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Symbolic and Expedient 'Solutions', Grandparents and the Private Family Justice System: The Risk of Unintended Consequences

JOANNA HARWOOD

I. Introduction

The principal challenge at the heart of family law is having to make decisions about children's futures in the face of conflicting arguments from the parties to a dispute, without being able to know with any certainty how those decisions will play out in practice.[1] Private family law responds to this challenge of 'future uncertainty',[2] in part, through recognising some family members as more significant than others to the promotion of children's welfare within the statutory framework, including through differentiating between those who need to seek permission from the court before applying for orders to spend time with children and those who can apply directly, and by guiding the courts' decision making at the substantive hearing stage. Judges also have some flexibility to find solutions to the challenge of future uncertainty in individual cases when deciding how cases should progress once they leave court. This chapter explores the challenge of future uncertainty in relation to grandparents' relationships with the private family justice system by extending, for the first time, the use of autopoietic theory from other areas of family law to this specific context. By doing so, the chapter provides a framework that connects theory with practice, which can be used to evaluate the merits of the

[1] For discussion of this challenge of 'future uncertainty', see M King, 'Future Uncertainty as a Challenge to Law's Programmes: The Dilemma of Parental Disputes' (2000) 63(4) *Modern Law Review* 523.

[2] A term originally used by King (ibid). Michael King has been influential in applying autopoietic theory to understand family law's navigation of this future uncertainty. Until now, an autopoietic approach has not been applied in the context of grandparents and the private family justice system, potentially owing to the current nature of these debates.

calls for statutory reform to promote grandparents' involvement in grandchildren's lives and the role they may play once cases leave court. This framework reveals the significant risks that attach to reliance on symbolic and expedient solutions within the legal system to solve problems that emanate from outside the legal system itself.

The calls for statutory reform to promote grandparents' relationships with their grandchildren include the removal of the requirement that grandparents must seek leave from the court before applying for child arrangements orders to spend time with their grandchildren, when this time is being denied by one or both of the child(ren)'s parents.[3] There has also been a more recent call for the existing statutory presumption of parental involvement to be extended to include the promotion of grandparents' relationships with their grandchildren.[4] At the later stages of parties' progression through the private family court, there is evidence that, rather than being neglected by the legal framework, grandparents are being called upon by the courts, in some cases, to perform an unduly extensive role in the post-separation family once cases leave court. The evidence here is that grandparents are being tasked with monitoring the time spent between a parent who has perpetrated domestic abuse and their child(ren), in response to limited alternatives for progressing contact, with concerns raised that children's safety is threatened since grandparents are insufficiently qualified to be performing this protective function.[5] This concern has become more pronounced in the light of the shift away from the courts' involvement in cases post-order, with a reduction in the number of post-order reviews to monitor how the arrangements made for children are progressing once those cases leave court.[6]

The perception driving the calls for statutory reform is that grandparents are losing out on valuable relationships with their grandchildren,[7] and that the law can

[3] The Children and Families Act 2014 removed the terms 'contact' and 'residence', replacing these with 'child arrangements orders'. These orders determine where a child shall live and if/with whom they should spend time. Since 'child arrangements orders' do not differentiate between contact and residence, and this chapter focuses solely on contact, 'contact' is used throughout this chapter to refer to the time spent between children and their parents/grandparents. Grandparents who turn to the private family justice system to secure time with their grandchildren do so for different reasons. In some cases, contact might be being refused to grandparents when parents remain together; in other cases, grandparents might or might not have a pre-existing relationship with their grandchildren but contact is being refused following parental separation, by either one or both parents, with this latter category being among the most contentious. For discussion of the most common circumstances in which grandparents turn to the private law family courts, see, eg, L Dickson, 'Grandparents and Contact: What's the Solution?' (2019) 49(Oct) *Family Law* 1091, 1092. This chapter focuses on the cases in which both parents are alive.

[4] The statutory presumption of parental involvement directs the courts 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': Children Act 1989, s 1(2A).

[5] As explored later in this chapter, see, eg, the concerns raised by the All-Party Parliamentary Group on Domestic Violence, *Parliamentary Briefing: Domestic Abuse, Child Contact and the Family Courts* (All-Party Parliamentary Group on Domestic Violence and Women's Aid 2016) 21.

[6] See, eg, Ministry of Justice, *Assessing Risk of Harm to Children and Parents in Private Law Children Cases: Final Report* (London, Ministry of Justice, 2020) 145–46.

[7] For the calls for reform to remove this leave requirement, see, eg, the arguments in Family Justice Review Panel, *Family Justice Review: Interim Report* (Ministry of Justice, Department for Education

provide the solution to that problem. These calls can be located within a broader trend within private family law of using statutory reform for symbolic ends, the intention being not to change the courts' practice but rather to attempt to change the behaviour of the parties to the dispute, inside and outside court, by sending 'messages' on how those parties should behave.[8] Underpinning the calls both to remove the leave requirement and to extend the statutory presumption of parental involvement to include grandparents is the perception that giving grandparents enhanced status within the statutory framework will stop parents from denying grandparents a relationship with their grandchildren, since parents will, the argument goes, change their behaviour in line with the expectations set out within that statutory framework.[9] The deployment of grandparents to perform a protective role in domestic abuse cases is driven not by these symbolic aims but rather by expediency, with grandparents tasked with stepping in to compensate for the lack of funding for professional supervision of contact. Whilst informed by different motivating factors, uniting the calls for both symbolic statutory reform and the expedient deployment of grandparents to perform a protective function are attempts to control the uncertainty of children's futures through generalisations on the importance of grandparents in children's lives.

Autopoietic theory provides a framework for understanding how significant problems arise when attempting to translate these generalisations into a legal system that must be based on the particular circumstances of each individual child. It offers a 'depiction of society as consisting of closed, self-referring systems of communications', with each system only able to 'reproduce another in that first system's own terms'.[10] Within family law to date, the theory has provided an

and Welsh Assembly Government, March 2011) paras 5.37–5.38; and Family Justice Review Panel, *Family Justice Review: Final Report* (Ministry of Justice, Department for Education and Welsh Government, November 2011) paras 4.41–4.48. Whilst not supported unanimously by grandparents' groups, Grandparents Apart has called for a presumption to promote grandparents' involvement in the lives of their grandchildren (for discussion, see F Kaganas and C Piper, 'Grandparent Contact: Another Presumption?' (2020) 42(2) *Journal of Social Welfare and Family Law* 176). See also J Deuchars and J Loudoun, *Grandparents Speak Out for Vulnerable Children: To Be in Our Grandchildren's Lives* (GAUK Scotland, 2006) at http://grandparentsapart.co.uk/wp-content/uploads/2018/08/Grandparents-Book.pdf. As discussed later in this chapter, the call for a statutory presumption for grandparents has gained some traction within Parliament since. See, eg, House of Commons, *Access Rights to Grandparents*, HC Deb 2 May 2018, vol 640. For discussion more generally of the campaigns by grandparents' organisations, see Kaganas and Piper (within this footnote).

[8] See, eg, the discussion outside the context of grandparents' relationships with the private family justice system in F Kaganas, 'A Presumption that "Involvement" of Both Parents is Best: Deciphering Law's Messages' (2013) 25(3) *Child and Family Law Quarterly* 270. See further A Newnham, 'Shared Parenting, Law and Policy: Considering Power Within the Framework of Autopoietic Theory' (2015) 11(4) *International Journal of Law in Context* 426.

