

Grandparent contact: another presumption?

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Abstract (150 words)

This article notes a resurgence in debate about the enhancement of grandparents' legal status in relation to their grandchildren. In particular, it observes that calls for a legal presumption in favour of grandparent contact with their grandchildren when family relationships break down have been emboldened by the enactment in s1(2A) of the Children Act 1989 of a presumption that involvement of both parents in their children's lives furthers children's welfare. Proponents of grandparent rights argue that there should be a similar presumption in favour of grandparent involvement. The article examines the welfare case for such involvement and concludes that there is no unequivocal evidence to support it. It also considers the effect of the presumption in s1(2A). The article concludes that to enact a similar presumption in favour of grandparents, and even to remove the leave requirement that currently exists, could prejudice the interests of mothers as well as children.

Key words

Grandparents, contact, child arrangements, presumption.

Introduction

The status and rights of grandparents in relation to their grandchildren have been in the news again. The Telegraph ran a piece with the headline: ‘Rising number of grandparents going to court to win right to see their grandchildren’ (Rudgard, 2018) The Daily Mail featured the headline ‘Grandparents have a legal right to see their grandchildren, EU's top court rules’.¹ More recently, the possibility of introducing a presumption in favour of grandparent contact was discussed on BBC Radio 2.² And a European Court of Human Rights case, *Beccarini and Ridolfi v Italy*, has drawn attention to the potential use of Article 8 if there has been a significant grandparent-grandchild relationship.³

In the UK, it is not only the press that has focused on grandparents’ contact with their grandchildren; Westminster too has debated the issue. And this is not the first time that grandparents’ status has entered the public and political arena. Since the enactment of the Children Act 1989 the question of whether grandparents should have special legal status in relation to their grandchildren has periodically received considerable public and academic attention,⁴ largely as a result of the efforts of grandparent groups.⁵

The focus of the efforts of grandparent groups over the last three decades has been twofold. First, there was pressure to ensure that grandparents would be considered as a priority by local authorities seeking to place children whose parents could not or would not care for them. Allied to this was pressure to ensure that grandparents who were caring for grandchildren would receive financial help from the state to do so. The second focus has been on the private law status of grandparents. In particular, the removal of their special, albeit limited, rights⁶ as a result of the enactment of the Children Act 1989 was criticised by grandparent groups.⁷ Their campaigns focused on the fact that grandparents who are not ‘allowed’ to see their grandchildren and seek an order for contact⁸ with grandchildren are obliged, under s10 of the Children Act 1989, to apply for the leave of the court to do so.

¹ MailOnline 31st May 2018. Judgment of the Court (First Chamber) of 31 May 2018 *Neli Valcheva v Georgios Babanarakis*. Case C-335/17 accessed @ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62017CJ0335>. In fact the Court, faced with a dispute over jurisdiction, ruled that, in relation to Brussels IIa Regulation, ‘The notion of rights of access refers not only to the rights of access of parents to their child, but also to the rights of access of other persons with whom it is important for the child to maintain a personal relationship, among others, the child's grandparents’. . See also BBC News 7 May 2018. ‘Call for “rights for grandparents” law <https://www.bbc.co.uk/news/uk-politics-44028473> (accessed 21 March 2019).

² BBC Radio 2 13 March 2019 Jeremy Vine <https://www.bbc.co.uk/sounds/play/m00036mt>, <https://www.bbc.co.uk/sounds/play/m00036mt> Accessed 21 March 2019. See also Bristol Grandparents Support Group 19 March 2019 ‘You can’t please all of the people...’ <https://www.bristolgrandparentssupportgroup.co.uk/blog/you-cant-please-all-of-the-people/>.(accessed 21 March 2019).

³ *Beccarini and Ridolfi v Italy* (no.63190/16) in relation to a violation of Article 8 (summarised in J Queen Family Law in the European Court of Human Rights in 2017 Family Law Week 26 Feb 2018)

⁴ See eg Kaganas and Piper (1990) pp 27-8 and references there. See, more recently, Taylor (2018).

⁵ See Kaganas (2007).

⁶ Under the Domestic Proceedings and Magistrates Court Act 1978 and the Guardianship of Minors Act 1971. These statutes gave grandparents standing to apply for what was termed access during the subsistence of a custody order. See Kaganas and Piper (1990, pp. 29-30).

⁷ See Kaganas and Piper (2001, p.253).

⁸ Now a child arrangements order.

To some extent, the first aim has been achieved; legislation was passed in 2008 requiring the Local Authority (LA) to consider kinship carers in preference to unrelated carers.⁹ The campaign for financial support for those who do become kinship carers continues.¹⁰ But the campaigns relating to private law status failed to gain official support.

Calls for the law to change in order to confer a special legal status on grandparents were firmly rejected in 2011 in the Final Report of the Family Justice Review (Norgrove 2011, para 4.46), which stated that the existing law was not ‘not overly burdensome’ and did not involve extra expense (para 4.5). The Review recommended that the requirement for grandparents to apply for leave should remain as it is because it “prevents hopeless or vexatious applications that are not in the interests of the child” (para 110).

However the matter has not rested there. The campaign to strengthen the legal position of grandparents when it comes to contact with grandchildren seems to have been reinvigorated in the wake of the enactment in 2014 of a presumption in favour of parental involvement which was introduced into the Children Act 1989.¹¹ As a Grandparent contact was considered anew by politicians in a Westminster Hall debate in 2017 (UK Parliament, House of Commons, 2017a) and, more recently, in another Westminster Hall debate in May 2018 (UK Parliament, House of Commons 2018). That debate saw Members of Parliament responding positively to representations from grandparent champions and from individuals calling for a change in the law.¹²

In the light of these developments, this article reviews the way that campaigning groups are constructing a problem which they believe can be ‘solved’ by legislation but argues that any such change would not be based on strong evidential foundations showing it would be best for children. There is no more evidence in favour of a legal entitlement to contact for grandparents as a class than there was in 2011 and, indeed, legislative change such as the statutory presumption that is currently being sought by some campaign groups would have the potential to operate to the detriment of children as well as mothers.

Constructing the Problem

First, we should point out that not all grandparent groups now campaign for changes regarding contact: some have changed the focus of their campaigning to other concerns such as the needs of grandparents caring for children. Grandparents Plus, for

⁹ Section 22C CA inserted by the Children Act 2008.

¹⁰ See Kaganas and Piper (2018).

¹¹ Section 1(2A). See also BBC Radio 2 13 March 2019 Jeremy Vine show where a founder of the campaign group, Bristol Grandparents Support Group, and a member of Resolution were interviewed to discuss the law and the possibility of introducing a legal presumption in favour of grandparent contact. <https://www.bbc.co.uk/sounds/play/m00036mt> (accessed 21 March 2019).

