

**Written evidence submitted by Dr. Charlotte Bendall, Birmingham Law School, and Dr.
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Summary

1. Grandparents can perform an important role in the lives of their grandchildren. However, they frequently struggle to maintain contact with those grandchildren where family relationships have broken down.
2. The courts and legal frameworks have minimised and, in many cases, ignored the value of the grandparent/grandchild relationship and, indeed, the practical involvement that many grandparents have in caring for their grandchildren on an everyday basis.
3. Grandparents have no specific right to contact that is recognised within the law of England and Wales, with a blanket preference being shown toward parents. Private law children matters have consequently failed to recognise children's wider networks of care, with preference instead being shown towards the traditional 'nuclear' family (entailing mother and father only).
4. This evidence argues that greater consideration and, ultimately, recognition should be provided of the significance of multi-generational bonds, not only to ensure the welfare of grandparents, but also, crucially, the best interests of their grandchildren.

Authors of the submission

5. Dr. Charlotte Bendall is an Associate Professor at Birmingham Law School, University of Birmingham. She is the author of several publications in family law relating both to adults and children, and leads, together with Dr. Rehana Parveen, on the Family Law Reform Now project, part of which has entailed liaising with the Law Commission seeking to influence their programme of family law reform. Dr. Bendall has recently co-authored a book chapter, together with Dr. Davey, on the potential held by mediation for grandparents involved in intrafamilial conflict (C. Bendall and S. Davey, 'The 'grandparent problem': Encouraging a more relational approach

towards child arrangements via mediation’, in S Davey and D Lindsey (eds) *Grandparents and the Law: Rights and Relationships* (Oxford, Hart), pp.21-48). She has further presented on this topic at the annual meetings of the International Society of Family Law (Antwerp) and the Society of Legal Scholars, and held a research seminar for the Norma Research Group, Lund University. Drs. Bendall and Davey’s initial work in this area identified a lack of empirical evidence into grandparents’ experiences of courts and mediation, and they have since begun to conduct such research, funded by a grant from the Society of Legal Scholars. In addition, Dr. Bendall has recently been the recipient of an Arts and Humanities Research Council Impact Acceleration Account grant to hold a stakeholder event on the project-attended by legal practitioners, mediators, and grandparent support organisations-which took place in August 2023.

6. Dr. Samantha Davey is a Lecturer in Law at the University of Essex, where she teaches family law. She has published widely in the field of family law, with a particular interest in inter-generational relationships. She is the author of a well-regarded textbook, *Family Law* (Macmillan HE, 2020), and has published two other books. Her monograph, *A Failure of Proportion: Non-Consensual Adoption in England and Wales* (Hart, 2020) explored the importance of incorporating the United Nations Convention on the Rights of the Child within analysis of non-consensual adoption cases. Within the book, she also explored the importance of grandparents as an alternative measure of long-term care to adoption for children who cannot be raised by their parents. More recently, she co-edited *Grandparents and the Law: Rights and Relationships* (Hart, 2023) with Dr. Jaime Lindsey, an Associate Professor at the University of Reading. Within this book, she co-authored a chapter with Dr. Bendall (referred to above) and was the sole author of another chapter, entitled ‘Grandparents: Anchor in uncertain times, alternatives to adoption?’ (pp.117-148). This chapter explores the importance of grandparents in children’s lives via the lens of family constellation theory and considers the circumstances in which grandparent care may be in children’s best interests. Along with Dr. Bendall, Dr. Davey is in the process of embarking on empirical research, funded by the Society of Legal Scholars. This will involve interviewing practitioners and grandparents to determine the

efficacy of mediation as alternative to court proceedings, in resolving intra-familial disputes between parents and grandparents over contact with grandchildren.

The social context

7. Grandparents commonly perform a key role in caring for their grandchildren. For instance, a recent poll indicated that as many as 40% of UK grandparents aged over 50 had provided regular care for grandchildren, evidencing the prevalence of what has been termed to be ‘grannannyng’.¹ This form of grandparental involvement is particularly common amongst ‘working class’ families, where both parents are in employment, and in single parent households. Many grandparents are involved in tasks including collecting children from school and keeping them occupied until their parents finish work, or even looking after them during the day when their parents are out conducting paid employment.