[9] See, eg, J Stather, 'Enhancing the Rights of Grandchildren to See Their Grandparents' *Family Law Week* (May 2018); Nigel Huddleston MP, HC Deb 2 May 2018, vol 640, cols 173–74WH. See also Dickson (n 3) 1903.

[10] M King, '"Being Sensible": Images and Practices of the New Family Lawyers' (1999) 28(2) *Journal of Social* Policy 249, 252. See also G Teubner, 'How the Law Thinks: Toward a Constructivist Epistemology of Law' (1989) 23(5) *Law & Society Review* 727; M King, 'Child Welfare Within Law: The Emergence of a Hybrid Discourse' (1991) 18(3) *Journal of Law and Society* 303; M King and C Piper, *How the Law Thinks About Children*, 2nd edn (Aldershot, Ashgate, 1995); Newnham (n 8).

explanation of the law's navigation of future uncertainty, with the self-referential nature of the system allowing children's welfare to be defined within the legal system's own terms and norms.[11] When applied to the context involving grandparents, the theory highlights the reinterpretations and retranslations of meaning that take place between policy intentions, the statutory framework, the courts' interpretation of that framework and the understanding of the law possessed by families themselves.[12] The theory shows how understandings within one broadly defined 'system' are not neatly transferred into another, instead going through a process of 're-entry' into a format compatible with each particular system, which can then give rise to misinterpretations and mistranslations.[13]

The framework provided by autopoietic theory demonstrates why symbolic statutory reform, in relation to both the leave requirement and the statutory presumption of parental involvement, will serve neither grandparents nor children, since parents and grandparents are not guaranteed to respond in any predictable way to either the policy intention behind reform or legal rules themselves.[14] As this chapter shows, the more likely outcome of statutory reform will be unintended consequences, including renewed grandparent dissatisfaction with the legal system and an increased risk that the courts will reach judgments that threaten the safety and welfare of children, in particular in cases involving allegations of harm. Autopoietic theory is also valuable in identifying how the expedient deployment of grandparents as 'protectors', in cases in which a child is to spend time with a domestically abusive parent, risks undermining the safety and welfare of children. This is due again to the misinterpretations and mistranslations that can take place between the courts' intentions in designating grandparents as 'protectors', and parents' and grandparents' interpretations of those intentions, particularly when there are significant limits to the information being fed back into the legal system on how contact is progressing. The application of autopoietic theory to these issues is timely, owing to the Ministry of Justice's current exploration of whether reform is needed to the statutory presumption of parental involvement and the calls for the reinstatement of post-order reviews in child arrangements disputes involving allegations of harm.[15]

[11] See, eg, King (n 1) 525; G Teubner, R Nobles and D Schiff, 'The Autonomy of Law: An Introduction to Legal Autopoiesis' in D Schiff and R Nobles (eds), *Jurisprudence* (London, Butterworth, 2003) 897, 917–19; Newnham (n 8) 427.

[12] For further discussion outside the context of grandparents and the private family justice system, see, eg, R Nobles and D Schiff, 'Why Do Judges Talk the Way They Do?' (2009) 5(1) *International Journal of Law in Context* 25, 30–31; Newnham (n 8) 427, 432–33 and 441.

[13] Newnham (n 8) 427–28. See further G Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' (1998) 61(1) *Modern Law Review* 11; R van Krieken, 'The Socio-Legal Construction of the "Best Interests of the Child": Law's Autonomy, Sociology and Family Law' in M Freeman (ed), *Law and Sociology* (Oxford, Oxford University Press, 2006) 437.

[14] For discussion outside of the context of grandparents' relationships with the private family justice system, see, eg, Newnham (n 8).

[15] Ministry of Justice (n 6); Ministry of Justice, *Assessing Risk of Harm to Children and Parents in Private Law Children Cases: Implementation Plan* (London, Ministry of Justice, June 2020). At the time of writing, an inquiry has also recently commenced by the Children and Families Act 2014

The chapter first outlines the general contribution autopoietic theory has already made to account for the way in which the family justice system navigates the challenge of future uncertainty. It then applies insights provided by the application of this theory to both the calls for statutory reform and the deployment of grandparents to play a protective role in domestic abuse cases. By doing so, the chapter foregrounds the value of autopoietic theory in identifying the necessarily imperfect interactions that take place between different systems, and demonstrates how, if the family courts are truly to respond to the challenges posed by children's uncertain futures, the answer cannot be found in symbolically motivated reform and expedient solutions that serve neither grandparents nor grandchildren. Instead, the only meaningful pathway available is closer scrutiny of the particular grandparent–grandchild relationship in each individual case, unfettered by general pronouncements on the importance of grandparents to children and an untested faith in the protective role they can play in children's lives.

II. Autopoietic Theory and the Challenge of Future Uncertainty for Family Law

Deciding which family members are best positioned to promote children's welfare is inherently difficult within family law, because this rests upon an assessment of each individual child's welfare in a future setting that, by definition, has yet to take place.[16] Despite this uncertainty, judges cannot decline to deliver a judgment when faced with conflicting accounts of how to promote children's welfare by the parties to the dispute.[17] The legal system has had to find a way, through its autonomous and self-referential existence, to be 'based on certainty, or at least have an air of certainty', since it cannot 'tie itself to an unknown, uncertain future'.[18]

Autopoietic theory, by framing the legal system as self-referring and closed,[19] is able to explain how the family courts attempt to overcome the challenge of future uncertainty and 'decide who is right and who is wrong and then how to justify that decision in ways that appear cogent and convincing'.[20] The legal system is 'cognitively open' but 'normatively closed', meaning that it will 'admit' or 'recreate' information, but that information does not automatically change the approach taken within the legal system, with that system retaining control over its own interpretations of the information.[21] Any 'reconstruction' of the

Committee within the House of Lords; see at https://committees.parliament.uk/committee/581/children-and-families-act-2014-committee/.

[16] King (n 1).

[17] ibid 542.

[18] ibid.

[19] ibid. More generally, see N Luhmann, 'The Third Question: The Creative Use of Paradoxes in Law and Legal History' (1988) 15(2) *Journal of Law and Society* 153; Newnham (n 8).

[20] King (n 1) 523.

[21] Newnham (n 8) 429.

information entering the legal system will take place 'only on terms that make sense within law'.[22] Family law thus structures its specific communications on '*present futures* rather than *future presents*',[23] with the family courts reaching their judgments in individual cases through their own 'internally reconstructed version of reality'[24] of 'what is best for children upon the facts (as perceived by law) *of the existing situation* – the present child-parent relations, the wishes of the children, their response to separation etc'.[25] By doing so, it becomes possible to '[tie] together past, present and present futures'.[26] It has been acknowledged that this is a 'selective, restrictive and … necessarily biased account of children's welfare', but that, crucially, it is this autonomy and self-reference that 'allows the legal system to construct and apply its conditional programmes and so avoid exposing the paradoxical nature of its own being'.[27]

The application of an autopoietic understanding to the private family law's treatment of grandparents is important, since it focuses our attention on the potential tensions between policy intentions, the statutory framework, the courts' interpretation of that framework and the understanding of the law possessed by families themselves,[28] rather than assuming that they exist in harmony. 'Legality', therefore, is what 'the law decides … is lawful',[29] but there is no guarantee that this understanding of legality will be easily transferred outside of the legal context into, for example, grandparents' understanding of the law. As this chapter will argue, it is this process of reinterpretation and retranslation that warns against both the use of the law for symbolic purposes to promote the involvement of grandparents in children's lives, and the expedient reliance on grandparents as a protective force in cases involving domestic abuse. Both risk significant unintended consequences that undermine, rather than promote, children's welfare.

