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## **“Grandparents and Kinship Carers Act or Granny ‘Annex’? Waiting for the Government”<sup>1</sup>**

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### Abstract

The Children Act 1989 does not provide sufficient protection to the rights of grandparents and kinship carers. Grandparents, and other non-parental attachment figures, lack procedural and substantive legal rights within English Law. This leads to difficulty in protecting the relationship between children and non-parents (such as grandparents) when children are taken into care, or parents choose to terminate these relationships. Whilst challenges of this nature are often faced by grandparents, they are representative of challenges encountered by other blood family members and step-relatives. Reform could be achieved via the enactment of a Grandparents and Kinship Carers Act which would amend three essential provisions of the Children Act 1989: s1 on children’s welfare including the welfare checklist, s3 on parental responsibility and s10 on the leave requirement.

The proposed Act could make changes aimed at benefiting a wide range of social and cultural networks enjoyed by children, including the grandparent/grandchild relationship. Doing so would have the benefit of promoting inclusivity within the existing law. First, it is proposed that the Children Act 1989, s1(3) welfare checklist should be amended to make specific reference to the interests of ‘relatives’ such as grandparents, in line with the Adoption and Children Act 2002, s1(4)(f). Secondly, the language of the Children Act 1989 could be amended, to be more inclusive of those closely involved in children’s lives, such as grandparents. Hence s3 could be made more ‘inclusive’, to reflect greater diversity in family forms, via amending ‘parental responsibility’ and replacing it with ‘welfare responsibility’. Finally, s10 could be amended to remove the leave requirement for grandparents.

### 1. Introduction

Millions of children form significant, beneficial, emotional attachments to a range of individuals within the family, in addition to (or instead of) their parents. Aunts and uncles, brothers and sisters, cousins, step-parents, grandparents and others have differing roles to play, depending on the specific family circumstances. Relatives, such as grandparents, may become kinship carers (a last port of call before children would be removed into the care system) or have subsidiary (but still significant) responsibilities in children’s lives via regular contact. This chapter seeks to explore the limiting, and outdated, aspects of the Children Act 1989, such as the provisions on the welfare checklist<sup>2</sup>, parental responsibility<sup>3</sup> and the need for most grandparents to obtain leave<sup>4</sup> before commencing legal proceedings. Sections 1, 3 and 10, in their current form, are non-inclusive, outdated and do not fit in well with subsequent child law statutes such as the Adoption and Children Act 2002.<sup>5</sup>

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<sup>2</sup> Children Act 1989, s1(3).

<sup>3</sup> *ibid*, s3.

<sup>4</sup> *ibid*, s10.

<sup>5</sup> The core Act of Parliament in England and Wales, which pertains to adoption proceedings).

The focus of this chapter is on grandparents, since research demonstrates that it is largely grandparents who take on the responsibility as kinship carers.<sup>6</sup> Disputes between parental and non-parental figures, due to breakdown in contact, often occur between grandparents and parents. Moreover, most academic and political discussion in this sphere has focused on grandparents, rather than relationships between children and other attachment figures. While this chapter will focus on the challenges faced by grandparents, these challenges can be seen as representative of the hurdles faced by other attachment figures in a child's life, in the face of a framework which does not comfortably reflect the complexity of the 21<sup>st</sup> century family. Many of the points made within this chapter will focus on increasing legal protection for all family forms, via considering the example of grandparent/grandchild relationships. It is important to realise that there are positive and empowering relationships between children and attachment figures, within a familial setting, which may warrant increased recognition and protection via suitable legal frameworks.

Although grandparents have long had importance to children and parents, changes such as increased rates of divorce mean that it is common for relationships between grandparents and grandchildren to become fractured. It is not uncommon too, for parents to remarry and children may become part of reconstituted family units. This means that children may lose out on vitally important support links, despite developing and maintaining new relationships with step-parents and step-siblings. The fact is that many children are experiencing greater diversity in family forms in the 21<sup>st</sup> century. Yet, despite the importance grandparents have, they often lack the 'tools' to protect the welfare of their grandchildren, including the continued enjoyment of mutually supportive relationships. It is argued that legal reform to protect relationships such as those between the grandparent and grandchild is needed to reflect social changes which have already occurred.

## 2. The 21<sup>st</sup> century shift in family patterns: the increasing role of grandparents in children's lives

The Children Act 1989 is an important, comprehensive legal document which has, in many ways, stood the test of time. It is a broad piece of legislation which covers a myriad of issues pertaining to public and private law matters. It is, however, over thirty years of age at the time of writing and has been amended several times including vis-à-vis the Adoption and Children Act 2002 and the Children and Families Act 2014. Further legal reform to the Children Act 1989 is required because of the distinct shifts in family patterns during the 21<sup>st</sup> century which have not been reflected in these amendments. Clarke and Roberts suggested back in 2002, 'Demographic, social and economic changes have affected the living arrangements and family experiences of both parents and children'.<sup>7</sup> Over 20 years later, there have been greater shifts in living arrangements and family forms. However, despite this increased diversity in family forms, successive governments' reform agendas have suffered from tunnel vision. According to Brown, most legal reform, and changes in social 'norms', have centred around the 'nuclear' family,<sup>8</sup> rather than an extended model. This is despite the fact that, arguably, '[the] nuclear family is only sustainable with the support of the wider

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<sup>6</sup> I Zuchowski, S Gair, D Henderson and R Thorpe, 'Convenient Yet Neglected: The Role of Grandparent Kinship Carers' [2019] 49 *The British Journal of Social Work* 615.

<sup>7</sup> L Clarke and C Roberts, 'Policy and rhetoric: The growing interest in fathers and grandparents in Britain' in Carling, A, Duncan, S, and Edwards, R, *Analysing Families: Morality and Rationality in Policy and Practice* (London, Routledge, 2002) 164.

<sup>8</sup> A Brown, *What is the Family of Law? The Influence of the Nuclear Family* (Oxford, Hart, 2020).

family around it’.<sup>9</sup> In fact, grandparents have prominence in 21<sup>st</sup> century western family life,<sup>10</sup> and provide a range of ‘inter-generational transfers’.<sup>11</sup> These include money,<sup>12</sup> time<sup>13</sup> via child-care while both parents work,<sup>14</sup> and moral and practical support, especially in single-parent families.<sup>15</sup> Grandparents, in particular, perform important functions, for many children living with their parents, as providers of care<sup>16</sup> and mentors.<sup>17</sup> Grandparents may also intervene where a child is at risk of significant harm and, in circumstances where children cannot remain with their parents, they may step in as alternative carers.

Herring and Choudhry note that, despite the increased significance of grandparents, it is ‘surprising’<sup>18</sup> that grandparents have no special status in general. They describe it as an ‘uphill task’<sup>19</sup> for grandparents to argue their case in the context of private law proceedings. In contrast, Douglas argues that there is insufficient ‘evidence’ to support providing grandparents with ‘special status’<sup>20</sup>. Regardless of one’s perspective on whether grandparents ought to be afforded ‘special status’, the loss of grandparent relationships may detrimentally affect children’s welfare. When grandparents are denied access to their grandchildren, the effect on the children themselves can be harmful. Nigel Huddleston MP has observed that:

‘Large numbers of children in family breakdowns are left very sad and confused about the sudden loss of contact with their grandparents, which in many cases goes completely and utterly unexplained. The children are then left feeling that they have been unloved by their grandparents or believe that their grandparents simply did not want to see them anymore.’<sup>21</sup>

Similarly, the loss of these relationships in the wake of breakdown in grandparent/parent relationships is harmful to grandparents themselves. The position has been summarised by Nigel Huddleston, MP:

‘[T]he family dynamic that is all too often overlooked is that between grandparents and their grandchildren. When access to grandchildren is blocked, some grandparents call it a kind of living bereavement. Unlike some other countries, grandparents in the UK have no automatic rights to see their grandchildren, and vice versa.’<sup>22</sup>

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<sup>9</sup> Grandparents Plus, *Rethinking Family Life: exploring the role of grandparents and the wider family* (London, Grandparents Plus, 2009) 2.

