

Family Law **ALERT**

Over The River And Through The Woods, To A 'Complex Litigation Track' We Go

Recently, in a unanimous decision, the N.J. Supreme Court ruled that some grandparent visitation cases may warrant designation as “complex litigation” – requiring case management by trial courts and even lengthy discovery. To fully appreciate the potential impact of this decision, a basic understanding of laws governing grandparent visitation is helpful.

Sixteen years ago, our nation’s highest court overturned Washington State’s “breathtakingly broad” grandparent visitation statute in the case of *Troxel v. Granville*, 530 U.S. 57 (2000). The statute was struck down on the grounds that it unconstitutionally infringed upon fundamental rights of parental autonomy. In support of its decision, the U.S. Supreme Court held that a parent’s right to decide how his or her child will be raised is one of the oldest and most fundamental rights emanating from the liberty interest of the Due Process Clause. Therefore, a fit parent’s decision as to whether he or she wishes to permit third party visitation, including visitation with a child’s grandparents, must be protected and given great deference.

Following *Troxel*, the N.J. Supreme Court was asked to review our State’s grandparent visitation statute, N.J.S.A. 9:2-7.1, in the case of *Moriarty v. Bradt*, 177 N.J. 84(2003). In that case, after the death of one parent, the child’s grandparents successfully petitioned the Court for visitation (over the objection of the surviving parent). The defendant-parent appealed, arguing that N.J.S.A. 9:2-7.1 was unconstitutional because it allowed courts to order visitation with a grandparent over the objection of a parent, so long as the grandparent could show that the proposed visitation was “in the child’s best interest”. The *Moriarty* Court ultimately agreed, holding that the State could not constitutionally infringe on parental autonomy, absent a showing the child would suffer harm if deprived of contact with his or her grandparents. After *Moriarty*, the rule in New Jersey became that a petitioner must make a threshold showing that a denial of visitation will result in harm to the child before a best interest analysis may be undertaken under N.J.S.A. 9:2-7.1. In other words, parents have a fundamental right to decide whether they want their child visiting with his or her

grandparents, and absent a showing of actual harm to the child – neither the court, nor an involved grandparent, are entitled to veto rights.

A procedural framework for grandparent visitation cases was later outlined by the Appellate Division in the case of *R.K. v. D.L.*, 434 N.J. Super. 113 (2014). In *R.K.*, the Court held that all grandparent visitation cases should be assigned to a particular judge for individual case management, and that judge should review the pleadings and determine whether active case management is needed. The Court also recommended that in any such case, the trial court should first conduct a fact-sensitive analysis applying the statutory factors in N.J.S.A. 9:2-7.1 to determine whether the grandparents have presented a prima facie case warranting the relief requested. Then, the Court should determine whether the grandparents have satisfied their burden of proving visitation is necessary to avoid harm to the child.

The recent N.J. Supreme Court decision of *Major v. Maguire* addressed the *R.K.* framework. There, Plaintiff-grandparents moved for an Order compelling visitation with their late son’s daughter under N.J.S.A. 9:2-7.1. At an initial hearing, Defendant-mother moved for dismissal of the complaint, arguing Plaintiffs had failed to establish a prima facie showing of harm to the child in the absence of visitation. The trial court agreed that Plaintiffs’ failed to make the necessary showing of harm in the complaint, but permitted Plaintiffs to supplement their pleadings with testimony. The Court did not, however, allow expert testimony on the issue of harm. The grandparents later offered testimony expressing their view that the child would suffer harm if deprived of a continued relationship with her grandparents. Notwithstanding the additional testimony, the Court found the complaint failed to demonstrate a particularized harm to the child in the absence of grandparent visitation and dismissed the application. The Appellate Division reversed, invoking the procedural guidelines set forth in *R.K.* and concluding that the trial court’s approach was inconsistent with governing statutory and case law. The panel remanded the matter to the trial court with directions to re-examine the complaint under *R.K.*

The Supreme Court was asked to review the case and ultimately agreed with the Appellate Division, holding that the trial court erred when it dismissed Plaintiffs' complaint. The Court found the pleadings satisfied the requirements of Moriarty for a prima facie showing of harm to the child because: (1) Plaintiffs demonstrated their granddaughter enjoyed a close relationship with her father, who shared custody with her mother, and contended that his death caused a major trauma in the child's life; and (2) Plaintiffs presented evidence that they had maintained a close bond with their granddaughter prior to her father's death and assumed significant responsibility for her care during her father's parenting time. Based on these allegations, the Court found Plaintiffs established a prima facie showing of harm to the child at the pleading stage, as required by Moriarty, and the trial court should have denied defendant's motion to dismiss. The Court also found that Plaintiffs should have been given the opportunity to satisfy their burden of proving harm by permitting the matter to proceed beyond the pleading stage and managing the case as a complex matter.

Although it's still too soon to tell, *Major v. Maguire* may change the landscape of grandparent visitation cases in this State. Complaints filed under N.J.S.A. 9:2-7.1 are generally handled under the inundated FD (non-dissolution) docket, where most cases get much less attention and are treated as summary proceedings without the benefit of discovery. Now, courts may be more hesitant to dismiss grandparent visitation cases in their usual swift manner, and may even insist on providing petitioners with a greater opportunity to satisfy their initial burden. At the very least, the Supreme Court has given courts and litigants a clearer roadmap as to how these cases should be litigated going forward. However, these expanded procedural principles will inevitably lead to an increase in attorney involvement in these types of cases.