III. Symbolic 'Solutions' and the Calls for Statutory Reform: The Removal of the Leave Requirement and the Extension of the Statutory Presumption of Parental Involvement

The law has frequently been identified within arguments for reform as part of the solution to the perceived problem that grandparents are missing out on

[22] L Smith and L Trinder, 'Mind the Gap: Parent Education Programmes and the Family Justice System' (2012) 24(4) *Child and Family Law Quarterly* 428, 447.

[23] King (n 1) 542 (original emphasis).

[24] Newnham (n 8) 428.

[25] King (n 1) 542 (emphasis added).

[26] ibid.

[27] ibid. See also Newnham (n 8) 426.

[28] Newnham (n 8) 426–27.

[29] ibid 427. See also N Luhmann, 'Law as a Social System' (1989) 83(1&2) *Northwestern University Law Review* 136, 141–142; J Priban, 'Beyond Procedural Legitimation: Legality and Its "Infictions"' (1997) 24(3) *Journal of Law and* Society 331, 335-336; King, '"Being Sensible"' (n 10) 252; King (n 1)

relationships with their grandchildren,[30] despite relatively few grandparents taking their cases to court.[31] This section first outlines the calls for statutory reform and then uses an autopoietic understanding to explore the significant risks that are likely to attach to pursuing such reform.

A. The Calls to Remove the Leave Requirement

Grandparents in England and Wales can apply for a section 8 order within the Children Act 1989 to spend time with their grandchildren. Grandparents are not, however, given direct access to proceedings, having first to seek leave from the court.[32] At this leave stage, and unlike at the substantive stage of deciding if an order will be made for the grandparent to spend time with the grandchild, the welfare of the child is not the court's paramount consideration. Instead, the court will have 'particular regard' to a range of factors in determining if leave should be granted, including: 'the nature of the proposed application for the section 8 order'; 'the applicant's connection with the child'; and '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'.[33] If leave is granted, there is no presumption that the grandparent's application for a child arrangements order will go on to be successful.[34]

At the core of the arguments that the leave requirement is unjustified is the belief that grandparents are in a 'special position regarding their grandchildren' in comparison with other non-parental relatives and non-relatives who may have a relationship with the child.[35] Grandparents Plus, for example, has argued in relation to the leave requirement:

> A grandparent's relationship to a child is different and special but the law treats them like any other adult when they are trying to establish contact with their grandchildren. We believe this should change and do not accept the argument that the court system would be overrun with applications if this requirement were removed.[36]

It has also been argued that the leave requirement creates an unjustified barrier to grandparents' access to the courts,[37] giving rise to delay and cost by increasing the

525; Teubner, Nobles and Schiff (n 11) 905. And more broadly, see King, 'Child Welfare Within Law' (n 10).

[30] See, eg, the arguments in Family Justice Review Panel, *Interim Report* and *Final Report* (n 7) and House of Commons (n 7).

[31] L Cusworth et al, *Uncovering Private Family Law: Who's Coming to Court in England?* (London, Nuffield, Family Justice Observatory, 2021) 9.

[32] Unless they fall into one of the limited categories in which leave is not required (see further Children Act 1989, s 10(5)).

[33] Children Act 1989, s 10(9).

[34] See, eg, *Re W (Contact: Application by Grandparent)* [1997] 1 FLR 793.

[35] See, eg, G Douglas and N Ferguson, 'The Role of Grandparents in Divorced Families' (2003) 17(1) *International Journal of Law, Policy and the Family* 41, 63.

[36] Family Justice Review Panel, *Final Report* (n 7) para 4.43.

[37] See, eg, the discussion in KR Pritchard and K Williams, 'The Rights of Grandparents and Other Family Members in Relation to Children – From Both a Domestic and International Perspective' (2018) 4 *International Family Law* 281.

length of time grandparents have to spend within proceedings.[38] From a policy perspective, however, the leave requirement has never been 'designed to be an obstacle to grandparents'.[39] Instead, it is intended to act 'as a filter to sift out those applications that are clearly not in the child's best interests'.[40]

The leave requirement for grandparents was most recently formally considered within the Family Justice Review,[41] and within both its *Interim Report* and *Final Report*, the conclusion was that the leave requirement should be retained,[42] which was accepted by the then Coalition Government.[43] Influential in shaping the Family Justice Review's conclusion was that it was 'not convinced that the courts are refusing leave unreasonably or that seeking leave is slow or expensive for grandparents'.[44] This point has been more recently echoed in Parliament, with Lucy Frazer MP (the then Parliamentary Under-Secretary of State for Justice) stating that 'experience shows that grandparents do not usually experience any difficulty in obtaining permission when their application is motivated by a genuine concern for the interests of the child'.[45] It also remains the case that grandparents can apply for permission at the same time as applying for the child arrangements order itself, and they do not need to pay two sets of fees, one for the leave application and another for the substantive application.[46] As it stands, therefore, it is difficult to see how removing the requirement to seek leave would bring meaningful benefits to grandparents, save for differentiating them at a symbolic level from other non-parental relatives and non-relatives who might have a relationship with the child. The cost and disruption arising from the child arrangements proceedings themselves are likely to constitute the more significant barrier to grandparents' engagement with the court system, a barrier that would continue to exist whether the leave requirement is removed or not.[47]

[38] ibid. See also the discussion in Dickson (n 3) 1093.

[39] Child Arrangements Orders: Grandparents, Question for Ministry of Justice, UIN 20478, tabled on 16 December 2015.

[40] ibid.

[41] This Review commenced in March 2010, during the time in office of the Labour Government, and was taken forward by the subsequent Coalition Government. An earlier Green Paper consultation on whether to remove the leave requirement ran until April 2010 (Department for Children, Schools and Families, *Support for All: The Families and Relationships Green Paper* (Cm 7787, 2010)), but the Labour Government then lost the May 2010 General Election. The new Conservative–Liberal Democrat Coalition Government declined to take the Green Paper forward, making the Family Justice Review the next time the leave requirement was formally reviewed.

[42] Family Justice Review Panel, *Interim Report* (n 7) para 5.82; Family Justice Review Panel, *Final Report* (n 7) para 4.48.

[43] Ministry of Justice and Department for Education, *The Government Response to the Family Justice Review: A System with Children and Families at its Heart* (Cm 8273, 2012) 22.

[44] Family Justice Review Panel, *Interim Report* (n 7) para 5.84; Family Justice Review Panel, *Final Report* (n 7) para 4.46. See also J Herring, *Older People in Law and Society* (Oxford, Oxford University Press, 2009) 246–47.

[45] Lucy Frazer, HC Deb 2 May 2018, vol 640, col 184WH.

