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**Family Law - A Limitation on Grandparental Rights in New Mexico:  
Christian Placement Service v. Gordon**

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# FAMILY LAW—A Limitation on Grandparental Rights in New Mexico: *Christian Placement Service v. Gordon*

## I. INTRODUCTION

In *Christian Placement Service, New Mexico Christian Children's Home v. Gordon*,<sup>1</sup> the New Mexico Court of Appeals determined whether a grandparent's statutorily-created right to seek visitation with a grandchild is sufficient to support a motion to intervene of right in an adoption proceeding, and, alternatively, whether a grandparent's interest in the child's well-being will support a motion for permissive intervention in such a proceeding. The *Christian Placement Service* court held that a grandparent has no inherent or statutory right to intervene in an adoption proceeding<sup>2</sup> and, moreover, that under the Visitation by Grandparents Act, a grandparent's right to petition for visitation terminates when the parents relinquish their parental rights.<sup>3</sup> Furthermore, the court of appeals found that grandparental status alone will not support permissive intervention.<sup>4</sup>

This Note examines the interaction between the Visitation by Grandparents Act,<sup>5</sup> the Adoption Act,<sup>6</sup> and the common law doctrines of the best interests of the child and parental rights<sup>7</sup> which impact on grand-

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1. 102 N.M. 465, 697 P.2d 148 (Ct. App. 1985).

2. *Id.*

3. *Id.* at 467, 697 P.2d at 150. Neither the Adoption Act, N.M. Stat. Ann. §§40-7-1 to -13 (1978), nor the Visitation by Grandparents Act, N.M. Stat. Ann §§40-9-1 to -4 (1978), gives grandparents a statutory right to custody of their grandchildren over third parties. *See also Ex parte Bronstein*, 434 So. 2d 780 (Ala. 1983), wherein the court stated:

The law is unequivocal. It mandates that upon entry of a final order of adoption the natural parent is "divested of all legal rights and obligations" and the child is freed from all corresponding obligations of obedience to such parent. . . . [I]n all logic, this abrogation of all legal relationships and rights would likewise apply to the [natural] grandparents of the adopted child.

*Id.* at 782

*See also In re Nicholas*, 457 A.2d 1359, 1360 (R.I. 1983) ("[T]he decision of the natural father not to contest the adoption petition was conclusive upon him and upon all who might claim by, through, or under him.") The *Christian Placement Service* court concluded that grandparents are bound by the effective consent of the parents or surviving parent to the child's adoption. 102 N.M. at 470, 697 P.2d at 153.

4. 102 N.M. at 471, 697 P.2d at 154.

5. N.M. Stat. Ann. §§40-9-1 to -4 (1978).

6. N.M. Stat. Ann. §§40-7-1 to -11, 40-7-13 to -17 (1978) (repealed 1985) (current version at N.M. Stat. Ann §§40-7-29 to -61).

7. The parental rights doctrine and the best interests of the child doctrine serve as broad policy statements to guide trial judges in exercising their unquestionably broad discretion in deciding custody disputes. *Shorty v. Scott*, 87 N.M. 490, 535 P.2d 1341 (1975). *See infra* note 34.

parents' right to intervene. This Note also analyzes the New Mexico Court of Appeals' reasoning in denying grandparental intervention in this case and considers the implications of the court of appeals' decision for grandparent's rights in New Mexico.

## II. STATEMENT OF THE CASE

John Doe was born June 14, 1982 to unmarried parents.<sup>8</sup> Seven days later, the natural mother relinquished her parental rights to the Christian Placement Service of the New Mexico Christian Children's Home ("the Home") and consented to his adoption.<sup>9</sup> Meanwhile, the father received a military transfer to England.<sup>10</sup> On August 26, 1983, upon the Home's petition and without notice to the father or his consent, the court entered a decree terminating the father's parental rights and placing the child with the Home.<sup>11</sup> On September 4, 1983, the father died and his mother, Delores Wiley, was named personal representative of his estate.<sup>12</sup> In November, John Doe's foster parents filed a petition to adopt him. Wiley, the child's paternal grandmother, moved to intervene in the adoption proceeding and to set aside the decree terminating her son's parental rights.<sup>13</sup>

Under the New Mexico Rules of Civil Procedure, Wiley could intervene in one of two ways. First, Wiley could intervene of right upon a showing that she had an interest in the action which was not protected.<sup>14</sup> Alternatively, Wiley could seek the court's permission to intervene.<sup>15</sup>

Wiley based her motion to intervene of right on three grounds. First, as the grandmother, Wiley alleged the decree terminating her son's pa-

8. 102 N.M. at 467, 697 P.2d at 150.

