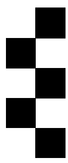

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2

The 'Grandparent' Problem: Encouraging a More Relational Approach Towards Child Arrangements via Mediation

CHARLOTTE BENDALL AND SAMANTHA DAVEY

I. Introduction: A 'Nuclear' Norm

This chapter focuses on the relationships between grandparents and their grandchildren, and on the ways in which these might best be preserved in the event of family network fragmentation. It identifies how the 'traditional' legal frameworks around private children matters have failed to accommodate more diverse family arrangements due to 'dominant, orthodox'[1] understandings of the family. A recent poll found that as many as 40 per cent of grandparents over the age of 50 in the United Kingdom (UK) had provided regular care for their grandchildren, highlighting the prevalence of what has been termed 'grannannying'.[2] This is in a context of a rise in lone-parent employment, and in the number of dual-earning households,[3] combined with the significant cost of childcare.[4] Grandparents have increasingly undertaken caregiving, particularly within 'working-class' families across Europe,[5] where both parents are in full-time employment.[6] Many grandparents are involved in tasks such as collecting children from school and keeping

[1] A Brown, *What is the Family of Law? The Influence of the Nuclear Family* (Oxford, Hart Publishing, 2019) 3.
[2] Age UK (2017) *5 Million Grandparents take on Childcare Responsibilities* at www.ageuk.org.uk/latest-news/articles/2017/september/five-million-grandparents-take-on-childcare-responsibilities.
[3] Office for National Statistics (2018), *Families and the Labour Market, England*: *2018* at www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/articles/familiesandthelabourmarketengland/2018.
[4] J Herring, *Law and The Relational Self* (Cambridge, Cambridge University Press, 2019).
[5] Grandparents Plus, *Grandparenting in Europe* (London, Grandparents Plus, 2010).
[6] T Leonce, 'The Inevitable Rise in Dual-Income Households and the Intertemporal Effects on Labor Markets' (2020) 52 *Compensation and Benefits Review* 64.

them occupied until their parents finish work, or even looking after them for the day while their parents are out at their paid employment. Yet the courts and legal frameworks have ignored the practical involvement that grandparents can have on an everyday basis, with a blanket preference being shown towards parents instead. We identify how stepping outside of the legal frameworks, vis-à-vis mediation, can more effectively foster greater 'relationality', reinforcing the connections not only between grandparents and grandchildren, but also with the parents themselves.

The 'nuclear' family, comprising (generally two) parents and their biological, dependent children, has traditionally held greater 'legal legitimacy'[7] in England and Wales than other family units. The twenty-first century has, however, been a 'game changer', characterised by a 'kaleidoscope of family forms'.[8] Altered familial social norms have led to corresponding changes in legislation and judicial decision making. Unmarried fathers have enjoyed the establishment of their legal status as parents with parental responsibility,[9] transsexuals' rights to recognition have been protected by the law,[10] and same-sex relationships have attained formal legal status through the development of a regime on civil partnership[11] and the subsequent introduction of same-sex marriage.[12]

Legislators and the courts have also had to contend with challenges in defining 'parent', 'parentage' and 'parenthood',[13] in the light of advances in medical treatment vis-à-vis assisted reproduction,[14] including surrogacy arrangements.[15] The focus, though, in the modernisation of the concept of family within medical law has been on the legal recognition and protection of *parental* interests, rather than the recognition of the interests and involvement of extended family, including grandparents. Thus, one stone has been left unturned: the recognition and protection of grandparents' rights in legal proceedings – especially in private law matters. The omission continues despite research by Cusworth et al, based on a sample of 546,000 private law applications between 2007 and 2020, which found that approximately 10 per cent of private law applications were made by non-parents, including grandparents.[16] This high number of applications suggests a significant issue for many grandparents, who have felt the need to commence litigation.

[7] C Huntington, *Failure to Flourish: How Law Undermines Family Relationships* (Oxford, Oxford University Press, 2014) xv.

[8] D Orchard, 'Family and Family Law' in E Brake and L Ferguson, *The Philosophical Foundations of Children's and Family Law* (Oxford, Oxford University Press, 2018) 59, 59.

[9] Under s 111 of the Adoption and Children Act 2002, unmarried fathers can acquire parental responsibility if paternity is registered on the child's birth certificate.

[10] Gender Recognition Act 2004.

[11] Civil Partnership Act 2004. See also A Rolfe and E Peel, 'It's a double-edged thing: The paradox of civil partnership and why some couples are choosing not to have one' (2011) 3 *Feminism and Psychology* 317.

[12] Marriage (Same Sex Couples) Act 2013.

[13] A Bainham, 'Arguments About Parentage' (2008) 67 *CLJ* 322.

[14] Human Fertilisation and Embryology Acts 1990 and 2008.

[15] *Z (Surrogacy agreements: Child arrangement orders)* [2016] EWFC 34.

[16] L Cusworth et al, *Uncovering Private Family Law: Who's Coming to Court in England?* (London, Nuffield Family Justice Observatory, 2021) 19.

In other words, despite all of the challenges to the deeply embedded social norm of the 'nuclear' family, and the superior courts' insistence that there is no natural parent 'presumption',[17] there is a tendency 'to marginalise, to exclude, and to deny equal protection to relationships and families who do not come close to the normative ideal'.[18] Grandparents have no specific legal rights that are recognised in English law, and family law has remained 'heteronormative', declining to opt for a more 'relational' route. In suggesting that the law in this area has operated 'heteronormatively', we mean that it has worked to privilege those behaviours and relationships that closely replicate the heterosexual 'binary' familial norm, whilst attaching less value to those that deviate. In this respect, it is both reflecting and ultimately sustaining patterns of social 'normality'.[19] The law has failed to promote the various caring relationships that can exist between the child and those connected to the child, such as grandparents.[20]

This chapter begins by interrogating what 'relationality' means, and why adopting a more connected approach is so important in private law children matters. It then discusses the various legal routes through which grandparents can secure contact, and how these, in contrast to operating 'relationally', have encouraged 'heteronormativity'. It considers the practical challenges faced in accommodating grandparents within the existing legal frameworks, and argues that they are, in fact, ill-equipped to meet those. Ultimately, the chapter asserts that mediation offers greater prospects for adopting a 'relational' approach, and thereby for protecting children's relationships with extended family members. This is not only in the sense that mediation can be less confrontational than the court system, but also in that it enables parties to reach outcomes that differ from the 'heteronormative' conclusions that the law might draw. Mediation should consequently be promoted through, for example, greater public education and judicial encouragement.

II. 'Relationality': A Preferred Approach Towards Private Children Disputes

When it comes to dispute resolution in this context, we argue that it is important to focus on the child's wider relationships, rather than to view the family in a restrictive way. This would help to recognise that we, as people, are 'constitutively interconnected and interdependent'.[21] The notion behind the 'relational' approach is that the 'very nature' of our selves is to be in 'interaction' with others,

[17] *W (A Child)* [2016] EWCA Civ 793; *Re B (A Child)* [2009] EWCA Civ 545.
[18] A Margaria, *The Construction of Fatherhood* (Cambridge, Cambridge University Press, 2019) 5.
[19] M Davies, 'Legal Pluralism' in P Cane and H Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford, Oxford University Press, 2010) 805.
[20] Herring (n 4).
[21] M Friedman, 'Relational Autonomy and Individuality' (2013) 63 *University of Toronto Law Journal* 327, 327.

with the relationships that we have operating to 'shape' our lives.[22] As Naffine puts it, 'human beings are inseparable from their relations … within [these] relations we become what we are as persons'.[23] We live in the context of a 'web', or network, of interconnection, within which our relationships are central to our identities and to the capacities that we can develop.[24] Our social connections influence our well-being, with close, 'strong, stable' relationships being essential for human growth.[25] The very possibility of our 'flourishing' is created through the relationships that we have established, with 'flourishing' being defined here as including 'the development, and exercise, of cognitive, social, [and] affective … skills'.[26]

Children, like all of us, are connected and 'live in the context of relationships',[27] with 'no child [being] an island unto itself'.[28] Even just genetically, each child is a product not only of their parents, but also of their grandparents before them.[29] In this respect, Kornhaber stresses that 'the child in the womb already possesses instincts, temperament, and emotions that are not his or hers alone', with the child developing 'not only in the world of [their] parents, but within the larger world of [their] grandparents'.[30] It is, Liebermeister suggests, an 'illusion' to imagine that we are 'unconnected to the generations that preceded us', with those generations playing 'an important part in affecting the lives of [the following] generations'.[31] Moreover, when first beginning to interact with the world, children do so through the relationships that they have with their caregivers.[32] In this sense, the 'collectivity' of family helps to 'form' us and 'explain much of [our] behaviour'.[33]

Familial caregivers provide not only the language that children use, and the development of their ideas, but further offer them a sense of 'who [they] are and where [they] belong'.[34] As Herring suggests, even from this early stage, 'we think, live, and establish our identity through [these] relationships'.[35] They supply us with our belief systems, values and world view.[36] Where caring is conducted by a grandparent, previous generations 'leave their mark' on the current one, impacting the child's 'ways of knowing and seeing'.[37] Especially as children grow older,