[46] Gov.uk, 'Form C100: Apply for a Court Order to Make Arrangements for a Child to Resolve a Dispute About Their Upbringing' at www.gov.uk/government/publications/form-c100-application-under-the-children-act-1989-for-a-child-arrangements-prohibited-steps-specific-issue-section-8-order-or-to-vary-or-discharge. See also Frazer (n 45).

[47] Douglas and Ferguson (n 35) 63.

Of more significance, therefore, is the argument also advanced in favour of removing the leave requirement that this removal would '"focus the minds" of parents' and 'compel' them to 'think twice before refusing contact'.[48] This argument rests heavily upon the assumption that legal reform can shape the behaviour of the non-legal actors to the dispute in a predictable way. This same assumption also drives the most recent push for reform to extend the statutory presumption of parental involvement to include the importance to children of grandparents' involvement in their lives.

B. The Calls to Extend the Existing Statutory Presumption of Parental Involvement to Include Grandparents

There have been recent calls to extend the statutory presumption of parental involvement in section 1(2A) of the Children Act 1989 to include grandparents.[49] Section 1(2A) directs the court that, in the absence of evidence to the contrary, it should be presumed that the involvement of each parent in the child's life will further the child's welfare.[50] The main driver for this extension of the statutory presumption of parental involvement has not been that the courts are unduly denying grandparents time with their grandchildren in individual cases.[51] Instead, the assumption is that, by including grandparents within the statutory presumption, parents will be less likely to stop grandparents from spending time with their grandchildren, both in cases that reach court and those that do not.[52] That the law is being viewed as the 'solution' to problems that emanate from outside the legal system can be clearly seen here in the development of policy recommendations for reform. In expressing his support for an extension of the statutory presumption to include either the words 'and extended family' or 'and any grandparents', Nigel Huddleston MP, for example, said that 'changing the law also changes the culture so that deliberately restricting the access of one family member to another becomes socially unacceptable'.[53] The claim is that by extending the statutory presumption to include grandparents, this would 'avoid the need for people to go to court in the first place'.[54] The belief, therefore, is that the law can shape behaviour in a controlled way, performing a culture-changing function by setting a standard on what is, and is not, acceptable, which will then be dutifully observed by the parties involved in disputes, regardless of whether they access the court system or not.

[48] As discussed in Dickson (n 3) 1093. See also Stather (n 9).

[49] See n 7.

[50] 'Involvement' can be direct or indirect, and the presumption does not guarantee 'any particular division of a child's time': Children Act 1989, s 1(2B).

[51] See, eg, the arguments advanced for reform in House of Commons (n 7).

[52] See, eg, Huddleston (n 9).

[53] ibid cols 173WH–174WH. See also Deuchars and Loudoun (n 7); Stather (n 9).

[54] Michael Tomlinson MP, HC Deb 2 May 2018, vol 640, col 184WH.

This faith in the law's capacity to bring about predictable behavioural change is more than familiar within private family law.[55] The most recent iteration of this argument heavily influenced the introduction of the statutory presumption of parental involvement.[56] As this chapter explores, the assumption that the law can change behaviour in a predictable way is flawed, and the legal framework has an important 'censoring' role that warns against the removal of the leave requirement and the calls to extend the statutory presumption.

C. Are Grandparents 'Special'? The 'Censoring' Role of the Legislative Framework

An autopoietic understanding of the law as autonomous and self-referential demonstrates how the legislative framework within the family justice system can act as a 'censor' on the 'entry into legal decision-making' of information, including 'science-generated notions of what is good, healthy or less risky for children' arising from existing research evidence.[57] In response to children's inherently uncertain futures, the Children Act 1989 exerts some control over this uncertainty by setting the criteria by which family members are deemed 'closest' to the child, through both the leave requirement and the statutory presumption of parental involvement.[58] Judges are then charged with making assessments in individual cases on whether particular grandparents will promote children's welfare within that legal framework. The extent to which the legal system can, and should, reflect the broader research evidence base on children's welfare is a complex issue.[59] This issue does not form the focus of this chapter, save for considering the extent to which the 'censoring' process that constructs the legislative framework has resulted in a legal position that is aligned with the existing research evidence.

The involvement of grandparents in children's lives can undoubtedly be of great importance to children (see chapter 2 of this volume for further discussion),[60]

[55] For further discussion of the way in which the Children Act 1989 has previously been deployed for symbolic ends, see, eg, PG Harris and RH George, 'Parental Responsibility and Shared Residence Orders: Parliamentary Intentions and Judicial Interpretations' (2010) 22(2) *Child and Family Law Quarterly* 151; Kaganas (n 8); Newnham (n 8).

[56] See, eg, the discussion in Kaganas (n 8); J Harwood, 'Presuming the Status Quo? The Impact of the Statutory Presumption of Parental Involvement' (2021) 43(2) *Journal of Social Welfare and Family Law* 119.

[57] King (n 1) 532.

[58] In relation to the leave requirement, see Children Act 1989, s 10(1). In relation to the statutory presumption of parental involvement, see s 1(2A).

[59] For discussion of the relationship between the law and research evidence bases, see, eg, Newnham (n 8) 431–33. See further F Kaganas and C Piper, 'Shared Parenting: A 70% Solution?' (2002) 14(4) *Child and Family Law Quarterly* 365; A Barnett, 'Family Law Without Lawyers: A Systems Theory Perspective' (2017) 39(2) *Journal of Social Welfare and Family Law* 223; King and Piper (n 10) 43.

[60] See further the discussion in M Purnell and B H Bagby, 'Grandparents' Rights: Implications for Family Specialists' (1993) 42(2) *Family Relations* 173, 174–75; J Eekelaar, *Family Law and Personal Life* (Oxford, Oxford University Press, 2007) 70; M Murch, *Supporting Children when Parents Separate* (Bristol, Policy Press, 2018) 51, 55–56, 59–60 and 87.

particularly in relation to adolescent children.[61] Reviews of the available research evidence with relevance to private family law cases, however, have found that whilst this importance can exist in individual cases, there is currently a lack of evidence, overall, that grandparents are sufficiently different from other non-parental relatives to merit being given a blanket privileged legal status.[62] It has been shown that grandparents' relationships with their grandchildren are not uniform,[63] and the emphasis within existing research is on the quality of the relationship in individual cases, rather than on its mere existence.[64] Grandparents who enjoyed a meaningful relationship with their grandchildren when the parental relationship was intact have also been shown to be unlikely to lose that relationship following parental separation,[65] meaning that the cases that engage the private family court system are likely to be those where this meaningful relationship is lacking and/or there is high conflict between grandparents and parents. Overall, there are also limited studies conducted in the United Kingdom, and the studies that exist tend not to cover the higher-conflict cases that result in court action.[66]

This is again not to downplay the important role grandparents can play in grandchildren's lives. Instead, it is to suggest that any removal of the leave requirement, or any extension of the statutory presumption of parental involvement on the basis of grandparents' enjoyment of a 'special' relationship with their grandchildren, would represent more of a symbolic attempt to translate a perceived societal importance of grandparents within families into the legal framework than a firm rooting in the available evidence. As it stands, the current legal framework in acting as a 'censor' is broadly aligned with this evidence, with no special legal status being given to grandparents through either the non-existence of a leave requirement or the extension of the statutory presumption of parental involvement to include them.