¹² Esther Rantzen, the Bristol Grandparents’ Support Group and Granpart were specifically mentioned (UK Parliament, House of Commons 2018). The website of Granpart does not refer to changes in the law and covers mainly their publicity successes. Grandparents Apart, however, has a website that focuses on contact and the law and appears to campaign extensively. Grandparents Plus, which appears to have replaced the Grandparents Association, is concerned mainly with public law issues and grandparents as carers.

example, deals neutrally with the issue of contact by stating the legal position without comment (Grandparents Plus, undated). The Family Rights Group's campaigns relate to state intervention in the family (Family Rights Group, undated). The Grandparents Association no longer has a presence on the internet at all. However, Grandparents Apart UK remains focused on contact and the Bristol Grandparent Support Groups have emerged as advocates of grandparent contact. Grandparents Apart is somewhat more strident than any other group and demands a presumption in favour of contact. The Proud Grandparents website takes a more balanced view in its recent article 'Grandparents who are Denied Access to Grandchildren' (Grace 2018).

As with all campaigns for legislative change the campaigners must gather evidence to support their 'case' and present it in such a way that it gains widespread support. In this instance, therefore, those promoting grandparent contact must establish two things: that there are significant numbers of grandparents and children affected and that grandparent contact is good for children. The Bristol Grandparents Support group is one group that sets out to show the extent of the problem (2018c):

It is estimated that over one million children in the UK are denied contact with their grandparents due to family breakdown, but this is not specific to the UK it is a global problem. (sic and emphasis in original)

The other part of the campaigning strategy - to emphasise the value to children of links with grandparents and also the harm they suffer if those links are severed¹³ – is evident in the following submission by Grandparents Apart Self-Help Groups Scotland to the Scottish Parliament (GASH 2005):

Too often when parents separate a child is deprived of contact with grandparents they love and the stability they can offer because of the parent's disagreements. The child should not suffer. 'One person' control over a family has to be stopped as too many children are being deprived because of it and too many are 'alienated' because this control is encouraged.

That group, whose Patron is Sir Bob Geldof, has published a 40 page booklet which includes further details of their strategy, notably in a chapter entitled 'Gathering the Ammunition' which begins:

We felt that grandparents and grandchildren were getting a raw deal, not being recognised in their grandchildren's lives was a total insult to them and a great loss to the children, ... Highlighting the issues and problems and showing how common this heartache was becoming had become our life's work. (Deuchars and Loudoun 2006).

Groups also emphasise the distress of grandparents separated from their grandchildren¹⁴ and point to instances of suicide in some cases.¹⁵ Nigel Huddleston, MP said in a recent debate that '[S]ome of the grandparents who have contacted me have said that being cut off from their grandchildren is like a living bereavement. One

¹³ See Kaganas (2007 p. 29).

¹⁴ 'Being estranged and alienated is deeply, deeply devastating and it can all feel so utterly hopeless' (Jackson, 6 March 2019).

¹⁵ See Nigel Huddleston (UK Parliament, House of Commons 2018, Col 172 WH).

grandparent poignantly said that the grief does not have “the closure or finality of death” (UK Parliament, House of Commons 2018, Col 172). As regards the perceived solution, he agreed with the suggestion of Tim Loughton MP that there should be ‘a presumption that grandparents should be involved as much as possible in the upbringing of those children’ and he asked that the Minister consider ‘an automatic right for grandparents to seek contact through the courts’ (UK Parliament, House of Commons 2018, Col 1730).

The desired changes to the law, therefore, are two-fold: the removal of the leave requirement and the introduction of a particular presumption. The next section considers the relevant law in relation to both these aspects in some detail, together with what we know about the success of grandparent applications for contact. We start with the leave requirement and suggest that it is not a major hurdle.

The Law

Seeking leave

Grandparents concerned about lack of contact (access) with a grandchild must seek a child arrangements¹⁶ order under s8 of the Children Act 1989 but must first get the leave of the court before applying. In deciding whether to grant leave, the court must take into account the circumstances¹⁷ and in particular the checklist in s10(9). It is also entitled to consider the welfare checklist in section 1(3) but the child’s welfare is not the paramount consideration.¹⁸ In addition, the court can take into account the application’s prospects of success:¹⁹ ‘leave will not be given for an application that is not arguable’.²⁰ However the court should not allow this consideration to displace the factors in the s10(9) checklist.²¹

The factors set out in s10(9) include:

- (a) the nature of the proposed application for the section 8 order;
- (b) the applicant’s connection with the child;
- (c) any risk there might be of that proposed application disrupting the child’s life to such an extent that he would be harmed by it;

The disruption referred to in s10(9)(c) is the disruption caused by the legal proceedings if leave were to be granted²² and the definition of ‘harm’ in that section is the restrictive one contained in section 31(9) of the Children Act 1989.²³ The applicant’s connection with the child need not have been in the form of significant

¹⁶ Previously called a contact order

¹⁷ Re A (A Minor) (Contact: Leave to Apply) [1995] 3 F.C.R. 543

¹⁸ A (A Minor) (Contact: Leave to Apply), Re [1995] 3 F.C.R. 543

¹⁹ A (A Minor) (Contact: Leave to Apply), Re [1995] 3 F.C.R. 543; Re F and R (Section 8 Order: Grandparents’ Application), Re [1995] 1 F.L.R. 524

²⁰ B (A Child) [2012] EWCA Civ 737 [48].

²¹ Re H (Children) [2003] EWCA Civ 369 [16] – [19].

²² Re H (Children) [2003] EWCA Civ 369 [26].

²³ Re A (Minors) (Residence Order) [1992] 3 All ER 872

involvement but the reasons for a less than substantial role should be examined in oral evidence.²⁴ Courts should be mindful of the importance of the blood tie.²⁵

It was thought that s10(9)(b) in particular would lead to courts giving grandparents ‘special consideration’,²⁶ a view shared by the Lord Chancellor and the Minister of Health at the time of the passage of the Act.²⁷ Talbot and Kidd (2004, p.274), commenting on case law,²⁸ suggest that there is indeed a presumption in practice that grandparents should be given leave.

However there have been cases where the court has found the value of grandparents’ involvement in their grandchildren’s lives to be outweighed by other factors. In particular, hostility between the parents and grandparents might make the prospects of success unlikely. In one reported case in the Family Division in the 1990s,²⁹ the judge dismissed an appeal against the decision of a stipendiary magistrate who had refused leave because of the ‘total opposition’ of the parents to the child’s contact with her paternal grandmother. Later cases, as noted below³⁰ have taken a less rigid approach to previous guidance.³¹

Removing the requirement to apply for leave.

Some grandparent groups and some MPs have limited their aims to abolishing the requirement to apply for leave. They suggest that it increases cost as well as the duration of proceedings and is a disincentive to grandparents needing the intervention of the court.³² The Parliamentary Under-Secretary of State for Justice, speaking during the 2018 Westminster Hall debate and referring to the Family Justice Review, countered these arguments:

Some people see that [the leave requirement] as an additional hurdle, but experience shows that grandparents do not usually experience any difficulty in obtaining permission when their application is motivated by a genuine concern for the interests of the child. That is because a person can seek the court’s permission at the same time as they make their substantive application simply by ticking the box on the relevant form, and there is no need to pay a separate fee. That can be part and parcel of the hearing.