9. *Id.*

10. *Id.* Both of John Doe's parents were stationed at Cannon Air Force Base in Clovis, New Mexico when he was conceived.

11. *Id.* Presumably, the father's parental rights were terminated pursuant to the New Mexico Adoption Act. N.M. Stat. Ann. §§ 40-7-4 (1978)(repealed 1985) (current version at N.M. Stat. Ann. § 40-7-36); termination of parental rights N.M. Stat. Ann. § 32-1-54 (Repl. Pamp. 1986). See *infra* note 30.

12. 102 N.M. at 467-68, 697 P.2d at 150-51.

13. *Id.* at 468, 697 P.2d at 151. Since Wiley was not a party to the adoption proceedings, she had to show that her intervention was justified.

14. A party may seek intervention of right pursuant to Rule 24(a) N.M. R. Civ. P. 24(b) provides for permissive intervention at the court's discretion. of the New Mexico Rules of Civil Procedure which provides:

Upon timely application anyone may be permitted to intervene in an action: (1) when a confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest.

N.M. R. Civ.P. 24(a).

15. N.M. R. Civ. P. 24(b) provides for permissive intervention at the court's discretion.

rental rights was defective and, consequently, her right to petition for visitation with her grandson was wrongfully terminated.<sup>16</sup> Second, she argued that the termination decree was void and as personal representative of her son's estate she was entitled to move the court to set aside this void judgment.<sup>17</sup> Both of these arguments assume as the underlying premise that if Wiley's son's parental rights had not been terminated, Wiley would have statutorily guaranteed grounds for intervention pursuant to the Visitation by Grandparents Act.<sup>18</sup> Therefore, for Wiley to assert a statutory right to intervene in the adoption proceeding, Wiley had to attack the validity of the termination decree. Third, Wiley argued that, even if the termination of parental rights was valid, the vitality of her rights conferred by the Visitation by Grandparents Act continued until a final adoption decree was entered.<sup>19</sup> Alternatively, Wiley moved for permissive intervention claiming that the best interests of her grandson required that she, as grandparent, be permitted to intervene.<sup>20</sup> The New Mexico Court of Appeals, affirming the trial court, denied Wiley's motions on procedural and substantive grounds.<sup>21</sup> Addressing Wiley's motions to intervene of right the court held, first, that Wiley had no standing to attack the allegedly defective decree which terminated her son's parental rights and added that the decree was irrelevant to Wiley's right as grandmother to intervene.<sup>22</sup> Moreover, the court found that the issue of whether or not the termination decree was defective was mooted upon Wiley's son's death.<sup>23</sup> Second, the court determined that Wiley, as personal representative of her son's estate, had no standing to intervene, reasoning that no estate interest existed in the adoption proceeding.<sup>24</sup> Third, the court held that the Visitation by Grandparents Act does not confer a right upon a grandparent to intervene after parental rights are terminated and before adoption occurs.<sup>25</sup> As to Wiley's motion for permissive intervention, the court concluded that grandparental status cannot

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16. 102 N.M. at 469-70, 690 P.2d at 151-52.

17. *Id.*

18. *See infra* note 28.

19. 102 N.M. at 470, 697 P.2d at 153.

20. *Id.* at 472, 697 P.2d at 155.

21. *Id.* at 467, 697 P.2d 150.

22. *Id.* at 469, 697 P.2d at 151. Wiley's first ground for intervention rested on the allegedly defective termination of her son's parental rights. Wiley recognized that as a grandparent she had no right to notice or to an opportunity to be heard. N.M. Stat. Ann. § 40-9-4 clearly prohibits her intervention in the adoption proceeding of her grandson when parental rights are terminated and adoption proceedings are pending.

23. 102 N.M. at 471, 697 P.2d at 154.

24. *Id.* Wiley challenged the decree, arguing that no notice was given to her son that his parental rights were being terminated. The court held that service of process defects are personal to the one entitled to notice. Thus, Wiley had no standing to raise the notice and constitutionality issues.