[61] See, eg, S Attar-Schwartz and A Buchanan, 'Grandparenting and Adolescent Well-being: Evidence from the UK and Israel' (2018) 13(2) *Contemporary Social Science* 219. More generally, see A Buchanan and A Rotkirch, 'Twenty-First Century Grandparents: Global Perspectives on Changing Roles and Consequences' (2018) 13(2) *Contemporary Social Science* 131.

[62] See, eg, Douglas and Ferguson (n 35) 62–63; Kaganas and Piper (n 7) 189–91. See also N Ferguson et al, *Grandparenting in Divorced Families* (Bristol, Policy Press, 2004) 72–74 and 140–41. For further discussion of the empirical evidence base, see F Kaganas and C Piper, 'Grandparents and the Limits of the Law' (1990) 4(1) *International Journal of Law, Policy and the Family* 27, 32–34; F Kaganas, 'Grandparents' Rights and Grandparents' Campaigns' (2007) 19(1) *Child and Family Law Quarterly* 17, 26–28.

[63] Douglas and Ferguson (n 35) 45–49 and 63; Kaganas and Piper (n 7) 191.

[64] Ferguson et al (n 62); Douglas and Ferguson (n 35); A Buchanan and E Flouri, *Involved Grandparenting and Child Well-being*, UK Data Archive Study No 6075, 2007; Kaganas and Piper (n 7) 191.

[65] Ferguson et al (n 62). This finding was influential in the Family Justice Review's interim review (n 7) para 5.83.

[66] For further discussion, see Kaganas and Piper (n 7) 189–91.

D. Is There a Place for Symbolic Reform to Promote the Involvement of Grandparents in Children's Lives?

The issue, then, is whether there is any role for the law in relation to grandparents to be used for symbolic ends to attempt to shape the behaviour of the parties involved in disputes. There are significant parallels between the introduction of the statutory presumption of parental involvement through the Children and Families Act 2014, and the calls to remove the leave requirement and to extend the statutory presumption to include grandparents. When explored through an autopoietic perspective, there are important lessons to take from the introduction of the statutory presumption of parental involvement that warn against the adoption of both of these reforms.

The articulated policy intention behind the introduction of the statutory presumption of parental involvement was to address public perceptions of bias against fathers within the family justice system,[67] set a standard at the 'societal level' on the importance of parents' joint responsibility for their children's upbringing[68] and, by doing so, encourage parents to reach agreements on contact without reliance on the court.[69] The government at the time was emphatic that the statutory presumption was never intended to change the courts' practice,[70] which was important since there was no empirical evidence of any actual bias against fathers, or any indication that judges were unduly restricting contact when sought by a parent.[71] The assumption was, therefore, that parents would receive the message from the legislative framework that both parents should be involved in their children's lives post-separation, process that message in the way intended at the policy level, and then change their behaviour to stop the denial of contact and shift, instead, to reaching amicable agreements without court assistance.[72]

There was significant doubt expressed prior to the introduction of the statutory presumption of parental involvement that this 'message-sending' function of the reform would achieve these intended objectives,[73] and the available evidence

[67] The emphasis was on remedying a *perception* of bias, since no bias had been found to exist within the courts' practice: M Harding and A Newnham, *How Do County Courts Share the Care of Children Between Parents?* (London, Nuffield Foundation, 2015). See also Harwood (n 56). For a more general discussion of the impact of perceptions of bias, see also Newnham (n 8) 434 and 439.

[68] Department for Education and Ministry of Justice, *Consultation: Co-operative Parenting Following Family Separation: Proposed Legislation on the Involvement of Both Parents in a Child's Life* (London, Department for Education and Ministry of Justice, 2012) para 3.2.

[69] ibid para 4.3.

[70] See, eg, Secretary of State for Education, *Children and Families Bill 2013: Contextual Information and Responses to Pre-Legislative Scrutiny* (Cmnd 8540, 2013).

[71] Harding and Newnham (n 67).

[72] Department for Education and Ministry of Justice (n 68).

[73] See Kaganas (n 8). See also Justice Committee, *Fourth Report of Session 2012–13: Pre-Legislative Scrutiny of the Children and Families Bill* (HC 739, 2012); M O'Grady, 'Shared Parenting: Keeping Welfare Paramount by Learning from Mistakes' (2013) 43(Apr) *Family Law* 448; F Kaganas, 'Parental Involvement: A Discretionary Presumption' (2018) 38(4) *Legal Studies* 549.

on its impact post-implementation suggests that it is indeed unlikely that those objectives are being achieved.[74] As autopoietic theory explains, this is due to the 'well known' understanding 'that changes sought by one system are rarely straightforwardly achieved in the other'.[75] Each system has its own 'internal logic'.[76] As a result, the 'second system will not respond as required [by the first system], as it "obeys a different internal logic"'.[77] It cannot, therefore, be assumed that parents will respond to legislative change in the way intended at the policy level, since parents inhabit their own normative systems and will interpret the legal framework through their own 'internal logic', if they are even aware of the legislative change in the first place. Indeed, it has consistently been argued that parents 'feel justified in disobeying legal pronouncements where these conflict with their internal moral codes'.[78] As a result, parents' perception of the legal framework depends on what they 'can understand and process and what they want to hear'.[79]

It is similarly unlikely that introducing a further symbolic gesture into the statutory framework by extending the statutory presumption to include grandparents will have any meaningful impact on the behaviour of the parties to a dispute, at least not in the way intended at the policy level.[80] The belief that removing the leave requirement will make parents 'think twice'[81] before refusing contact is also misplaced. When understood from an autopoietic perspective, the more likely outcomes of an extension of the statutory presumption, and the removal of the leave requirement, are unintended consequences, both in increasing grandparents' dissatisfaction and in introducing a risk of unpredictable change to the courts' approach in cases involving allegations of harm that could undermine children's welfare.

i. Unintended Consequences – Increasing Grandparents' Dissatisfaction

In theory, neither the removal of the leave requirement nor the extension of the statutory presumption of parental involvement to include grandparents should significantly alter the courts' practice. The removal of the leave requirement for grandparents should not materially change the final outcomes the courts reach, since the courts' decisions on whether to grant leave are separate, and involve

[74] See, eg, Kaganas, 'Parental Involvement' (n 73) 564–65; Kaganas and Piper (n 7) 188.
[75] Newnham (n 8) 438.
[76] Teubner (n 13) 22. For further discussion, see, eg, Newnham (n 8).
[77] Newnham (n 8) 438.
[78] Newnham (n 8) 438. See also F Kaganas and S Day Sclater, 'Contact Disputes: Narrative Constructions of "Good" Parents' (2004) 12 *Feminist Legal Studies* 1; K Laing, 'Doing the Right Thing: Cohabiting Parents, Separation and Child Contact' (2006) 20(2) *International Journal of Law, Policy and the Family* 169.
[79] Newnham (n 8) 426 (quoted) and 426–27.
[80] For further discussion of possible broader unintended consequences, see Kaganas and Piper (n 7).
[81] Dickson (n 3) 1093. See also Huddleston (n 9).

different considerations, from the decisions on whether to allow grandparents to spend time with their grandchildren, as discussed previously. If the existing statutory presumption were to be extended to include grandparents, it is most likely that it would operate in the same way as the presumption that currently applies to parents: it would become one of the factors for the court to consider when determining if an order should be made for the grandparent to spend time with the grandchild. The Explanatory Notes to the Children and Families Act 2014 frame the statutory presumption not as a strict legal presumption but, instead, as one of the factors for the court to 'weigh in the balance … along with the other considerations in section 1 of the Children Act 1989, subject to the overriding requirement that the child's welfare remains the court's paramount consideration'.[82] This is significant, since anything stronger than this in steering the courts' decision making is likely to encounter incompatibility with the paramountcy of the welfare principle.[83] In common with the original introduction of the statutory presumption of parental involvement,[84] therefore, it is unlikely that the policy intention behind any extension to include grandparents will be to change the courts' practice in individual cases, or to detract from the paramountcy of the welfare principle.