The leave requirement is not designed to be an obstacle to grandparents or other family members; it is meant to be a filter to sift out applications that are clearly not in a child’s best interests, such as vexatious applications aimed at undermining one of the parents involved in a dispute over the child or continuing parental conflict. Leave was examined as part of the independent

²⁴ Re H (Children) [2003] EWCA Civ 369 [24].

²⁵ Re H (Children) [2003] EWCA Civ 369 [28].

²⁶ Douglas and Lowe, 1990: 105

²⁷ See Crook (1994); The Law Commission (1998) prior to the Act, had also expressed this opinion at para 4.41

²⁸ Re J [2003] FLR 114; Re H [2003] EWCA Civ 369

²⁹ Re A (A Minor) (Contact: Leave to Apply) [1995] 3FCR 543

³⁰ Re J (Leave to Issue Application for Residence Order)[2003] 1 FLR 114; Re B (Paternal Grandmother: Joinder as Party [2012] 2 FLR 1358

³¹ See Douglas (2003).

³² See, for example, Norgrove (2011, para 4.4).

family justice review led by David Norgrove, which in its final report, published in November 2011,³³ recommended that the requirement for grandparents to apply for leave should remain.
(UK Parliament, House of Commons, 2018, Col 184-5).

It is this requirement of leave that grandparent groups have long campaigned against but it appears that the arguments put forward to remove it continue to have little traction within government or among policymakers. One grandparent group is now looking beyond the goal of abolishing the need for leave and has focused on the substantive law instead.

Applying for contact

While the number of reported cases dealing with substantive applications for grandparent contact in the context of parental opposition is small, there is some evidence that courts regard such contact as generally beneficial. For example, in *Re W (Contact: Application by Grandparent)*, Hollis J asserted that grandparents ‘have a very great place to play in the life of children, particularly young children ... This influence can be extremely beneficial to children, provided it is exercised with care and not too frequently’.³⁴ And in *Re J*³⁵ the court stated:

[I]t is important that trial judges should recognise the greater appreciation that we have developed of the valuable contribution that grandparents make, particularly to children of disabled parents. Judges should be careful not to dismiss such a potential contribution without full inquiry. That seems to me to be the minimum essential protection of the Article 6 and Article 8 rights that grandparents enjoy.

In another more recent case, *CW*, the court favoured contact with grandparents (with some safeguards, including supervision by NYAS) despite the grandparents’ hostility to the mother and despite their support for their son who was banned from being near the children by the court.³⁶ We include below a long excerpt because it reveals a particular difficulty which can arise where the application is by paternal grandparents where the father presents a risk to the children. and perhaps also where relationships are simply acrimonious.

27 On the one hand there is a powerful case for saying that the children should be in touch with the paternal side of their family. On the other is the fact that – as they presented to me – the grandparents are entirely in the father's camp. They are bitterly hostile to the children's mother, and as recently as December 2009 referred in terms to their son's “everlasting ordeal”; the “onslaught of false allegations against him”, and of his “torture” by the police. They accused the children's mother of “cruelty” and of the intention to stop

³³ See Norgrove (2011, para 4.46).

³⁴ [1997] 1 FLR 793 at 795

³⁵ [2003] FLR 114

³⁶ *CW, CHW, BAW, v TW OW and YW* (by their Guardian ad Litem, NYAS) [2011] EWHC FAM 76

their son's contact with his daughters. How could contact with such grandparents be in the interests of the children?

31 Grandparents usually have the capacity to deliver the vital quality of normality. They are normally outside and above the fray. They can provide a haven for children whilst, at the same time, keeping them in touch with the absent side of their family. But can these grandparents do this?

32 I have, in the end, come to the conclusion that they can, and I have reached that conclusion, albeit hesitantly, for two allied reasons. The first is that I believe Mrs. BAW to be a fundamentally honest woman, who recognises that – were contact to take place freely at or near her home – she would find it impossible to keep the father away. Secondly, I think that Mrs. BAW recognises the harm that the children may suffer if she seeks to proselytise the father's case to the children. I may be wrong about that. I hope I am not.

It would appear, however, that in relation to substantive applications for contact there is no presumption that grandparents should have contact. *Re A (Section 8 Order: Grandparent Application)*³⁷ the judge stated that ‘there cannot be a presumption that a grandmother who gets leave is entitled to contact unless it can be shown by cogent reasons that she should not have it’. Grandparents are not in a ‘special position’.³⁸ In *Re K (Mother’s Hostility to Grandmother’s Contact)*³⁹ the court reaffirmed that there is no presumption and that grandparents should remember that they are not in the same position as parents. They do, however, have an important role and cessation of contact should be temporary. Where direct contact is refused, indirect contact should be considered.

That grandparents are not in the same position as parents was also made clear in an appeal against a transfer of residence to grandparents because the mother was not allowing contact:

I know of no case in which such a dire sanction has been exercised against an obdurate parent to transfer the primary care to a grandmother. Manifestly grandparents are not on equal footing with parents. Statute requires an *application for leave* before a grandparent may make application. Inevitably there are disbenefits for a child to be brought up by an adult of a different generation to either of her parents.⁴⁰ (emphasis added)

. However, as noted above, at least one grandparent group is demanding more; they want a presumption in favour of contact with grandchildren to be included in

³⁷ [1995] 2 FLR 153 at 157

³⁸ *Idem*. This principle was affirmed in relation to applications under section 34 of the Children Act 1989 (for contact with a child in care) in *Re W (Contact: Application by Grandparent)* [1997] 1 FLR 793 and also, in *Re M (Care: Contact: Grandmother’s Application for Leave)* [1995] 2 FLR 86, when Ward LJ stated, ‘The fact is that Parliament has refused to place grandparents in a special category or to accord them special treatment’ (at 95).

³⁹ [1996] CLY 565, Case Digest. See also *Re A (A Minor) (Contact Application: Grandparent)* [1995] 2 FLR 153.

⁴⁰ *In the Matter of B (A Child)* [2012] EWCA Civ 858.

legislation. In effect, they want the legal position of grandparents to become more closely aligned with, albeit not the same as, that of parents.

The ‘grandparent contact is good’ presumption

Grandparents Apart states that, ‘We are proposing a presumption of contact NOT rights and responsibilities over the children’ (Deuchars and Loudoun, 2006). And there are politicians backing this. This demand for a ‘grandparent presumption’ has undoubtedly gained credence as a result of the enactment of the presumption that both parents should be involved in their children’s upbringing.

The presumption relating to parental involvement

Section 11 of the Children and Families Act 2014 amended s1 of the Children Act 1989 and, as a result, since 22 October 2014,⁴¹ all new contested cases between parents about child arrangements that brought under s8 of the Children Act have been decided in the light of the new statutory presumption. Where there is a dispute between separated or divorced parents about where their children should live or when and with whom they should spend time, the courts must presume that involvement of both parents in their child’s life furthers that child’s welfare.

The new wording of s1 is as follows:

(2A) A court, in the circumstances mentioned in subsection (4)(a) or (7), is as respects each parent within subsection (6)(a) to presume, unless the contrary is shown, that involvement of that parent in the life of the child concerned will further the child's welfare.