<sup>10</sup> A Buchanan and A Rotkirch, ‘Twenty-first century grandparents: global perspectives on changing roles and consequences’ [2018] 13 *Contemporary Social Science* 131.

<sup>11</sup> D Coall, S Hilbrand, R Sear and R Hertwig, ‘Interdisciplinary perspectives on grandparental investment: a journal towards causality’ [2018] 13 *Contemporary Social Science* 159 at 162.

<sup>12</sup> (n 9) 4.

<sup>13</sup> (n 11) 159.

<sup>14</sup> J Wheelock and K Jones, ‘Grandparents Are the Next Best Thing: Informal Childcare for Working Parents in Urban Britain’ [2002] 31 *Journal of Social Policy* 441.

<sup>15</sup> S Harper and I Ruicheva, ‘Grandmothers as Replacement Parents and Partners: The Role of Grandmotherhood in Single Parent Families’ [2010] 8 *Journal of Intergenerational Relationships* 219.

<sup>16</sup> G Di Gessa, K Glaser and P Zaninotto, ‘Is grandparental childcare socio-economically patterned? Evidence from the English longitudinal study of ageing’ [2022] *European Journal of Ageing* 763.

<sup>17</sup> J Michalek-Kwiecien, ‘The Mentoring Relationship with the Closest Grandparent and Identity Processes Among Emerging Adult Grandchildren in Poland: The Role of Perceived Grandparents’ Perspective Taking’ *Journal of Adult Development* (2022) <https://doi.org/10.1007/s10804-022-09429-0>

<sup>18</sup> S Choudhry and J Herring, *European Human Rights and Family Law* (Oxford, Hart, 2010) 271.

<sup>19</sup> *ibid.*

<sup>20</sup> G Douglas, ‘Re J (Leave to Issue Application for Residence Order) - Recognising grandparents’ concern or controlling their interference?’ [2003] 15 *Child and Family Law Quarterly* 103 at 103.

<sup>21</sup> HC Deb, 2 May 2018, vol 640, col 171WH.

<sup>22</sup> *Ibid.*, 170WH.

Despite the importance of the grandparent/grandchild relationship to many children, especially for those grandparents who act as permanent carers for their grandchildren, English Law does not recognise or protect their status and aspects of the Children Act 1989 such as s1, s3 and s10 can be argued as non-inclusive in the 21<sup>st</sup> century. Unfortunately, English Law has often been slow to recognise and protect the existence of certain family forms. Lesbian and gay couples, for instance, have in the past faced difficulty in having important aspects of identity<sup>23</sup> and relationships recognised and protected due to a lack of ‘inclusivity’ in the law. They have struggled to be recognised within legal frameworks, first, as couples<sup>24</sup> and, secondly, as parents.<sup>25</sup> Hayward, in his chapter, has considered similar challenges faced by cohabiting couples due to differential treatment, following family breakdown, when compared to married couples. While gay and lesbian families struggled to be acknowledged due to prejudice, grandparents face a similar quandary. Only the lack of legal recognition they face stems from poor social awareness of their importance and because the law has not ‘kept up’ with social norms. While the dilemmas suffered by gay and lesbian families are distinct, grandparents and other kinship carers face a similar quandary in terms of the lack of legal protection of important relationships. The law fails to provide either the ‘recognition’, or the ‘tools’ needed to protect the grandparent/grandchild relationship (while simultaneously acknowledging the need to protect children from the risk of significant harm or significant harm).

### 3. Consensus on the need to protect children’s relationships with their grandparents

There are few empirical UK-based studies on the grandparent/grandchild relationship,<sup>26</sup> with most of the research having been undertaken in the USA.<sup>27</sup> Despite the relative paucity of UK-based empirical legal research, there has been valuable dialogue between the academic community,<sup>28</sup> non-governmental organisations<sup>29</sup> and successive governments<sup>30</sup> on grandparents. This discussion has focused on whether legislative reform could improve protection of the grandparent/grandchild relationship. This existing lack of protection can make it challenging for grandparents to safeguard relationships with their grandchildren and intervene, when required, to protect and promote children’s welfare when they are at risk of

<sup>23</sup> N Hudson-Sharp and H Metcalf, *Inequality among lesbian, gay, bisexual and transgender groups in the UK: a review of evidence* (London, NIESR, 2016).

<sup>24</sup> C Bendall, ‘A ‘divorce blueprint’? The use of heteronormative strategies in addressing financial remedies on same sex partnership dissolution’, [2016] 31 *Canadian Journal of Law and Society* 267.

<sup>25</sup> A Tryfonidou, ‘The parenting rights of same-sex couples under the European law’ [2020] 25 *Marriages, Families and Spirituality* 176.

<sup>26</sup> Such as: N Ferguson, G Douglas, N Lowe, M Murch and M Robinson, *Grandparenting in Divorced Families* (Bristol, Policy Press, 2004).

<sup>27</sup> (n 7) 173. See, for example: M Harrington Meyer and A Kandic, ‘Grandparenting in the United States’ [2017] 1 *Innovation in Aging* 1; R Margolis and A Verdery, ‘A Cohort Perspective on the Demography of Grandparenthood: Past, Present and Future Changes in Race and Sex Disparities in the United States’ [2019] 56 *Demography* 1594.

<sup>28</sup> M Purnell and B Bagby, ‘Grandparents’ rights: Implications for family specialists’ (1993) 42 *Family Relations* 173; L Spitz, ‘Grandparents: their role in 21st century families’ [2012] *Fam Law* 1254.

<sup>29</sup> (n 9); Grandparents Plus, *Kinship Care State of the Nation Survey* (London, Grandparents Plus, 2020). See also discussion in: F Kaganas, ‘Grandparents’ Rights and Grandparents’ Campaigns’ [2007] 19 *Child and Family Law Quarterly* 17.

<sup>30</sup> Ministry of Justice, *Family Justice Review* (London, Ministry of Justice, 2011); House of Commons, *Children: Grandparents and others who require leave of the court to apply for access*, 2016 (HC Briefing Paper, Cm 07574, 2016) 8.

significant harm. The consensus for reform is apparent from the work and high-profile campaigns of organisations such as Kinship,<sup>31</sup> Grandparents Apart UK<sup>32</sup> and the Bristol Grandparents Support Group.<sup>33</sup> This can also be seen via politicians' attempts to introduce legal reform via private members bills, within Parliament.<sup>34</sup> Where the disagreement lies, however, is whether it is desirable to address this lack of recognition at all and, assuming that such reform is desirable, the approach to take in reforming the law.

