

## **GRANDPARENT VISITATION UNDER NEW JERSEY LAW: A Heavy Burden**

By Ellen M. Seigerman, Esq.

What happens when a biological parent decides that his or her child will not have independent visitation with his or her grandparent?

What happens when a biological parent decides that the grandparent/grandchild relationship should be terminated?

Does it matter if one of the biological child's parents has passed away and the grandparents are the only remaining link to that side of the family?

A warm and loving relationship between a grandparent and a grandchild may well result in a bond that can have a significant and positive impact on a child's life. It may also be true that most children benefit from a loving relationship with their grandparents. However, during the last several years, it has become increasingly difficult for a grandparent to obtain visitation rights when one or both of the child's biological parents, for one reason or another, has said "no." Given the current state of the law, it is important to understand the legal rights of grandparents, the facts that must be established as well as the factors a Court will consider when it is called upon to decide a dispute between a biological parent's decision to limit or deny grandparent visitation and the grandparents' desire to pursue visitation.

Recent case law on this issue has been significantly impacted by the decision of the United States Supreme Court in Troxel v. Granville, 530 U.S. 57(2000). That opinion held that the Grandparent Visitation Order issued by a Court in the State of Washington was an unconstitutional infringement on the mother's fundamental right to make decisions concerning the care, custody, and control of her children and that the Washington statute, as applied in that case, was unconstitutional.

The Supreme Court rested its decision on the "sweeping breadth" of the statute which permitted any person to petition for parenting time at any time with the only requirement being that parenting time serves in the best interest of the child. Although the Supreme Court did not pass on the issue as to whether a parental visitation statute must include a showing of harm or potential harm to the child before granting parenting time, the High Court held that where the custodial parent is fit, due deference must be accorded that parent's decision as to whether third party parenting time is appropriate.

The ruling by the United States Supreme Court has resulted in constitutional challenges to statutes in several states. The law respecting grandparents' visitation rights in New Jersey has since undergone significant changes. In New Jersey, grandparents visitation rights are governed by a statute: N.J.S.A. 9:2-7.1. Prior to the U.S. Supreme Court's decision in Troxel, New Jersey provided grandparents an independent right to seek visitation with their grandchildren provided that the grandparent proved, by a preponderance of the evidence, that visitation was in the best interest of the child. The statute provides that:

- a) A grandparent or any sibling of a child residing in this state may make application before the Superior Court in accordance with the Rules of Court, for an Order for

- visitation. It shall be the burden of the applicant to prove by preponderance of the evidence that the granting of visitation is in the best interest of the child.
- b) In making a determination on an application filed pursuant to this section, the Court shall consider the following factors: (1) the relationship between the child and the applicant; (2) the relationship between each of the child's parents or the person with whom the child is residing and the applicant; (3) the time which has elapsed since the child last had contact with the applicant; (4) the effect that such visitation will have on the relationship between the child and the child's parents or the person with whom the child is residing; (5) if the parents are divorced or separated, the time sharing arrangement which exists between the parents with regard to the child; (6) the good faith of the applicant in filing the application; (7) any history of physical, emotional or sexual abuse or neglect by the applicant; (8) any other factor relevant to the best interest of the child.
  - c) With regard to any application made pursuant to this section, it shall be prima facie evidence that visitation is in the best interest of the child if the applicant had, in the past, been a full-time caretaker for the child.

Previously, a parent's decision regarding grandparent visitation was not given deference. A parent's decision regarding grandparent visitation was subject to Court review which left the determination of what was in the child's best interest solely in the hands of a judge. Furthermore, certain grandparents were given a preference. Simply stated, the Court could disregard and overturn any decision by a fit custodial parent concerning visitation whenever a grandparent affected by the decision filed an application and the Court concluded that the grandparent visitation was in the child's best interest.

However, as noted above, the Troxel decision brought a different light to the issue. A fit parent has a fundamental constitutional right to make decisions concerning the care, custody and control of their children. Following Troxel, the New Jersey Supreme Court imposed a threshold harm standard such that grandparents seeking visitation must prove by a preponderance of the evidence that denial of grandparent visitation would result in harm to the children. Under the statutory scheme set forth above, a Court was entitled to assess the best interest of the children vis-à-vis the biological parent's decision respecting grandparent visitation rights. Under current New Jersey law, the grandparent now has the burden to prove to the Court that denial of grandparent visitation would result in harm to the children. Indeed, the tide has turned.

In 2003, the Supreme Court of New Jersey established a procedure to be followed in every case where a grandparent is denied visitation with the grandchild. First, the grandparent must establish by a preponderance of the evidence that visitation is necessary to avoid harm to the child. If the grandparent meets this burden, then the parent must propose a visitation schedule. If the grandparent does not accept the proposed schedule, then the Court will determine whether the schedule is in the child's best interests based upon the statutory factors set forth in N.J.S.A. 9:2-7.1. If visitation is not denied outright, but the grandparents object to the sufficiency of the proposed schedule, the grandparent must show by a preponderance of the evidence that the proposed schedule is inadequate to avoid harm to the child. If the grandparent meets this burden, the Court will then be required to develop a schedule that is in the child's best interest based upon the statutory factors. See Moriarity v. Bradt, 177 N.J. 84 (2003).

New Jersey has long recognized that the best interest standard, which is a “tie breaker” between fit parents, is inapplicable when a fit parent is in a struggle for custody with a third party. Watkins v. Nelson 163 N.J. 235 (2000). A dispute between a fit custodial parent and a child’s grandparent is not, under the law, a contest between equals. The New Jersey Supreme Court has sent a clear message: a Court does not have sufficient justification to infringe upon a parent’s fundamental due process right to raise their children as they see fit. Interference with parental autonomy will be tolerated only to avoid harm to the health and welfare of a child.

It is important for grandparents who pursue visitation to understand that bald assertions or mere conclusions are not enough to establish harm. In other words, “loss of potentially happy memories” is not sufficient to justify intruding into a parent’s decision-making authority. A grandparent must identify a specific harm that would come to the child if visitation were denied. Mizrahi v. Cannon 375 N.J. Super. 221 (App.Div.2005). Grandparents seeking visitation should establish, at the outset, that there is a significant pre-existing relationship between the grandparent and the grandchild; that there are significant emotional ties between them, and that the child would suffer specific psychological harm from the absence of visitation. Grandparents seeking visitation would benefit from an expert’s report to support their claims.

Although most people presume that a beneficial relationship exists between grandparents and grandchildren, not all such relationships are beneficial. Clearly, in the absence of harm to the child, parents have a constitutional right to make decisions concerning their children without interference from grandparents or the state.

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