(2B) In subsection (2A) “*involvement*” means involvement of some kind, either direct or indirect, but not any particular division of a child's time.

(6) In subsection (2A) “*parent*” means parent of the child concerned; and, for the purposes of that subsection, a parent of the child concerned—

(a) is within t his paragraph if that parent can be involved in the child's life in a way that does not put the child at risk of suffering harm; and

(b) is to be treated as being within paragraph (a) unless there is some evidence before the court in the particular proceedings to suggest that involvement of that parent in the child's life would put the child at risk of suffering harm whatever the form of the involvement.

Kaganas (2018, pp. 555-56) interprets the literal meaning of the provision as follows:

Subsection 2A, then, requires a court to presume, unless there is evidence to the contrary, that, as long as a parent falls within ss 6(a), that parent’s involvement in the child’s life is best for the child. A parent qualifies under ss 6 and the presumption in favour of involvement applies unless there is

⁴¹ Children and Families Act 2014 (Commencement No 5 and Transitional Provision) Order 2014/2749.

evidence that the parent’s involvement would put the child at risk. It is presumed that a parent’s involvement will not put the child at risk of harm unless there is evidence to that effect. The presumption that the parent can be safely involved is only fully rebutted if all forms of involvement pose a risk of harm. So if direct contact poses a risk of harm but indirect contact does not, it seems the court must presume that the parent should be involved through the mechanism of indirect contact.⁴²

A grandparent presumption

It is not just grandparent campaigners who are calling for grandparents to be included in this presumption: so are some MPs. As noted above, Tim Loughton MP asked in the 2018 Westminster debate:

Does my hon. Friend not think that it would be equally appropriate to have a presumption that grandparents should be involved as much as possible in the upbringing of those children, unless—and only unless—there is a problem with the welfare of that child?

(UK Parliament, House of Commons 2018 Col 172)

Nigel Huddleston MP agreed:

I am calling for the Government to introduce an amendment to the Children Act 1989, to enshrine in law the child’s right to have a relationship with their grandparents by adding the words “and extended family” or “and any grandparents” to the section on parental involvement in relation to the welfare of the child, as my hon. Friend Tim Loughton said.

(UK Parliament, House of Commons 2018 Col 173)

I am calling for an amendment to section 1(2A) of the Children Act 1989, to provide for the court to presume that the involvement of a grandparent in the life of the child concerned will further the child’s welfare, unless the contrary is shown.

(Ibid Col 174)

In response to a parliamentary question on the subject from the same MP in 2017, the Prime Minister said, ‘I am sure that the Ministry of Justice and the Department for Education will consider these points carefully’ (UK Parliament, House of Commons 2017b Col 1035). And in response to the 2018 Westminster debate, the Parliamentary Under-Secretary of State for Justice, Lucy Frazer, promised to ‘look at’ the possibility of enacting a presumption but stressed that, ‘the family justice system puts the child, not the grandparent, at the heart of its consideration.... [T]here may be some unintended consequences that we will have to look into’ (UK Parliament, House of Commons, 2018, Col 185).

There are signs, then, that the issue is on the agenda for consideration by law reformers. Whether there will be a change in the law remains to be seen. There has

⁴² But see p.557 on the discretion retained by the courts.

been support from politicians in the past for a change in the law in the form of removing the leave requirement but the law has remained the same.⁴³

Is there a role for law here?

The campaigners for legislative change are working on the assumption that law can remove or reduce the problem of lack of contact with grandchildren but there are serious impediments to this.

The limited role of the law and the courts

Whether any change in the law would have a significant instrumental impact is doubtful; relatively few applications are made to court by grandparents.⁴⁴ Indeed litigation is seen as a last resort and an unproductive route to go down even by grandparent support groups. And enforcement of court orders is seen as a problem.

The Bristol Grandparents Support Group⁴⁵ website makes this clear:

I never advise any grandparent to take the legal route, it is distressing for all concerned, it takes a long time and grandparents have spent their entire savings on legal fees (emphasis in original)....

If you are successful in obtaining a court order for contact, you need to be mindful that if the resident parent decided not to turn up at the agreed time and place you have to go back to court (2018f).

Similarly, the website of Grandparents Apart UK has this statement from its founder: 'I don't believe courts are the best place to resolve family problems. Mediation is more preferable' (Deuchars, 2013).

Grandparents Apart UK reports similar views in its findings from a questionnaire survey sent to 500 of its members and contacts, of which 135 questionnaires were returned. The responses show little faith in the courts. The report states that almost 98% of those replying thought it would be better if disputes could be dealt with outside of courts, 47% had experienced what they saw as injustice from the courts but, nevertheless, 96% wanted a change in the law 'to ensure attempts at family unity have the best chance of success' (Deuchars and Loudoun, 2006).

Earlier research conducted in Scotland also revealed general scepticism about the role of law in family matters. Public opinion was divided with some saying grandparents need legislation while others thought that legislation would exacerbate tensions, expose children to abuse and would lead to excessive demands on children's time.⁴⁶

Legal change as a strategy to change norms

⁴³ Nick Clegg, Deputy Prime-minister in the Coalition Government reportedly promised change. See Deuchars (2013). See also Gloria De Piero (UK Parliament, House of Commons, 2018, Col 181).

⁴⁴ Two thousand applications in 2016, according to Nigel Huddleston MP (UK Parliament, House of Commons, 2018, col 173).

⁴⁵ The patron of this group is Esther Rantzen.

⁴⁶ See Nicholson (2004, paras 7.1–7.2). See also mruk research (2004, para 5.49).

There is an apparent paradox; the law is not used by many grandparents and it is experienced as unhelpful by those who do use it, and yet there is still pressure for law reform.⁴⁷ The reason for the pressure is the belief that not only will law reform improve the legal position of grandparents, but, more importantly, that it would change professional practice, change the national culture⁴⁸ and alter public perceptions of grandparents' role in the family.

So Grandparents Apart argues:

Change the law to give **PRESUMPTION OF CONTACT** then the resident parent will know ahead of any challenges that they cannot simply wipe out a family from the child's life.⁴⁹

This will encourage those involved to attend conciliation/crisis counselling, which will assist in finding middle ground and compromise.
(Deuchars and Loudoun 2006)

And the Bristol Grandparents Support Group blog says:

We have to work towards a cultural change as well, very young children must be educated in the importance of family. Family values need to be reinforced, children need to understand the responsibility they will have when they are older. When they are in an adult relationship and go on to have children, that those children have a right to have contact with both parents and grandparents/extended family.

So to deny contact is as socially unacceptable as drink driving.

(Jackson March 15 2019)

Grandparent groups also clearly hope to influence the practice of professionals involved in finding the 'middle ground':

When couples divorce they have to attend mediation and going to court is a last resort, during the mediation stage it should be stressed (sic) the importance of the relationship between grandchildren and grandparents.
(Bristol Grandparents Support Group 2018e)

Professionals are meant to encourage parents to allow grandparent involvement, ideally obviating any need to litigate. And if cases go to court, judges should be alive to the benefits of grandparent involvement. This is apparent from the Charter for Grandchildren published by Grandparents Apart UK:

Families are important to children - grandchildren can expect ...