[22] ibid.
[23] N Naffine, 'The Liberal Legal Individual Accused: The relational case' (2013) 29 *Canadian Journal of Law and Society* 123, 123.
[24] J Nedelsky, *Law's Relations* (Oxford, Oxford University Press, 2011).
[25] Huntington (n 7) 6.
[26] J Herring and C Foster, 'Welfare Means Relationality, Virtue and Altruism' (2012) 32 *Legal Studies* 480, 487.
[27] Herring (n 4) 162.
[28] Herring and Foster (n 26) 497.
[29] J Herring, *Older People in Law and Society* (Oxford, Oxford Publishing, 2009).
[30] A Kornhaber, quoted in E LeShan, *Grandparenting in a Changing World* (New York, Newmarket, 1993) 268.
[31] S Liebermeister, *The Roots of Love* (Cambridge, Perfect Publishers Ltd, 2006) 8, 87.
[32] Herring (n 4).
[33] Liebermeister (n 31) 295.
[34] Herring (n 4) 196.
[35] ibid.
[36] Liebermeister (n 31).
[37] C Smart, *Personal Life* (Cambridge, Polity Press, 2007) 45, 87.

grandparents can offer 'knowledge of family … roots [and] a sense of [their] origins or heritage, as well as emotional support'.[38] This is important, given that Article 8 of the United Nations Convention on the Rights of the Child (UNCRC) states that the child has a right 'to preserve his or her identity including nationality, name and family relations'. Those 'family relations' arguably extend further than parent and child to those between the child and other relatives, including grandparents.[39] Children who enjoy strong bonds with their grandparents have been found, within empirical studies, to be more secure emotionally.[40] Eekelaar argues that the 'maintenance and development'[41] of relationships between children and grandparents can be in children's best interests, particularly in the aftermath of parental separation, where grandparents can offer 'safe' or 'neutral' territory.[42] It is clear that such relationships can be central to children's lives, well-being and sense of self, and a similar observation might be made about grandparents too. Given that 'every time a child is born, a grandparent is born',[43] grandparents' understandings of themselves can emerge from the relationships that they have with their extended families. It is accordingly unsurprising that qualitative research identifies that grandparents who have experienced a loss of contact with their grandchildren suffer emotional and physical health problems related to that loss.[44]

We focus particularly on the grandparent/grandchild relationship, because grandparents so frequently assume a caring role. Many of the arguments that we are making could, though, be carried across to other 'caring' relatives, such as aunts or uncles. It is also recognised that whilst some grandparents have significant relationships with their grandchildren, others play only a peripheral role; the extent and nature of their involvement can vary greatly (and can be financial, as well as practical and emotional).[45] Therefore, for the law to adopt a blanket 'presumption' in favour of contact with grandparents, as has been previously suggested as a potential reform, may seem inappropriate.[46]

Indeed, to encourage a 'relational' approach is not to suggest that all relationships are good, or should necessarily be maintained.[47] There may, for instance, be difficulties in terms of contact with paternal grandparents where there are safeguarding concerns based on domestic abuse perpetrated by the father against

[38] Grandparents' Association, quoted in Herring (n 29) 255.

[39] R Hodgkin and P Newell, *Implementation Handbook for the Convention on the Rights of the Child*, 3rd edn (Geneva, UNICEF, 2007) 114.

[40] M Purnell and B Bagby, 'Grandparents' Rights: Implications for family specialists' (1993) 42 *Family Relations* 173.

[41] J Eekelaar, *Family Law and Personal Life* (Oxford, Oxford University Publishing, 2006) 70.

[42] M Murch, *Supporting Children When Parents Separate* (Bristol, Policy Press, 2018) 60.

[43] Kornhaber, quoted in LeShan (n 30).

[44] L Drew and P Smith, 'The impact of parental separation/divorce on grandparents-grandchild relationships', (1999) 48 *International Journal of Aging & Human Development*, 191.

[45] Herring (n 29).

[46] F Kaganas and C Piper, 'Grandparent Contact: Another Presumption?' (2020) 42 *Journal of Social Welfare and Family Law* 176.

[47] Herring (n 4).

the mother and/or child (see chapter 7 in this volume). It is crucial to distinguish between cases where communication has simply broken down and those where grandparents have placed, or have the potential to place, children at risk of significant emotional or physical harm, for reasons that may include the level of ongoing conflict and disagreement between grandparent and parent. If such relationships put children at risk of significant harm, the state is obliged to take the steps required to 'protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment' under Article 19 UNCRC. Moreover, under Article 5 UNCRC, the state must 'respect the responsibilities, rights and duties of parents', which can be construed to include decisions to exclude influences that may be harmful to children. We do not argue that contact is always in the child's best interests. Parents and grandparents may also disagree over important decisions such as religious beliefs, medical treatment or schooling. Nevertheless, particularly where a grandparent has performed some sort of caring role within a child's life, it is argued here that this should be given recognition, and that an ongoing relationship should be facilitated wherever possible. Attempts should be made to 'write-in' those 'others' who conduct caring work, to reflect the complexity of family life.[48] An expansive vision of 'family' needs to be adopted, which acknowledges the varying contributions and responsibilities of wider family members, and the significance of intergenerational relationships.[49] This is not, though, what is taking place within the existing frameworks for child arrangements, which, as we will move on to discuss, instead work 'heteronormatively'.

III. Making and Enforcing Contact Orders in a 'Heteronormative' Framework

A. Defining Heteronormativity

The courts have expressed a preference towards applying the welfare principle,[50] in private law proceedings concerning children, in a way that is 'free from generalisations'.[51] However, we assert that they tend to favour the interests of parents over the claims of others, such as grandparents, in private law proceedings. We do not, in this chapter, necessarily dispute the preferred status enjoyed by parents. We do, however, believe that this prioritisation means that the law operates 'heteronormatively', and that the vital importance of family members such as grandparents is, at times, overlooked.

[48] M Kavanagh, 'Rewriting the legal family: Beyond exclusivity to a care-based standard' (2004) 16 *Yale Journal of Law & Feminism* 83.

[49] ibid.

[50] Children Act 1989, s 1(1).

[51] J Herring, 'The welfare principle and the Children Act: presumably it's about welfare?' (2014) 36 *Journal of Social Welfare and Family Law* 14, 14.

We argue that, through this prioritisation, the legal system within England and Wales has reproduced the traditional ('heteronormative') 'nuclear' family, comprising two parents only and their biological, dependent children. The law, in so operating, is not recognising the full diversity of parenting arrangements, or the nexus of relationships within which children can exist. Bendall has identified (albeit in the context of financial relief) that family law sometimes entails the application by legal actors of familiar, existing 'scripts' that can be 'mismatched with the parties' realities'.[52] In the case of less 'normative' forms of family living, relatively little consideration may be given to the ways in which the parties' lives diverge from those 'scripts'. It is arguable that we can see this happening in private law children matters too, in that the law struggles with how to acknowledge and protect the grandparent/grandchild relationship (given that it strays from the 'nuclear' norm). This is despite the fact that some children are raised by their grandparents, and others have close, loving bonds with their grandparents due to the frequency of contact.

Whilst 'heteronormativity' is a contested term, we use it to refer to the ways in which heterosexual identity and practices are 'expected, demanded and always presupposed by society'.[53] 'Heteronormativity' assumes that heterosexual relationship behaviour is 'self-evident … and necessary',[54] and works to privilege those relationships that closely replicate the heterosexual norm, while disregarding and ignoring (or even condemning) those that deviate. It has entailed a focus on procreation, and on conjugality and romance,[55] as well as the assumption that there are only two genders, the 'masculine' male (who engages in the production and circulation of commodities and operates as the family 'provider') and the 'feminine' female (who performs the domestic work). In fact, the assumption that the family should centre around gender complementarity has played out within family law to such an extent that attempts have been made to apply 'binary' norms to the context of same-sex relationships.[56] 'Heteronormativity' has been used as a term to describe practices that 'derive from and reinforce a set of taken-for-granted presumptions', including around the idea that 'marriage and the family are appropriately organised around different-sex pairings'.[57] 'Heteronormativity', in encouraging this exclusively 'binary' form of family living, links up with notions

[52] C Bendall, 'A 'divorce blueprint'? The use of heteronormative strategies in addressing economic inequalities on civil partnership dissolution' (2016) 31 *Canadian Journal of Law and Society* 268, 278.

[53] S Chambers, '"An incalculable effect": Subversions of heteronormativity' (2007) 55 *Political Studies* 656, 662.

[54] D Cameron and D Kulick, *Language and Sexuality* (Cambridge, Cambridge University Press, 2003) 55.

[55] N Palazzo, *Legal Recognition of Non-conjugal Families: New Frontiers in Family Law in the US, Canada and Europe* (Bloomsbury, London, 2021).

[56] C Bendall, 'A break away from the (hetero)norm? Lawrence v Gallagher' [2012] 1 FCR 557; [2012] EWCA Civ 394' (2013) 21 *Feminist Legal Studies* 303.