Specifically, assuming that grandparents ought to be more explicitly recognised within legal frameworks, should reform be modest and focus on procedural aspects of the law (such as the leave requirement and legal aid) or, alternatively, should a bespoke framework be created to protect those who have undertaken the full-time care of their grandchildren? The main suggested options for reform have included the following:

- A legal presumption in favour of contact.<sup>35</sup>
- Removal of the leave requirement before a court application can be made.<sup>36</sup>
- Easier access to legal aid for grandparents.<sup>37</sup>
- Statutory duties for local authorities to provide financial and practical support.<sup>38</sup>

The options above focus on distinct issues within 'private' law (grandparents versus parents) or 'public' law (grandparents versus the state), rather than opting for a holistic approach, which is advocated for within this chapter. Organisations such as Grandparents Apart UK have argued for procedural changes focusing more on disputes between parents and grandparents.<sup>39</sup> Organisations, such as the Family Rights Group<sup>40</sup> and Kinship,<sup>41</sup> have tended to focus on the needs of grandparents in the context of full-time caring roles. Reforms which focus on the law in such a narrow way overlook that many cases in this context have a 'hybrid'<sup>42</sup> element. In public law proceedings (where a child is subject to a care order), for instance, a grandparent or kinship carer may use private law to apply for a child arrangements order.<sup>43</sup> In private law cases (where a grandparent seeks contact with a grandchild), public law issues may arise where there are concerns about the child's welfare, while under the parent's care. Such issues could include, for instance, whether a care or supervision order is

<sup>31</sup> Kinship, *Out of the Shadows: A vision for kinship care in England* (London, Kinship, 2022).

<sup>32</sup> Grandparents Apart UK, *Grandparents Speak Out for Vulnerable Children* (Glasgow, Grandparents Apart UK, 2016).

<sup>33</sup> The Bristol Grandparents Support Group – <https://bristolgrandparentssupportgroup.co.uk>

<sup>34</sup> 'Kinship Care Bill' <https://bills.parliament.uk/bills/3308>

<sup>35</sup> F Kaganas and C Piper, 'Grandparent contact: another presumption?' [2020] 42 *Journal of Social Welfare and Family Law* 176.

<sup>36</sup> R Taylor, 'Grandparents and grandchildren: Relatedness, relationships and responsibility' in Clough, B and Herring, J, *Ageing, Gender and Family Law* (Abingdon: Routledge, 2018) 230 at 230.

<sup>37</sup> L Dickson, 'Grandparents and contact - what's the solution?' [2019] *Fam Law* 1091.

<sup>38</sup> In addition to the expenses faced by grandparents in the provision of care for grandchildren, research demonstrates increases in financial transfers from grandparents to grandchildren: B Beach, *Grandparental Generosity: Financial transfers from grandparents to grandchildren* (London, ILC, 2013). See also: (n 25) 11, e.g. via a 'Kinship Care' Act. Note that a provision providing for the extension of parental leave to grandparents is a measure of support currently passing through the Houses of Parliament as the Kinship Care (Parental Leave) Bill, which as of 28/06/2021 has not yet been published on the website for the Houses of Parliament.

<sup>39</sup> Grandparents Apart UK <https://www.grandparentsapart.co.uk>

<sup>40</sup> Family Rights Group, *First Thought Not Afterthought: Report of the Parliamentary Taskforce on Kinship Care* (London, Family Rights Group, 2020).

<sup>41</sup> Kinship, *The Cost of Loving: Annual survey of kinship carers 2022* (London, Kinship, 2022).

<sup>42</sup> A Bainham, 'Private and public children law: an under-explored relationship' [2013] *Child and Family Law Quarterly* 138.

<sup>43</sup> Children Act 1989, s8.

required.<sup>44</sup> It is argued within this chapter that a more holistic approach needs to be taken towards legislative reform, which will tackle issues in both private and public law contexts. The reform proposed, therefore, takes a more holistic approach towards the grandparent/grandchild relationship, as well as exploring the need for the Children Act 1989 to become more inclusive.

Moreover, while these proposals all provide grandparents with important tools, they fail to tackle a key critique of existing child law previously identified by Bendall and Davey.<sup>45</sup> Principally, they are not grappling with the fact that legal frameworks, such as the Children Act 1989, are based on a largely ‘nuclear’ ‘binary’ model of care. An argument can be made that ‘piecemeal’ reform, tackling one of these issues, might be better than no reform at all. Yet, such reform would be a lost opportunity to effect more significant changes which would benefit grandparent/grandchild relationships, in addition to other important familial relationships. It is argued, then, that substantial reform to legal frameworks is needed. Reform needs to attend to the ‘bigger picture,’ and to maximise the benefits that grandparents (or other kin) may have to their grandchildren’s welfare, regardless of their specific involvement in a child’s life. Such reform is also needed to make the law more inclusive and in line with other Acts of Parliament such as the Adoption and Children Act 2002.

#### 4. The proposal: a holistic approach to reform through minor changes to the Children Act 1989

##### *Inclusivity within the Children Act 1989*

In this chapter, it is argued that legislative reform to protect the grandparent/ grandchild relationship ought to pave the way to consider other sorts of beneficial relationships. This chapter seeks to argue that the Children Act 1989 should be amended so that it is more ‘inclusive’ and reflects the changing face of the ‘family’ in the 21<sup>st</sup> century. Moreover, such legal reform ought to address both private *and* public law matters, rather than provide piecemeal reform which would fail to fully address complex cases, involving diverse relationships which do not fit the ‘binary’ model referred to above. Similarly, it is challenging to pigeonhole cases concerning children’s lives into the ‘public’ law or ‘private’ law system, in stark contrast to family law disputes between adults over matters such as divorce and finance. Bainham has, in fact, observed that the family justice system faces difficulty with ‘hybrid’ cases which have both private and public law elements.<sup>46</sup> Such reform ought, too, to be mindful of increased familial diversity in the 21<sup>st</sup> century.

It is not suggested that it is time to ‘reinvent the wheel,’ but that it is time for the wheel to be revisited, due to the diverse range of relationships which impact on children’s lives (including their relationships with grandparents). Modern families are complex, inter-woven and often blended. As Davey and Bendall note, different family forms sit uneasily with existing legal provisions, and this is particularly true as regards acknowledging the importance of the grandparent/grandchild relationship.<sup>47</sup> The discussion in this chapter will, therefore, outline the main proposals for change and consider their potential effectiveness. In doing so, it will

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<sup>44</sup> *ibid*, s31.

<sup>45</sup> C Bendall and S Davey, ‘The ‘grandparent problem’: Encouraging a more relational approach towards child arrangements via mediation’ in S Davey and J Lindsey, *Grandparents and the Law: Rights and Relationships* (London, Hart, 2023).

<sup>46</sup> (n 42).

<sup>47</sup> (n 45).

explore how ‘holistic’ legal reform, via minor changes to the Children Act 1989, could provide greater protection for diverse family forms and relationships, including the grandparent/grandchild relationship. The chapter will demonstrate that any proposed reforms to the current state of affairs ought to be ‘inclusive’ and reflect the diversity in family units, specifically the importance of grandparents and other extended kin in children’s lives. It will also consider why existing legal frameworks, such as the Children Act 1989, need to be reviewed and potentially reformed, to afford better protection to children’s meaningful relationships.

Protection of the grandparent/grandchild relationship is an area of inchoate policy which has quietly simmered on the backburner for many years. Several changes have been proposed to the existing law and policy pertaining to grandparents, which have been repeatedly ignored by successive governments. There have been several high-profile attempts to introduce reform.<sup>48</sup> We have seen organisations such as Kinship (formerly known as Grandparents Plus<sup>49</sup>) and the Family Rights Group, more recently, campaign for change. This section will evaluate specific reforms suggested over the last decade and consider the following: the creation of a statutory presumption in favour of grandparental contact; removal of the leave requirement; reform to the provision of legal aid; and the creation of statutory duties of financial and practical support for grandparents. In doing so, this chapter will evaluate the appropriateness of incorporating each of these proposals within a Grandparents and Kinship Carers Act, with the aim of achieving reform that is both holistic and inclusive.