8. Grandparents can also have an important impact on their grandchildren’s identity. Even just genetically, children are not simply a product of their parents, but their grandparents before them as well. This influence is amplified where the grandparent has had practical involvement in the child’s upbringing; when beginning to interact with the world, children do so through the relationships that they have with their caregivers. Caregivers provide not only the language that children use, and the development of their ideas, but offer them a sense of ‘who [they] are and where [they] belong’.² They supply children with their beliefs, values, and world view. Especially where grandparents conduct caring work, they ‘leave their mark’ on the new generation, feeding into their grandchildren’s ‘ways of knowing and seeing’.³ As children grow older, grandparents can moreover offer ‘knowledge of family [...] roots [and] a sense of their origin or heritage, as well as emotional support’.⁴ This is vital, given that Article 8 of the United Nations Convention on the Rights of the Child

¹ Age UK, *5 Million Grandparents take on Childcare Responsibilities* (2017), available at: <https://www.ageuk.org.uk/latest-news/articles/2017/september/five-million-grandparents-take-on-childcare-responsibilities/>, last accessed 30 October 2023.

² J Herring, *Law and The Relational Self* (Cambridge: Cambridge University Press, 2019) 196.

³ C Smart, *Personal Life* (Cambridge: Polity Press, 2007) 45, 87.

⁴ Grandparents’ Association, quoted in J Herring, *Older People in Law and Society* (Oxford: Oxford University Press, 2009) 255.

specifies that children have the right to ‘preserve [their] identity, including nationality, name and family relations’.

9. Children who enjoy strong bonds with their grandparents have been found, within empirical studies, to be more emotionally secure.⁵ Eekelaar has argued that the ‘maintenance and development’ of relationships between children and their grandparents can be in children’s best interests, and this may notably be the case following parental separation, where grandparents can offer ‘neutral’ territory.⁶ Equally, their relationships with their grandchildren can be central to grandparents’ well-being and sense of self; it is perhaps unsurprising that qualitative research identifies that grandparents who have experienced a loss of contact with a grandchild suffer emotional and physical health problems related to that.
10. In some cultures, grandparents are especially revered and deemed to be important figures in children’s lives.⁷
11. However, despite the social significance of the grandparent/grandchild relationship, it is given inadequate weight by the law within England and Wales, which this evidence will proceed to discuss.

The legal context

12. Sadly, the relationship between grandparent and grandchild frequently suffers because of parental relationship breakdown. Disputes can filter through, particularly to paternal grandparents, in circumstances where parents have gone through the process of divorce and the mother is the resident parent. Inter-generational disputes often occur due to a breakdown in communication and/or due to contrasting values about how a child should be ‘parented’.

⁵ M Purnell and B Bagby, ‘Grandparents’ rights: Implications for family specialists’ (1993) 42 *Family Relations* 173.

⁶ J Eekelaar, *Family Law and Personal Life* (Oxford: Oxford University Press, 2006) 70.

⁷ See, for example, S Shrestha, ‘The impact of culture on grandparents’ rights: Law and social practices in Nepal’, in S Davey and J Lindsey (eds), *Grandparents and the Law: Rights and Relationships* (Oxford: Hart, 2023) pp.211-236.

The leave requirement

13. Grandparents, in contrast to mothers and fathers, lack an automatic right to contact. They are required to obtain leave (i.e., the court's permission) before being able to make an application for contact with their grandchildren. This means that, in some cases, the courts will not even consider the merits of making a Child Arrangements Order for contact between a grandparent and their grandchild. The courts are guided by various considerations under section 10(9) of the Children Act 1989 when deciding whether to grant the leave, such as the wishes and feelings of the child's parents.

14. Herring has suggested that serious reasons would need to be given for the refusal to grant leave to grandparents.⁸ Even should this be the case, the requirement acts as a symbolic example of the preferential status provided to parents and the subsidiary position of grandparents. Further, it has been indicated anecdotally to the researchers that the leave requirement may constitute more of a hurdle than those such as Herring have perceived. Drs. Bendall and Davey intend to explore this issue as part of their forthcoming empirical project, as detailed below.