[57] C Kitzinger, 'Heteronormativity in action: Reproducing the heterosexual nuclear family in after-hours medical calls' (2005) 52 *Social Problems* 477, 478.

such as 'mononormativity' (under which assumptions of the 'normalcy and naturalness of monogamy' are 'dominant').[58]

Butler's concept of 'performativity' suggests that norms (such as 'heteronormativity') are reproduced and perpetuated, ultimately coming to be seen as natural, via continued repetition through social and institutional structures and practices.[59] The law in this area, having placed more importance on the relationship between a child and their mother and father than on the child's other relationships, has largely operated to bolster this dichotomous, 'heteronormative' parenting model. Notably, developments within family law, such as the Human Fertilisation and Embryology Act 2008, have moved somewhat away from the gender 'binary' in recognising parents of the same sex. That said, such developments have continued to adhere to a maximum of a 'two-parent model [where] the couple must be (at least potentially) in a sexual relationship'.[60] As a result, the radical potential of multiple parenting models (including parties such as known sperm donors), which have been regarded as a 'point of difference in lesbian parenting practices',[61] has been blunted. Of course, same-sex relationships are not the only context within which multiple people are performing a key role in children's lives. Importantly, the law, as it stands, also neglects to provide sufficient recognition of the increase in close relationships between grandparents and grandchildren, with grandparents often taking on the role of part-time or full-time caregivers (as considered in chapter 6).

Having set out the key theoretical frameworks on 'relationality' and 'heteronormativity', we now consider how these connect to legal frameworks on the leave requirement and the making of child arrangements and enforcement orders under the Children Act 1989.

B. Leave Requirement

The focus of this subsection is on a grandparent's ability to obtain leave (ie the court's permission) for the purposes of obtaining contact with a grandchild. Unlike mothers and fathers, grandparents do not enjoy automatic leave to commence legal proceedings[62] (see chapter 4 and chapter 5 for more detail on the leave requirement). This means that, in some cases, the courts will not even consider the merits of making a child arrangements order for contact between a grandparent and their grandchild. At present, the leave requirement is viewed as

[58] M Pieper and R Bauer, quoted in M Barker and D Langdridge, 'Whatever happened to non-monogamies? Critical reflections on recent research and theory' (2010) 13 *Sexualities* 748, 750.

[59] J Butler, 'Critically Queer' (1993) 1 *GLQ: A Journal of Lesbian and Gay Studies* 17.

[60] J McCandless and S Sheldon, 'The Human Fertilisation and Embryology Act (2008) and the tenacity of the sexual family form' (2010) 73 *MLR* 175, 188.

[61] L Smith, 'Tangling the web of legal parenthood: Legal responses to the use of known donors in lesbian parenting arrangements' (2013) 33 *Legal Studies* 355, 375.

[62] Grandparents must apply for leave under s 10(9) of the Children Act 1989.

necessary by the Government and the judiciary alike, because it is perceived that some grandparents' claims may be 'vexatious'.[63] Currently, the courts are guided by explicit considerations under section 10(9) of the Children Act 1989 when deciding whether to grant leave, such as risk of harm to the child and the wishes and feelings of the child's parents. Within England and Wales, grandparents are treated unequally to parents, since parents do not have to satisfy a leave requirement in private law matters, and discord between a primary caregiver and a non-resident will rarely prevent a contact order from being made in a parent's favour.[64] It could be said that the leave requirement itself may reflect a 'binary' 'heteronormative' approach emphasising the primacy of the 'nuclear' family.

Despite the existence of this 'hurdle', Herring has observed that serious reasons would need to be given for the refusal to grant leave to grandparents.[65] Otherwise, such a refusal could be a potential violation of procedural and substantive rights under the European Convention on Human Rights (ECHR), specifically, Article 6 (the right to a fair hearing) and Article 8 (the right to respect for private and family life).[66] In fact, leave is not an insurmountable 'hurdle',[67] nor a blanket 'hurdle' applied to all grandparents, since those who fall within the special category of persons under section 34(1) of the Children Act 1989 are exempt and need not apply.[68] Even so, given that leave is required for most grandparents, this is a literal, and symbolic, example of the preferential status provided to parents and the 'subsidiary'[69] status of grandparents. Again, this reflects the law's tendency to embed 'heteronormativity', and failure to acknowledge the importance of the 'relationality' between children and grandparents.

Some legal scholars and non-governmental organisations have argued that greater emphasis needs to be placed on multi-generational bonds[70] via the removal of the leave requirement for grandparents,[71] a presumption in favour of contact[72] or more rigorous enforcement of child arrangement orders against uncooperative parents.[73] Others, such as Taylor, argue the law is sufficiently flexible to support

[63] Ministry of Justice, *Family Justice Review: Final Report* (London, Ministry of Justice, 2011) 21.

[64] See J Hunt and A Macleod, *Outcomes of Applications to Court for Contact Orders after Parental Separation or divorce* (London, Ministry of Justice, 2008) 36. According to this research, 86% of applications for staying contact were successful in obtaining face-to-face contact.

[65] Herring (n 29) 246.

[66] ibid.

[67] Ministry of Justice (n 63). Also, generally, see R Taylor, 'Grandparents and Grandchildren: Relatedness, relationships and responsibility' in B Clough and J Herring (eds), *Ageing, Gender and Family Law* (Abingdon, Routledge, 2018) 230.

[68] *Re M (Minors in Care) (Contact: Grandmother's Application)* [1995] 2 FLR 86. For more detail on these exceptions, see ch 1 of this volume.

[69] L Spitz, 'Grandparents: their role in 21st century families' (2012) 42 *Family Law* 1254.

[70] V Bengtson, 'Beyond the Nuclear Family: The Increasing Importance of Multigenerational Bonds' (2001) 63 *Journal of Marriage and Family* 1.

[71] Kaganas and Piper (n 46).

[72] Grandparents Apart (2006) *Grandparents Speak Out for Vulnerable Children* at http://grandparentsapart.co.uk/wp-content/uploads/2018/08/Grandparents-Book.pdf 28.

[73] For a general overview on the arguments, see Kaganas and Piper (n 46).

grandparents when it is for the child's benefit.[74] Although such options for legal reform exist,[75] we contend that these changes would not adequately tackle the underlying 'heteronormativity', and lack of 'relationality', inherent within the family justice system. This is due to the preference, in law, for supporting the interests of parents over those of grandparents. We will move on to examine in greater detail how this preference manifests.

C. Child Arrangements Orders with 'Contact'

Contact can take place in a myriad of forms. Whilst direct 'face-to-face' contact may be the most welcome format, especially post-Covid-19, we acknowledge that indirect contact (via telephone, e-mail and video conference) may alternatively be beneficial. Regardless of this increase in 'unconventional'[76] non-binary family relationships, there is still a 'hierarchy' within this area of the law,[77] and the grandparent/grandchild relationship is not prioritised in contact matters. Brown suggests that, in natural reproduction, the genetic connection is favoured over social parenting, and that the opposite is true for assisted reproduction.[78] Grandparents and their relationships with their grandchildren sit uneasily within the current legal framework, which emphasises parental genetic connections but not necessarily grandparental genetic connections. Despite the increased emphasis on grandparents' rights to relationships with their grandchildren under Article 8 ECHR,[79] the domestic courts have tended to differ in their treatment of grandparents when compared with non-resident parents (usually fathers).

The courts appear to have been more willing to grant contact in favour of fathers, whether married or unmarried, and mothers (where appropriate). They have taken the perspective that parental contact is almost always in the child's best interests,[80] whereas contact with grandparents is not. In many cases, grandparents will see their grandchildren during contact visits between children and their fathers (for example, assuming the father is the non-resident parent). Although this creates a practical way for such grandparents, there are circumstances where this is not possible (for example, in cases where fathers are not permitted to have direct contact, do not seek contact, have acted as sperm donors but are not regarded as a child's 'legal' parent, or are deceased). Moreover, this reliance on the parental route is still indicative of a symbolic legal hierarchy that may not reflect the strength

[74] Taylor (n 67) 230.
[75] For discussion, see Kaganas and Piper (n 46).
[76] Margaria (n 18) 27.
[77] ibid.
[78] Brown (n 1) 3.
[79] *L v Finland* App no 25651/94 (ECtHR, 27 April 2000); *Mitovi v The Former Yugoslav Republic of Macedonia* App no 53565/13 (ECtHR, 16 April 2015); *Beccarini and Ridolfi v Italy* App no 63190 (ECtHR, 7 December 2017).
[80] *Re O (Contact: Imposition of Conditions)* [1995] 2 FLR 124.

of the relationship between grandparents and their grandchildren. In circumstances such as those outlined above, it is submitted, children may well have much closer relationships with the non-resident grandparents (typically the paternal grandparents) than with their fathers.