25. *Id.* at 470, 697 P.2d at 153.

be the sole foundation for invoking permissive intervention under the "best interests of the child" doctrine.<sup>26</sup>

### III. DISCUSSION AND ANALYSIS

In order to better understand the New Mexico Court of Appeal's denial of intervention in this case, this Note will analyze the relationship between the statutory and common law doctrines which constrained the court and examine the court's interpretation of these doctrines and the ramifications of its interpretation for grandparental rights in New Mexico.

#### A. *Assessment of Law Interpreted by the New Mexico Court of Appeals in Christian Placement Service*

Wiley argued that she had a right to intervene arising from the grandparental interest in visitation created by the Visitation by Grandparents Act.<sup>27</sup> Section 40-9-2 of the Visitation by Grandparents Act provides that when a "minor child is in the custody of any person other than an adoptive parent," the grandparent can petition for visitation privileges.<sup>28</sup> Section 4, however, provides that a grandparent's right ends when the parents' rights are terminated pursuant to statutory adoption proceedings.<sup>29</sup> Thus,

26. *Id.* at 472-73, 697 P.2d at 155-56.

27. *Id.* at 472, 697 P.2d at 155.

28. The Visitation by Grandparents Act provides:

40-9-1. Dissolution of marriage or legal separation, judgment visitation privileges.

In rendering a judgment of dissolution of marriage or legal separation, or at any time after six months from entry of such decree, the district court may grant reasonable visitation privileges to a grandparent of a minor child, not in conflict with the child's education or prior established visitation privileges.

40-9-2. Children; visitation by grandparents.

If one or both parents of a minor child is deceased and the minor is in the custody of a surviving parent or any other person other than an adoptive parent, any grandparent of the minor may petition the district court for visitation privileges with respect to the minor.

40-9-3. Visitation; restrictions.

A. Under either Section 1 or 2 [40-9-1 or 40-9-2 NMSA 1978] of this act, the court may grant reasonable visitation privileges to a grandparent if the court determines that it is in the best interests and welfare of the child, and may issue any necessary order to enforce the visitation privileges to a grandparent if the court determines that it is in the best interests and welfare of the child, and may issue any necessary order to enforce the visitation privileges and may modify such privileges or order upon a showing of good cause by any interested person. . . .

40-9-4. Applicability.

The act [40-9-1 to 40-9-4 NMSA 1978] shall have no application in the event of a relinquishment or termination of parental rights in cases of statutory adoption proceedings.

29. N.M. Stat. Ann. § 40-9-4 (1978).

the court had to determine whether a grandparent's statutorily-created right to seek visitation with a grandchild ceases to exist when the parental rights are terminated but the child is in the custody of someone other than the adoptive parent.

The court of appeals decided that, in adopting Section 4 of the Visitation by Grandparents Act, the legislature intended to maintain the Adoption Act's supremacy in controlling the disposition of children notwithstanding the statutorily created right to grandparent visitation.<sup>30</sup> The court reasoned that grandparental rights stem from the relationship between the grandparent and the child's parent, and adoption proceedings terminate the rights of the natural parent to the child.<sup>31</sup> Thus, without the natural parent's link to the child, the law does not recognize a link between the grandparent

30. N.M. Stat. Ann. §§ 40-7-1 to -21 created adoption which was unknown at the common law. The Adoption Act provides in pertinent part:

40-7-2

I. "parental rights" means all rights of a parent with reference to a minor, including parental right to control, or to withhold consent to an adoption, or to receive notice of a hearing on a petition for adoption.

40-7-4

A. The rights of a parent . . . may be terminated by the court. . . . [T]he court shall give primary consideration to the physical, mental and emotional welfare and needs of the child.

B. The court shall terminate parental rights . . . to a minor child when:

- (1) the minor has been abandoned;
- (2) the minor has been left under such circumstances that the identity of the parents is unknown . . . ,
- (3) the child is a neglected or abused child; or
- (4) the child has been placed in foster care . . .

M. A judgment of the court terminating parental rights divests the parent and the child of all legal rights, privileges, duties and obligations

40-7-6

A. Unless consent is not required because of the provisions of the Adoption Act . . . , a petition to adopt a minor child may be granted only if written consent to the adoption has been executed by:

- (1) the mother of the minor; [or]
- (2) the father of the minor, if the minor was conceived or born while the father was married to the mother, if the minor is his child by adoption, or if the minor has been established to be his child . . .