### *Statutory Presumption in favour of Grandparental Contact*

One solution to the lack of legal recognition and protection of the grandparent/grandchild relationship, has been perceived to be the development of a new ‘grandparent’ presumption. In fact, the creation of a statutory presumption of parental involvement<sup>50</sup> under the Children and Families Act 2014, s11, has led to suggestions of a similar presumption in favour of grandparental contact.<sup>51</sup> The presumption of parental involvement has the effect that, in court proceedings, the court must give regard to the presumption of ‘involvement’ of both parents in a child’s life. This presumption was the culmination of years of government discussion and academic debate about whether there ought to be a presumption in favour of shared residence in custody disputes between parents.<sup>52</sup> This approach was rejected in favour of a broad presumption in favour of parental involvement, which provides that:

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

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

A similar presumption with respect to grandparents would undoubtedly strengthen their legal status and provide protection to grandparents who face difficulty in maintaining contact with

<sup>48</sup> Including via the Kinship Care Bill which is currently passing through the Houses of Parliament.

<sup>49</sup> Grandparents Plus, *Kinship Care: State of the Nation* (London, Grandparents Plus, 2017).

<sup>50</sup> Children and Families Act 2014, s11.

<sup>51</sup> J Stather, ‘Enhancing the rights of grandchildren to see their grandparents’ <https://www.familylawweek.co.uk/site.aspx?i=ed190342> (last accessed 08/07/2021).

<sup>52</sup> A Newnham and M Harding, ‘Sharing as caring? Contact and residence disputes between parents’ [2016] 175 *Child and Family Law Quarterly* 175.



their grandchildren, particularly after parental separation and/or divorce.<sup>53</sup> As Nigel Huddleston MP observes:

‘The estrangement of grandchildren from grandparents happens for a wide variety of reasons: divorce, bereavement, marital breakdown or just a falling out between family members. However the estrangement has come about, rarely is it anything to do with the grandchildren.’<sup>54</sup>

Nigel Huddleston MP has, moreover, suggested that conflict can be far-reaching and lead to consequences other than court:

‘I have heard from a number of grandparents who have tried to send birthday cards or Christmas gifts to their grandchildren and found themselves being visited by the police and accused of harassment.’<sup>55</sup>

Introducing a ‘grandparent’ presumption would provide legal protection to the grandparent/grandchild relationship. This could take the form of a new presumption entirely, or, as suggested by Nigel Huddleston MP, be introduced as an amendment to the existing ‘parental’ presumption:

‘I am calling for the Government to introduce an amendment to the Children Act 1989, to enshrine in law the child’s right to have a relationship with their grandparents by adding the words “and extended family” or “and any grandparents” to the section on parental involvement in relation to the welfare of the child.’<sup>56</sup>

The introduction of such a presumption would also be in line with the approach which has worked well according to Sauvé in some other jurisdictions.<sup>57</sup> In France’s Civil Code, for instance, it provides that: ‘Any child has a right to maintain personal relations with his ancestors’.<sup>58</sup> There is a rebuttable presumption in favour of contact between grandparents and grandchildren, in circumstances where disputes arise. This approach would address the concerns raised about the powerlessness of grandparents in circumstances where contact with their grandchildren is brought to a halt. Sauvé’s comparative research is the first attempt to analyse the efficacy of French Law and compare it with the approach taken towards grandparents in England and Wales. Her research suggests that French Law has worked well and that, since the presumption in favour of grandparent contact can be rebutted where it is not in the child’s best interests, that this serves to protect children from the maintenance of relationships which may be unhealthy at best and, traumatic, at worst. The approach taken in France shows that it is possible to recognise and protect relationships between grandparents and grandchildren while protecting the child’s welfare.

At first glance, a presumption of this nature appears to provide greater protection to the grandparent/grandchild relationship. It can also be seen as a way of providing grandparents with rights to protect relationships with their grandchildren, without explicitly referring to them as such. It could be put into creation via a very minor amendment to the Children and Families Act 2014, s11 which provides for a presumption in favour of parental involvement.

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<sup>53</sup> (n 26).

<sup>54</sup> HC Deb, 2 May 2018, vol 640, col 170WH.

<sup>55</sup> *ibid*, col 173WH.

<sup>56</sup> *ibid*.

<sup>57</sup> L Sauvé, ‘A French Perspective on Grandparents and Private Law: The Right of the Child to Maintain Personal Relationships’ in S Davey and J Lindsey, *Grandparents and the Law: Rights and Relationships* (Oxford, Hart, 2023).

<sup>58</sup> 371-4 French Civil Code, para 1.

It could be amended to encompass a presumption in favour of ‘grandparental’ involvement too. Despite the potential advantages that might lie within this type of amendment, there are reasons for caution. While it might appear to promote inclusivity and acknowledgement of diverse family forms, there are also reasons to suggest that this amendment would not produce the desired results. This author favours reform which is inclusive in nature, rather than reform which merely serves to complicate a ‘hierarchy’ of rights. In fact, there is a danger of promoting ‘grandparent’ adult rights over the rights and best interests of children (and, potentially, adult parents with vulnerabilities, including those who have been victims of domestic abuse).

Kaganas and Piper have argued that the existing presumption of parental involvement could ‘prejudice the interests of mothers and children’<sup>59</sup> because ‘parental involvement’ is presumed to be in the child’s best interests, even in cases of domestic abuse. Moreover, according to Harwood, the parental involvement presumption may be harmful since it reinforces a ‘dominant narrative that children ‘need’ contact’,<sup>60</sup> despite the existence of factors such as domestic abuse on resident parents and children. Although the presumption is ‘rebuttable’ if there is evidence that contact is harmful to the child, in practice, it is unusual for contact to be denied by the courts. A narrative of ‘contact at all costs’ is damaging in the context of the parent/child relationship<sup>61</sup> and ought not be extended to the grandparent/grandchild relationship.

Harwood has made similar, common-sense arguments in relation to the danger of extending this presumption to favour grandparents.<sup>62</sup> Not all organisations representing grandparents support such a reform either. Grandparents Plus, now known as ‘Kinship’, has expressed concerns previously that a similar presumption in favour of grandparental contact may result in the maintenance of unhealthy and harmful relationships.<sup>63</sup> These relationships could be harmful due to concerns about the behaviour of the grandparents themselves. Alternatively, a presumption of grandparental involvement could be used to circumvent limitations on or even outright prohibitions on contact between a non-resident parent and child. As Kaganas and Piper observe, a presumption in favour of grandparent contact could create the risk of a ‘backdoor,’ to provide contact between a child and a non-resident parent who is a risk to that child’s welfare.<sup>64</sup> This could occur, for instance, in cases where children have suffered physical harm and/or emotional harm due to witnessing domestic abuse perpetrated against the resident parent. Thus, it is suggested that a presumption in favour of grandparent contact may place a child at risk of significant harm and replicate the difficulties created by the presumption in favour of parental involvement. Reform to extend the ‘lexis’ of this presumption would be hasty, in any event, since the parental presumption is itself currently under review by the Ministry of Justice.<sup>65</sup> Although at the time of writing, it is uncertain what the outcome of this report might be, it makes little sense to seek to create a statutory provision mirroring one which may, itself, either be repealed or amended in future.