Grandparents are, however, granted some, albeit limited, rights to contact under Article 8 ECHR (the right to respect for private and family life) where a de facto relationship is established.[81] The stance of the European Court of Human Rights (ECtHR) is important, since it marks a less 'traditional' approach that more readily encompasses the need to protect different types of familial relationships. Moreover, the ECtHR undertakes a more 'relational' approach that values the connections between children and wider familial networks, including the grandparent/grandchild relationship. Fenton-Glynn observes that the jurisprudence of the ECtHR on grandparents 'represents an important acknowledgement by the Court that the protection of Article 8 must stretch further than the nuclear family and reflect the lived reality of children's lives'.[82]

Whilst we agree that these developments are a step in the right direction, the ECtHR has not been critical of the tentative approach taken towards the grandparent/grandchild relationship in the legal frameworks and judicial decision making in countries such as England and Wales. This may, in part, be due to the state's wide margin of appreciation. As Brown has identified, however, ECtHR decision making is still primarily based on 'the idealised image of the traditional nuclear family'.[83] It is apparent to us that much more work needs to be undertaken to improve the recognition of diverse parenting arrangements and to move away from the 'nuclear norm'. Moreover, change is necessary (via soft law guidance, legislation or judicial decision making) to adopt a more 'relational' approach as concerns disputes between grandparents and parents.

The courts have tended to take the position that contact with parents will be in a child's best interests, save in 'exceptional circumstances'.[84] In contrast, the common law and statutory legal frameworks provide no grandparent 'preference' or 'presumption'. Instead, the grandparent appears to bear the burden of proving that contact is in the child's best interests. This can be seen in the cases of *Re A (A Minor) (Contact Application: Grandparent)*[85] and *Re K (Mother's Hostility to Grandmother's Contact)*.[86] Again, in contrast to situations of hostility between a mother and a non-resident father, where the courts appear willing to order contact between children and non-resident fathers and express 'vehement disapproval'[87]

[81] *Re H (A Child)* [2014] EWCA Civ 271. For further detail, see ch 1 of this volume.

[82] C Fenton-Glynn, *Children and the European Court of Human Rights* (Cambridge, Cambridge University Press, 2021) 233.

[83] Brown (n 1) 40.

[84] *Re W (A Minor) (Contact)* [1994] 2 FLR 441 CA at 447.

[85] *Re A (A Minor) (Contact Application: Grandparent)* [1995] 2 FLR 153.

[86] *Re K (Mother's Hostility to Grandmother's Contact)* [1996] CLY 565.

[87] J Wallbank, 'Castigating Mothers: The Judicial Response to "Wilful" Women in Disputes over Parental Contact in English Law' (1998) 20 *Journal of Social Welfare and Family Law* 357, 558.

of mothers seen as wilfully obstructing such contact, the courts have refused to take the same approach with a non-resident grandparent.[88] Indeed, in *Re K*,[89] not only was the grandmother's application refused, but a prohibited steps order was made, preventing the non-resident father from allowing contact between the child and the grandparent. This was because it was considered that the mother's hostility towards the grandparents would risk causing emotional harm to the child. Unfortunately, even if grandparents can assert that their interests (and, of course, the best interests of children) ought to be protected legally vis-à-vis a contact order, this is not necessarily the end of the matter, as we will now consider.

D. Enforcement of Court Orders

Research has shown that, for the most part, loss of contact with grandparents can be explained by the residential arrangements made after divorce.[90] In that sense, then, there is the potential for a 'mirroring' effect in that, if contact with a non-resident parent decreases or ceases (whether due to limited contact via court order or difficulties in enforcing contact), so will the grandparental contact. Often, primary caregivers may refuse to comply with court orders, and grandparents who have contact orders in place (like non-resident parents) must then decide whether to 'give up' or seek enforcement of contact through further court proceedings. Primary caregivers who obstruct contact may, in 'high-conflict' cases, be regarded as 'implacably hostile',[91] or as exhibiting 'parental alienation'[92] towards the non-resident parent.[93] This hostility and alienating behaviour may be directed against grandparents too, thereby exacerbating interpersonal conflict. This means that grandparents may seek to enforce court orders to counter the failure of parents themselves to recognise the 'relationality' between grandparents and grandchildren. While we recognise that non-resident parents and grandparents both face challenges in the enforcement of court orders, we submit that the challenges faced by grandparents may be greater because of the more tentative approach taken by the judiciary, and also due to the 'heteronormative' legal frameworks that, for grandparents, exacerbate the challenges they may face.

The enactment of sections 2–5 of the Children and Adoption Act 2006 sought to broaden the range of remedies available for breaches of court orders, rather

[88] See also a study that shows that, in most cases, contact will be ordered in favour of fathers (whether indirect or direct) despite such hostility: Hunt and Macleod (n 64) 192–94.

[89] *Re K* (n 86).

[90] M Albertini and M Tosi, 'Grandparenting after parental divorce: The association between non-resident parent-child meetings and grandparenting in Italy' (2018) 15 *European Journal of Ageing* 277.

[91] See eg *Re A (A Child)* [2015] EWCA Civ 910.

[92] See eg *Re A (Children) (Parental alienation)* [2019] EWFC B56. For further discussion and analysis of parental alienation, see J Doughty, N Maxwell and T Slater, *Review of Research and Case Law on Parental Alienation* (London, OGL, 2018).

[93] *MFS (Appeal: Transfer of Primary Care)* [2019] EWHC 768 (Fam); *Re H (Parental Alienation)* [2019] EWHC 2723.

than to simply fine or imprison parents. The Act provided powers that encouraged the courts to promote and enforce contact orders via the attachment of 'warning notices' stating the consequences of the failure to comply, which could include imprisonment for contempt of court.[94] Alternatively, enforcement orders[95] can include less serious consequences, such as unpaid work, the ongoing monitoring of contact[96] by the Children and Family Court Advisory and Support Service (CAFCASS) or compensation for financial loss[97] caused by non-compliance. The difficulty is that although research has been undertaken into enforcement applications,[98] the data do not yet disaggregate grandparents from other 'non-parental' figures in determining how many grandparents have applied for enforcement proceedings and been successful in the enforcement of contact.

In terms of the measures of enforcement, imprisonment is the most draconian measure that the courts have in their toolkit. In practice, the courts have been hesitant to commit a parent to prison for non-compliance with a court order in general, but perhaps especially when a grandparent seeks enforcement of contact. In *CH v CT*,[99] the grandmother successfully applied for an enforcement order and requested the making of a suspended committal order against the mother. The mother's appeal was permitted on the basis that committal to prison should be a last resort, and that sufficient consideration had not been afforded to less draconian alternatives. This approach is broadly in line with the jurisprudence of the ECtHR, which emphasises that committal to prison ought to apply only as an exceptional measure.[100]

Comparatively, the transfer of residence has become a popular sanction against primary caregivers who fail to make children available for contact.[101] Judges may, however, be less inclined to use this tool to enforce contact for grandparents, because the grandparent/grandchild relationship is not viewed as being of the same value as that of the parent/child. This approach serves to emphasise the lack of 'equal footing'[102] between grandparents and parents. In *Re B (Transfer of Residence to Grandmother)*,[103] Thorpe LJ considered whether to transfer residence to a grandmother and stated that 'I know of no case in which such a dire sanction has been exercised against an obdurate parent.'[104] He also expressed concern that '[i]nevitably there are disbenefits for a child to be brought up by an adult of a different generation to either of her parents'.[105] This latter comment, in particular,

[94] Children and Adoption Act 2006, s 3.
[95] ibid s 4.
[96] ibid s 2.
[97] ibid s 5.
[98] Cusworth et al (n 16).
[99] *CH v CT* [2018] EWHC 1310 (Fam).
[100] *Fourkiotis v Greece* App no 74758/11 (ECtHR, 16 June 2016).
[101] *V v V* [2004] EWHC 1215 (Fam).
[102] *Re B (A Child)* [2012] EWCA Civ 858 [13].
[103] *Re B (Transfer of Residence to Grandmother)* ibid.
[104] ibid [13].
[105] ibid.

demonstrates a potentially outdated and traditional approach towards parenting and 'grandparenting'. This is especially the case since the age of first-time parenting is consistently getting higher,[106] due to changes in lifestyle and developments in assisted reproduction.[107]

Current legal frameworks, which can be used to 'make contact happen', have favoured the 'nuclear' family. This is due to the existence of legal 'presumptions' and 'preferences', past and present, which affect court applications and the likelihood of success in obtaining court orders and enforcing them. We suggest that the need for (and corresponding increase in) the enforcement of court orders[108] shows that the system is not working as well as it should to protect familial relationships. Thus, mediation is a preferred route, which may save the parties expense in the long term, and agreements could be included in a 'consent order' to highlight a symbolic (as well as a legally binding) commitment to making contact happen. We argue that if parties have reached the stage where enforcement proceedings are necessary, this will only serve to cause further damage to tenuous relationships between parents and grandparents. We consider in section III.E how the existence of a 'parental preference' interacts with the existing legal frameworks aimed (in part) at facilitating contact, and how the relationship between legal frameworks and a 'parental' preference have served to favour the 'divided' 'nuclear' family.

E. A Broader 'Dyadic' Parental Preference

We have argued, up to this point, that a 'heteronormative' approach, which favours the traditional 'nuclear' family, can be seen via the process of obtaining leave, and of making and enforcing contact orders. In this respect, the law has not operated 'relationally', recognising the wider nexus of relationships within which children can exist. Specifically, we submit this because parents have a 'preferred position'[109] in law, which usually (but not always) stems from a genetic connection.[110] They also derive the benefits and burdens that accompany automatic parental responsibility,[111] provided for within section 3 of the Children Act 1989, which states 'all the rights, duties, powers, responsibilities and authority which by law a

[106] Office for National Statistics, *Birth characteristics in England and Wales*: *2019* at www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/livebirths/bulletins/birthcharacteristicsinenglandandwales/2019.