40-7-7

A consent to adoption . . . is not required from:

A. a parent who has abandoned or deserted the minor to be adopted;  
 B. a parent of a minor in the custody of an agency, the department or a person not the minor's parent, if the parent:

- (1) for a period of at least one year has failed without justifiable cause to communicate with the minor.

Adoption law embodies in statutory form the public policy toward disposition of children who have no parents. In *Nevelos v. Railston*, the court found proper construction of New Mexico adoption statutes will promote the welfare of children. 65 N.M. 250, 335 P.2d 573 (1959).

31. See *In re Nicholas*, 457 A.2d 1359 (R.I. 1983).

and the child.<sup>32</sup> Therefore, Wiley's right to petition for visitation existed until the mother terminated her parental rights regardless of whether her deceased son's parental rights were terminated.<sup>33</sup>

In addition to statutory adoption law, New Mexico courts recognize two controlling common law doctrines in adoption proceedings, the "parental rights" doctrine and the "best interests of the child" doctrine.<sup>34</sup> The "parental rights" doctrine "creates a presumption that the welfare and best interests of the minor child will best be served in the custody of the natural parents."<sup>35</sup> If the parent relinquishes the child, the parent is presumed to have acted in the child's best interests. The parental rights doctrine controls cases between the parents and grandparents while pa-

32. *In re Interest of S.R.*, 217 Neb. 528, 352 N.W.2d 141 (1984) held that the best interests of the child are served by breaking all ties with the natural family and finding an adoptive family where the child begins anew without any former ties, including grandparents.

33. 102 N.M. at 469, 697 P.2d at 153. Since the father had died, he had no parental rights upon which Wiley's right as grandparent could rest. Despite his death, her connection to her grandson would have remained viable except the mother's parental rights had been terminated.

34. *State ex rel Dept. of Human Serv. v. Natural Mother*, 96 N.M. 677, 634 P.2d 699 (Ct. App. 1981). In *Natural Mother*, the court of appeals acknowledged that, in custody cases, it must consider the best interests of the child but not to the exclusion of the rights of parents to raise their children. *Id.* at 681, 634 P.2d at 703. The doctrines serve as broad policy statements to guide trial judges in exercising their unquestionably broad discretion in deciding custody disputes. *Shorpy*, 87 N.M. at 492, 535 P.2d at 1343.

Under the parental rights doctrine, parents have a primary right to custody of their children, with a rebuttable presumption that in the parent's care the best interests of the child will be protected. *Id.* at 493, 535 P.2d at 1344. The parental rights doctrine establishes that parents have a natural and legal right to their children which is *prima facie* and not absolute. *Id.*

The right stems from the duties and obligations embodied in parenting. Courts reason that if parents are responsible for children, certain rights must follow from that responsibility. *See, e.g., O'Dell v. Lutz*, 177 P.2d 628 (Cal. 1947).

When utilizing the best interests of the child doctrine, the court determines, on the basis of the facts presented, what will be in the best interests of the child. *Adoption of Doe*, 89 N.M. 606, 615, 555 P.2d 906, 915 (1976).

Although *Christian Placement Service* is not a custody dispute *per se*, the adoption proceeding is analogous in that it seeks an appropriate disposition for the child. In *Shorpy*, the court recognized that New Mexico cases fail to maintain a clear distinction between the two doctrines. 87 N.M. at 492, 535 P.2d at 1343.

In this case, one parent had died and thus had no parental rights and the surviving parent had relinquished her rights. Under the reasoning in *Shorpy*, the best interests of the child doctrine should have prevailed. In *Christian Placement Service*, however, even though the child's parents' rights were terminated, the presumptions embodied in the parental rights doctrine prevailed. That is, rather than examining the child's best interests, the court presumed that the mother acted in the child's best interests when she relinquished him to the Home. If the best interests of the child become paramount when the child's parents are no longer involved in the proceeding, then the court could determine that the involvement of concerned grandparents in this traumatic time of the child's life would foster the maintenance of the child's best interests. *See supra* notes 43, 71.