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<sup>59</sup> (n 35) 176.

<sup>60</sup> J Harwood, ‘Presuming the status quo? The impact of the statutory presumption of parental involvement’ [2021] *Journal of Social Welfare and Family Law* 119 at 119.

<sup>61</sup> A Barnett, ‘Contact At All Costs? Domestic Violence and Children’s Welfare’ [2014] 26 *Child and Family Law Quarterly* 439.

<sup>62</sup> J Harwood, ‘Symbolic and Expedient ‘Solutions’, Grandparents and the Private Family Justice System: The Risk of Unintended Consequences’ in S Davey and J Lindsey, *Grandparents and the Law: Rights and Relationships* (Oxford, Hart, 2023).

<sup>63</sup> (n 9) 34.

<sup>64</sup> (n 35) 176.

<sup>65</sup> HC Deb, 9 November 2020, vol 683, HCWS562.

Moreover, this author has suggested elsewhere, with Bendall, that many private law disputes between parents and grandparents could be addressed more effectively via increased promotion of, and engagement with, mediation.<sup>66</sup> While ensuring that language within legislation is up to date and reflective of diverse family forms, a presumption in favour of grandparental involvement is a narrow solution which fails to address the importance of other relationships in a child's life. It has the potential to tilt the balance in favour of adult rights, rather than the child's welfare and rights. Moreover, it does not promote an 'inclusive' approach and recognise the role of other family members who may also have importance in a child's life. This could include, for instance, step-parents, siblings, as well as aunts and uncles.

It is argued, therefore, that the creation of a 'grandparent' presumption must be addressed with caution. Such a presumption could replicate the challenges considered above and, in some circumstances, place a child at risk of significant harm. A 'grandparent' presumption could also, potentially, perpetuate a 'binary' inter-generational narrative, emphasising the role of 'biological' paternal and maternal grandmothers and grandfathers in turn, rather than the wide range of family members and their value in children's lives. This would assume the primacy of parents and then grandparents, rather than providing meaningful reform to reflect the diverse familial, social and cultural networks enjoyed by children. Consequently, whilst, at first glance, a 'grandparent' presumption might look like an effective solution, it is not the best way to afford protection to the grandparent/grandchild relationship, or indeed to acknowledge wider kinship links. A presumption in favour of grandparental involvement, it is argued, has no place within a potential Grandparents and Kinship Carers Act. It is considered, later in this chapter, that other aspects of the legal language could be reformed. Language in and of itself, however, cannot tackle all the issues which exist for grandparents seeking to engage with the legal system. An important statutory provision which has caused some difficulty for grandparents is the leave requirement, considered in further detail below.

### *Removal of the leave requirement*

The 'leave' requirement is an initial step which needs to be taken prior to applying for a court order. It may, in some circumstances, act as a barrier requiring an additional hearing or may prevent grandparents from applying for a court order (e.g. for a child arrangements order under the Children Act 1989, s8) at all. Whether or not to remove the 'leave' requirement for grandparents, has been debated for much longer than a presumption of grandparental involvement. Removal of the leave is, arguably, less controversial than a presumption in favour of grandparent involvement since, it removes a barrier to the court rather than being a method of bestowing grandparents with rights 'by the backdoor'. Prior to 1989, grandparents had the automatic right to make court applications in relation to children. The Children Act 1989 'reversed' the prior law under which grandparents had the right to automatic leave. The existing approach is non-inclusive and limits grandparents' ability to apply for court orders in relation to a child. Unless the grandparent comes under the scope of s10(4) or s10(5), he or she must now seek leave to apply for a court order under s10(9). This sub-section provides that:

'Where the person applying for leave to make an application for a section 8 order is not the child concerned, the court shall, in deciding whether or not to grant leave, have particular regard to—

(a) the nature of the proposed application for the section 8 order;

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<sup>66</sup> *ibid.*

- (b) the applicant's connection with the child;
- (c) any risk there might be of that proposed application disrupting the child's life to such an extent that he would be harmed by it; and
- (d) where the child is being looked after by a local authority—
  - (i) the authority's plans for the child's future; and
  - (ii) the wishes and feelings of the child's parents.'

The reason for this reform was explained by Sir Oliver Heald as follows:

'The leave requirement is designed not as an obstacle, but as a filter. The idea is to sift out applications that are not in the child's best interests.'<sup>67</sup>

The Law Commission took the perspective that the leave requirement was justified on that basis that it would not pose a substantial hurdle for 'close relatives such as grandparents'.<sup>68</sup> While not overtly in favour of a leave requirement, Taylor and Herring both concur with this perspective,<sup>69</sup> suggesting that, in practice, leave will not serve as a bar (in most cases) for grandparents to seek relationships with their grandchildren. There are those, however, who note the challenges faced by grandparents in the context of being entitled to engage in court proceedings.<sup>70</sup> There have been calls to remove the leave hurdle, in line with the approach adopted by the Scottish legal system.<sup>71</sup> In Scotland, there is no leave requirement for grandparents, and there is no evidence that this creates difficulties within the Scottish family justice system. Grandparents Plus (now known as Kinship) argued that those favouring the retention of the leave hurdle, do so 'based on a fundamental misunderstanding of the motivations and actions'<sup>72</sup> of grandparents and ought to be removed. Leave has been viewed by some as an unnecessary 'hurdle'<sup>73</sup> for well-intentioned grandparents.<sup>74</sup>

There are several reasons why it is argued that it is time to review the leave requirement. Firstly, family law frameworks have both 'moved on' since the enactment of the Children Act 1989, affecting the plight of grandparents and others seeking to maintain relationships with children. Two features of particular importance are the withdrawal of legal aid in most family law matters<sup>75</sup> and the increase in litigants in person.<sup>76</sup> In the light of these developments, a further court application and court hearing to consider leave could impose practical and financial burdens upon grandparents, with additional hearings and further

<sup>67</sup> HC Deb, 25 April 2017, vol 624, col 500WH.

<sup>68</sup> Law Commission, *Family Law Review of Child Law: Guardianship and Custody*, Law Com No 172 (HMSO, 1988), at para 4.41.

<sup>69</sup> J Herring, *Older People in Law and Society* (Oxford, Oxford Publishing, 2009) 246; R Taylor, 'Grandparents and grandchildren: Relatedness, relationships and responsibility' in B Clough and J Herring, *Ageing, Gender and Family Law* (Abingdon, Routledge, 2018).

<sup>70</sup> HC Deb, 25 April 2017, vol 624, col 497WH.

<sup>71</sup> Children (Scotland) Act 1995 and Children (Scotland) Act 2020.

<sup>72</sup> (n 9) 32.

<sup>73</sup> *ibid.*

<sup>74</sup> *ibid.*

<sup>75</sup> Legal Aid, Sentencing and Punishment of Offenders Act 2012.

<sup>76</sup> K Barnes and R Taha, 'Litigants in Person – Access to Justice via the Court Process?' [2020] 1 *LJMU Student Law Journal* 5.

expense. Thus, while the leave requirement might not serve as an ‘insurmountable’ barrier to the court process, its impact on grandparents, in a time of rising living costs, may act as a deterrent for grandparents to make applications to the court. Secondly, it is possible that a grandparent may have a valid arguable case, but face a risk of being refused leave, due to appearing ‘vexatious’<sup>77</sup> and ‘frivolous’<sup>78</sup> in court statements written without the assistance of a solicitor or barrister.