[107] S Sharma and N Aggarwal, 'In vitro fertilization in older mothers: By choice or by law?' (2016) 7 *Journal of Mid-life Health* 103.

[108] Cusworth et al (n 16).

[109] Eekelaar (n 41).

[110] Under the Human Embryology and Fertilisation Act 2008, s 33, the legal mother is the gestational mother, regardless of whether she is the biological parent. Under pt 2 of the Act, circumstances in which a man or woman can be regarded as the child's legal parent are provided for.

[111] Children Act 1989, s 3(1).

parent of a child has in relation to the child and his property'. Grandparents do not enjoy the same protected status, despite the existence of a genetic connection.[112] The Court of Appeal has observed that 'manifestly grandparents are not on equal footing with parents'.[113] This highlights the fact that, during the court process, parents' interests will usually be afforded more weight than grandparents' interests.

The weight that should be attached to the relative interests of natural parents versus others, such as grandparents, has, according to Everett and Yeatman, 'vexed' the courts for years.[114] Historically, the courts applied the natural parent presumption, which assumed that children would be better off with their parents.[115] In the oft-quoted Court of Appeal decision of *Re D (Care: Natural Parent Presumption)*,[116] rather than grant residence to the grandparent, the court favoured the father, despite his having a questionable background, including a history of drug abuse. In the House of Lords[117] decision in *Re G (Children)*,[118] Baroness Hale also placed a strong emphasis on the biological tie between the children and their mother, although the importance of 'relationality' is implicit within her observations about wider familial connections beyond the traditional 'nuclear' networks:

> The knowledge of that genetic link may also be an important (although certainly not essential) component in the love and commitment felt by the wider family, perhaps especially grandparents, from which the child has so much to gain.[119]

In fact, both the common law and statutory frameworks are weighted heavily in favour of parents. The importance of parental status is also reflected in the statutory presumption in favour of parental involvement in the Children and Families Act 2014, section 11 of which states that the court is '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'. However, doubt has been shed on the weight to be placed on the interests of parents. The courts have lately indicated that there is no 'broad natural parent presumption'[120] that children will always be better off living with their parents; nor is there a presumption for a child to be brought up by a member of the natural family,[121] such as a grandparent. There are those, such

[112] *Re B (A Child)* (n 102).
[113] ibid [13].
[114] K Everett and L Yeatman, 'Are Some Parents More Natural than Others?' (2010) 22 *Child and Family Law Quarterly* 290.
[115] *Re KD (A Minor) (Ward: Termination of Access)* [1988] 1 All ER 577.
[116] *Re D (Care: Natural Parent Presumption)* [1999] 1 FLR 134. For further discussion of this case and the natural parent presumption, see J Fortin, 'Re D (Care: Natural Parent Presumption) Is blood really thicker than water?' (1999) 11 *Child and Family Law Quarterly* 435.
[117] The final court of appeal in the UK is now the Supreme Court.
[118] *Re G (Children)* [2006] UKHL 43.
[119] ibid [33].
[120] *Re E-R (A Child)* [2015] EWCA Civ 405 [31]. See also *Re B (A Child)* [2009] UKSC 5.
[121] *Re H (A Child)* [2015] EWCA Civ 1284; *Re W (A Child)* [2016] EWCA Civ 793; *A v B and C* [2018] EWHC 3834 (Fam).

as Fortin, who have questioned the emphasis placed on genetic (or at least 'legal') parents over others.[122] Taylor has argued that it can be problematic to emphasise biological connections, stating that '[s]uch presumptions risk distorting children's welfare by emphasising biology over practical care'.[123] Indeed, according to Taylor, the law takes an 'ambivalent'[124] and 'outdated'[125] approach towards grandparents, despite their importance in children's lives.

Grandchildren typically have stronger relationships with grandparents related to the resident parent.[126] In many cases, it is the mother who will impede and restrict contact with the father and/or the (typically) paternal grandparents.[127] The situation can potentially be reversed in situations where fathers act as the primary carers.[128] It can also vary due to the rising numbers of gay and lesbian households.[129] In 2019, there were 212,000 same-sex families in the UK, having increased by 40 per cent since 2015.[130] This increase may mean that, in time, the balance of maternal versus paternal grandparents losing contact with the children changes, with the incidence of two maternal or two paternal grandparents also increasing. Furthermore, the increasing number of gay and lesbian parents may mean that the usual dispute 'framework' is complicated by additional matters, such as whether grandparents whose son has acted as a 'sperm donor'[131] for lesbian couples, or grandparents who are not 'genetic', have a claim equal to that of grandparents in 'divided' 'nuclear' family disputes. This could include, for instance, 'step-grandparents'.

There are, indeed, cases where the grandparent/grandchild relationship has been put before parents' interests, in furtherance of a child's welfare. The legal framework is largely geared towards prioritising the protection and promotion of the 'nuclear' family – whether 'united' or 'divided'. Bendall and Harding note, for example, that the legal framework on civil partnership was based on the marriage legal framework.[132] The legal framework on parenthood is likewise

[122] Fortin (n 116). See, also L Yeatman, 'Lesbian Co-Parents: Still Not Real Mothers' (2013) 43 *Family Law* 1581, 1587.
[123] Taylor (n 67) 230.
[124] ibid.
[125] ibid 231.
[126] S Westphal, A Poortman and T Van Der Lippe 'What About Grandparents? Children's Post-divorce Residence Arrangements and Contact with Grandparents' (2015) 77 *Journal of Marriage and Family* 424.
[127] L Dickson, 'Grandparents and contact – what's the solution?' (2019) 49 *Family Law* 1091. See, eg, *Re B (Transfer of Residence to Grandmother)* (n 103).
[128] A Tavares, C Crespo and MT Ribeiro, 'What Does it Mean to be a Targeted Parent? Parents' Experiences in the Context of Parental Alienation' (2021) 30 *Journal of Child and Family Studies* 1370.
[129] Office for National Statistics, *Families and Households in the UK*: *2019* at www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/families/bulletins/familiesandhouseholds/2019.
[130] ibid.
[131] *Re G (A Child)* [2018] EWCA Civ 305.
[132] C Bendall and R Harding, 'Heteronormativity in Dissolution Proceedings: Exploring the Impact of Recourse to Legal Advice in Same-Sex Relationship Breakdown' in E Brake and L Ferguson (eds), *Philosophical Foundations of Children's and Family Law* (Oxford, Oxford University Press, 2018) 134.

based on the norm of a heterosexual 'nuclear' family. Consequently, the notion of 'grandparenthood' has been largely ignored. Herring states the present position succinctly:

> The current approach of the law (on parenthood) is based on the heterosexual married model. The requirement that a child has one father and one mother reinforces that as a norm for parenthood.[133]

Herring advocates departing from the 'nuclear' norm to improve the recognition of a network of people who play roles in a child's family.[134] We support this type of 'relational' approach, albeit that we are less optimistic than Herring about the law's capacity to achieve it.

F. What Prospects Does the Legal System Hold for Accommodating 'Relationality'?

We submit that it is difficult to conceive of this kind of more connected approach being adequately accommodated within the legal structures of England and Wales. In any event, there has been little appetite to do so. The UNCRC (through, for example, the 'best interests' principle in Article 3) recognises the importance of parents and the wider community, and the possibility that parental, and even grandparental, interests might conflict with those of the child.[135] Although ratified by the UK in 1989, the Convention has still not been incorporated into English legislation, and there has been 'pessimism' around the possibility of this happening in the foreseeable future.[136] Turning to the Children Act, in terms of the assessment of what is within the concept of the 'welfare' of the child under section 1, Herring and Foster have claimed that the courts will 'typically follow the course of action which best promotes the interests of the child, viewed as an atomistic entity'.[137] Regardless, they argue that it is not desirable, nor even possible, to view children's interests in isolation from those of their parents, any other children, or even the wider community.[138] This is particularly the case if we take the perspective that all our lives are inherently interconnected and interdependent, and that the rights and interests of children and their carers are intertwined.[139] Herring and Foster suggest it to be 'absurd' to imagine it as feasible to break off the interests of one family member from another due to that interconnection: 'In family life, and

[133] Herring (n 4) 157.
[134] ibid.
[135] C Henrikson and A Bainham, *The Child and Family Policy Divide: Tensions, Convergence and Rights* (York, Joseph Rowntree Foundation, 2005).
[136] S Davey, *A Failure of Proportion: Non-consensual adoption in England and Wales* (Oxford, Hart Publishing, 2020) 28.
[137] Herring and Foster (n 26) 491.
[138] ibid 480.
[139] J Herring, *Caring and the Law* (Oxford, Hart Publishing, 2014).

particularly in caring for those who lack capacity, "I" and "you" become so intermingled that it is impossible to force them apart.'[140]

To follow this line of thinking, within intimate relationships, 'the boundaries between selves break down'.[141] A judge who conducts an assessment by taking a person outside of their social context will reach an incorrect conclusion, because that context is 'inextricably bound up' with what that person is.[142] It is arguable, therefore, that the courts should adopt a broader approach towards the 'welfare' principle, given that it is only possible to properly consider a child's well-being by also acknowledging the network of relationships within which that child lives.[143]