35. *Ex parte Bronstein*, 434 So.2d 780 (Ala. 1983). Under common law principles grandparents lacked any legal right to visitation and communication with their grandchildren if such visitation was forbidden by the parents. *Id.* The court in *Bronstein* enunciated two policies precluding courts from granting visitation rights to grandparents in adoption proceedings: 1) grandparent visitation, when against the wishes of adoptive parents, is never in the best interests of the child, and 2) grandparent visitation rights are derivative of the biological parents' rights; therefore, when parental rights are terminated, grandparental rights are also terminated. *Id.*

rental rights are still intact.<sup>36</sup> Once the parent's rights are terminated or challenged, however, the "best interests of the child" doctrine controls the child's placement.<sup>37</sup> The "best interests of the child doctrine" compels courts to ascertain what will be in the child's best interests in determining the child's placement.<sup>38</sup>

## B. New Mexico Court of Appeals Analysis in *Christian Placement Service*

### 1. Intervention of Right

Wiley, as grandparent, had statutorily guaranteed grounds for intervention pursuant to the Visitation by Grandparents Act as long as her son maintained his parental rights.<sup>39</sup> Therefore, in order to support a motion to intervene of right, Wiley had to show that the decree terminating her son's parental rights was defective or otherwise invalid.<sup>40</sup>

The first argument advanced for intervention of right was premised on the theory that Wiley, as grandparent, had a right to collaterally attack the decree terminating her child's parental rights.<sup>41</sup> Because there is no New Mexico case law regarding a grandparent's standing to intervene in proceedings which terminate a child's parental rights, the court looked to reasoning in case law from other jurisdictions to determine whether a grandparent has standing to collaterally attack a termination decree.<sup>42</sup>

Absent special circumstances, courts of other jurisdictions hold that grandparents have no right to participate in proceedings, such as the termination of parental rights, which lead to the adoption of their grandchildren.<sup>43</sup> In New Mexico, the Visitation by Grandparents Act specifies that a grandparent's right to petition for visitation ends when the parental rights of the child's parents are terminated.<sup>44</sup>

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36. *Shorty*, 87 N.M. at 493, 535 P.2d at 134.

37. In *Barwin v. Reidy*, 62 N.M. 183, 307 P.2d 175 (1957) the court indicated that when parents have relinquished their parental rights, the court must determine what is in the best interests of the child. Under this doctrine, known as *parens patrie*, the courts are presumed to do what is best for the child. *Id.* at 191, 307 P.2d at 183.

38. *Shorty*, 87 N.M. at 490, 535 P.2d at 1341. When the child's best interests are assumed to be protected they are not examined.

39. 102 N.M. at 467, 697 P.2d at 150; *See supra* text accompanying notes 31-33.

40. *Id.* *See* N.M. Stat. Ann. § 40-9-4. *See also supra* note 14.

41. *Id.* at 467, 697 P.2d at 150.

42. *See supra* notes 3 and 33.

43. When a grandparent stands in the role of parent to her grandchild, otherwise known as *in loco parentis*, the courts have held the grandparent has the same rights to the grandchild that the child's parents would have. *See, e.g., Quarles v. French*, 611 S.W. 2d 757 (Ark. 1981). This situation compels the court to view grandparent intervention as being in the best interests of the child. Since Wiley lacked custody and had no actual relationship with her grandson, she did not meet the exception; therefore, the court refused to permit her to intervene.

44. N.M. Stat. Ann. § 40-9-4 (1978). Implicitly, the court reasoned that it did not have the freedom to make or modify law clearly mandated by the legislature. Only the legislature can provide grandparents with a non-derivative right to intervene in adoption proceedings. *See supra* note 3.

In this case, John Doe's mother voluntarily relinquished her parental rights seven days after his birth.<sup>45</sup> More than a year later, the court entered an order terminating the father's parental rights.<sup>46</sup> Consequently, Wiley's statutory right to petition for visitation ended.<sup>47</sup>

The second ground for intervention was that, as personal representative of her son's estate, Wiley had a right to move the court to set aside a void judgment.<sup>48</sup> The court, however, held that there is no estate interest in the termination of the deceased person's parental rights.<sup>49</sup> Accordingly, Wiley, as personal representative, had no standing to attack the allegedly defective termination decree.<sup>50</sup>

Compelling public policy prevented the court from finding an estate interest which would permit attack on a decree terminating the deceased parent's parental rights.<sup>51</sup> The court recognized that parents have a natural and legal right to raise their own children; however, the estate of a deceased parent, as an abstract entity, cannot raise children.<sup>52</sup>

In denying that a personal representative could intervene, the court reasoned that the living parent must be allowed to make determinations regarding the child.<sup>53</sup> Furthermore, allowing a personal representative to set aside a void judgment affecting a child's placement directly conflicts with the public policy of facilitating swift and permanent placement of the child.<sup>54</sup> In this case, John Doe had been in a foster home for an extended period of time, a situation not favored by the courts or the

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45. 102 N.M. at 467, 697 P.2d at 150.

