to remain with their parents “[r]einforces safety, stability, and well-being; reduces trauma; [r]einforces [a] child’s sense of identity; [h]elps keep brothers and sisters together; [h]onors family and cultural ties; [and] [i]ncreases the likelihood of having a permanent home.”²¹⁰

At a meeting of the United States Senate Special Committee on Aging, Jaia Peterson Lent, the Deputy Executive Director of Generations United,²¹¹ shared the story of Ray Krise, a member of the Skokomish Tribe near Shelton, Washington. When asked about being raised by his grandparents, he responded: “If not for

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 262 (internal citations omitted).

²⁰⁶ *Id.* at 263.

²⁰⁷ *Id.*

²⁰⁸ *Grandparents to the Rescue: Raising Grandchildren in the Opioid Crisis and Beyond: Hearing Before the Senate Spec. Comm. on Aging*, 115th Cong. 35 (2017) (written statement of Jaia Peterson Lent, Deputy Exec. Dir., Generations United).

²⁰⁹ *Id.* at 36.

²¹⁰ *Id.*

²¹¹ GENERATIONS UNITED, <https://www.gu.org/who-we-are/mission/> [<https://perma.cc/9J3E-ASPR>] (“The mission of Generations United is to improve the lives of children, youth, and older people through intergenerational collaboration, public policies, and programs for the enduring benefit of all.”).

being raised by my grandparents, I would not have a cultural identity. I wouldn't know my family lineage and my son would not bear the name Tcha-LQad—a name that is 17 generations old . . . [They] helped me develop a real sense of pride and belonging.”²¹² Grandparents are also more likely to provide children with a home, or “safe haven,” even after they reach their eighteenth birthday. As Ms. Lent put it in her written testimony to the Senate, “[a] young person may age out of a system—they never age out of a family.”²¹³

Because of the importance of the grandparent-grandchild relationship, Mississippi courts should make all efforts to allow grandparents to become parties in the adoption proceedings of their grandchildren. While studies have revealed that children raised in two-parent homes may fare better than children raised by their grandparents, this possibility must be weighed against the recognition that children receive certain benefits from maintaining connections with their biological families. Being raised by biological family members allows children to feel rooted to their past, while giving them the opportunity to learn and grow from those roots. A connection to biological relatives can instill in children a sense of hope and motivate them to live out the legacy of their families.

F. Courts' historical recognition of the importance of familial, biological relationships

The Supreme Court of the United States and Mississippi courts have a rich history of recognizing the importance of biological, familial relationships in court proceedings. Through the Due Process Clause, the Supreme Court of the United States has recognized “the right of individuals to be free from State interference in private decision making involving the family, such as marriage, procreation, contraception, family relationships, child rearing, and education.”²¹⁴ The liberty interest that parents have

²¹² *Grandparents to the Rescue*, *supra* note 208, at 36.

²¹³ *Id.*

²¹⁴ *Smith v. Malouf*, 722 So. 2d 490, 502 (Miss. 1998) (Smith, J., concurring in part and dissenting in part) (citing *Loving v. Virginia*, 388 U.S. 1 (1967) (interracial marriages); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942) (procreation); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (the right to educate

in the care, custody, and control of their children is one of the oldest fundamental liberty interests recognized by the Court.²¹⁵ In 1923, the Court recognized that this “liberty” included the rights of parents to “establish a home and bring up children” and “to control the education of their own.”²¹⁶ Soon after, the Court held that this protected liberty also included a parent’s right “to direct the upbringing and education of children under their control.”²¹⁷

The Court of Appeals of Mississippi stated in *Messer v. Messer* that “the presence of extended family is a legitimate factor to support awarding custody to a parent.”²¹⁸ Further, the Supreme Court of Mississippi has said that “it is presumed that it is in the best interest of a child to remain with the natural parent as opposed to a third party.”²¹⁹