Child Arrangements Orders

15. In terms of Child Arrangements Orders with 'contact', the legal framework similarly places emphasis on parental genetic connection, but not necessarily on grandparental genetic connection. The courts have tended to differ in their treatment of grandparents when compared with non-resident parents (usually fathers), appearing to have been more willing to grant contact in favour of fathers. Courts have adopted the perspective that parental contact is almost always in the best interests of the child (see, for example, *Re O (Contact: Imposition of Conditions)* [1995] 2 FLR 124), whereas that contact with grandparents is not. It is recognised that, in many cases, grandparents may be able to see their grandchildren during visits between the children and their father (assuming, again, that the father is the non-resident parent). There are, though, circumstances within which this is not possible, such as: those where fathers are not permitted to have direct contact at all; those where fathers do not wish to have contact; where they have acted as a sperm donor, but are not regarded as a 'legal' parent of the child; or where the father is deceased.

⁸ J Herring, n 2 above.

16. The common law and statutory frameworks provide no grandparent ‘preference’ or ‘presumption’. Instead, the grandparent bears the burden of proving that the contact is in the child’s best interests (see, for example, the case of *Re A (A Minor) (Contact Application: Grandparent)* [1995] 2 FLR 153). In addition, as against situations of hostility between a mother and non-resident father- where the courts are often willing to order contact, and can express their disapproval at mothers viewed to be wilfully obstructing this- the courts have refused to take the same approach with a grandparent (*Re K (Mother’s Hostility to Grandmother’s Contact)* [1996] CLY 565).
17. Whilst grandparents are granted some, albeit limited, rights to contact under Article 8 of the Convention, the European Court of Human Rights has not been critical of the tentative approach taken towards the grandparent/grandchild relationships adopted within the legal frameworks of England and Wales. This may be, first, due to the state’s wide margin of appreciation and, secondly, because the European Court’s decision-making has been suggested, in itself, to be primarily based on ‘the idealised image of the traditional nuclear family’.⁹

Enforcement of court orders

18. Although it is acknowledged that both non-resident parents and grandparents face challenges in the enforcement of court orders, the challenges faced by grandparents may be greater. Whereas, for instance, the transfer of residence can be a sanction imposed against primary caregivers who fail to make children available for contact, judges will be even less inclined to use this tool to enforce contact for grandparents. In fact, in the case of *Re B (A Child)* [2012] EWCA Civ 858 [13], Thorpe LJ, when considering whether to transfer residence to a grandmother, expressed concerns around the ‘disbenefits for a child to be brought up by an adult of a different generation to either of her parents’. Once more, the courts’ approach in this respect serves to emphasise the lack of equal footing between grandparents and parents.

⁹ A Brown, *What is the Family of Law? The Influence of the Nuclear Family* (Oxford: Hart, 2019) 40.

Difficulties with the 'welfare principle'

19. Previous works by academic scholars and non-governmental organisations have argued in favour of various options to encourage emphasis on multi-generational bonds, such as: removing the leave requirement for grandparents¹⁰; a presumption in favour of contact¹¹; or more rigorous enforcement of child arrangement orders. The researchers suggest that these options may all be worthy of consideration, but that the 'welfare principle' itself, under section 1 of the Children Act 1989, poses its own difficulties for grandparents.
20. Section 1(1) of the Act specifies that, when a court determines any question with respect to a child's upbringing, the 'child's welfare' shall be their 'paramount consideration'. It is argued by Herring that a judge who conducts this kind of assessment by taking the child outside of their social context will reach an incorrect conclusion, because that context is 'bound up' with who/what that person is.¹² It follows that it is only possible to properly consider a child's well-being by acknowledging the network of relationships within which that child lives. The focus of Herring's work here, though, is predominantly on the parent/child relationship (and so, how to account for the rights and interests of parents), and it seems challenging to extend this approach to include grandparents too. Litigation demands that matters be adjudicated one way or another and, where courts are required to 'balance out' the independent interests of both parents and grandparents, they face difficulties in weighing up interests that point in different directions. Under the United Nations Convention on the Rights of the Child, in the case of such conflict, decision-makers must analyse and weigh the rights of all of those concerned, bearing in mind that the right of the child to have their best interests taken as a primary consideration means that those interests have high priority. This entails that more weight is attached to what actions serve the child best. Yet, in many cases, it may be problematic were the interests of a grandparent to be outweighed by those of a resident parent.