In practice, however, the reinterpretations and retranslations of meaning that take place between different systems point to the unpredictability of reform. One outcome of removing the leave requirement and extending the statutory presumption of parental involvement is that there will indeed be no material change to the courts' approach. If this is the case, the risk then arises that, rather than placating those arguing for reform, the reform itself could bring about further dissatisfaction. Since grandparents will interpret the statutory reform using their own 'internal logic',[85] there is no guarantee that this logic will be aligned with the policy intention behind the reform, or the application of the statute by judges. In particular, once grandparents realise the limited practical impact of the removal of the leave requirement and the extension to the statutory presumption of parental involvement, and in particular that neither guarantees that any order to spend time with their grandchild will be made, their dissatisfaction with the legal framework is likely to become more, rather than less, entrenched.[86] This speaks again to the limits of using the law for symbolic purposes, as autopoietic theory reveals. Once the law fails to fulfil its expected objectives, as interpreted through the specific perspectives of the particular actors involved, renewed dissatisfaction then opens the door to further arguments for reform.[87]

[82] Children and Families Act 2014, Explanatory Notes, 109.

[83] Children Act 1989, s 1(1). For further discussion, see A Bainham and S Gilmore, 'The English Children and Families Act 2014' (2015) 46(3) *Victoria University of Wellington Law Review* 627; Kaganas, 'Parental Involvement' (n 73).

[84] Secretary of State for Education (n 70).

[85] Teubner (n 13) 22.

[86] For discussion of this risk in relation to previous attempts to utilise the law for symbolic purposes, see, eg, Newnham (n 8) 441.

[87] N Luhmann, *Essays on Self-Reference* (New York, Columbia University Press, 1990) 240. See also the discussion in Newnham (n 8) 440.

ii. Unintended Consequences – Changing Decision Making in High-Risk Cases Involving Allegations of Harm

Owing to the unpredictability of reform, an alternative outcome is that statutory reform changes the courts' approach, which is likely to impact particularly negatively the higher-risk cases, such as those involving domestic abuse. The risk is that contact would be promoted in cases in which it does not, in practice, serve the welfare of the child. Judges may '[obey] a different internal logic'[88] to the legislation itself and, again, as a result, the 'second system will not respond as required [by the first system]'.[89] Even if the policy intention is not to change the courts' practice, therefore, it cannot be guaranteed that the courts' practice will remain unchanged in individual cases.

A material change to the courts' practice is more likely in relation to an extension of the statutory presumption of parental involvement than the removal of the leave requirement, since the former concerns the substantive application for the child arrangements order itself. That said, the removal of the leave requirement, and its 'censoring' function in particular, could still undermine the level of safeguarding the court can provide. The policy intention behind any removal of the leave requirement would never be to encourage grandparents who pose a risk of harm to gain access to substantive hearings to argue to spend time with their grandchildren. However, there is an ever-present and well-established risk that domestically abusive parents' parents attempt to secure contact 'through the back door'.[90] This suggests that there is a need, therefore, for verification on a case-by-case basis that the grandparents seeking to use the court system to secure time with their grandchildren are not those who would pose a risk of harm to either children or parents who have been subject to domestic abuse. The retranslations that take place between different systems, here in relation to the removal of the leave requirement from the statutory framework and the courts' resolution of cases in practice, could have the unintended consequence of taking away the additional layer of protection available to the courts, contrary to any policy intention underpinning the leave requirement's removal.

Without a leave requirement, judges would have more limited scope to verify that the grandparents entitled to apply for contact are not those who would risk putting parents and children who have experienced domestic abuse into positions where their safety and well-being may be at risk. The leave requirement also provides the opportunity to assess the risk of intergenerational abuse, with grandparents potentially at risk of abuse themselves, as well as to safeguard against grandparents' involvement in the perpetration of abuse. Support for the retention

[88] Teubner (n 13) 22.
[89] Newnham (n 8) 438.
[90] For discussion more generally, see Dickson (n 3) 1092.

of the leave requirement to perform this protective role has been expressed by Women's Aid for this reason:

> While many grandparents can provide a vital positive role, in our experience this can sometimes be negative or harmful if it exacerbates and intensifies existing disputes or risks. We have seen some examples of cases where grandparents perpetuate or collude in abuse against a child and their non-abusing parent, especially if they are facilitating contact between the child and the abusive parent.[91]

This risk, in cases involving domestic abuse, of undermining the protective power of the court is even greater at the substantive hearing stage, and there are lessons that should be learned again here from the introduction of the statutory presumption of parental involvement that warn against its extension to include grandparents. The existing evidence on the impact of the statutory presumption suggests, overall, that, as intended at the policy level, it is indeed not having a material impact on the courts' approach.[92] There is, however, some evidence that the reinterpretations and retranslations of meaning that take place between the statutory legal framework and judges' applications of that framework in individual cases, are resulting in the misinterpretation of the statutory presumption as a direction that contact should always take place.[93] This speaks more generally to the problems inherent in the use of presumptions within family law, namely that they can 'inhibit or distort the rigorous search for the welfare solution', in particular since they can be relied upon 'as an aid to determination when the individual advocate or judge feels either undecided or overwhelmed'.[94] The evidence here suggests that the statutory presumption could be undermining the courts' duty to give paramount consideration to each individual child's welfare, by being used not simply as one of the factors for the courts to 'weigh in the balance'[95] but rather as a direction that children always 'need' the involvement of both of their parents in their lives.

Owing to the level of concern about misinterpretation, and its negative impact on the courts' practice,[96] a major expert review into the family courts' treatment of harm to children and parents in private law disputes recently concluded that a follow-up review into the operation of the presumption was 'needed urgently in order to address its detrimental effects'.[97] At the time of writing, this review

[91] Family Justice Review Panel, *Interim Report* (n 7) para 5.84.

[92] Harwood (n 56); House of Lords, Children and Families Act 2014 Committee, *Corrected Oral Evidence: Children and Families Act 2014* (Monday, 4 April 2022, 4.15pm).

[93] For further discussion, see Harwood (n 56).

[94] *Re L (A Child) (Contact: Domestic Violence); Re V (A Child) (Contact: Domestic Violence); Re M (A Child) (Contact: Domestic Violence); Re H (Children) (Contact: Domestic Violence)* [2001] Fam 260, 295 (Thorpe LJ).

[95] Children and Families Act 2014, Explanatory Notes (n 82). See further see Kaganas, 'Parental Involvement' (n 73).

[96] See also the concerns raised in *F v L* [2017] EWHC 1377 [11] (Russell J); and Kaganas, 'Parental Involvement' (n 73) 563.