The focus of Herring's work here, though, is predominantly on the parent–child relationship (and so, how to account for the rights and interests of parents), and we argue that it would be challenging to extend this approach to include grandparents too. In this sense, the legal process is inadequately equipped to account for the intricacies of parenting/caring arrangements. A dilemma is posed particularly in terms of the fact that litigation requires that matters ultimately be adjudicated one way or another. Were the courts to try to 'balance out' the independent interests of both parents and grandparents, they would be faced with difficulties around weighing up interests that point in different directions. Under the UNCRC, in the case of conflict, decision makers are to analyse and weigh the rights of all of those concerned, bearing in mind that the right of the child to have their 'best interests' taken as a primary consideration means that those interests have high priority.[144] This entails that more weight is attached to what actions serve the child best. Yet in many cases it would be problematic were the interests of a grandparent, in relation to their grandchild, to outweigh those of the resident parent, as this would present a risk that they might overstep boundaries. Chapter 3 speaks to similar issues with respect to reproductive health decisions. Lindsey concludes that the courts should draw on prospective grandmothers' evidence simply to contextualise the decisions of prospective mothers, rather than taking into account the interests of the prospective grandmothers in themselves. However, of course, that kind of decision making can be contrasted with the present context, where the application made will relate directly to the grandparent.

Consequently, it might be possible to somehow attribute less weight to grandparents' interests than to those of the parents. Still, it would perhaps seem inappropriate to suggest that, for example, a father who has hitherto not been involved in his child's upbringing, and who suddenly shows an interest in contact, should be in a more advantageous position than a grandparent who has seen that child regularly and formed strong bonds with them. An issue would also be posed

[140] Herring and Foster (n 26) 489.
[141] ibid 487.
[142] ibid 494.
[143] ibid 481.
[144] Committee on the Rights of Children (2013) General Comment No 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (Art 3, para 1).

in terms of quantification. A key problem is that, in practice, 'parental responsibility', as defined in section 3(1) of the Children Act 1989, involves a variety of different tasks and has been criticised as being 'vague'.[145] In the absence of an agreed list, these tasks would seem to include, but not be limited to: bringing up the child on a day-to-day basis; having contact with them; determining and providing for their education and religion; and consenting to their medical treatment.[146] These tasks are often allocated in a fragmented way. Different people take on different responsibilities within different families, with some of the de facto tasks being performed by grandparents. Were the courts required to decide how much significance to allocate to each of these tasks to determine a grandparent's 'level' of interest, this would prove complex, time-consuming and potentially expensive. Accordingly, we make the case that the legal system is not the most suitable forum for preserving positive relationships between children and their grandparents.

IV. Mediation: A More Promising Option for Furthering Grandparents' Claims

We argue that relationships between children and their grandparents can be better promoted and protected outside of the court system, using mediation. Notably, within England and Wales (unlike in some jurisdictions), mediation is not court-based. Mediation can incorporate various functions, including those that are 'evaluative' and 'facilitative'.[147] Whereas 'evaluation' and 'facilitation' have been seen as binary opposites, Blakey has instead conceived of them as forming part of a 'continuum', in the sense that aspects of both may be present.[148] In their 'evaluative' capacity, mediators are themselves more likely to express opinions and to assist the parties in assessing the merits of the arguments. They adopt techniques that 'direct some or all of the outcome' of the matters before them.[149] It is recognised that, given the absence of publicly funded legal advice as a result of the Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) 2012, mediators now behave more 'evaluatively'.[150] Maclean and Eekelaar, for instance, have found that mediators frequently give information that moves parties towards a particular action.[151] However, in this section we are concentrating less on mediation's

[145] Brown (n 1) 137.

[146] N Lowe and G Douglas, *Bromley's Family Law*, 11th edn (Oxford, Oxford University Press, 2015).

[147] L Riskin 'Understanding mediators' orientations, strategies, and techniques: A grid for the perplexed' (1996) 1 *Harvard Negotiation Law Review* 7.

[148] R Blakey, 'Cracking the code: The role of mediators and flexibility post-LASPO' (2020) 32 *Child and Family Law Quarterly* 53.

[149] Riskin (n 147) 24.

[150] Blakey (n 148).

[151] M Maclean and J Eekelaar, *Lawyers and Mediators: The Brave New World of Services for Separating Families* (Oxford, Hart Publishing, 2016).

'evaluative' possibilities and more on its 'facilitative' role, as a way of encouraging greater 'relationality'. 'Facilitation' refers to the more traditional understanding of mediation, entailing a voluntary, confidential process within which participants seek to decide amongst themselves to resolve their disagreement with the help of a 'facilitator' – a mediator. In addition, we see promise in mediation's 'transformative' capacity, through which it can bring about an 'internal move in participants from an individualistic orientation to a balanced concern for self and others'.[152]

We identify two broad advantages to mediation, from a 'relational' perspective, when it operates in these ways. These are in terms of its less adversarial and confrontational nature, fostering greater cooperation between the parties, and also in terms of its capacity to depart from the 'heteronormativity' of the legal system. First, Huntington has emphasised that the court system is

> [b]ased on the same … system that was developed to address commercial disputes and the like. When this … approach is overlaid on families, [it] creates a win-lose dynamic that pits one family member against the other.[153]

Likewise, courts 'impose' a 'solution' upon the parties from 'above', adopting a 'one-size-fits-all approach' that does not account for important differences between family disputes and other types of legal matter.[154] These include the intense emotions that can be involved, and the potential need for the parties to continue to relate to one another after their dispute has concluded.[155] As against the court-based approach towards dispute resolution, mediation can instead 'support the parties to find their own solutions',[156] conferring flexibility and 'outcome control' on them.[157] Both sides are encouraged to negotiate and compromise to find an arrangement that everyone can live with, presenting the greatest chance that no one walks away feeling injustice and loss. The emphasis is more on reaching a position that the parties find 'acceptable', and on all parties getting something from the process.[158] This is rather than strictly adhering to notions of 'fairness' and 'justice' as they have been conceived of from a legal perspective, that is, as 'objectively pre-determined (and pre-determinable) and based on precedent and comparison with like for like cases'.[159] That aspect of mediation has been criticised,[160] not least in

[152] P Franz, 'Habits of a highly effective transformative mediation programme' (1998) 13 *Ohio Journal on Dispute Resolution* 1039, 1042.
[153] Huntington (n 7) 82.
[154] ibid.
[155] ibid.
[156] K Salminem, 'Mediation and the best interests of the child from the child law perspective' in A Nylund, K Ervasti and L Adrian (eds), *Nordic Mediation Research* (Cham, Springer, 2018) 209, 215.
[157] J Lindsey, *Reimagining the Court of Protection*: *Access to Justice in Mental Capacity Law* (Cambridge University Press, Cambridge, 2022).
[158] www.familymediationhelpline.co.uk, quoted in C Irvine 'ADR Professional: Mediation and social norms: A response to Dame Hazel Genn' (2009) 39 *Family Law* 351.
[159] Lindsey (n 157).
[160] H Genn, 'Civil Justice and ADR', Hamlyn Lecture, Edinburgh, December 2008.

the sense that at least one party might find themselves in a worse position having attended mediation than they might have done had they litigated.[161] There is, moreover, some debate as to how reflective this kind of understanding is of how mediation operates in 'reality'.[162] Nevertheless, it is arguable that, where adopting such an approach, mediation presents more opportunity for healing rifts and promoting better ongoing relationships between the disputing parties as well as with the child.

For grandparents, the potentially 'heated', divisive nature of legal proceedings is unlikely to improve, and may well exacerbate, already strained relationships with (and between) parents. This is important, because the relationship between grandparent and grandchild is itself interdependent on the relationship between child and parent, and cannot be viewed in isolation. As Herring highlights, 'the grandparent-grandchild relationship must … be seen as part of the network of interlocking family relationships'.[163] Where one or both of the parents object to a child's contact with their grandparent, that will impact the role that a grandparent will be able to perform (in much the same way as grandparents can themselves help to either strengthen or weaken the relationship between parent and child).[164] Equally, in the context of a more collaborative environment, there is a possibility of tackling those objections, which can result in greater involvement by grandparents in their grandchildren's lives.