⁴⁷ It is claimed that a presumption in favour of grandparent contact has received support from 'the higher judiciary' (Buchanan and Rotkirch, 2018 p.140). The authors do not elaborate on this claim. In addition, the authors claim that Kaganas (2007) argues in favour of a presumption (at 140). This claim is erroneous.

⁴⁸ See UK Parliament, House of Commons (2017a, Col 49)

⁴⁹ Elsewhere Jimmy Deuchars has expressed a contradictory view: 'It may surprise some people to learn that I don't believe in automatic legal rights for grandparents. However, courts and social services do need to give grandparents more consideration than at present when making assessments about children's lives' (Deuchars 2013).

- Social workers, when making assessments about their lives, to take into account the loving and supporting role grandparents can play in their lives.
 - The courts, when making decisions about their lives, to take into account the loving and supporting role grandparents can play in their lives.
 - Lawyers and other advisers, to encourage relationship counselling or mediation when adults seek advice on matters affecting them and their children.
- (Grandparents Apart 2013)

None of these aims require a change in the law. However it is thought that the normative power of the law will have a wide-ranging impact. This was adverted to by Nigel Huddleston MP in the 2018 Westminster debate:

Changing the law also changes the culture so that deliberately restricting the access of one family member to another becomes socially unacceptable. The legal change that France⁵⁰ has already pursued is very important, as is the social tone that comes with it.

(UK Parliament, House of Commons 2018 Col 174).

Grandparents Apart also refers to the supposed power of the law to deter litigation: ‘If a Legal Right of Contact became the norm and everyone was aware of it, fewer disputes would go as far as court. This has to be better for everyone concerned, especially the children’ (Deuchars and Loudoun 2006).

So, it is argued, a change in the law will mean less need to use the law. Stather, a barrister, writes that a change in the law would encourage parties to attend mediation and CAFCASS would have to consider grandparents in their reports. But, she goes on,

[P]ossibly the biggest benefit of a change of the statutory emphasis would be in terms of changing people's way of thinking. It seems to be universally acknowledged that grandparents play an extremely important part in the lives of grandchildren in terms of emotional and practical support. If that relationship were then protected in law, perhaps parents would think more carefully before stopping contact and taking away from their child the lifelong benefits of that bond with grandparents. (Stather 2018)

Legal change will, then, create a new norm according to which grandparent contact is a ‘good’ and those who oppose it are deviant. The pressure will be on parents and, more specifically, on primary caretaking mothers, as nine in ten single parent families are headed by a single mother and 45% of them were once part of a married couple (Rabindrakumar 2018, p.3). They may feel they must not only accede to contact with their former partners, usually fathers, but also with grandparents, including paternal grandparents who support their sons in the conflict over contact. So it will be not only courts and professionals but also mothers themselves who might see it as deviant to resist contact with fathers and/or grandparents and to precipitate litigation..

⁵⁰ For a brief summary, see Paris Logue (undated).

However, the way that the presumption of parental involvement has operated in the years since its enactment would suggest that some of these hopes and fears will not materialise: the inclusion of grandparents in the s1(2A) presumption in the Children Act 1989 is likely to prove a disappointment to campaigners and to individual grandparents alike.

The approach of the courts to the current presumption of involvement

There is no reason to suppose that the presumption will discourage determined combatant grandparents engaged in a high conflict dispute from resorting to the courts as there is no evidence that the current s1(2A) has reduced litigation between parents.⁵¹ And in those cases that do reach court, it appears from the reported cases that it is having little impact on decision-making.

The welfare principle, making the child's welfare the paramount consideration for the court adjudicating a dispute, is, theoretically, unaffected by the presumption. The presumption is not drafted with the intention of creating a default position; it is not meant to be the case that, if it is not rebutted, the court is obliged to make a child arrangements order for contact.

The Explanatory Notes to s11 of the Children and Families Act 2014, which introduced the parent involvement presumption into the Children Act 1989 state:

109. In a case where the presumption stands in respect of either or both of the child's parents, the court will be required to presume that the child's welfare will be furthered by the involvement of that parent (or those parents) in the child's life. This will be a consideration for the court to weigh in the balance when deciding whether to make an order (and if so what order to make) in a particular case, along with the other considerations in section 1 of the Children Act 1989, subject to the overriding requirement that the child's welfare remains the court's paramount consideration.

Consequently, as Kaganas (2018 p.556) explains, that, if the explanatory notes are followed,⁵² 'despite the operation of a presumption that contact is best for the child, and despite a lack of evidence to rebut it in any particular case, the court is at liberty, by, for example, applying the s1(3) welfare checklist, to decide that contact is not in the child's best interests' and 'at least in theory, if the presumption is rebutted by evidence of risk, the court can still decide that contact is best'.

Moreover, an analysis of the reported cases suggests that the higher courts are largely ignoring the presumption. They are continuing to use their discretion to decide cases according to their assessment of the child's best interests. Their reasoning is confined, in most cases, to applying the s1(3) checklist and the case law (Kaganas 2018, pp. 561-63).

⁵¹ See Kaganas (2018, pp. 564-65).

⁵² Although the courts are not bound to do so. We are indebted to Stephen Gilmore for stressing this point in the context of an email exchange about parental involvement.

This lack of attention to the statutory presumption can be explained by the fact that the courts have long operated a de facto presumption in favour of paternal contact and the courts are simply continuing to rely on that presumption embodied in case law (Kaganas 2018, p. 563). However, this leaves open the question as to whether the presumption of grandparent contact - where there is not so strong a de facto assumption about the 'good' of such contact - might operate differently. Yet, given the apparent reluctance of grandparents to litigate and the norm of non-interference with parental authority that Douglas and Ferguson (2003) identified as defining our society's approach to grandparenting in the context of divorce, it may well be that substantive applications will continue to be unusual and that they will be decided in the same way they were in the past. According to Taylor's analysis of past cases, courts, while they do not protect parents 'as such' against grandparent claims, do 'usually protect functioning relationships of primary responsibility and their importance to the child's welfare' (2018 p.233). And it is usually the parent(s) who take on the role of primary carer.

Is grandparent contact good for children?

The research

When the enactment of the Children Act 1989 precipitated an earlier campaign for grandparent rights we pointed out that, 'Champions of grandparent rights typically draw on specialist knowledge in order to legitimate their proposals and to present their case as promoting a universal good' (Kaganas and Piper 1990, p.32). Yet while some studies support the view that grandparents serve as confidants for grandchildren, provide emotional and practical support and act as repositories of family history, other research findings, both then and now, are more equivocal⁵³ and, as Douglas and Ferguson (2003, p.43) argue, 'The assumption that grandparents might be a useful resource to meet the needs of children has been made without taking account of much evidence as to the nature of the grandparenting role and the quality of grandparenting relationships (particularly after divorce).' They go on to say that grandparent claims for better legal rights 'are similarly made in the absence of clear evidence of the extent of the 'mischief' that such recognition might address'.