[97] Ministry of Justice (n 6) 9.

process has commenced but not concluded.[98] There remains a real possibility that the outcome will be one of 'legislation [inciting] legislation',[99] with the Children Act 1989 needing amendment to remedy the risks that came into existence with the initial introduction of the statutory presumption.

Additional risks of misinterpretation arguably exist even more in relation to grandparents than parents. In relation to parents, it was well-established prior to the introduction of the statutory presumption that the courts already navigated the challenge of future uncertainty through the imposition of their self-referential legal knowledge that what is 'best' for children is to maintain a relationship with both parents post-parental separation, since both are seen to be of 'equal psychological importance to a child's present and future well-being'.[100] The statutory presumption therefore put on the statute book the approach the courts were already following in practice, with an assumption,[101] or even non-statutory presumption, in favour of contact being in existence prior to the reform.[102] This is not the case in relation to grandparents. The case law suggests that while judges are willing to recognise the potential benefits to children of spending time with grandparents,[103] they have also been clear that grandparents do not stand in the same position in relation to children as parents.[104] As Thorpe LJ said in *Re B (Transfer of Residence to Grandmother)*, 'Manifestly grandparents are not on equal footing with parents. … Inevitably there are disbenefits for a child to be brought up by an adult of a different generation to either of her parents.'[105]

As a result, the courts have been less willing to assume the benefits to children of a relationship with their grandparents than they have been to children's relationships with parents,[106] and there is neither an assumption nor a presumption in favour of a relationship between grandparents and their grandchildren within the existing case law.[107] Any unintended change in the courts' approach through the mistranslation of the statutory presumption into judicial practice by leading judges to promote contact with grandparents, in cases in which it would not previously have been promoted, is likely to give rise to significant questions about the

[98] A broader inquiry into the Children and Families Act 2014 is also being undertaken by the House of Lords, Children and Families Act 2014 Committee (n 15).

[99] Luhmann (n 87) 240.

[100] King (n 1) 526.

[101] *Re L; Re V; Re M; Re H* (n 94) 294–95 (Thorpe LJ). See also *Re P* [2008] EWCA Civ 1431 [38] (Ward LJ).

[102] For discussion, see Harwood (n 56). See also A Barnett, 'Contact at All Costs? Domestic Violence and Children's Welfare' (2014) 26(4) *Child and Family Law Quarterly* 439.

[103] See, eg, *Re W (Contact: Application by Grandparent)* (n 34) 795 (Hollis J); *Re J (Leave to Issue Application for Residence Order)* [2003] 1 FLR 114 [19] (Thorpe LJ); *CW v TW* [2011] EWHC 76 (Fam) [31] (Sir Nicholas Wall). See further the discussion in Kaganas and Piper (n 7) 182–83.

[104] See, eg, *Re A (Section 8 Order: Grandparent Application)* [1995] 2 FLR 153, 157 (Butler-Sloss LJ); *Re W (Contact: Application by Grandparent)* (n 34) 795–98 (Hollis J).

[105] *Re B (Transfer of Residence to Grandmother)* [2012] EWCA Civ 858 [13] (Thorpe LJ).

[106] See, eg, *Re A* (n 104). More broadly see, eg, *Re G (A Child)* [2018] EWCA Civ 305.

[107] See, eg, *Re A* (n 104); *Re K (Mother's Hostility to Grandparent's Contact)* [1996] CLY 565, Case Digest. See further the discussion in Kaganas and Piper (n 7) 182–83.

presumption's interruption of the courts' proper application of the welfare principle. In response to the calls both to remove the leave requirement and to extend the statutory presumption to grandparents, therefore, it would be advisable to listen, this time, to the earlier warning by the Family Justice Council in relation to the statutory presumption of parental involvement:

> *Rather than introducing a provision that creates problems and then adding a fix for those problems, it would be far more sensible not to introduce the problem-creating provision in the first place.*[108]

Instead, there needs to be a more sustained focus on individual grandchild-grandparent relationships, unimpeded by general pronouncements on the importance of grandparents to children, along with greater sensitivity to the risk of unintended consequences that can attach to reform.

IV. Expedient 'Solutions': The Deployment of Grandparents to Play a Protective Role in Domestic Abuse Cases

The questions raised by the application of an autopoietic understanding of the legal status of grandparents explored thus far also provides a framework for the interrogation of the later stages of parties' progression through the family court, and in particular the uncertainty of the outcomes arising from the expedient deployment of grandparents to play a protective role in domestic abuse cases. An autopoietic understanding focuses attention again here on the way in which the law gives itself legitimacy in navigating the challenge of future uncertainty, as well as the way in which the closed and autonomous nature of legal and non-legal systems means that they do not necessarily work harmoniously with each other. In common with the risks that attach to the use of the law for symbolic ends, risks are revealed here too that the expedient use of grandparents can threaten the safety and broader welfare of children, principally owing to the misinterpretations and mistranslations that can take place between judicial intentions and grandparents' application of those intentions in practice.

The challenge of future uncertainty is particularly acute when the decision is whether a child should spend time with a domestically abusive parent. These cases involve the additional layer of unpredictability of how the parent will behave and the precise level of risk they pose. Judges, however, are bound to reach a decision in these contested cases. Future uncertainty is overcome by basing judicial decisions on 'present futures', namely, the information and resources available to judges at the time of hearing the case, interpreted through their own self-referential

[108] Family Justice Review Panel, *Final Report* (n 7) para 4.39 (original emphasis).

framework.[109] There is some evidence that a judicial solution to future uncertainty has been the temporary designation of maternal or paternal grandparents as the protectors of the child during the time the child spends with a parent who has perpetrated domestic abuse.[110]

The practical need for reliance on grandparents has arisen in part due to the lack of resourcing for supervised contact centres.[111] The courts have faced the dilemma of accepting significant delay to the resumption of contact or refusing contact altogether, or, alternatively, calling upon relatives to perform a protective role. By calling upon grandparents, the courts are relying on the self-perpetuating judicial perception that the priority in promoting children's welfare is maintaining children's relationships with both parents wherever possible,[112] and that this can be made 'safe' by asking loving grandparents to step in to monitor contact.

How widespread the practice of relying on grandparents is remains unclear. Evidence was, however, given to the All-Party Parliamentary Group on Domestic Violence that 'very unsafe or inappropriate' contact arrangements were being made involving supervision conducted by grandparents, including in cases such as the following:

> He applied for contact, and at the first hearing they granted supervised contact but the supervision was to take place at his parents' home and his parents would do the supervision – his parents had two weeks before watched him smash my head through a wall and refused to tell the police what had happened … [They] (the court) never met the parents. BO[113]

The existence of these arrangements was also evidenced in the author's qualitative empirical study involving interviews with judges, barristers, solicitors, CAFCASS practitioners and representatives from domestic abuse organisations.[114] Forty-one semi-structured interviews were conducted within one county in England between February 2016 and April 2017. Interviewees were not asked specifically about grandparents, but some, nevertheless, pointed to this practice. One of the barristers explained that in some cases, including those involving threats to life, the court might arrange for 'some friendly granny to come along' to monitor the time spent between the domestically abusive parent and the child. Other interviewees pointed to variations in judicial practice, with some judges being more in favour of reliance on grandparents than others. Another barrister, for example, spoke of experiences with one circuit judge who 'thinks grandparents are the best thing ever'.