Thirdly, it has been argued by Bendall and Davey that the removal of the leave requirement could form an important ‘symbolic’<sup>79</sup> step for grandparents and it would ensure that grandparents, regardless of ‘court literacy’,<sup>80</sup> can make their case. Therefore, it is proposed that, despite some resistance to calls for changes,<sup>81</sup> a review of the current landscape is long overdue. Finally, it is argued that this amendment would bring the approach to leave in England and Wales in line with the process within the Scottish legal system.<sup>82</sup> In Scotland, grandparents are not required to apply for leave. There is no evidence, including empirical research, to suggest that the Scottish courts are flooded with a significant number of ‘vexatious’ claims from grandparents. It is thus argued that a Grandparents and Kinship Carers Act ought to encompass removal of the leave requirement, reverting the process to the pre-Children Act 1989 state of affairs. This would also serve to create a more ‘inclusive’ approach to the entry point of litigation, eliminating one of the barriers that some grandparents face when opting for the legal route. Consequently, a simple amendment to the Children Act 1989 could have significant consequences for grandparents. Although the removal of the leave requirement would be a significant improvement, there are further challenges grandparents face which would need to be addressed, which will be considered in further detail below.

### *Reform of Means-Tested Legal Aid*

The paucity of legal aid is a challenge for grandparents seeking to engage with the court process. Legal aid is no longer available in private law family disputes, unless one of the parties is a victim of domestic abuse, or the child is at risk of significant harm.<sup>83</sup> This is despite the fact that there may be circumstances such as when a grandparent seeks to put him or herself forwards as a carer in the context of care or adoption proceedings, or to maintain a relationship with his or her grandchild. It is argued here that extending the scope of legal aid for grandparents, and others, promotes the best interests of the child.

Within her contribution to this edited collection, Maclean has raised concerns about the limited scope of legal aid and has advocated reform to rectify a thorny and complex issue. This writer agrees with the perspective taken by Maclean and supports a thorough review of means-tested legal aid. The lack of access to legal aid has affected the protection of

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<sup>77</sup> House of Commons, *Children: Grandparents and others who require leave of the court to apply for access*, 2016 (HC Briefing Paper, Cm 07574, 2016) 8.

<sup>78</sup> *Re M (Care: Contact: Grandmother's application)* [1995] 2 FLR 86; *B (A Child)* [2012] EWCA Civ 737.

<sup>79</sup> (n 45).

<sup>80</sup> L Trinder, ‘Taking Responsibility? Legal Aid Reform and Litigants in Person in England’ (2015) in Maclean, M, Eekelaar, J, and Bastard, B, ‘Delivering Family Justice in the 21st Century’ (Oxford, Bloomsbury, 2015) 236.

<sup>81</sup> (n 30) 31; House of Commons, *Children: Grandparents and others who require leave of the court to apply for access*, 2016 (HC Briefing Paper, Cm 07574, 2016) 8.

<sup>82</sup> Children (Scotland) Act 1995, s11.

<sup>83</sup> See the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

grandparents' relationships with their grandchildren. This has been shown through discussion within Hansard debates, with David Hinchcliffe MP sharing the following:

'I had fought for a woman who is the grandparent of a six-year-old child. She brought up the child, was the only figure in the child's life and loved and cared for him in the absence of a mother. Then he was adopted, and she had no rights. She could not get legal aid, because she had no right to be heard in court.'<sup>84</sup>

Currently, unless they satisfy strict means-testing requirements, grandparents (or other family members who wish to obtain a court order to 'safeguard' a child) will not usually qualify for legal aid and will have to fund litigation themselves.<sup>85</sup> While the financial status of grandparents varies, with some grandparents able to afford litigation, this will not be true for all. Research by Kinship suggests that the decreased access to legal aid will be especially harrowing for grandparents who may have a limited income due to retirement, or being unable to work due to illness or disability.<sup>86</sup> In public law disputes, where a child is subject to care or adoption proceedings, parents will have automatic access to legal aid. Grandparents will not have access to legal aid in the same circumstances unless they have parental responsibility for the child or have a child arrangements order (with residence)<sup>87</sup> or special guardianship order<sup>88</sup> in effect. Where children are 'looked after' by the state and local authorities support court applications by kinship carers, grandparents might receive a 'one off' sum, which will usually be sufficient only to cover an initial consultation.<sup>89</sup> This is, however, entirely discretionary, without specific guidance from the government on the circumstances in which local authorities ought to provide such financial assistance. Where local authorities do not support grandparents as carers, they will not typically provide such financial support. Where grandparents are parties or third parties to care or adoption proceedings, they may have limited access to legal aid, which is means-tested. This potential challenge in accessing public funding can directly affect grandparents' ability to be involved in children's lives on a long-term basis.

It is argued that grandparents ought not be subject to means-testing where they: (a) apply for a court order, such as a child arrangements order, because a child is at risk of significant harm; or (b) oppose care or adoption orders so that they can be carers of a child. The difficulty in accessing legal aid is not the only challenge that grandparents face in the context of both private and public law proceedings. It is suggested, however, that reform to legal aid would need to be dealt with comprehensively as a separate reform entirely (potentially as envisaged in Maclean's chapter). There is, however, a light at the end of the tunnel since the All Party Parliamentary Group on Kinship Care has recommended reform to the existing provision of legal aid for kinship carers.<sup>90</sup> The next section of this chapter will explore further challenges which can be faced in obtaining financial and practical support, after legal proceedings have been concluded.

### *Statutory Duties of Financial and Practical Support*

<sup>84</sup> HC Deb, 27 October 1989, vol 158, col 1307.

<sup>85</sup> (n 9) 27.

<sup>86</sup> (n 41).

<sup>87</sup> Children Act 1989, s8.

<sup>88</sup> Children Act 1989, s14A.

<sup>89</sup> All Party Parliamentary Group on Kinship Care, *Lost in the legal labyrinth: How a lack of legal aid and advice is undermining kinship care* (London, APPG, 2022) 25-26.

<sup>90</sup> APPG Legal Aid Inquiry <https://frg.org.uk/policy-and-campaigns/kinship-care/appg-on-kinship-care/legal-aid-inquiry/>

It has long been argued that grandparents (and others) who take on care of children who would otherwise be cared for by the state ought to be provided with financial and practical assistance. Hansard discussion back in 2008, for instance, considered that grandparents need financial help, including an immediate lump sum for essential items and ongoing maintenance.<sup>91</sup> The government ‘financing structure’, in this context, has been described as ‘inappropriate’<sup>92</sup> and may be seen as unfit for purpose.