They report that, in their study, relationships were asymmetrical, with grandchildren usually being more important to grandparents than grandparents were to grandchildren. Some grandparents were not 'enthusiastic about the role' (p.46) and children were less close to grandparents who were 'out of touch with their interests' (p.60). They argue that their finding of asymmetry means that grandparents should not have a right to contact against the parents' wishes (Ferguson *et al*, 2004, p. 32).

Cowan, writing about grandparent visitation in the United States is of the same opinion. While she considers contact generally positive, 'it is not beneficial when it is ordered over a parent's objection' and it can be damaging (2007, p. 3169). She summarises the 'damaging effects of visitation disputes':

⁵³ For a more detailed account of the earlier research, see Kaganas and Piper (1990 pp.32-4); Kaganas (2007, pp. 26-8)

Children in this situation will (1) see that they are at the heart of the family strife; (2) experience the stress of loyalty conflicts; (3) perceive that the normal authority of their parent has been undermined by the power of the grandparent and the judge; (4) have to deal with attempts by parents, grandparents, or both to pressure or cajole them into taking sides in the conflict; (5) be exposed to a grandparent who communicates - explicitly or implicitly - anger at and criticism of the parent; (6) feel nervous, anxious, or frightened by the compulsion to do what their mother or father (or both) strongly opposes; (7) return from visitation to a parent who feels angered and upset by the grandparent's unwanted imposition and control; (8) experience the tensions in their own households caused by the tremendous stress of the litigation process (references omitted).
(2007, pp. 3178-79)

However, research published in a recent special issue of *Contemporary Social Science* is more positive. Attar-Schwartz & Buchanan (2018) conclude that their large-scale studies on adolescent–grandparent relationships conducted in the UK and in Israel ‘reveal that grandmothers and grandfathers are highly involved in adolescents’ lives and that this involvement is associated with increased adolescent well-being’. Their research focused on times of stress, including divorce. In the same volume Buchanan and Rotkirch (2018 p. 137) argue that, ‘There is now a growing body of research that illustrates that grandparent involvement is associated with improved mental health, improved resilience and pro-social behaviour in grandchildren’.⁵⁴ Further, they argue, ‘Quite apart from the issue of Grandparental rights, it could be argued that children have a right to contact with grandparents because of the support they offer, resources and future inheritance available, and indeed because this is what young people want’ (p. 140). They refer to three studies in the special issue to support these statements but only one is based in the UK (also with data from Israel); the others cover South Africa (Wild 2018) and Malaysia (Tan 2018). Yet the results of these studies should not be overstated;

It is especially important to be cautious when interpreting the results of the UK and the Israeli studies, as well as other cross-sectional studies, because some recent findings show that there might not be causal associations between grandparent involvement and child outcomes (Attar-Schwartz and Buchanan 2018 p. 221)

Even if the benefits identified are all apparent in the UK, they may depend on which set of grandparental relationships are the focus. Douglas and Ferguson (2003 p. 49) found that relationships between children and their grandparents varied; in their sample, maternal grandparents tended to be more significant to grandchildren than paternal grandparents both before and after parental separation, and grandmothers were more involved in their grandchildren’s lives than grandfathers (2003 p45). Douglas and Ferguson note that, whilst most paternal grandparents retained contact after divorce, contact often depended on the father acting as ‘the bridge’ between the generations (2003 p.47). There were many family variations and ‘the problem of lack of contact was not just to do with the relationship between the paternal grandparents and the resident parent, it was also a reflection of other conflicts in the family’ such as

⁵⁴. See also p.136.

conflict between fathers and paternal grandparents (2003 p. 48). Nevertheless, it may be that with increasing involvement by fathers in parenting and so, perhaps, more use of paternal grandparents to help them, more paternal grandparents may develop close relationships with the grandchildren. Further, there may be more shared care arrangements after divorce, although such arrangements are still very much in the minority.⁵⁵

Attar-Schwartz & Buchanan found that paternal grandparents in post-divorce families had ‘the weaker status’ (2018, p. 219) and that, in the Israeli study, ‘father–paternal grandmother relationship was found to have a positive association with adolescents’ perceived emotional closeness to the paternal grandmother in two-biological-parent families but had an insignificant association in custodial-mother families’ (p. 223). They report that, in the Israeli study, parent/grandparent relationships, and in particular relationships between ‘custodial’ mothers and paternal grandparents significantly affected the emotional closeness between grandparents and grandchildren: ‘Apparently, mothers have a key role in shaping intergenerational relationships’ (2018 p. 223). Referring, again, to the Israeli study, the authors observe that, ‘When paternal grandparents preserve ties with their ex-daughter-in-law, they may help secure access to and strengthen their long-term relationships with their grandchildren’ (p.224). They state: ‘The findings also showed that paternal grandmothers’ involvement in adolescent grandchildren’s everyday lives is important for maintaining emotionally close relationships with them’ (p. 223). The ‘closeness’ of the relationship also appears to be important to the degree to which their involvement benefits children: Buchanan and Rotkirch point out that a study by Buchanan & Flouri (2008) ‘found that adolescents whose closest grandparent was involved in their lives following their parents’ separation or divorce, reported fewer emotional symptoms and more pro-social behaviours than those with less grandparent involvement’ (2018, p. 137).

So, the available evidence suggests that, in general, it is maternal grandparents whose involvement is more likely to be beneficial. Yet it is the paternal grandparents who are most likely to use to courts to secure contact. Moreover, none of these studies examine specifically the benefits to children of grandparents’ involvement with grandchildren in cases where there is serious conflict between those grandparents and parents, particularly mothers. Nor do they address the value of grandparent contact pursuant to court orders. What Attar-Schwartz and Buchanan do say, however, points to the importance of the parent-child relationship:

These findings may show that the quality of the adolescent–parent relationship is not only linked with adolescents’ adjustment and well-being but may also possibly contribute to adolescents’ ability to have close bonds with others outside the nuclear family, such as their grandparents. (2018 p.225)

We would suggest, therefore, that the available research still does not unequivocally support the claims made about the benefits of grandparent involvement, particularly when it comes to involvement in cases of conflict and litigation. Research in this area is difficult to do and to interpret and the detail and quality of relationships would

⁵⁵ See Peacey V and Hunt J (2009) *I’m not saying it was easy ... Contact problems in separated families* (Ginger Bread and Nuffield Foundation). They estimate on the basis of their sample that about 9% of families have some form of shared care after separation or divorce (p.17)

seem to be of more importance than generalisations might suggest. And while we would not wish to belittle the distress of grandparents who have no contact with their grandchildren, it should be acknowledged that grandparent groups use assertion and sometimes sentiment, rather than research findings, to put their case. Such stories can be very influential.

Using personal stories

The Bristol Grandparents Support Group website asserts that, 'Every child has the right to a loving and caring relationship with their grandparents unless it is proven unsafe for the child' (2018c). And while careful to refer to the right of the child, the website focuses also on the undoubted distress of the grandparent: 'There is a knot in my stomach that just never goes away. It is the same feeling when you loose (sic) someone close to you. A living bereavement' (2018d).