[109] King (n 1) 542.
[110] See, eg, All-Party Parliamentary Group on Domestic Violence (n 5).
[111] See, eg, J Harwood, 'Child Arrangements Orders (Contact) and Domestic Abuse – An Exploration of the Law and Practice' (PhD thesis, University of Warwick, 2018) 282–87.
[112] King (n 1) 526. See also Barnett (n 102).
[113] All-Party Parliamentary Group on Domestic Violence (n 5).
[114] Harwood (n 111). The particular findings discussed in this chapter have not previously been published elsewhere.

The autonomous and self-referential nature of different systems allows for misalignment between the courts' intentions in finding 'solutions' to the challenges posed by limited resources, and the implementation of those intentions by grandparents charged with performing the protective role in the high-risk cases. Whilst the judicial intention behind the temporary designation of grandparents as protectors of the child may be well-meaning, based on perceptions of grandparents as being 'friendly' and 'loving', there is no guarantee that, when translated outside of the legal framework into practice, grandparents will have either the impartiality or the skills needed to safeguard children. There is also the associated risk of the involvement of the grandparents themselves in the perpetration of abuse post-separation.[115] One of the representatives from the domestic abuse organisations within the author's empirical research, for example, was particularly concerned about the practice of calling upon grandparents to perform a protective role, in particular in relation to paternal grandparents:

> And that is something that has come up a lot with regards to survivors, where someone in the perpetrator's family is meant to supervise contact and where, actually, they feel that that is really unsafe and they don't feel they can trust that person who is in the supervisor role to actually ensure that contact is happening in a safe way … And I think the level of anxiety that that gives to women [is significant, with survivors] feeling that the supervision is really inadequate.[116]

These risks are being amplified by the move away from post-order reviews, with limited information on the way in which contact is progressing being fed back into the legal system. In the place of post-order reviews, there is evidence that judges have instead increasingly been using staggered orders, in which the court sets out a map for the relaxation of the restrictions on the time spent by a domestically abusive parent over time with their children, without directly overseeing this relaxation.[117] The onus then falls on the non-abusive parent to monitor the relaxation of contact, and to bring the case back to court if deemed necessary.[118] In practice, therefore, it is possible that orders for grandparents to monitor contact are being made, with contact progressing to an unsupervised level without further judicial oversight.[119]

An autopoietic understanding enables assessments of possible solutions to overcome these risks, here by drawing attention to the importance of the feeding of information back into the legal system. Due to the circularity in the law's construction of meaning, information entering the legal system on how contact is progressing post-order, such as from parents, will be reprocessed into a format understood by judges on their own terms.[120] However, it remains crucial that

[115] See, eg, Family Justice Review Panel, *Interim Report* (n 7) para 5.84.
[116] Harwood (n 111) 284.
[117] ibid 199–203.
[118] For further discussion, see ibid; Ministry of Justice (n 6) 145–46.
[119] Harwood (n 111) 199–203; Ministry of Justice (n 6) 145–46.
[120] King (n 1) 525; Newnham (n 8) 427–28.

this information is at least entering the legal system. Without this, contact risks progressing when there might be significant threats to children's safety and welfare. The expedient deployment of grandparents to perform a protective role should not, therefore, be an outcome reached without careful scrutiny; and in the cases where this role is performed, it becomes imperative that the court maintains greater oversight of the way in which contact is progressing through post-order reviews.

This autopoietic understanding is particularly significant now, since the resistance to post-order reviews was identified as a problem within the Ministry of Justice's recent expert review.[121] One of the recommendations was that there should be greater court involvement post-order to monitor how contact is progressing.[122] While there are major disadvantages to prolonging children's involvement in the court system, this call for post-order reviews should be welcomed as a practical tool to support the courts in navigating the challenge of future uncertainty. There are significant problems with passing responsibility, in practice, to a parent who has experienced domestic abuse to manage this uncertainty by monitoring the relaxation of the restrictions on contact over time, including the impact of domestic abuse on that parent's safety, well-being and parenting capacity.[123]

V. Conclusion

This chapter has explored how well-intentioned attempts to promote the involvement of grandparents in children's lives through the use of symbolic and expedient 'solutions' give rise to significant risks of unintended consequences that threaten children's welfare, and ultimately do not serve grandparents. Both in the formation of the statutory framework and in its application to individual cases, the risk of unintended consequences arises since, at the time decisions are taken, there is no way of predicting with certainty how those decisions will play out in practice in relation to the specific children subject to the dispute.[124] From an autopoietic perspective, any statutory reform, or indeed any judgment given by the court, can give rise to unpredictable results within children's uncertain futures, owing to the reinterpretations and retranslations of meaning that take place between different systems. While this unpredictability will always exist, given that symbolic reform and the expedient deployment of grandparents are very unlikely to serve either grandparents or grandchildren, taking this risk of unpredictable results is one that is not merited, and different solutions are needed.

At the heart of resistance to statutory reform to remove the leave requirement and to extend the statutory presumption of parental involvement to include

[121] Ministry of Justice (n 6) 145–46.
[122] ibid 147.
[123] ibid 145–47; Harwood (n 111) 199–203.
[124] King (n 1).

grandparents should be an understanding, informed by the insights provided by autopoietic theory in this context, that there can be no guarantee that the intended impact of reform will be achieved neatly in practice. Lessons should be learned here from previous, failed attempts to deploy the law for symbolic means, and most recently from the problems arising from the introduction of the statutory presumption of parental involvement. Generalised presumptions, while convenient, have never sat easily within family law, given the diversity of the issues at stake, and they also give rise to significant risks of undermining the paramountcy of each individual child's welfare. Neither the removal of the leave requirement, nor the extension of the statutory presumption to include grandparents is likely to enjoy success in positively shaping the behaviour of the parties to any dispute. These non-legal actors will reinterpret legal reform from their own perspectives since they inhabit their own normative systems, based on how they can, and want to, interpret the legal framework, with no guarantee that this will align with policy intentions. The more likely outcomes are unintended consequences, including renewed dissatisfaction and the introduction of a risk that the courts will unduly promote contact in inappropriate cases.

The reliance on grandparents later in the private family court process as 'protectors' to monitor the time spent between domestically abusive parents and children again gives rise to risks of harmful unintended consequences, here through mistranslations of the courts' intentions for grandparents to safeguard children into grandparents' capacity to actually do so in practice. The importance of the feeding of information back into the court system on how contact is progressing through post-order reviews is also highlighted here, albeit with the acknowledgement that this information will be re-processed into judges' own terms once it enters that system.

In progressing debates in this space, the framework provided by the application of autopoietic theory has contributed to an understanding of the real risks that attach to reliance on symbolic and expedient solutions. It has also shone light on the pathway that needs to be taken to find more meaningful solutions. Within the court system, these solutions cannot involve reference to generalised statements on the benefits grandparents can bring to children, or an untested reliance on the protective role they can play. Instead, there has to be a true examination of the particular grandchild–grandparent relationship in each individual case. More careful scrutiny of where any problem with grandparents' relationships with their grandchildren actually lies is also needed, which should involve an acceptance that there are significant limits to the deployment of the law to solve problems with grandparents' relationships with their grandchildren that originate from outside the legal system itself.