Grandparents and other relatives who provide kinship care often struggle financially, especially when they provide ‘informal’ care. Although they may be entitled to limited benefits such as child benefit or child tax credit- depending on whether a child arrangements order or special guardianship order is in place- local authorities have no specific duties to provide financial assistance unless children are ‘looked after’ by the state.<sup>93</sup> If local authorities have facilitated a kinship placement, relatives are entitled to a kinship allowance which is equivalent to the (higher) foster care allowance.<sup>94</sup> Unfortunately, grandparents still may need to challenge local authorities in court to receive this money in practice, since local authorities do not have to provide automatic funding for private non-statutory kinship care arrangements.<sup>95</sup>

Organisations such as Kinship<sup>96</sup> have strongly argued in favour of a requirement of financial support for such carers (who are not classed as foster carers), to be provided for via statute law. Several Members of Parliament are in favour of providing similar statutory protection for grandparents,<sup>97</sup> with Munira Wilson MP describing kinship care as a ‘Cinderella service of our children’s social care system’.<sup>98</sup> At the time of writing, in 2023, a Kinship Care Bill introduced by Wilson on 5 July 2022 using the Ten Minute Rule, is passing through the House of Commons. If this law were to come into effect, this would: create a statutory definition for kinship carers; provide automatic financial support for kinship carers which would equal the support allowance already provided to foster carers; provide kinship carers with paid leave when a child comes to live with them; and provide the children with educational benefits stemming from the Pupil Plus Premium.<sup>99</sup>

This Bill has laudable aims and would make a significant impact. If it were to become law, it would be an important item in the ‘toolkit’ of grandparents and other kinship carers. Its disadvantage, however, is that it is an example of ‘piecemeal’ reform which addresses only ‘public’ law issues, largely providing regulation of the relationship between children, kinship carers and local authorities, rather than a more comprehensive reform of the legal landscape concerning grandparents and kinship carers. It is suggested therefore that, while these provisions would address important matters which are in need of reform, and which ought to be included within the Grandparents and Kinship Carers Act, the legislation proposed within this chapter should be broader in its scope.

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<sup>91</sup> HL Deb, 17 March 2008, vol 700, col 58,

<sup>92</sup> Children and Young Persons Bill 2008 (HL) 17 March 2008.

<sup>93</sup> Grandparents Plus, *Growing up in Kinship Care* (London, Grandparents Plus, 2017) 24.

<sup>94</sup> *R (SA) v Kent County Council* [2011] EWHC Civ 1303.

<sup>95</sup> *R (CO) v Surrey County Council* [2014] EWHC 3932 (Admin); House of Commons, *Research briefing paper: Financial Support for family and friends carers (Kinship Carers)* (London, House of Commons, 2021) 9.

<sup>96</sup> P McGrath and L Ashley, *Kinship Care: Financial Allowances Survey 2022* (London, Kinship, 2022).

<sup>97</sup> Such as Jim Shannon and Matthew Offord.

<sup>98</sup> HC Deb, 5 July 2022, vol 717, col 747.

<sup>99</sup> A type of funding to help disadvantaged children reach higher levels of attainment educationally.

### *Other Reforms to the 'Lexis' of the Law*

Many social and legislative changes have taken place since the enactment of the Children Act 1989, and there are ways in which it could be modernised to provide greater protection to diverse family forms, including grandparents and kinship carers who arguably have increased importance in the context of the modern family. As considered above, the 1989 Act could be amended to remove the leave requirement and provide additional practical and financial support for grandparents. It is suggested that a new Grandparents and Kinship Carers Act should provide grandparents (and others) with important symbolic and practical legal protection of valuable relationships. The reform suggested here is different from the types listed above since emphasis is placed on clarifying existing relationships and to provide for greater inclusivity in the language of the Children Act 1989, as well as substantive reform.

The Family Rights Group has campaigned for a statutory definition of 'kinship carer'. This author would agree that, to effect meaningful reform, it is important to clarify relationships between children and other adults who have significant involvement in those children's lives. It is time for an Act of Parliament to define the concept of 'kinship carer' or 'grandparent' and for this to be applied universally within the family law justice system. Ad hoc reference to 'kinship carers' can be found in statutes, such as the Children and Young Persons Act 2008, s36, which provides for the entitlement of relatives to apply for child arrangements orders.<sup>100</sup> Under the Children Act 1989, s17, local authorities have a duty to 'promote the upbringing of such children by their families'. Although the latter provision refers primarily to those with 'parental responsibility', it includes care provided by relatives and carers.<sup>101</sup> These brief mentions to extended kin fail to provide sufficient acknowledgement of the grandparent/ grandchild relationship.

It is suggested that 'grandparent' and 'kinship carer' ought to be defined widely, to be as 'inclusive' as possible considering the diverse family forms emerging within the 21<sup>st</sup> century. A 'kinship carer' is typically regarded to be a blood relative but could be construed more widely to include, for instance, close family friends including a child's godparents. The definition of 'grandparent' gives rise to similar issues, since it raises questions of whether this should be limited to blood relatives only, or extended more widely to include, for example, step-grandparents and great-grandparents. One option, for the purposes of simplicity, is that a definition of 'grandparent' can be drawn from the traditional definition implemented by France, which limits grandparents to those with blood ties only.<sup>102</sup> Another possibility would be to adopt a wider definition of 'grandparents', which can be drawn from the suggestion of Baroness Lane-Fox:

'grandparent in relation to a child means a grandparent whether of the blood or by affinity and includes, where the child is illegitimate, any person who would be such a grandparent if the child were the legitimate child of his mother and father.'<sup>103</sup>

A 'kinship carer' could be defined similarly as 'a member of extended family whether by blood or affinity'. The definition of these individuals, and the types of relationships they

<sup>100</sup> After providing care for at least one year.

<sup>101</sup> Department for Education, *Family and Friends Care: Statutory Guidance for Local Authorities* (Department for Education, London, 2010) 14.

<sup>102</sup> (n 57).

<sup>103</sup> HL Deb, 18 June 1986, vol 476.



signify, would enable them to have symbolic recognition and to protect the rights and welfare of children in their families. Although defining terms such as ‘grandparent’ and ‘kinship carer’ are important, the reform to the legal ‘lexis’ ought not end here. It is proposed that reform could shift away from the language of ‘parental responsibility,’ which itself emphasises ‘exclusivity,’<sup>104</sup> towards more ‘inclusive’ language, such as ‘welfare responsibility’. It is also argued that ‘responsibility’ itself could be defined more comprehensively, including some examples of the types of responsibilities falling under the provision (e.g. responsibilities in relation to health, education, etc).<sup>105</sup> At present, there is no specific list or guidance provided on which responsibilities are encompassed by the scope of parental responsibility.

It is suggested that shifting the language from ‘parental’ responsibility to the non-binary language of ‘welfare’ responsibility would provide greater reflection of diverse family forms. This is because it is more ‘neutral’ language focused on protecting the child, rather than on narrowly defining the carer’s relationship with the child. While necessitating an adjustment for legal professionals, this change in language would benefit not only grandparents, but would constitute more ‘neutral’ language, appropriate to recognise other caregivers who may or may not be blood relatives of the child. It is argued also that the shift from ‘parents’ to more child-orientated language is in line with the child-centred ethos of the United Nations Convention on the Rights of the Child (UNCRC),<sup>106</sup> and more recent legislation, such as the Adoption and Children Act 2002, which has emphasised the paramountcy of children’s welfare.

Another way in which the ‘lexis’ of the Children Act 1989 could be improved, and made more inclusive, is through reform to the welfare checklist under s1(3) of the Act. This checklist could be modified to provide consideration of children’s ‘relatives’ and be aligned with the welfare checklist under the Adoption and Children Act 2002 s1(4)(f). S1(4)(f) of the Act provides that the court must have regard to:

‘the relationship which the child has with relatives... and with any other person in relation to whom the court of agency considers to be relevant’.

Although the courts have wide discretion under the Children Act 1989, s1(3) welfare checklist, introducing alignment with the Adoption and Children Act 2002, s1(4)(f) would improve legislative consistency between the welfare frameworks, since the 1989 Act makes no direct reference to relatives in its welfare checklist. Moreover, it would promote the importance of relatives in matters extending beyond adoption, such as in disputes over contact and residence arrangements between grandparents and parents. This would, as with the removal of the leave requirement, introduce a ‘symbolic’ change. While including s1(4)(f) within the Children Act 1989 would provide no guarantee of it being considered in every case, it would be an important step in the right direction.