It is appreciated that where the parties are determined not to engage with the process, mediation will not work. Getting parties into the same room may present a challenge in itself (although, notably, mediation can operate in separate physical spaces, via telephone calls, online meetings or in separate rooms within the same building).[165] However, in contrast to the 'nastiness and aggravating effects'[166] of the court system, mediation attempts to 'orient the parties towards reasonableness and compromise, rather than … vindication'.[167] Given that outcomes must be consensual, the 'punitive urge' that is often a feature of disputes could be 'tempered by pragmatism'.[168] Within court proceedings, participants can become combative and adopt a more individualistic view of the scenario at hand. They can be emboldened by their legal advice, seeing their way as the only way. In contrast, mediation encourages the parties to listen to, and appreciate, the other's viewpoint. This means that, ultimately, choices can be made based not just on one's own needs

[161] Lindsey (n 157).
[162] Irvine (n 158).
[163] Herring (n 29) 236.
[164] ibid.
[165] Family Solutions Group, '"What about me?" Reframing Support for Families following Parental Separation' (Family Solutions Group, 2020) 73.
[166] L Riskin, 'Mediation and lawyers' (1982) 43 *Ohio State Law Journal* 29, 33.
[167] T Grillo, 'The mediation alternative: Process dangers for women' (1991) 100 *Yale Law Journal* 1545, 1560.
[168] C Irvine, 'What do "lay" people know about justice? An empirical enquiry' (2020) 16 *International Journal of Law in Context* 146.

but also in light of what others have said.[169] It is in this respect that we argue that mediation can helpfully act 'transformatively', urging people to recognise other people's interests.[170] Mediation engages the 'neuroplasticity'[171] of the brain, helping to encourage rationality and communication, in addition to active listening and reflection on one's actions. This is in stark contrast to the adversarial process, which draws on the more primitive limbic system,[172] meaning that participants' responses are based on instinct rather than on thoughtful reflection.

The participants' discussions are particularly aided by the fact that lesser restrictions are imposed on the parties to mediation than in the legal context. A strict approach is adopted, in the context of legal proceedings, to what is relevant and 'sayable'. As Rosenberg has expressed it, 'the message that comes from the court is: "your wants and needs are irrelevant, except to the extent that we say otherwise"'.[173] Parties in court may also talk to each other through legal counsel (where instructed), becoming even further apart emotionally and often losing sight of the other's humanity in the process. In comparison, while mediation does not offer an alternative to counselling,[174] and while the focus is largely on problem solving, the parties are not 'silenced' in the way that they can be by the court process.[175] They are offered a more empowering opportunity to 'tell their stories'[176] and to have some validation of their perceptions and feelings.[177] Their defensive barriers, which obstruct agreement, can be lowered through the satisfaction of their 'natural need to be heard and understood'.[178] The participants are able to speak to one another directly in a 'safe space'[179] and, often for the first time, discuss the 'root' of the issue at hand. Mediation, where operating 'facilitatively', can '[f]acilitate … communication between the parties and empower … them … to articulate their own interests, concerns, needs and solutions, and to genuinely listen to and understand each other's'.[180] This enables the parties to have conversations around what has gone wrong in the past, and what might be improved in the future.

[169] Franz (n 152).

[170] R Baruch Bush and J Folger, *The Promise of Mediation*: *The Transformative Approach to Conflict* (San Francisco, CA, Jossey-Bass, 2004).

[171] This refers to 'the brain's ability to modify, change, and adapt both structure and function throughout life and in response to experience'. See P Voss et al, 'Dynamic Brains and the Changing Rules of Neuroplasticity: Implications for Learning and Recovery' (2017) 8 *Frontiers in Psychology* 1657.

[172] This is the part of the brain that processes emotions and memories. See V Rajmohan and E Mohandas, 'The limbic system' (2017) 49 *Indian Journal of Psychiatry* 132.

[173] J Rosenberg, 'In defence of mediation' (1991) 33 *Arizona Law Review* 467, 484.

[174] Gingerbread (2020) *Help When you Can't Agree* at www.gingerbread.org.uk/information/legal-help-and-responsibilities/help-when-you-cant-agree.

[175] J Nolan-Haley, 'Court mediation and the search for justice through law' (1996) 74 *Washington University Law Review* 47.

[176] A Davis and J Rifkin, quoted in J Nolan-Haley, 'Court mediation and the search for justice through law' (1996) 74 *Washington University Law Review* 47, 56.

[177] Rosenberg (n 173).

[178] Franz (n 152) 1051.

[179] T Tallodi, *How Parties Experience Mediation: An Interview Study on Relationship Changes in Workplace Mediation* (Dordrecht, Springer, 2019) p51.

[180] Salminem (n 156) 215.

The mediation process can also be used to protect and promote the 'voice' of the child, a right recognised and protected under Article 12 UNCRC. This can be done either directly or indirectly. Although still relatively uncommon,[181] it is possible to engage in 'child-inclusive' mediation, where the mediator speaks to the child alone and confidentially. Children are able to speak honestly about what they want, how they feel, who they want to spend time with and with whom they wish to live. This provides for a greater voice for children in a context where a child's 'right to be heard' has 'not sufficiently benefited children'.[182] The Family Solutions Group has advocated the wider use of 'child-inclusive' mediation, including the introduction of funding for it,[183] and a presumption in favour of listening to the voice of a child over the age of 10 in 'mediation and solicitor-led processes'.[184]

Whilst we would broadly support the more widespread use of a more 'child-centred' approach towards mediation, it is not a central purpose of this chapter to argue in its favour. Indeed, it is recognised that there is also a debate to be had as to whether the burden of responsibility for children to be involved in family decision making may be too onerous (although, of course, there is a distinction between giving the child a 'voice' and giving them a 'choice').[185] Even in the absence of the direct involvement of the child, though, where the parties are able to reach an agreement between themselves, mediation holds the capacity to '[r]eorient parties toward each other … by helping them to achieve a new perception of their relationship … that will redirect their attitudes and dispositions towards one another'.[186]

The focus is on establishing 'a degree of harmony through a resolution that will work best'[187] for all parties concerned. Where an agreement has been reached between, and accepted by, the parties, this will, in itself, be advantageous to the child. This is on the basis that it is beneficial for children to be raised in families whose members respect, and are able to cooperate with, one another. As is stated in the preamble to the UNCRC, 'the child … should grow up … in an atmosphere of happiness, love and understanding'. Enabling the parties to reach their own 'solution' to their dispute, on the basis of what they (rather than the law) perceive to be 'fair' and what is most congruent with their lives, offers a greater chance of success in the long run, with a higher likelihood of compliance.[188] This helps to put the dispute to rest once and for all, removing the need for enforcement (which, as is identified in section III, has frequently proved problematic for grandparents). Through the process of mediation, the parties can gain the skills to 'manage their

[181] J Smithson et al, 'The "child's best interests" as an argumentative resource in family mediation sessions' (2015) 17 *Discourse Studies* 609.

[182] For detailed discussion see A Daly, *Children, Autonomy and the Courts* (Leiden, Brill, 2017) 115.

[183] Family Solutions Group (n 165) 95.

[184] ibid 94.

[185] A Smith and N Taylor, 'Rethinking children's involvement in decision-making after parental separation' (2003) 10 *Childhood* 201.

[186] L Fuller, 'Mediation – Its forms and functions' (1971) 44 *Southern California Law Review* 305, 325.

[187] Riskin (n 166) 34.

[188] See, for instance, The Scottish Government, *An International Evidence Review of Mediation in Civil Justice* (Social Research Series, Edinburgh, 2019).

relationships in such a way as to lessen their future dependence upon lawyers'.[189] It can therefore help to 'induce learning and build bridges between parties'.[190] Mediation carries an additional benefit of potentially reducing the amount of time and cost involved in resolving disputes, in comparison to pursuing those disputes through the court process.[191] This takes some of the strain off the parties (which can have a knock-on impact on the children involved as well) and keeps the length of any interruptions in the relationship between grandparent and grandchild to a minimum. 'Strength and stability' are promoted in enabling the child to develop 'a secure attachment with a caregiver, [which] requires repeated, ongoing contact'.[192]

Moving on to the second broad advantage of mediation from a 'relational' perspective, it offers opportunities to break away from problematic norms that underpin family law. We do, of course, recognise that research has not supported the 'mythical' notion of the mediator as a completely 'neutral' entity, with it possible for mediators to 'actively influence' the sessions that they oversee.[193] This can pose difficulties in the sense that participants may 'mirror' any talk that is not neutral in nature.[194] Mediators with a legal background may particularly be more likely to adopt an approach driven by the law than those without one.[195] We have noted as well that, in the era post-LASPO, mediators are required to perform more of an assessment role (predicting court outcomes and 'reality testing' proposals), which requires greater awareness of the law.[196] However, the substantive law is at least conventionally viewed as not being dispositive in the process of mediation. Instead, it operates simply as a 'template' to show what might happen in a more formal legalistic setting.[197] As Nolan-Haley describes it, relatively 'free-standing normative standards govern' in the mediation context.[198] Where the parties order their affairs through the more private route of mediation, it is possible for them, to a greater extent, to 'opt out' of legal norms. This is because, for example, parties can use mediation to focus solely on resolving their problems, rather than concentrating on asserting their legal rights. This approach has been criticised by Genn[199] but, given the lack of legal rights that grandparents have in the context of the law,

[189] Riskin (n 166) 49.
[190] Tallodi (n 179) 4.
[191] S Bahr, 'Mediation is the answer: Why couples are so positive about this route to divorce' (1981) 3 *Family Advocate* 32.
[192] Huntington (n 7) 18.
[193] See, eg, D Kolb and K Kressel, 'The realities of making talk work' in D Kolb & Associates (eds), *When Talk Works: Profiles of Mediators* (New York, John Wiley & Son Inc, 1994); S Silbey, 'Mediation mythology' (1993) 9 *Negotiation Journal* 349.
[194] Smithson et al (n 181).
[195] J Lewis, *The Role of Mediation in Family Disputes* (Edinburgh, Scottish Office Central Research Unit, 1993).
[196] Blakey (n 148).
[197] Nolan-Haley (n 175) 56.
[198] ibid.
[199] H Genn, 'What is civil justice for? Reform, ADR, and Access to Justice' (2012) 24 *Yale Journal of the Law & Humanities* 397.