46. *Id.* at 470, 697 P.2d at 153.

47. *Id.*

48. *Id.* at 469, 697 P.2d at 152. New Mexico Rule of Civil Procedure 60(b)(4) allows the court to relieve a party "or his legal representative" from a void judgment. N.M. R. Civ. P. 60(b)(4).

49. 102 N.M. at 469, 697 P.2d at 152. *See supra* note 24 and *infra* note 50.

50. *Id.* Wiley argued that if notice was not required to be given to her son under § 40-7-6(A)(2) of the Adoption Act, the failure to require that notice be given rendered that section of the Adoption Act unconstitutional. Under the Adoption Act, Wiley's son's consent was not needed for the adoption since he did not fit the statutorily created category of fathers from whom consent is required: if the person is the father of the minor, if the minor was conceived or born while the father was married to the mother, if the minor is his child by adoption, or if the minor has been established to be his child by his acknowledgment or a court proceeding. Wiley's son was not married to his son's mother and had not been acknowledged by the court as the father. The *Christian Placement Service* court found persuasive authority that grandparents are bound by the effective consent to adoption of the surviving parent who, in this case, is the mother of John Doe. *See supra* note 3. Furthermore, the court of appeals refused to decide the constitutionality of § 40-7-6(A)(2) of the Adoption Act because Wiley's son's death precluded him from challenging it, and, as the affected party, he alone had the right to challenge the law.

51. 102 N.M. at 469, 690 P.2d at 152. An estate's interest could arise years after a decree terminating the deceased parent's rights was erroneously entered. Allowing an estate to intervene could potentially prolong uncertainty rather than facilitate a child's permanent placement. *See infra* note 62 and note 71.

52. *Id.*

53. *Id.*

54. *Id.* *See infra* note 69.

legislature.<sup>55</sup> The *Christian Placement Service* court found that it was contrary to the child's best interests to allow a personal representative of a deceased parent's estate to impede an appropriate permanent placement for the child.<sup>56</sup>

Wiley asserted as her third ground for intervention that, even if the termination of parental rights was valid, the Visitation by Grandparents Act allowed her to seek visitation privileges with her grandson until the final adoption decree was entered and such privileges did not terminate upon the day consent for the adoption was given.<sup>57</sup> Implicitly, she urged the court to interpret the Visitation by Grandparents Act to encourage, allow, or require grandparent intervention in proceedings related to custody of grandchildren before adoption orders are entered.<sup>58</sup> Wiley argued that such an interpretation would be consistent with the legislature's recognition of the value of the grandparent-grandchild relationship embodied in the Visitation by Grandparents Act.<sup>59</sup>

The court denied Wiley's interpretation of the Visitation by Grandparents Act, reasoning that such an interpretation conflicted with the Adoption Act. The court, therefore, held that Wiley's right to petition terminated when the child's mother relinquished her parental rights and did not extend until the child's legal adoption.<sup>60</sup> The court's rationale stems from the court's acceptance that, as an offset to the responsibilities of parenting, parents have the right to make decisions affecting their children, including adoption, without interference from relatives.<sup>61</sup> Recognizing a right in relatives to intervene, it is argued, would hinder proceedings designed to place the child in an adoptive home.<sup>62</sup>

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55. See 102 N.M. at 465, 690 P.2d at 148; *Adoption of Doe*, 98 N.M. 340, 648 P.2d 798 (Ct. App. 1982), wherein the court found that providing a means for termination of parental rights to free children legally for adoption, § 40-7-4(B)(4) constitutes legislative recognition that extended long term foster care of children is not in their best interest; Adoption Act, see *supra* note 30.

56. *Id.* at 469, 697 P.2d at 152. See *supra* notes 48 and 51.

57. *Id.* at 470, 697 P.2d at 153. N.M. Stat. Ann. § 40-9-2 allows grandparents to seek visitation if the grandchild is in the custody of one other than the adoptive parent. The Home had legal custody of Wiley's grandson.

58. *Id.* at 469, 697 P.2d at 152.

59. *Id.*

60. *Id.* at 470, 697 P.2d at 153.