## 5. Conclusion: The Shape of Legislative Reform

<sup>104</sup> P Marcus, ‘Parental responsibilities: Reformulating the paradigm for parent-child relationships Part 2: Who has responsibilities to children and what are these responsibilities?’ [2017] 14 *Journal of Child Custody* 106.

<sup>105</sup> N Lowe, G Douglas, E Hitchings and R Taylor, Bromley’s *Family Law* 12<sup>th</sup> edn (Oxford, Oxford University Press, 2021). 436-470

<sup>106</sup> This Convention is discussed in more detail, in the context of the voice of the child, in Barlow’s chapter.

The issues highlighted by the ‘grandparent debate’ are significant and demonstrate the difficulty lawmakers and policymakers face in grappling with diverse relationships. Bremner, Lind and Moscati have considered this difficulty in the context of birth registration, but the failure to recognise and protect diverse family forms has been problematic in the context of legal proceedings also. It has been argued, in this chapter, that legislative reform could be achieved via a Grandparents and Kinship Carers Act, or an amendment (a ‘granny annex’) to the Children Act 1989, designed to reflect greater ‘inclusivity’ of extended family members (namely grandparents). It is suggested that ‘holistic’ and ‘inclusive’ reform is best achieved by way of an Act of Parliament which removes the requirement of leave, provides for legal aid in specified circumstances and improves the practical and financial support available for grandparents. A new Act could also amend specific sections of the Children Act 1989 (i.e. s1(3), s3 and s10) to improve the inclusivity of its language and approach to diverse family forms. Such an Act would constitute an important practical and symbolic change to the law. This is of particular importance in circumstances where grandparents are long-term caregivers, making decisions for children daily.

The creation of a Grandparents and Kinship Carers Act would symbolise that the grandparent/grandchild relationship, and other de facto relationships, deserve greater recognition, commensurate with the level of involvement these adults have in children’s lives. The Act, it is argued, would need to be worded carefully to include principles which serve to promote inclusivity in both private and public law contexts. While the focus, outside of parental disputes, tends to be on the grandparent, parent and child triad, other extended kin- including aunts and uncles, great-grandparents and step-relatives (including step-grandparents)- may also have meaningful relationships with children which are deserving of protection.

As a society, we have moved from openly favouring a traditional, nuclear, heterosexual ‘two-parent’ model of parenting towards acknowledging the existence of a wide range of families. These families with children are created in various ways and include those borne from reproductive assistance via fertility treatment and/or surrogacy, same-sex parents, ‘blended’ families and single parents. In circumstances where parents are unable to care for their children, grandparents may step in as full-time carers. Yet, this chapter has identified a range of impediments which, it is argued, fail to facilitate the grandparent/grandchild relationship. While my focus has been on the status of this relationship, it has been asserted that there are circumstances where other kinship carers ought similarly to have rights which are recognised and protected. These are relationships which serve, ultimately, to benefit children and need to be placed on legal footing.

The law has, incrementally, been taking steps to recognise diverse family relationships. Despite these welcome developments, however, grandparents and other kinship carers lack sufficient legal protection, to the detriment of the vulnerable children cared for by them. Reform should, in fact, go even further to challenge the existing ‘social norm’ of the ‘nuclear family’, via a more inclusive approach within the Children Act 1989 (specifically via amending s1(3), s3 and s10). This reform would provide a more ‘inclusive’ system of family law considering a wide range of family forms. This would extend the law beyond a ‘binary’ norm concerned with the child and parent, the child and the state, or even the ‘triad’ of the child, the parent and the state provided for within the Children Act 1989. It is apparent from

the law on assisted reproduction,<sup>107</sup> where family forms are being challenged, that we need to move past the existing dyadic approach towards ‘parenting’ and ‘grandparenting’. This dyadic model creates barriers to those who may have significant bonds with children, which benefit children’s welfare, from developing and maintaining those relationships.

It can by no means be asserted that all potential avenues for reform have been exhausted within this chapter. What can be said, however, is that it has addressed many challenges which grandparents (and kinship carers) face while attempting to protect their relationships with their grandchildren. The creation of a Grandparents and Kinship Carers Act, which incorporates the changes to the law suggested above, as well as modifications to the legal ‘lexis’ within the Children Act 1989, would be far-reaching. The existence of such an Act would clarify that the grandparent/grandchild relationship, and other de facto relationships, deserve greater recognition, commensurate with the level of involvement that these adults have in children’s lives. An Act of this nature would be a significant step in acknowledging greater diversity in modern relationships and would provide greater protection within formal legal frameworks.

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<sup>107</sup> P Brezina and Y Zhao, ‘The Ethical, Legal, and Social Issues Impacted by Modern Assisted Reproductive Technologies’ [2012] *Obstetrics and Gynecology International* doi: 10.1155/2012/686253 .

## Appendix

### Grandparents and Kinship Carers Bill

# A BILL

## TO

Make provision to define ‘grandparents’ and ‘kinship carers’, to provide legal recognition of children’s relationships with their grandparents and kinship carers; to provide financial support for grandparents and kinship carers and to provide an amendment to the Children Act 1989.

BE IT ENACTED by the King’s most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows: –

S1.

#### 1(1) Definitions

Define ‘grandparent’ and ‘kinship carer’ in an amendment to the Children Act 1989:

‘Grandparent’ shall be defined as: ‘a grandparent whether of the blood or by affinity and includes, where the child is illegitimate, any person who would be such a grandparent if the child were the legitimate child of his mother and father.’<sup>108</sup>

A ‘kinship carer’ shall be defined as ‘a member of extended family whether of the blood or by affinity’.

S2.

(2) An amendment to the s1(3) welfare checklist of the Children Act 1989 via s1(3)(h):

‘the relationship which the child has with relatives, and with any other person in relation to whom the court considers the relationship to be relevant, including—

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<sup>108</sup> Using the definition recommended by Baroness Lane-Fox. Children and Young Persons Amendment Bill 1986, June 18, 1986 vol 476 HL Deb.

- (i) the value to the child of having, or continuing to have, a relationship with a relative or of any such person;
- (ii) the ability and willingness of any of the child's relatives, or of any such person, to provide the child with a secure environment in which the child can develop, and otherwise to meet the child's needs,
- (iii) the wishes and feelings of any of the child's relatives, or of any such person, regarding the child.

S3.

S3.(1) An amendment to 'parental responsibility' within ss2-4 of the Children Act 1989:

All references in the Children Act 1989 to 'parental responsibility' will be replaced with 'welfare responsibility'.

S(3)(2) Amends the Children Act 1989 s3 definition of parental responsibility to state that: 'welfare responsibilities include, but are not limited to safeguarding the protection of the child's:

- (i) Health and well-being
- (ii) Education
- (iii) Physical, emotional and moral development
- (iv) Safety
- (v) Child support
- (vi) Property
- (vii) Rights

S4.

S4(1) amends the Children Act 1989, s10(4) to provide the following: 'parent, grandparent, guardian or special guardian of the child'.

S5.

S5(1) provides that:

'local authorities shall provide financial support for kinship carers equal to the support allowance already provided to foster carers;

S5(2) provides that:

'kinship carers shall be provided with paid leave when a child comes to live with them'.

S5(3) provides that:

‘children cared for by kinship carers shall be entitled to claim the Pupil Plus Premium’.