we argue it serves to level the playing field. Participants within mediation can determine their own outcomes in a less constrained, pre-determined way. They are able to reach outcomes that would be unlikely to be favoured, or may not even be possible, were the matter to be decided by a court.[200] Agreements can be reached that are simply beyond the law's scope.[201] As Irvine emphasises, self-determination is a 'driving value', and the parties are ultimately able to ignore any guidance from the mediator.[202]

Mediation, as is emphasised by Riskin, is less 'hemmed-in by … assumptions that dominate the adversarial process'[203] in this area, such as 'heteronormativity'. This 'heteronormativity' can be seen, as previously explained, in the plethora of legislative provisions that protect and promote the interests of parents over others (such as on 'parental responsibility' and the 'presumption of parental involvement'). A 'heteronormative' approach is also evident from the 'hurdle' of leave, which applies to grandparents but does not apply to parents in private law proceedings,[204] as well as in the reluctance to apply remedies (such as a change of residence) to protect the grandparent/grandchild relationship. The fact that parties can resolve their own matters within mediation, and prioritise what they, rather than the law, see as important, means that mediation presents a real chance to break away from the dyadic parenting norm that has been evident within the law and to accommodate greater diversity in family forms. It enables the protection of devalued and de-emphasised relationships that fall outside of the 'nuclear' model and yet which form an important part of children's identity. Having the ability to do this is particularly important in the context of enormously varying familial relationships and roles, which are, in any event, better suited to a more individualised form of decision making than the court process can offer.

We therefore argue that mediation offers greater prospects for promoting ongoing relationships between grandparents and grandchildren. This is in the sense that it allows greater significance to be placed on the caring roles that grandparents can perform (in addition to others who similarly do not fit neatly into the 'heteronormative' binary parenting model). In other words, mediation allows for greater emphasis on contemporary, and often complex, de facto relationships, rather than on the narrow range of relationships upon which the law has tended to focus.

[200] R Field and A Lynch, 'Hearing parties' voices in Coordinated Family Dispute Resolution (CFDR): An Australian pilot of a family mediation model designed for matters involving a history of domestic violence' (2014) 36 *Journal of Social Welfare and Family Law* 392.

[201] Lindsey (n 157).

[202] Irvine (n 162).

[203] Riskin (n 166) 34.

[204] Unless placement orders have been made under the Adoption and Children Act 2002, s 21. If so, a parent needs to apply for leave to apply for the revocation of the placement order and to oppose the making of an adoption order.

V. Conclusion

We have stressed in this chapter the central importance of grandparents in the lives of many children. Grandparents may have lived with, or have had substantial contact with, their grandchildren prior to separation or divorce. Research demonstrates that multi-generational bonds can, in fact, be more important than 'nuclear' ties for well-being and support over the course of children's lives.[205] Grandparents' importance may even extend onwards, becoming significant figures once their grandchildren reach adulthood.[206] Yet the law in this area has performed a significant role in minimising grandparents. In focusing on the 'heteronormative' binary model of the family, the legal system has not recognised or accommodated key societal developments, and we have expressed concern over its capacity to do so. This is not least given the adversarial nature of this system, and the difficulty of balancing interests in a context where 'a' decision is ultimately required to be produced. Mediation, in helping to break away from the norms of the law, offers some prospect of hope for those who are virtually unseen by the legal process. Mediation helps parties to identify all issues and needs, legal and non-legal, and to find a mutually satisfactory resolution. Given its possibilities for fostering a more 'relational' approach, we submit that mediation needs to be encouraged wherever possible in disputes involving grandparents. Empirical investigation is needed into grandparents' experiences of mediation 'on the ground', although currently data from family mediation outcomes tend not to be collected routinely. Nonetheless, the 2019 Family Mediation Council (FMC) statistics compiled from 122 participating mediators across 2,161 mediation sessions demonstrated full or partial agreement in approximately 70 per cent of these disputes.[207]

Whilst we recognise that mediation is already promoted via the compulsory attendance of a Mediation Information and Assessment Meeting (MIAM), this appears to have been insufficient, with uptake still being relatively low. A recent freedom of information request by the authors has revealed that, of the 1,916 child arrangement order applications made in 2019, a MIAM session was attended in only 622 cases,[208] and it is unknown how many of these were attended by the grandparents themselves.

More recently, the Ministry of Justice has introduced a scheme, to be administered by the FMC via individual mediators, that will provide a £500 voucher towards mediation for up to 2,000 eligible families, to be distributed on a

[205] Bengtson (n 70); D Coall et al, 'Interdisciplinary perspectives on grandparental investment: A journey towards causality' (2018) 13 *Contemporary Social Science* 159, 162.

[206] R Giarusso et al, 'Grandparent-adult grandchild affection and consensus. Cross-generational and cross-ethnic comparisons' (2001) 22 *Journal of Family Issues* 456.

[207] Family Mediation Council, *Family Mediation Survey Autumn 2019 Results* at www.familymediationcouncil.org.uk/2020/01/20/survey-shows-mediation-is-successful-in-over-70-of-cases.

[208] Ministry of Justice, freedom of information request, on 'child arrangements orders' (13 April 2021).

first-come-first-served basis. This, it is hoped, will encourage greater uptake, and will help to address the further difficulties in facilitating and enforcing contact that exist in the wake of the coronavirus.[209] We also hope that the introduction of 'no fault' divorce via the Divorce, Dissolution and Separation Act 2020 may help to reduce conflict between parents and make them more likely to engage with mediation, whether with each other or with grandparents. Time will tell.

We acknowledge that mediation is not the answer in every case. It can be unsuitable where there have been issues of domestic abuse, or where there is significant power imbalance between the parties (albeit that those with the least power and resources are also unlikely to fare well in the courts[210]). There may be issues outside of developing and maintaining relationships, such as decision making over religious beliefs, education or medical treatment, that are not appropriate matters for grandparental interference. We also appreciate that many see the aspect of 'choice', and people's ability to come 'voluntarily' to the process, as being one of mediation's key strengths.[211] Consequently, we are not suggesting that mediation should become compulsory. We are mindful, too, that there can be variation amongst mediators, and would support a move towards greater consistency in training programmes. We do, however, assert that there should be an even stronger steer towards mediation in private law children matters, especially when involving parties who fall outside of the 'nuclear' family. This makes sense in the context of the significant court backlog caused by the pandemic,[212] with the resultant delays potentially leading to parties' relationships deteriorating further.[213]

The challenge is to determine how to promote the use of mediation more effectively. We favour continuing to educate the public about the benefits of mediation via workshops mandated by court, such as the 'Separated Parents Information Programme',[214] as well as promoting its usage via the extension of initiatives such as the voucher scheme. We also support the exploration of funding for packages of mediation, legal advice and counselling,[215] where appropriate. Further consideration as to whether to make mediation agreements legally binding, as proposed by the Family Solutions Group,[216] may have the benefit of strengthening the status of mediation agreements. While significant sums are currently being channelled into CAFCASS and the high-conflict pathway,[217] resources would be better utilised on

[209] E Neil, R Copson and P Sorensen, *Contact During Lockdown: How are children and their birth families keeping in touch?* (London, Nuffield Family Justice Observatory/University of East Anglia, 2020).
[210] A Sarat, 'The law is all over: Power, resistance and the legal consciousness of the welfare poor' (1990) 2 *Yale Journal of Law & the Humanities* 343.
[211] E Richardson, 'The role of mediation in family disputes' *Law Gazette* (2021) at www.lawgazette.co.uk/practice-points/the-role-of-mediation-in-family-disputes/5107078.article.
[212] J Robey, 'It's time to consider making family mediation compulsory' *Family Law* at familylaw.co.uk/news_and_comment/it-s-time-to-consider-making-family mediation-compulsory.
[213] *Bergman v The Czech Republic* App no 8857/08 (ECtHR, 27 October 2011).
[214] CAFCASS, *Separated Parents Information Programme* (London, CAFCASS, 2017).
[215] Family Solutions Group (n 165) 70.
[216] ibid 83.
[217] CAFCASS, *High Conflict Child Arrangements Disputes Handbook* (London, CAFCASS, 2016).

these sorts of more proactive, rather than reactive, solutions. The judiciary could also use their powers to order mediation with greater frequency. Were judges encouraged by law to order mediation at an early stage in the process, this might serve to halt further court processes such as CAFCASS reports, expert reports and the provision of further evidence from parties, which tend to promulgate an unhelpful, adversarial mindset. Although the removal of the leave requirement is widely conceived of as the most effective way of assisting grandparents in private law children matters, it is merely a small symbolic step that still sets them onto a conflict-ridden path. We argue that, instead, a legal steer towards early judicial intervention could help steer the parties onto a more 'relational' route towards resolution. Such incremental steps would help to 'level the playing field' between parents and grandparents, serving to sidestep (and thereby challenge) the current approach within the law, which perpetuates the norm of the 'nuclear' family.