61. See *Krieg v. Glassburn*, 419 N.E.2d 1013 (Ind. App. 1981); *Benavidez v. Oliva*, 52 Ill. App. 3d 626, 10 Ill. Dec. 362, 367 N.E.2d 971 (1977); *Adoption of Doe*, 89 N.M. 606, 555 P.2d 906 (Ct. App. 1976); *Roberts v. Staples*, 79 N.M. 298, 535 P.2d 1341 (1968); *Wilson v. Family Services Division*, 554 P.2d 227 (Utah 1976), *aff'd*, 572 P.2d 682. See also *Huey v. Lente*, wherein the court held that the sole consideration applied in termination proceedings was the relationship of a parent with respect to a minor. 85 N.M. 585, 595, 514 P.2d 1081, 1091 (Ct. App. 1973) (*Hernandez*, specially concurring opinion), *rev'd.*, 85 N.M. 597, 514 P.2d 1093 (1973).

62. *Wilson v. Family Serv. Div.*, 554 P.2d 227 (Utah 1976). The *Wilson* court added that the problem is where to draw the line between the potential number of protesters to a child's adoption. The *Wilson* court found that allowing relatives to intervene is fraught with trouble, makes placement of children more difficult for social agencies, and is to be avoided. The court in *Benavidez* noted

## 2. Permissive Intervention

Wiley also moved for permissive intervention, arguing that the best interests of the grandchild required that Wiley be permitted to intervene.<sup>63</sup> Wiley asserted that she could provide the best home for the child.<sup>64</sup> The *Christian Placement Service* court, however, decided that Wiley was relying solely upon her grandparent status to support her "best interests of the child" argument, and the court held that grandparental status cannot be the sole foundation for invoking permissive intervention.<sup>65</sup> Thus, by denying Wiley's motion to intervene, the *Christian Placement Service* Court upheld the policy underlying the parental rights doctrine that the mother acted in the child's best interest when she consented to his adoption.<sup>66</sup>

### C. Implications for the Future of Grandparental Rights

The court's refusal to recognize a relative's right to intervene presents a dilemma for relatives like Wiley, who believe that the best interests of the child justify their intervention. As a general rule, courts emphasize the parents' right to make decisions regarding their children including the right to give up the child for adoption.<sup>67</sup> Accordingly, once parental rights are terminated, relatives have no rights to these children against strangers.<sup>68</sup> Underlying this approach is the policy that refusing to permit relatives to intervene facilitates placement of children and economizes scarce judicial resources.<sup>69</sup>

On the other hand, there are equally compelling arguments favoring intervention which emphasize society's high valuation of preserving family relationships.<sup>70</sup> Changes in society's public policy toward adoption

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"a grave matter of public policy [is] implicit in the contention of the grandparents that they have a right to intervene because they are the grandparents and are the preferred parties in an adoption case." 52 Ill. App. 3d at 629, 10 Ill. Dec. at 365, 367 N.E.2d at 974. The *Benavidez* court questioned giving grandparents preference absent statutory authority because, in reality, other relatives may have closer ties to the child. *Id.* at 975. Furthermore, relatives' intervention could create delay and red tape in the adoption process leaving prospective parents and social agencies with a choice between going ahead with the adoption and facing relatives' intervention halfway through the process or attempting to get waivers from close relatives of the child. *Id.*

63. 102 N.M. at 470, 697 P.2d at 153. See *supra* note 15.

64. *Id.*

65. Implicitly, had the grandparent assumed the status of *in loco parentis*, such status may have provided a sufficient foundation for permissive intervention. See *supra* note 43.

66. 102 N.M. at 470, 690 P.2d at 153.

67. *Id.* See also *Shorty*, 87 N.M. at 490, 535 P.2d at 1347. See *supra* notes 43, 65.

68. 102 N.M. at 472, 697 P.2d at 155.

69. See *supra* note 62.

70. See *infra* note 71; Note, *Grandparents Versus the State: A Constitutional Right to Custody*, 13 Hofstra L. Rev. 375 (1977).

would broaden grandparents' rights upon their grandchildren.<sup>71</sup> Courts have recognized the value of the grandparent-grandchild relationship.<sup>72</sup> To end this meaningful relationship because the parents' parental rights have been terminated denies the grandparent and the child the opportunity, when appropriate, to maintain familial ties.<sup>73</sup> In some instances, the child's best interests will require cutting off his ties with the consanguineous family;<sup>74</sup> in other circumstances, the child's best interests will be best

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71. Several cases from other jurisdictions recognize the need for such a change. In *In re Fox*, 567 P.2d 985 (Okla. 1977), the court held that grandparents may adopt their grandchild under appropriate circumstances, after appropriate legal consent, and pursuant to a proper court hearing and court orders. Although "appropriate" was not defined, the court could apply the term to grandparents narrowly, thus following the *loco parentis* exception, or broadly, construing the best interests of the child doctrine to favor grandparents.