A Grandparents Apart UK founder, in the course of an interview reported in their book, stated:

Finding out you have no rights to see your own flesh and blood is devastating and a major cause of illness in older people who are deprived of their family. Recently there was a case of a grandparent who died of a broken heart. No medical reasons were found for the death.
(Moug 2006)

And in answer to a question about the importance of grandparents, he said:

Playing with the kids and searching for frogs and fairies in the garden is great fun. When grandparents lose contact with their grandchildren it's similar to a bereavement.

It's also beneficial for children to have as many people as possible in their lives who love and look out for them. Grandparents have time to provide the personal touch. Often parents are busy so plant the kids in front of a telly or computer. Grandparents have more time to play and tell them stories.
(Moug 2006)

Politicians too invoke personal experience and childhood memories rather than empirical research. For example, the 2018 Westminster debate is characterised by reliance on such personal accounts:

I think back to the incredibly important and influential role that my two grandmothers played in my upbringing; I cannot imagine what my life would have been like without them and cannot imagine that similar level of love and support being denied any grandchild. They passed away many years ago, but I still think of them regularly.
UK Parliament, House of Commons 2918 Col 179)

Grandparents play a significant role in family life. There is something special about the bond between a grandparent and a grandchild. The loving relationship that is formed often enriches family life. Grandparents provide stability when it is needed. They can give a sense of history and show how important it is to belong to a family. They can give familial support when it is

needed, such as when it is difficult for more immediate family members to be called upon. My grandparents—in particular my grandmother—taught me many things.
(Col 182).

Such comments cannot provide clear evidence of the benefits to children of grandparental involvement. But those campaigning for an enhanced grandparental legal status also use another argument - that children are harmed if denied a relationship with grandparents because grandparents can protect them. Protection is needed because they have been manipulated and brainwashed, usually by resident mothers, and they are exposed to dangerous new men.

Are children harmed by ‘alienating’ mothers?

The word ‘alienation’⁵⁶ is prevalent on the websites despite the fact that this is a contested concept.⁵⁷ Parental alienation is described on the websites as a situation where a parent (usually the mother) alienates her child from the other parent and/or grandparents by presenting them in a very negative light, telling untrue and critical stories and effectively brainwashing the child. The child’s refusal to have contact is construed as the effect of manipulation rather than as a reflection of the child’s own wishes.

The Bristol Grandparents Support Group (2018b) presents the idea of alienation unproblematically:

As grandparents we know only too well the affect (sic) grandparental alienation has on all of us, the thought that our grandchildren have been told terrible things about us, have been told we don’t care about them or don’t love them anymore is intolerable. Systematically being erased from their lives.

Grandparents Apart UK’s (GAUK) book (Deuchars and Loudoun 2006) contains similar material: ‘Children can suffer “alienation”, being told that their grandparents are bad and don’t want them. They are educated to tell lies and can be brainwashed to say they do not want to see their grandparents (and their Dad, or Mum).’ However, the book goes on to conflate the ‘injustice’ against fathers and grandparents when the research we noted above would suggest that the situation is more complex.

[W]e realised that fathers were getting the same raw deal as grandparents, with courts and social services disregarding their value to children.... We also realised that this problem was reflecting on many paternal grandparents and to help one would help the other. We therefore began to concentrate on the whole family issue and how children were suffering because one person had been given too much control, supported by the current legal system. Because children usually live with their mother this was the person given all the control and children were not benefiting from this.

⁵⁶ See also Jackson 26 February 2019. Similarly, in the USA Grand - advertised as ‘The Lifestyle Magazine for Awesome Grandparents!’ - ran an article by the president of ‘Alienated Grandparent Anonymous’ which was headed ‘Florida Grandparents Fighting For the Right To See Their Grandchildren’ (Aga 2018).

⁵⁷ See eg Meier (2009).

Grandparents Apart UK (GAUK) also put forward the argument about the need for grandparents to protect the children who are in situations where they are at risk:

Above all we want to fill the gap in the law that exists in the protection of children. The gap is that the child's best interests are not always being served by Social Services, the courts and professionals across the board. Especially in the home when children can be alienated, abused, used as weapons of blackmail. In the home, where child abuse is on the increase, their rights can be zero.

(Deuchars and Loudoun 2006).

They go on to say that, 'Grandparents without legal rights are not able to protect the children and speak up about abuse without the fear of excommunication from their young lives, if we don't have contact we cannot help' (Ibid). GAUK also state that children have been 'proven to be at risk when their mother brings strangers into the home and in some cases have been abused and murdered'. This leads to unbearable torment for fathers and grandparents, 'yet biological dads and grandparents are treated as a bigger danger to the children in a separated family' (Ibid).

Often, the Bristol Group (2018a) say, the reason that fathers and grandparents are treated as dangerous is because the mother makes false allegations:

It appears that false allegations are rife, and have been for many years, although at the highest level it is acknowledged that this happens on a daily basis little seems to happen to put this utter injustice right.

The organisations that are in place to investigate, do report after report, time and time again we hear stories where the side of allegations is more often than not accepted, the premise that Mums are always right abounds. I say Mums, as in the main it is the females who are making these allegations, but I am also mindful that this is not necessarily gender specific.

The only evidence presented of these sorts of behaviour is that produced by Grandparents Apart UK (Deuchars and Loudoun 2006). The responses to questionnaires sent out by GAUK are the basis of their findings. 78.6% of respondents said their grandchildren had been brainwashed against the grandparent; 79.4% said their grandchildren had been used as weapons against them in arguments; 91.6% experienced one person having control over the whole family. However these results are not surprising given that those responding were members or contacts of the pressure group.

Causes for Concern

That grandparents are important to many children and that their involvement in most cases is positive is not being questioned by us. There is also no question that many grandparents are playing significant caretaking roles in the family.⁵⁸ The norm of

⁵⁸ See Kaganas and Piper 2018.

grandparent contact is well established; grandparents have for years been included in advice about parental plans and in the Separated Parents Information Programme.

But grandparent groups have been calling for legal change to strengthen their status and rights for some years. Grandparents Apart in particular was already calling for a presumption by 2006.⁵⁹ And this call has now been enthusiastically taken up by a number of politicians in the recent Westminster debates. There can be little doubt that the case for a presumption has gained strength from the enactment of the presumption in favour of parental involvement. A precedent has been set and it appears relatively simple to add grandparents or the extended family generally to the wording of the provision.

However, there are three potential developments which are of concern.

1. 'Simplistic' application of a presumption

Even if there were a presumption in favour of grandparents with, presumably, an attendant abolition of the leave requirement, it is likely that grandparents, even though formally in a position analogous to parents, would not easily obtain an order in the face of high levels of conflict. The welfare analysis which would almost certainly decide the case may well favour tranquillity for the child with the primary carer. Certainly, in the case of s1(2A) of the Children Act 1989, the explanatory notes suggest that the courts should continue to use their discretion and to apply the welfare principle assiduously.