¹⁰ F Kaganas and C Piper 'Grandparent contact: Another presumption?' (2020) 42 *Journal of Social Welfare and Family Law* 176.

¹¹ Grandparents Apart, *Grandparents Speak Out for Vulnerable Children* (2006), available from: <http://grandparentsapart.co.uk/wp-content/uploads/2018/08/Grandparents-Book.pdf>, last accessed 30 October 2023.

¹² See, for example, J Herring and C Foster, 'Welfare means relationality, virtue and altruism' (2012) 32 *Legal Studies* 480.

21. It may be possible to somehow attribute less weight to grandparents' interests than to those of the parents. Even so, it would perhaps seem inappropriate to suggest that, for example, a father who had not been involved in a child's upbringing to date, but who suddenly shows interest in contact, should be in a more advantageous position than a grandparent who has seen that child regularly and formed strong bonds with them. An issue is moreover posed on quantification. 'Parental responsibility', as defined under section 3(1) of the Children Act 1989, involves a variety of different tasks (including bringing up the child on a day-to-day basis, having contact with them, determining and providing for their education and religion, and consenting to their medical treatment). The reality is that different people take on different responsibilities within different families, and that some of these may well be performed by grandparents. Were the courts to need to decide how much significance to allocate to each of these tasks in deciding a grandparent's 'level' of interest, this would prove complicated and time-consuming.
22. The researchers are, again, due imminently to begin empirical research which examines how many of these issues have played out 'on the ground' within the court process, given that reported cases offer only relatively minimal insight. This evidence submission, even at this early stage of the work, nevertheless urges a rethink around how the law might do more to recognise the significance of wider caring relationships- such as that between grandparent and grandchild- that fall outside of the binary family model. That said, the researchers intend additionally to examine the potential of mediation to better foster, and maintain, those relationships (whilst simultaneously avoiding exacerbating tensions between grandparents and parents, as can occur within the adversarial legal system).

The voice of the (grand)child

23. Finally worthy of consideration is the fact that the United Nations Convention on the Rights of the Child, Article 12, states the crucial role of the child's voice in issues affecting them directly. It stresses that children should be allowed to express their views freely, and that these views should be duly taken into account, in accordance with the child's age and maturity level. It becomes especially relevant in cases where parents may inhibit the contact between grandparents and grandchildren. Here,

ensuring that children's voices are heard within these family dynamics is essential, not just as a global standard for their rights, but for their emotional and mental well-being. The child's perspective provides valuable insight into how parental/grandparental disputes ought to be resolved and, whilst the adults may need to weigh the child's opinion against their ability to make informed decisions, their input should form a critical part of the equilibrium that supports the overall best interest of the child. This is presently an under-researched area, but early indications are that the voice of the child has limited impact in these inter-generational disputes. This further contributes towards the importance of the grandparent/grandchild relationship being downplayed.

Empirical exploration

24. Drs. Bendall and Davey's research to date highlights private contact disputes as a key area where not only older people's, but also their grandchildren's, needs and interests have not been attributed sufficient acknowledgment and protection. However, desk-based research is only able to provide a partial picture, which is why the researchers are now embarking on empirical work. This work, commencing in November 2023 and intended to continue into 2024, will entail interviews with mediators, family solicitors, and grandparents themselves. The project is supported by, and continues to engage with, key grandparent groups, such as Grandparents Apart and the Bristol Grandparent Support Group.
25. The research aims to generate knowledge into grandparents' experiences of the legal system and/or mediation when seeking contact with grandchildren. It is intended ultimately to feed both into guidance as to how lawyers and mediators can most effectively support grandparents, and to generate insights into how the legal frameworks in this area might best be reformed. Particularly, the work aims to examine how grandparents are navigating intra-familial disputes, and obstacles that they are facing therein.
26. Should the Women and Equalities Committee so wish, Drs. Bendall and Davey would gladly keep them updated on the research as it progresses, and would be delighted for the opportunity to discuss the work further.

November 2023