In *Wilson v. Family Serv. Div.*, 554 P.2d 227 (Utah 1976), the court articulated the policies which must be balanced when considering grandparental involvement in adoption proceedings. The court's objectives in custody decisions are to utilize practical procedures to facilitate placement and, in facilitating placement, to relieve the public of expense and responsibility. The state stands in the role of parent with commensurate duties and responsibilities for the child. It is desirable to achieve the above stated objectives while recognizing the natural love and affection within families, the need to encourage and preserve family unity, and the stability essential to the good order of society.

If the court looked to the child's grandparents first in the adoption proceeding, the adoption procedure would be quickened. The identity of the child's extended family could be readily determined, and, if placement within the extended family followed, society could be relieved of long term foster care expenses.

In *Muggenborg v. Kessler*, 630 P.2d 1276 (Okla. 1981), the court recognized standing in a grandparent, although not a natural guardian, to claim custody of his offspring when both parents are dead or their parental rights have been terminated. The maternal grandparent obtained custody of the grandchildren and the paternal grandparents obtained a perogative writ to prohibit the enforcement of the adoption decree. The recognition of such a right by the court of appeals in *Wiley's* case would have permitted her to be heard in the adoption proceeding of her grandson.

Perhaps the most compelling case favoring the maintenance of ties with the consanguineous family is *In re Adoption of Anthony*, 113 Misc. 2d 26, 448 N.Y.S.2d 377 (Fam. Ct. 1982). In *Adoption of Anthony*, Anthony was permitted to maintain an ongoing relationship with his blood siblings. The concept permitting contact with his blood relatives is called "open adoption" and is permitted when the best interests of the child require this alternative. Had this alternative been applied in *Christian Placement Service*, Wiley would not have been given custody, but she would have been permitted to maintain a relationship with her grandson. Since Wiley's grandson was an infant who had never established a relationship with his grandmother, it is unlikely that the court would permit an ongoing relationship to encumber the "adopting" family. The best interests of the infant would be seen as demanding the severance of all ties.

In contrast, *Adoption of Anthony* involved the adoption of an older child. Its holding recognizes significant social changes have occurred in our society which no longer demand severing old ties. The secrecy, so imperative in earlier days when a heavy stigma was attached to illegitimacy, is no longer vital. Fewer babies are given up for adoption because of declining birth rates, abortion, and changing societal attitudes. More older children, who know of their past are being adopted. Psychological and social research has revealed the importance of knowing one's ancestral, religious, ethnic, and cultural background. In addition, congenital disease treatment demands knowledge of the blood family's medical history.

72. See *supra* note 71.

73. See *supra* note 3.

74. For example, extra-familial placement is required where the child's safety may be endangered by remaining with a family member.

served by allowing visitation with grandparents or permitting the grandparents to adopt the grandchild.<sup>75</sup>

In the final analysis, Wiley's dilemma<sup>76</sup> may be most effectively alleviated through the legislative process. The legislature can permit grandparents a right to intervene in adoption proceedings by modifying the Visitation by Grandparents Act. By granting grandparents a right to intervene, the legislature will acknowledge the significance of the grandparent-grandchild relationship and will require the judge to determine under what circumstances the child should be permitted to maintain familial ties with a grandparent.

#### IV. CONCLUSION

The passage of the Visitation by Grandparents Act demonstrates a recognition of emerging grandparental rights in New Mexico. Grandparents presently have a very limited statutory right to petition for visitation rights pursuant to the Visitation by Grandparents Act and similarly limited rights under specific circumstances pursuant to permissive intervention. If the legislature modified the Visitation by Grandparents Act, the courts could either provide a child access to the consanguineous family or permit the grandparent to adopt the child when appropriate. Such a modification will assure that the best interests of both the child and the family are met.

CLAUDIA RAY

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75. *See supra* note 71.

76. *See supra* notes 3, 13, 28, 32.