The federal and state courts’ long history of recognizing the importance of familial relationships further supports the Proposed Grandparent Intervention Statute. While the Supreme Court of the United States has yet to explicitly extend the rights of grandparents, the Court has recognized the importance of the grandparent-grandchild relationship in upholding grandparent visitation statutes that do not infringe upon parental rights. Mississippi courts have also historically recognized the importance of biological relationships and extended families. The proposed statute would support keeping biological families together, without infringing on a natural parent’s constitutionally protected liberties. Statutorily defining the rights that grandparents hold in their grandchildren’s adoption proceedings is in line with the jurisprudence of Mississippi courts and will afford greater protection to grandparents and children in these situations.

one’s child as one chooses); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (the right of private schools to teach as they see fit); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (use of contraception between married couples); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (use of contraception between unmarried couples); *Roe v. Wade*, 410 U.S. 113 (1973) (right to terminate a pregnancy); and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) (modified the right to terminate a pregnancy)).

²¹⁵ *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

²¹⁶ *Meyer*, 262 U.S. at 399, 401.

²¹⁷ *Pierce*, 268 U.S. at 534-35.

²¹⁸ 850 So. 2d 161, 167 (Miss. Ct. App. 2003).

²¹⁹ *Davis v. Vaughn*, 126 So. 3d 33, 37 (Miss. 2013) (quoting *In re Dissolution of Marriage of Leverock and Hamby*, 23 So. 3d 424, 429 (Miss. 2009)).

CONCLUSION

In response to the changing dynamic of the American family and the increase of children being placed in foster care due to the opioid and drug crisis, the Mississippi Legislature should consider enacting the Proposed Grandparent Intervention Statute. The proposed statute would give grandparents a statutorily recognized right to intervene in the adoption proceedings of their grandchildren. Without this legal protection, grandparents are at risk of losing their relationship with their grandchild if their own child were to terminate their parental rights. The grandchildren are also at risk of losing the opportunity to be adopted by their biological grandparents. The grandparent-grandchild relationship has been shown to be of benefit to both parties and has been described as being a relationship that is only second to the parent-child relationship.

Allowing grandchildren to be adopted without giving grandparents a chance to be heard in court impedes the court's ability to make a finding in support of their "polestar consideration," the best interest of the child. The Proposed Grandparent Intervention Statute would support a finding in favor of the best interest of the child by presenting to the court additional evidence and factors to consider when evaluating custody using the *Albright* factors. The proposed statute would not be giving grandparents a presumption in their favor or granting them an advantage over nonbiological, potential adoptive families. Once grandparents are allowed to intervene in the proceeding, the court will still undertake a thorough discussion using the *Albright* factors that will ultimately lead to a finding in the best interest of the child.

The proposed statute is also in line with the Supreme Court's plurality opinion in *Troxel* and the Mississippi Grandparents' Visitation Statute. Authorizing grandparents to intervene in their grandchildren's adoption proceedings does not impair the natural parent's fundamental parental liberties since their rights will have already been terminated by the point of intervention. Further, the Mississippi Legislature has demonstrated its support of grandparents' rights and recognition of the role grandparents play in the lives of their grandchildren through its visitation

statute. A recently proposed amendment demonstrates lawmakers' continued support.

The recently passed Family First Prevention Services Act seeks to decrease the number of children in foster care by providing preventive services, such as mental health services, substance use treatment, and in-home parenting skill training. The proposed statute aligns with the federal government's goal as it would ultimately lead to a decrease in the number of children in the state foster care system. The proposed statute also aligns with the "reasonable efforts" requirement outlined in both federal and state laws. Child welfare agencies, in order to receive federal funding, are required to make "reasonable efforts" to ensure that a child remains in the familial home. The proposed statute would support this overall goal by allowing a child's biological family, through their grandparents, one final chance at keeping the child within the home or family.

Additionally, studies have revealed that the grandparent-grandchild relationship can be beneficial for both parties. The majority of grandparents that have chosen to raise their grandchildren have stated that they would make the same decision over again, even though many hardships were faced along the way. The grandparent-grandchild relationship also serves as a connection to the grandchild's past, which can give them a sense of belonging and connection. Finally, both the Supreme Court of the United States and Mississippi courts have a rich history of recognizing the importance of familial, biological relationships. The proposed statute is a much-needed change to the Mississippi foster care system and will afford legal protection to the grandparent-grandchild relationship in a time when grandparents are being called upon to step back into the role of parents.

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