However this is not necessarily how the courts are interpreting the provision. In *F v L*,⁶⁰ despite allegations of coercive control on the part of the father, the court below had ordered shared care. The judge in the Court of Appeal was highly critical of what it considered to be an unthinking application of the presumption:

11. Secondly, the judge was wrong not to have considered and made findings in respect of the complaints of abusive and controlling behaviour on the part of L as alleged by F.The judge simply split the child's time between two homes in what may seem to be an even-handed approach to a difficult and all too common problem. This is unsophisticated, over-simplistic approach, *all too often* taken by the Family Court when making child arrangements orders, to attempt to adhere to the amendments to the CA brought in by the Children and Families Act 2014 by making an order for shared care which is an even split of time and to compel parents to co-operate. Splitting a child between two homes which are antagonistic and unsupportive of each other is not consistent with the best interests of a child nor congruent with that child's welfare. (Emphasis added).

If this observation accurately reflects what is 'all too often' happening in the lower courts (and it is of course only anecdotal evidence), then there is significant cause for disquiet. It suggests that judges are relying on the presumption in s1(2A) 'to resolve disputes mechanistically without fully considering the safety or welfare implications

⁵⁹ See Deuchars and Loudoun (2006) .

⁶⁰ *F v L* [2017] EWHC 1377 (Fam).

of their decisions’ (Kaganas 2018 p. 563). There is, then, the possibility that some courts might also invoke a presumption in favour of grandparent contact in an ‘unsophisticated, over-simplistic way’. This could lead to court-ordered contact in a case like *Re A*, where the grandmother was judged to be domineering and controlling.⁶¹

2. *The fostering of a professional norm of contact*

We noted above that those seeking change in the law hope that it will operate symbolically, that the shadow of the new law would create a strong norm of grandparent contact which would in turn encourage various professionals in the family justice system to urge a parent or parents to allow contact.

There are signs that grandparents are now seen as special by professionals in the family justice system. For example, they are specifically singled out in the pro forma Parenting Plan on the CAFCASS website, where parents are told to ‘[t]ry to agree and stick to a plan for contact with the other parent and with grandparents or other important people in their lives’ (CAFCASS, undated). Parents are instructed to ask themselves, ‘When and how are we making sure that the children are seeing their grandparents?’ (Ibid). In addition, the Separated Parents Information Programme website has a Handbook which can be accessed freely on the website by any person, even if not directed by the court to attend a programme. This Handbook also refers to the importance of contact with grandparents, even in the face of conflict:

Grandparents and other family members play an important part in your child’s life... Family members might feel strongly about what has happened. However, it is important to continue to allow your child to have contact with them. (Ingamells with Reibstein 2017 p. 45).

The website of Resolution (undated), an organisation for family lawyers, includes a section dedicated to grandparents and written for grandparents. This tells grandparents: ‘You have a special relationship with your grandchildren that is special to them too. Be clear that you want to support your grandchildren and continue to see them’. Grandparents having difficulty gaining contact are advised to seek mediation or find a solicitor.

A change in the law to create a presumption in favour of grandparent contact could, then, heighten the perception of ‘specialness’ and strengthen the norm of contact among Cafcass officers and solicitors. What is more, the impact would not be confined to the courtroom. It could affect the way solicitors advise clients and the way they negotiate for them. And it could affect the way mediators deal with disputing parties. Mediators have been observed to set the ‘parameters of the permissible’, placing considerable pressure on clients who strayed outside the boundaries (Dingwall and Greatbach 2001, p. 380); the norms of mediators tend to shape agreements reached in the mediation process.⁶²

On one level this appears to be a positive development but, an emphasis on contact may increase the pressure on mothers, making contact difficult to resist even if

⁶¹ *Re A (Section 8 Order: Grandparent Application)* 1995 2 FLR 153 at 154

⁶² See Diduck and Kaganas (2012, 722); Kaganas (2007 pp.25-6); Piper (1996, pp. 74-77); Piper (1993, especially chapters 4-6).

resistance is to protect children's interests. If this means that a clear analysis of the child's welfare, and wishes and feelings, in the context of the family circumstances, is bypassed then that is a retrograde step.

3. *The position of mothers and children*

Extra pressure to allow contact could prove very problematic for children and their primary carers, usually mothers, because already professionals, along with courts, the media, politicians and the public have accepted as credible the image of the unreasonable resident mother purveyed by father's rights groups.⁶³ Grandparent groups, while generally more moderate than fathers' rights groups are building on this image of the bad mother.

Mothers who obstruct contact with grandparents – portrayed as having a special contribution to make to children's welfare - are presented as not acting in their children's best interests and as motivated by irrational prejudice or malice. As Kaganas (2007, p. 40) suggests:

[I]t cannot but assist the cause of grandparent lobbyists that resident mothers are regarded with distrust. Professionals such as lawyers and mediators will be far more willing to seek to "persuade" women whose opposition is seen as unreasonable, malicious or simply wrong-headed'. What is equally disquieting is that 'mothers themselves who are apprised of the pro-contact norm are more likely to internalise the belief that to be 'good' mothers, they should comply'.

And, for those cases reaching the courts, the narrow interpretation of harm currently in use will mean that judicial orders for contact will not necessarily serve children's best interests. It has been observed by Barnett that courts have been downgrading risk and prioritising contact with parents 'at all costs.' (2014).⁶⁴ The optimism displayed in the *CW* case about the grandmother's likely conduct is cause for concern and, by analogy with the courts' approach to parental contact, such assessments could become even more widespread in relation to grandparent contact in the context of a presumption.⁶⁵

Conclusion

It may be the case that the courts will pay little attention to a presumption given that they appear to pay little more than lip service, if any attention at all, to the current s1(2A). In any event, most grandparents do not invoke the law. However, our fear is that a presumption of grandparent contact could give rise to a strong norm favouring contact and so marginalise and render illegitimate any opposition from mothers. Further, many mothers would internalise the norm of contact and wish to position themselves as 'good' mothers whilst the image of the 'bad' mother would be extended to embrace mothers who obstruct grandparent contact. The result would surely be an intensification of external as well as internal pressure on mothers in the course of

⁶³ See Kaganas (2007, p. 39).

⁶⁴ In addition, PD12J has been amended to qualify the reference to harm by introducing the notion of 'unmanageable risk'. See Kaganas (2018, p 559) for discussion.

⁶⁵ *CW, CHW, BAW, v TW OW and YW (by their Guardian ad Litem, NYAS)* [2011] EWHC (Fam) 76

informal resolution of disputes. Consequently, issues which are of concern to mothers and impacting on the welfare of the children may not be raised.

It would appear that there is not strong, conclusive evidence that - in families where relationships have broken down or there has never been (for whatever reasons) a strong relationship between grandparent and grandchild – imposing, through normative and/or legal change, a child's contact with his or her grandparents is in the child's best interests. In the light of the concerns noted above the changes being proposed are not prudent. This is not to dismiss the anguish of many grandparents who cannot see their grandchildren but to suggest that removing the leave requirement and introducing a presumption of grandparent involvement would not be helpful to mothers, children and perhaps, to those who embark on legal wrangles, even to the grandparents themselves.

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